



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1106

Appeals P_9500578 and P_9500579

Ministry of the Attorney General



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NATURE OF THE APPEALS:

The Ministry of the Attorney General (the Ministry) received a request from the Chief of Police for the City of London (the Chief) for access to three categories of records pertaining to activities and investigations conducted by the Special Investigations Unit (the SIU) of the Ministry. These categories can be described as follows:

1. Records relating to communications between the SIU and the Mayor and/or elected councillors for the City of London between December 1, 1994 and February 15, 1995.
2. Records relating to communications between the SIU and Members of Provincial Parliament between December 1, 1994 and February 15, 1995.
3. Records containing the personal information of the Chief under the custody or control of the SIU relating to the following:
 - (a) the SIU audit process;
 - (b) an SIU investigation involving a named police constable;
 - (c) an SIU investigation involving a second named police constable;
 - (d) an SIU investigation involving a third named police constable;
 - (e) an SIU investigation involving a fourth named police constable;
 - (f) interviews and contacts with members of the media with respect to these investigations;
 - (g) responses by the SIU to criticism about its performance;
 - (h) contacts with the Mayor and/or elected councillors for the City of London and/or Members of Provincial Parliament.

The Ministry responded by providing the Chief with full access to all responsive records relating to parts 3b, c, and e, and partial access to records responsive to part 3d. As far as parts 1, 2 and 3a, f, g and h were concerned, the Ministry stated that no responsive records existed.

The Ministry relied on the exemption contained in section 19 of the Act (solicitor client privilege) as the basis for denying access to the following part 3d records:

1. a one-page fax cover sheet from a Ministry lawyer (the Ministry lawyer) to the Director of the SIU (the Director) dated October 3, 1994;
2. a two-page memorandum from the Ministry lawyer to the Director dated October 3, 1994;
3. a one-page fax cover sheet from the Ministry lawyer to the Director and the Head of Investigative Operations of the SIU, an attached one-page memorandum from the Ministry lawyer to the Head of Investigative Operations of the SIU, and an attached three-

- page draft letter from the Ministry lawyer to the Chief's lawyer, all dated August 9, 1994;
4. a three-page draft letter which, although not signed or addressed, appears from its contents to be from the Ministry lawyer to the Chief's lawyer, dated August 12, 1994;
 5. a one-page fax cover sheet from the Ministry lawyer to the Director, and an attached three-page draft letter from the Ministry lawyer to the Chief's lawyer, both dated August 25, 1994.

The Chief appealed the Ministry's decision regarding access, and also claimed that records should exist which would respond to parts 1, 2 and 3a of the request.

Mediation was unsuccessful, and Notices of Inquiry were sent to the Chief and the Ministry. Because the records appeared to contain the Chief's personal information, one Notice of Inquiry raised the possible application of section 49(a) of the Act. Two sets of representations were received from the Ministry, and one from the Chief.

DISCUSSION:

PERSONAL INFORMATION

The Ministry submits that the Chief's request was made in his professional capacity as Chief of Police for the City of London and, therefore, should not be considered his personal information.

In its representations, the Ministry provides some background on the records at issue in these appeals, which I feel is relevant in determining whether they contain personal information.

On July 29, 1994, the Chief's lawyer sent a letter to the Director of the SIU which refers to statements attributed to the Director and published in the London Free Press. The letter states that the reputation and integrity of the Chief and others was defamed by these attributed statements. The letter concludes by putting the Director on formal notice under the Libel and Slander Act that the Chief intended to bring an action against the Director for libel. This letter was among the records released to the Chief in response to his request.

The Chief subsequently sent two other letters to the Director, dated August 30 and 31, 1994, both of which were also released to the Chief in response to his request. On September 1, 1994, the Director responded to the August 30 and 31, 1994 letter, wherein he stated:

In light of the litigation against . . . myself which you have apparently commenced, I have decided to discuss the contents of your letters with our legal counsel prior to replying to them.

Again, this September 1, 1994 letter was released to the Chief.

The records which are at issue in these appeals were created in this context and during this time period.

Having reviewed the records, in my view, they contain the personal information of both the Chief and the Director. The existence of a possible libel suit initiated by the Chief against the Director is sufficient to bring the characterization of records created in this context within the definition of personal information under section 2(1) of the Act. It is also relevant to note that the Chief specifically framed part 3 of his request under section 47(1) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government institution. However, section 49 includes a number of exceptions to this general right of access.

Section 49(a) gives the Ministry discretion to deny access to an individual's own personal information in circumstances where any of the exemptions listed in that section would otherwise apply to that information. One of the exemptions listed in section 49(a) is section 19, solicitor-client privilege.

I will consider whether the records qualify under section 19 as a preliminary step in determining whether the exemption in section 49(a) of the Act applies.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act reads as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel, and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The Ministry submits that the records were prepared by Crown counsel for use in giving legal advice to the Director, specifically the proper content of a letter which might be sent in response to correspondence received from the Chief and his lawyer.

The Chief submits that no solicitor-client relationship exists, and states that documentation prepared within the SIU should not be subject to solicitor-client privilege, even if some of its employees happen to be lawyers.

Having reviewed the records and considered the representations of both parties, I accept the submissions of the Ministry, and find that all records qualify under Branch 2 of the section 19 exemption. All records were prepared by Crown counsel for use in giving legal advice and in contemplation of litigation, and there was a reasonable prospect of litigation at the time these records were prepared.

Because I have found that the records meet the requirements of Branch 2, it is not necessary for me to consider whether they also qualify under Branch 1.

I find that the records satisfy the requirements of section 19, and qualify for exemption under section 49(a) of the Act

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and a Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate all records responsive to the request.

One of the Notices of Inquiry sent to the Ministry during the course of these appeals contained the following statements made by the Chief in his Notice of Appeal letter which identify his reason for feeling that records relating to part 3a of his request should exist:

The intent of the request for "The Special Investigations Unit audit process" refers to the audit/review that was carried out of the SIU by two seconded members of the OPP and Halton Regional Police. I participated in the audit/review and supplied the two assigned officers with information and documentation, and therefore, again request that I be provided with relevant material including the final report, as intended in 3(a).

In his representations, the Chief points out that the audit he refers to was completed, and that a report and accompanying documentation must have been created,

The Ministry's representations include an affidavit sworn by an Administrative Manager who, after receiving the Notice of Inquiry, undertook various searches for records responsive to parts 1 and 2 of the Chief's request. As a result of these searches, two additional responsive records were identified, one being a letter dated January 10, 1995 from the Director of the SIU to the Mayor of the City of London, and the other being the first page of the Chief's request letter, with handwritten notations in pencil. The Ministry agrees to release these two additional records, and I will include an order provision to that affect.

However, neither set of representations submitted by the Ministry make reference to any searches undertaken to locate records responsive to part 3a of the Chief's request. In my view, the Chief has provided information which presents a reasonable basis for concluding that additional responsive records may exist. In the absence of any response to this issue from the

Ministry, I am unable to conclude that the search undertaken by the Ministry for records responsive to part 3a of the Chief's request was reasonable.

ORDER:

1. I uphold the Ministry's decision to refuse to disclose the five records at issue in Appeal P-9500578.
2. I order the Ministry to disclose the January 10, 1995 letter from the Director of the SIU to the Mayor of the City of London and the first page of the Chief's request letter with handwritten notations in pencil, by **February 13, 1996**.
3. The Ministry's search for records responsive to parts 1 and 2 of the Chief's request was reasonable in the circumstances, and Appeal P-9500579 is denied.
4. I order the Ministry to conduct a further search for records responsive to part 3a of the Chief's request, and to communicate the results of this search to the Chief in writing by **February 13, 1996**. If responsive records are located, I further order the Ministry to provide an access decision to the Chief in the form contemplated by sections 26 and 29 of the Act, by **February 23, 1996** without recourse to a time extension.
5. In order to verify compliance with Provisions 2 and 4 of this order, I order the Ministry to provide me with a copy of the correspondence referred to in Provision 2 by **February 13, 1996** and a copy of any correspondence sent to the Chief under Provision 4 by **February 23, 1996**. These should be forwarded to my attention, c/o Information and Privacy Commission/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

January 24, 1996