



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1340

Appeal P_9600332

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documents in the files of the Family Support Plan (the FSP) related to the requester. The requester did not seek access to his own correspondence or that of his counsel.

The Ministry identified 222 pages of responsive documentation and disclosed 157 pages in their entirety to the requester. Access was denied to 59 pages in full and six pages in part on the basis of the following exemptions in the Act:

- advice and recommendations - section 13(1)
- law enforcement - sections 14(1)(a), (b), (c) and (d)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse access to requester's own information - section 49(a)

The requester (now the appellant) appealed this decision.

This office sent a Notice of Inquiry to the Ministry, the appellant and an individual whose interests may be affected by disclosure of the information contained in the records (the affected person). Representations in response to the Notices were received from all three parties.

In its representations, the Ministry indicated that it is now willing to disclose pages 2 and 142 to the appellant. As these documents are not subject to any mandatory exemptions, I will order the Ministry to release them to the appellant.

A description of the records remaining at issue, the exemptions claimed by the Ministry to deny access to them and my decision as set out in this order is attached as Appendix A.

DISCUSSION:

PERSONAL 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 all the records to determine if they contain personal information and, if so, to whom the personal information relates. I have made the following findings:

- (1) Records 1, 22, 71, 72, 130-131, 132, 143, 146-154, 160-162, 191, 192-194, 195 and 218, 221-222 contain the personal information of both the appellant and the affected person.
- (2) Records 6-7, 16, and 56 contain only the personal information of the appellant.

- (3) Records 8-11, 54, 55, 64-68, 73-74, 88 and 184 contain only the personal information of the affected person.
- (4) Records 163-164, 196-204, 215-217 and 219-220 contain the personal information of the appellant and other identifiable individuals, including the affected person.

INVASION OF PRIVACY

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

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Of these, only section 21(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy."

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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 to the personal information.

If none of the presumptions contained 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 that are relevant in the circumstances of the case.

In this case, the appellant maintains that:

... [S]ection 21 is not directly relevant to my request since my request is for my personal information and is therefore governed by section 49 which does not make reference to section 21.

The appellant sought access to all materials in the FSP file "... in relation to [him] ...". Given the nature of the information contained in these files, in my view, it is reasonable to expect that some of the responsive records would only contain information about the affected person, even though they were located in the FSP file identified by the appellant. Therefore, I will consider whether section 21 of the Act applies to those records containing information about the affected person and whether section 49(b) applies to those containing both the personal information of the appellant and others, including the affected person.

Records 1, 8-11, 54, 55, 64-68, 73-74, 88, 143, 146-154, 160-162, 184, 191, 192-194, 195, 196-204, 215-217 and 218-222

All of these documents, with the exception of Records 1, 8-11 and 195, are communications between the affected person and the FSP. Some of them are faxes sent by the affected person and her counsel; others are correspondence sent to the affected person by the FSP. Certain of the documents are FSP forms completed by the affected person providing information to the FSP.

Records 1, 8-11 and 195 are all documents prepared by the FSP. However, they contain information provided to the FSP by the affected person.

As indicated, Records 8-11, 54, 55, 64-68, 73-74, 88 and 184 contain solely the personal information of the affected person. Accordingly, I will consider whether section 21 applies to exempt them from disclosure. I will consider whether section 49(b) applies to Records 1, 143, 146-154, 160-162, 191, 192-194, 195, 196-204, 215-217 and 218-222 which contain the personal information of both the appellant and the affected person.

Both the Ministry and the affected person maintain that information she provided to the FSP was supplied in confidence (section 21(2)(h)). In addition, they maintain that it is highly sensitive (section 21(2)(f)). Therefore, they argue that disclosure of this information would result in an unjustified invasion of the personal privacy of the affected person.

The appellant maintains that there are three reasons why disclosure of information concerning the affected person would not result in an unjustified invasion of her personal privacy.

He notes that her financial information has already been disclosed by her as part of the recent litigation in which they were involved. He has attached a copy of her financial statement to his representations. This document constitutes Records 64-68.

The appellant also submits that information concerning the affected person's address, employer and living arrangements are well known to him. Moreover, the appellant states that the affected person had no expectation of confidentiality with respect to information provided to the FSP. As an example, the appellant has provided this office with a copy of a document entitled "Application for Wage Garnishee". The appellant indicates that the affected person voluntarily disclosed this document to his counsel. Records 148 and 161-162 comprise this document.

In my opinion, these submissions all relate to the identity of the appellant and the nature of his relationship with the affected person.

Previous orders of the Commissioner's office have held that the identity of the requester is not a relevant consideration when determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy (Orders M-96 and P-578).

In Order M-96, former Assistant Commissioner Tom Mitchinson concluded:

In my view, a requester's status cannot be a relevant factor in determining whether disclosure of personal information will constitute an unjustified invasion of personal privacy. Disclosure of a record under Part I of the Act, is, in effect, disclosure to the world and not just to the requester, and I find that the status of the Federation, or the relationship of the Federation to its members, is not a relevant consideration.

This decision was upheld by the Divisional Court in an unreported decision Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al. (20 December 1994), Toronto, 407/93 (Ont. Div. Ct.).

I find, therefore, that the submissions of the appellant do not support disclosure of the records at issue.

Many of the records, including Records 64-68 and 148, 161-162 noted by the appellant, contain information describing the affected person's finances, income, assets and financial history. They are thus subject to the presumption in section 21(3)(f). None of this information falls within section 21(4); nor has the appellant argued that there is a public interest in disclosing this information pursuant to section 23 of the Act. I find, therefore, that some of the information at issue is subject to the presumption in section 21(3)(f) of the Act.

With respect to the remaining information, I find that all of the documents contain highly sensitive information and the majority were provided to the FSP in confidence.

In my view, with respect to the records containing solely the information of the affected person, the appellant has not established that disclosure would not constitute an unjustified invasion of her personal privacy under section 21 of the Act. In addition, I am satisfied that disclosure of those records containing both the personal information of the appellant and the affected person would constitute an unjustified invasion of her personal privacy pursuant to section 49(b).

In summary, I find that Records 8-11, 54, 55, 64-68, 73-74, 88 and 184 are exempt under section 21 of the Act and section 49(b) applies to exempt Records 1, 143, 146-154, 160-162, 191, 192-194, 195, 196-204, 215-217 and 218-222.

DISCRETION TO REFUSE ACCESS TO REQUESTER'S OWN INFORMATION

Section 49(a) of the Act represents another exception to a requester's right of access to his or her own personal information. This section states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14**, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

The Ministry has claimed that sections 19 (solicitor-client privilege) and 14 (law enforcement) apply to exempt from disclosure some of the records containing the appellant's personal information. I will first consider the section 19 documents.

SOLICITOR CLIENT PRIVILEGE

Section 19 of the Act consists of two branches, which provide a head 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

(Order 49)

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

(Order 210)

The Ministry has claimed that Records 22, 55, 56, 71, 72, 130-131, 132, 163 and 164 all qualify for exemption under Branch 2 of section 19. I have already dealt with Record 55 under section 21 and will not consider it further.

The Ministry states that the notes on Record 56 were written by FSP counsel for use in giving legal advice. It submits that Record 71 is a memorandum prepared by FSP counsel for giving legal advice to her client, the Director of the FSP. The note on Record 72 refers to the issues considered in the memorandum.

Records 130-131 and 132 are pages of a legal memorandum written by an FSP law student for a staff lawyer. These records also contain the notes of the lawyer on various parts of the memorandum which was prepared for use in giving legal advice and in contemplation of litigation.

Record 164 is a request for a legal opinion submitted by an FSP enforcement officer to FSP counsel. The notes on Records 22 and 163 refer to the opinion.

The appellant submits that the information exempted by the Ministry under section 19 "may be" the information contained in a letter from FSP Associate Counsel to the appellant's lawyer. Accordingly, the appellant submits that "... the solicitor-client privilege has been lost by voluntarily [sic] disclosure to a party potentially adverse in interest ...".

In my opinion, the information highlighted by the appellant in this letter merely identifies the nature of the dispute between the appellant and the affected person. It does not reveal the substance of any of the information contained in the records for which the Ministry has claimed solicitor-client privilege.

In summary, I find that Records 22, 56, 71, 72, 130-131, 132, 163 and 164 all qualify for exemption under Branch 2 of section 19. Because they all contain the personal information of the appellant, section 49(a) applies to exempt them from disclosure.

LAW ENFORCEMENT

Records 6-7 and 16 remain at issue. The Ministry has claimed that these records are exempt under sections 14(1)(a), (b), (c) and (d) of the Act which state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

These are discretionary exemptions. As the Ministry has not provided any submissions on the application of section 14(1)(b) of the Act, I will not consider it in the discussion which follows.

In order for a record to qualify for exemption under sections 14(1)(a), (c) or (d), the matter to which the record relates must first satisfy the definition of the term "law enforcement", found in section 2(1) of the Act.

The records at issue contain information gathered by the FSP under the Family Support Plan Act (the FSPA) R.S.O. 1990, c.S.28.

The FSP has broad investigatory and enforcement powers in relation to the administration of the FSPA and the enforcement of support and custody orders filed with the Director of the FSP. The Director, or any person designated by the Director as an enforcement officer, has the power to commence and conduct a proceeding and to take steps for the enforcement of an order. The enforcement of a support deduction order does not end until the support order to which it relates is terminated and there are no arrears owing, and enforcement continues despite the fact that the support order has not been filed in, or has been withdrawn from, the Director's office.

The FSPA also provides that when a payor under a support order is in default, the Director may require the payor to file a financial statement and to appear before the court to explain the default. If the payor fails to appear before the court, the court may issue a warrant for the payor's arrest for the purpose of bringing him or her before the court. The court may also order the arrest of an absconding payor.

The FSPA also provides that, in addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of, or resistance to, its process, rules or orders under the FSPA.

In Order P-589, former Inquiry Officer Asfaw Seife concluded that, on the basis of the above description of the jurisdiction of the FSP, information gathered by the FSP under the FSPA in enforcement of a support deduction order issued by the court against the appellant was a law enforcement matter. This approach has been adopted in Orders P-1198 and P-1269 of this office. The appellant submits that the issue involved in this FSP file was not one of "law enforcement" but rather one of the interpretation of the separation agreement between him and the affected person. The interpretation of the separation agreement was resolved by a decision of the Provincial Court dated April 26, 1996.

In this case, the separation agreement between the appellant and the affected person was filed with the Director of the FSP who then proceeded to monitor and enforce the support provisions of the agreement pursuant to the provisions of the FSPA as described above. In my view, that the issue of arrears was ultimately resolved by a court judgement, does not negate the fact that

the matters contained in the records deal with the functions of the FSP as set out in the FSPA. Accordingly, I find that these are "law enforcement" matters for the purposes of section 14(1) of the Act.

Records 6-7 and 16 are FSP computer printouts. Records 6-7 are entitled "Debtor Tracing Information" and "Payor Tracing Information" respectively. Record 16 is entitled "Payor Assets Information". Apart from the standard information headings and the case, file and enforcement officers' numbers which appear on Records 7 and 16, these documents are blank.

The Ministry states that section 14(1)(a) applies to these records because, even when no arrears are currently outstanding, the Ministry continues to have the case before it and retain the ability to take enforcement action in the future if necessary. The Ministry also states that the information contained in the records is exempt from disclosure in that it was provided by a confidential source. Thus, it submits that section 14(1)(d) applies.

Section 14(1)(c) has also been claimed by the Ministry on the basis that the disclosure of these records could reasonably be expected to reveal investigative techniques and procedures currently in use.

Having reviewed the information in these records, I am not satisfied that their disclosure could reasonably be expected to interfere with a law enforcement matter or disclose the identity of a confidential source. I am not satisfied that there is a reasonable expectation of confidentiality with regard to the identity of the source of the information or the information provided by the source within the process under which these records were prepared.

Furthermore, in my view, the records relate to what is more appropriately categorized as an enforcement technique as opposed to an investigative technique.

Therefore, I find that Records 6-7 and 16 do not qualify for exemption under sections 14(1)(a), (c) or (d) of the Act. As they contain solely the personal information of the appellant, they should be disclosed to him.

ORDER:

1. I order the Ministry to disclose Records 2, 6-7, 16 and 142 to the appellant by **February 27, 1997**.
2. I uphold the decision of the Ministry to deny access to the balance of the records.
3. In order to verify compliance with 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 1.

Original signed by: _____ February 6, 1997
Anita Fineberg
Inquiry Officer

APPENDIX A
INDEX OF RECORDS AT ISSUE
Appeal Number P-9600332

| RECORD NUMBER(S) | DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART | EXEMPTIONS OR OTHER SECTION(S) CLAIMED | DECISION ON RECORD |
|-------------------------|--|---|---------------------------|
| 1 | FSP Computer Printout - Case summary (in part) | 21, 49(b) | Do not disclose |
| 6-7 | FSP Computer Printout - Debtor Tracing Information | 14(1), 49(a) | Disclose in full |
| 8-11 | FSP Computer Printout - Creditor General Information | 21, 49(b) | Do not disclose |
| 16 | FSP Computer Printout - Payor Assets Information | 14(1), 49(a) | Disclose in full |
| 22 | FSP Computer Printout - Enforcement History (in part) | 19, 49(a) | Do not disclose |
| 54 | Fax from Affected Person to FSP | 21, 49(b) | Do not disclose |
| 55 | Fax from Affected Person to FSP with Handwritten Note | 19, 49(a), (b) | Do not disclose |
| 56 | Letter from Appellant's Counsel to FSP with Handwritten Note (in part) | 19, 49(a) | Do not disclose |
| 64-68 | Financial Statement of Affected Person | 21, 49(b) | Do not disclose |
| 71 | Memorandum of FSP Counsel | 19, 49(a) | Do not disclose |
| 72 | FSP Computer Printout - Support Deduction Order Status with Handwritten Note (in part) | 19, 49(a) | Do not disclose |
| 73-74 | Fax from affected Person's Counsel to FSP | 21, 49(b) | Do not disclose |
| 88 | Letter from FSP to Affected Person | 21, 49(b) | Do not disclose |
| 130-131 | FSP Legal Memorandum | 13(1), 19, 49(a), (b) | Do not disclose |
| 132 | FSP Legal Memorandum | 19, 21, 49(a), (b) | Do not disclose |
| 143 | Client Request Form to FSP | 14(1), 21, 49(a), (b) | Do not disclose |
| 146-154 | Faxes from Affected Person to FSP | 21, 49(b) | Do not disclose |
| 160-162 | Fax from Affected Person to FSP | 21, 49(b) | Do not disclose |
| 163 | Accrual Adjustment Form (in part) | 19, 49(a) | Do not disclose |
| 164 | Request for Legal Opinion | 19, 49(a) | Do not disclose |
| 184 | FSP Telephone Message from Affected Person's Counsel | 21, 49(b) | Do not disclose |
| 191 | Statement of Arrears | 14(1), 21, 49(a), (b) | Do not disclose |
| 192-194 | Fax from Affected Person to FSP | 21, 49(b) | Do not disclose |
| 195 | Accrual Adjustment Form | 14(1), 21, 49(a), (b) | Do not disclose |
| 196-204 | Faxes from Affected Person to FSP | 21, 49(b) | Do not disclose |

| RECORD NUMBER(S) | DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART | EXEMPTIONS OR OTHER SECTION(S) CLAIMED | DECISION ON RECORD |
|------------------|---|--|--------------------|
| 215-217 | Faxes from Affected Person to FSP | 21, 49(b) | Do not disclose |
| 218-222 | Payor Information and Statement of Arrears Forms | 14(1), 21, 49(a), (b) | Do not disclose |