



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

ORDER P-1182

Appeal P-9500691

Ministry of Citizenship, Culture and Recreation



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NATURE OF THE APPEAL:

The Ministry of Citizenship, Culture and Recreation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the appellant and two organizations with which he is affiliated. The Ministry located in its Anti-Racism Secretariat 35 records which were responsive to the request and granted access to 29 of them in their entirety. The Ministry disclosed portions of four of the remaining records and denied access in full to the other two documents, claiming the application of the following exemptions contained in the Act:

- Cabinet records - section 12
- advice or recommendations - section 13
- solicitor-client privilege - section 19
- invasion of privacy - section 21(1)

The appellant appealed the Ministry's decision. A Notice of Inquiry was provided to the Ministry, the appellant and to another individual whose interests may be affected by the disclosure of the records (the affected person). As the records appeared to contain the personal information of the appellant, representations on the possible application of section 49(a) and (b) of the Act were also solicited. Representations were received from all of the parties.

DISCUSSION:

DISCRETION TO DENY ACCESS TO REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the remaining records, and parts of the records at issue, and find that all of them contain the personal information of the appellant. In addition, Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c contain the personal information of the affected person.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information.

CABINET RECORDS

The Ministry submits that the withheld parts of Records 9b, 10c and 12c are exempt from disclosure under section 12(1)(e) of the Act. This section reads:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

The Ministry submits that the records to which it has applied section 12(1)(e) **were**:

prepared to, among other purposes, brief the Minister of Citizenship for consultation with the Minister of Education about a government decision and/or the formulation of government policy relating to the requester's activities.

In Order 131, former Commissioner Sidney B. Linden held that in order to qualify for exemption under this subsection, the record itself must have been prepared to brief a Minister in relation to matters that are either:

- (a) before or proposed to be brought before the Executive Council or its committees; or,
- (b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.

In Orders 22 and 40, Commissioner Linden, in addressing the proper interpretation to be placed on the wording of section 12(1)(e), held that:

The use of the present tense in the subsection precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

In my view, the use of the word "are" in that portion of the section which discusses consultations among ministers also precludes the application of section 12(1)(e) to a record which has been, but is no longer, the subject of consultations among ministers.

In this appeal, Records 9b, 10c and 12c are dated between November, 1992 and March, 1993. The Ministry has not provided me with any evidence that the matters to which the records relate **are** the subject of consultations among ministers which relate to government decisions or the formulation of policy. Nor have I been provided with any evidence that the records relate to matters which are either before, or proposed to be brought before the Executive Council or one of its committees. Accordingly, I find that the exemption provided by section 12(1)(e) has no application to Records 9b, 10c and 12c.

I must now determine whether the minutes are exempt from disclosure under the introductory wording of the mandatory exemption provided by section 12(1). This preamble provides that the Ministry must refuse to disclose a record where such disclosure would reveal the substance of deliberations of the Executive Council or one of its committees.

Based on previous orders, it is possible that a record which has never been placed before an Executive Council or its committees may, nonetheless, qualify for exemption under the introductory wording of section 12(1). This result will occur where a Ministry establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations of an Executive Council or its committees.

The introductory text of subsection 12(1) reads:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, **including** ... (emphasis added).

Again, the Ministry has not provided me with any evidence that the disclosure of the matters to which the records relate would reveal the substance of deliberations of the Executive Council or its committees. Nor has the Ministry established that the disclosure of the records would permit the drawing of accurate inferences with respect to the substance of the deliberations of the Executive Council or one of its committees. As such, I find that Records 9b, 10c and 12c are also not exempt under the introductory wording of section 12(1).

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of section 13(1) of the Act to Record 11a and to pages one and two of Records 4 and 10c, which are issue notes dated June 11, 1993 and March 18, 1993, respectively. Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

Records 4 and 10c describe the "Suggested Responses" prepared by the Minister's staff by way of preparation for questions by the media or in the Legislature. In Order P-529, Assistant Commissioner Irwin Glasberg held that the majority of the "Suggested Responses" contained in a record at issue in that appeal did not qualify for exemption under section 13(1) as they simply described decisions which the Ministry has already made. He further found that the remaining responses in the record could not be said to provide advice in the sense of giving direction, which may be accepted or rejected, as part of a deliberative process.

I adopt the approach taken by Assistant Commissioner Glasberg and find that, in the circumstances of this appeal, the "Suggested Responses" similarly describe the actions taken by

the Ministry to address the questions posed in Records 4 and 10c. As such, I find that section 13(1) has no application to these records.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that Record 2 is exempt from disclosure under section 19 of the Act, which states:

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 which 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).

The Ministry claims that Record 2 is exempt under both branches of section 19. Record 2 is a letter from the Ministry's Assistant Deputy Minister to legal counsel retained by the Ministry of Education to undertake an investigation of the activities of the appellant. The letter sets out the submissions of the Ministry's Anti-Racism Secretariat to counsel containing the Ministry's position on the appellant's activities and steps which the Ministry of Education might wish to take to address the situation.

In respect of Branch 2 of the exemption, the Ministry submits, and I agree, that Record 2 was prepared for Crown counsel, who had been retained by the Ministry of Education to investigate the appellant's activities. Further, the Ministry submits and I concur that Record 2 was intended for his use in giving legal advice on the Ministry's rights against and obligations to the appellant. Accordingly, I find that Branch 2 of section 19 applies to Record 2 and it is properly exempt from disclosure under section 49(a) of the Act.

INVASION OF PRIVACY

I have found that the remaining records, with the exception of the undisclosed information contained in Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c, contain only the personal information of the appellant. The disclosure of these records to the appellant would not constitute an unjustified invasion of the personal privacy of any other individuals and the exemption does not apply.

Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c contain the personal information of the affected person and the appellant.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. In this situation, the requester is not required to prove that the disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his own information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that the disclosure of this information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations which are relevant in the circumstances of the case.

The Ministry submits that the considerations listed in sections 21(2)(e) (unfair exposure to pecuniary or other harm) and 21(2)(f) (the information is highly sensitive) are factors weighing against the disclosure of the information contained in Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c.

The affected person submits that the information in these portions of the records ought not to be disclosed to the appellant as it was supplied to the Ministry in confidence (section 21(2)(h)). The appellant has not made any representations on this issue.

I find that the undisclosed information contained in Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c is highly sensitive in nature and was supplied to the Ministry by the affected person in confidence. These considerations favour the protection of privacy of the affected person. Having balanced the factors favouring privacy protection against the appellant's right of access to his own personal information, I find that the disclosure of the information in Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c would constitute an unjustified invasion of the personal privacy of the affected person and it qualifies for exemption under section 49(b).

I have highlighted on the copy of Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator those portions which are not to be disclosed.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 2 and to those portions of Page 3 of Record 9b, Page 6 of Record 10c and Page 4 of Record 12c which I have highlighted

on the copy of these records provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose to the appellant the remaining records by sending him a copy by **June 27, 1996** but not before **June 24, 1996**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ May 23, 1996