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

ORDER P-1452

Appeal P_9700089

Ministry of the Attorney General

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester submitted a request under the Act to the Ministry of the Attorney General (the Ministry) for copies of all records in its possession concerning a named individual. In general, the request relates, but is not restricted, to all attempts, efforts or requests to have the named individual charged under the Criminal Code with spreading hate. The named individual provided a consent for the requester to receive his personal information. The requester subsequently advised that she was acting on the named individual's behalf in this appeal. Accordingly, for ease of reference, I will refer to the named individual as the appellant throughout this order.

The Ministry located responsive records and granted partial access to them. The Ministry denied access to the remaining records pursuant to the following exemptions under the Act:

- advice and recommendations - section 13(1)
- law enforcement report - section 14(2)(a)
- solicitor-client privilege - section 19
- danger to safety or health - section 20
- invasion of privacy - section 21
- information published or available - section 22(a).

The appellant appealed this decision and Appeal P-9600329 was opened. The Appeals Officer assigned to this file, the Ministry and the appellant's agent entered into extensive mediation regarding the issues and records at issue in this appeal. In order to understand the issues in this appeal, it will be helpful to describe the results of this mediation.

In his letter of appeal, the appellant indicated that he does not wish to appeal the Ministry's decision with respect to 993 pages of documents denied under section 22(a) of the Act, which consist of newspaper clippings, court decisions, transcripts and a videotape. He further advised that he also does not wish to appeal the decision with respect to the Ontario Provincial Police Investigation Brief consisting of 73 pages, access to which was denied pursuant to sections 14(2)(a), 19, 20 and 21 of the Act. Accordingly, these records and section 14(2)(a) are not at issue in this appeal.

During the mediation stage of the appeal, the Ministry issued a second decision letter informing the appellant that additional records responsive to his request were located. Access to these records was denied pursuant to sections 13(1), 19 and 21 of the Act. The appellant appealed this decision, which became the subject of a separate appeal (Appeal P-9600366). This appeal was later settled in mediation.

Also during mediation, the appellant, agreed that he is no longer pursuing access to a number of records. Specifically, these records are: Pages 1, 2, 61, 63 - 65, 67, 111 - 133, 152, 154, 155, 168 _ 177, 179, 180, 181 - 182, 184, 185, 187, 188, 190, 191, 200 - 204, 206 - 218, 220, 264,

276 - 279, 284, 296 - 301 and 311 - 315. Accordingly, these records are no longer at issue in this appeal.

Furthermore, the appellant advised the Appeals Officer that he is not pursuing access to any personal information which exists within the records which remained at issue. This includes names of individuals, as well as any personal identifiers. In turn, the Ministry agreed to consider a number of records for disclosure.

At this point, the appeal was put "on hold". That is, the appeal was removed from active processing by this office.

The Ministry issued its revised decision in this matter and granted the appellant partial access to some of the records which remained at issue. The Ministry indicated that access to part of the records is denied pursuant to sections 13(1), 19, 20 and 21 of the Act.

The appellant wrote to the Commissioner's Office, and indicated that he would like to proceed with his appeal in this matter. The Commissioner's Office reactivated Appeal P-9600329 under a new appeal number -- Appeal P-9700089.

In his letter, the appellant advised that, with respect to Records 33, 38 and 60, he is only appealing the severances made pursuant to the section 19 exemption. The appellant further clarified the following: (1) with respect to Record 39, he is only appealing the section 21 severance relating to the individual who wrote the May 29, 1985 letter; (2) with respect to Record 178, he is only appealing the section 21 severance relating to the individual who wrote the August 26, 1983 letter; (3) with respect to Record 189, he is only appealing the section 21 severance relating to the individuals who wrote the May 28, 1981 letter; and (4) with respect to Record 293, he is only appealing the section 21 severance relating to the individual who wrote the February 24, 1993 letter. The appellant confirmed that he is not appealing any other severances with respect to these records.

During the mediation stage of appeal number P-9700089, the appellant confirmed that from the group of records which were released to him in part, aside from Records 33, 38, 39, 60, 178, 189 and 293, which were discussed above, he also wishes to appeal the Ministry's decision with respect to Records 66, 97 and 138. All other records which were released by the Ministry in part are no longer at issue in this appeal.

The appellant further confirmed that, aside from the records which he agreed not to pursue prior to Appeal P-9600329 being placed on hold, he is appealing the Ministry's decision with respect to all other records which were withheld by the Ministry in their entirety.

The appellant clarified, however, that he is not seeking access to any letters written in German for which there exist English translations. Accordingly, the letters written in German, which form part of Records 136, 162, 221 and 227, are no longer at issue in this appeal.

Also during mediation, the Ministry released to the appellant the information which remained at issue in Record 39. Accordingly, this record is no longer at issue in this appeal.

During the mediation stage of this appeal, the Ministry provided the Appeals Officer with an index outlining the exemptions which were claimed for various groups of records. Later in the process, all records were assigned individual record numbers. Therefore, as a result of the mediation undertaken by the parties, and in accordance with the Ministry's index, the Appeals Officer identified a list of the records which remained at issue in this appeal (either in whole or in part) and the exemptions which were claimed by the Ministry.

This office sent a Notice of Inquiry (including a description of the records at issue) to the Ministry, the appellant's agent, and four other individuals whose interests might be affected by disclosure of the records. In this Notice, the Appeals Officer indicated that the Ministry had claimed discretionary exemptions for certain records outside the 35-day time limit as set out in the Confirmation of Appeal, and asked the Ministry to provide the reasons why it is claiming a discretionary exemption(s) at this late date, and the reasons why the discretionary exemption(s) should apply. Also, because it appeared that the records may contain the personal information of the appellant, and it was clarified that the agent was acting on his behalf in making this access request, the Notice raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy).

Representations were received from the appellant, the Ministry and one affected person. In her representations, the affected person indicates that she objects to the disclosure of her personal information to the appellant.

In his representations, the appellant raised the possible application of section 23 of the Act, the so-called "public interest override". Although this issue was not raised in the Notice of Inquiry, I have considered the appellant's representations in this regard.

In its representations, the Ministry claims certain exemptions for records which were not identified by the Appeals Officer and has withdrawn certain exemptions for other records.

The appellant was notified about the changes to the description of the records at issue as identified by the Ministry, and was given an opportunity to make further representations on this issue. No representations were received from the appellant in this regard.

RECORDS AT ISSUE

In my view, because of the extensive mediation undertaken on this file and the large number of records at issue, I am prepared to accept the records at issue as described by the Ministry. Therefore, the following is a list of the records at issue in this appeal:

Exemption: section 13
Records: 151, 153, 295 and 303

Exemption: section 19
Records: 9, 33, 38, 62, 151, 153, 166, 192, 198, 219, 283, 295 and 303

Exemption: section 20

Records: 9, 10, 13, 14, 28, 68, 96, 99, 134, 138, 140 - 142, 156 - 158, 161, 162, 166, 221 _ 254, 256 - 262, 265 - 275, 286 - 288, 303 and 305

Exemption: section 21
Records: 9, 10, 13, 14, 28, 62, 66, 80, 96, 97, 99, 103, 105, 107, 110, 136, 138, 140 - 142, 151, 158, 161, 162, 166, 178, 189, 192, 193, 196, 219, 254, 283, 290 - 293, 295, 303 and 305.

Because the Ministry has withdrawn its exemption claims for Records 157, 158 and 195, these records should be disclosed to the appellant.

The records at issue consist of internal and external correspondence, notes, literature, audio tape and video tape.

PRELIMINARY MATTER:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

In its representations, the Ministry states simply that:

> The exemptions applicable to each record, as claimed in the Ministry's original response letter of August 29, 1996, are identified below.

It appears that the Ministry is taking the position that it did not raise any discretionary exemptions late in the appeals process. The Ministry does not elaborate on this point, nor, in my view, is it clear from any of the background discussed above, that this is the case. Because it is unclear in the circumstances of this appeal, I have decided to consider the issue of the late raising of discretionary exemptions by the Ministry.

On September 10, 1996, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the correspondence, to raise any additional discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

It was not until March 5, 1997, when the Ministry issued its revised decision that the Ministry indicated for the first time that it wished to claim the application of the discretionary exemptions provided by sections 13(1), 19 and 20 of the Act to certain records (for which these exemptions had not previously been claimed).

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, former Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, she made the point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In my view, however, because of the extensive mediation which the parties have undertaken in this appeal, it would be unreasonable for me to take a strict approach in dealing with this issue in the circumstances. Accordingly, since all exemptions have been included in the Notice of Inquiry and the appellant is fully aware of those claimed by the Ministry (in both of its decision letters), the appellant is not disadvantaged or prejudiced in any way by my consideration of these new discretionary exemptions in this order. Therefore, I will include them in my analysis.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, as "recorded information about an identifiable individual". I have reviewed the records, and I find that with the exception of Records 242 - 252, 254, 256 - 262, 266, 272 - 274 and 286 - 288, the remaining records all contain the appellant's personal information as author/publisher of various materials or because reference is made to him in the records.

The Ministry claims that Records 9, 10, 13, 14, 28, 62, 66, 80, 96, 97, 99, 103, 105, 107, 110, 136, 138, 140 - 142, 151, 158, 161, 162, 166, 178, 189, 192, 193, 196, 219, 254, 283, 290 - 293, 295, 303 and 305 contain the personal information of individuals other than the appellant. However, the Ministry has made no submissions on this issue with respect to Records 158, 161, 166, 219, 283, 290, 292 and 305. Nevertheless, I have reviewed these pages to determine if they contain personal information and to whom it relates.

As I indicated above, except for Records 178, 189 and 293, the appellant is not seeking any personal information in the records.

I have reviewed the records identified above and I find as follows:

- Records 10, 62, 66, 158, 161, 196, 219, 254, 283, 292 and 305 do not contain personal information of other individuals.

- Once the names, addresses and any other personal identifiers are removed from Records 9, 13, 14, 28, 80, 96, 97, 99, 103, 105, 107, 110, 136, 140, 141, 142, 151, 162 and 303, the remaining portions of these records cannot identify the individuals referred to in them. Therefore, the remaining portions do not qualify as personal information. I have highlighted the personal information on the copies of these records which are being sent to the Ministry's Freedom of Information and Privacy Co_ordinator (the Co-ordinator) with a copy of this order. The personal information in these records is not at issue in this appeal and should not be disclosed to the appellant.

- The names and/or addresses of the authors of Records 138, 166, 178, 189, 192, 193, 290, 291, 293 and 295 were provided by these individuals in their professional capacity or as representatives of organizations and do not qualify as personal information. However, the two telephone numbers of the individuals referred to on page 189 are the home telephone numbers of these two people and thus qualify as their personal information. I have highlighted these two numbers on the copies of these records which are being sent to the Co-ordinator with a copy of this order and as the appellant only questioned the severance of the names, the telephone numbers are not at issue in this appeal and should not be disclosed.

As Records 66, 178, 193, 196, 290, 291, 292 and 293 and the portions of Records 80, 97, 103, 105, 107, 110, 136 and 189 at issue do not contain personal information, and as no other exemptions have been claimed with respect to them, these records should be disclosed to the appellant in accordance with the highlighted copies of these records which are being sent to the Co-ordinator with this order.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found that most of the records contain the appellant's personal information. 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 institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

> 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. [emphases added]

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the Ministry's claims that particular records qualify for exemption under sections 13, 19 and 20, which are referred to in section 49(a).

ADVICE OR RECOMMENDATIONS

The Ministry claims that the advice or recommendations exemption found in section 13(1) of the Act applies to Records 151, 153, 295 and 303. This provision 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 many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just 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 151 and 153 are a draft letter for the Attorney General's signature prepared by Crown counsel. The Ministry indicates that the Attorney General received many letters regarding the appellant's activities. In each case, the Attorney General had to decide how best to respond to each letter. The Ministry submits that Records 151 and 153 are a draft response for the Attorney General's approval or rejection. I agree. Accordingly, these records are exempt pursuant to s.13 of the Act.

Record 295 is a draft letter from a member of the Ontario Provincial Police (the OPP) to Crown counsel for his review and approval. The record contains the handwritten editing of Crown counsel. The record contains the recommendation of the OPP officer and Crown counsel regarding whether certain specific statements made by the appellant constitute criminal offences. I find that this record is properly exempt under section 13 of the Act.

The Ministry claims that section 13(1) applies to page 2 of Record 303. This portion of the record contains a note from Crown counsel regarding the appropriate response to a letter received by the Attorney General from a named individual. This record is also properly exempt under section 13.

As I have found that section 13(1) applies to these records, they are all properly exempt under section 49(a) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that Record 9, the severed portions of Record 33, and Records 38, 62, 151, 153, 166, 192, 198, 219, 283, 295 and 303 qualify for exemption under section 19 of the Act. Because I have already found that Records 151, 153, 295 and 303 qualify for exemption under section 13, I will not consider them further in this order.

Section 19 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 the following 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 adviser, **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 submits that Records 192, 219 and 283 qualify for exemption under Branch 2, and that the remaining records qualify under both branches.

I have reviewed all of the records at issue under this section and I find that they have all been prepared by or for Crown counsel. I am satisfied that each record was prepared for use in giving legal advice. Accordingly, the records and parts of records at issue in this discussion are properly exempt under Branch 2 of section 19 of the Act.

As all of the records in this discussion are exempt under section 19, they are properly exempt under section 49(a) of the Act.

DANGER TO SAFETY OR HEALTH

Section 20 of the Act states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Ministry claims that the following records and parts of records are exempt under section 20 of the Act on the basis that release of such material could reasonably be expected to seriously threaten the safety and/or health of individuals in the community:

> 9-2; 10-4 to 10-6; 13 except page 1; 14 except page 1; 28; 68-4 to 68-9; 96; 99-2; 134; 138-5 and 138-6; 140-2 and 140-3; 141-4 to 141-6; 142-2 to 142-4; 156 to 158; 161 except pages 1, 2, 10 and 13; 162 except page 4; 166-4 to 166-6 and 166_12 to 166-14; 221 to 254; 256 to 262; 265 to 275; 286 to 288; 303-5 to 303-7; and 305.

I have already found that Records 166 and 303 are exempt under section 49(a). Accordingly, I will not consider these two records in the ensuing discussion.

With respect to the remaining records, the Ministry submits that the above material is rife with offensive, inflammatory and hateful comments directed at identifiable groups. Publication of such material can reasonably be expected to seriously threaten the health and/or safety of individuals targeted by such hate propaganda.

The Ministry refers to a number of court decisions regarding judicial recognition of the harms caused by hate propaganda.

The Ministry indicates that although distribution of some of this hate material might not necessarily give rise to a criminal prosecution pursuant to the Criminal Code, it is nevertheless conducive to the promotion of hatred against the individuals and groups targeted. In this regard, the Ministry states that the Supreme Court of Canada has recognized the benefit of recourse to alternative means to suppress the dissemination of hate propaganda. The Ministry submits that, in the context of an access request, the invocation of the discretionary exemption provided by section 20 of the Act is an appropriate and effective means of suppressing the dissemination of hate propaganda.

The Ministry indicates that the records for which it has claimed exemption under section 20 of the Act, are an accumulation of hate materials forwarded to the Ministry over the years by citizens and law enforcement agencies.

The Ministry states that it wishes to have absolutely no part in the communication, dissemination or further propagation of these hate materials. Further, the Ministry argues that in addition to the certain and serious psychological harms caused by dissemination of this material, there is a real

risk that public dissemination of these materials may lead to an increase in racially motivated hate crimes and to a general escalation of intolerance in our society.

Section 20 stipulates that the Ministry may refuse to disclose a record where doing so **could reasonably be expected to** result in a specified type of harm. Section 20 similarly requires that the expectation of a serious threat to the safety or health of an individual, should a record be disclosed, must not be fanciful, imaginary or contrived but rather one which is based on reason. The Ministry must offer sufficient evidence to support the position that the record at issue could reasonably be expected to seriously threaten the safety or health of an individual.

The records at issue in this discussion consist of articles regarding propaganda and the holocaust, other atrocities reported in the media, Nazism, censorship and world events. Many of the articles have commentary attached to them in the same vein as much of the literature at issue. As I indicated above, the appellant is referred to in many of them as author or publisher of the materials.

In the circumstances of this appeal, the appellant is clearly aware of the literature, having been involved in its dissemination and production. In my view, the Ministry has not established that disclosure of this information to the appellant would result in the harms referred to in section 20 as this information has already been published.

Therefore, while I accept that the materials at issue in this appeal may be extremely offensive, I do not accept the Ministry's arguments that section 20 applies to them. Because of this finding it is not necessary for me to consider the application of section 49(a) to those records which contain the appellant's personal information.

In summary, as section 20 does not apply to the records, the above records should be disposed of as follows:

- No other exemptions apply or have been claimed for Records 10, 68, 134, 138, 156, 158, 161, 221, 254, 256 - 262, 265 - 275, 286 - 288 and 305. Therefore, these records should be disclosed to the appellant.

- Once the names on the remaining records are removed as per the highlighted copies of the records, these records should be disclosed to the appellant.

Because of the way I have disposed of the issues in this appeal, it is not necessary for me to consider the application of sections 21(1) or 49(b) to any of the records.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there is a compelling public interest in the disclosure of the records which outweighs the purpose of the exemptions claimed by the Ministry. This raises the possible application of section 23 of the Act, which states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

The solicitor-client privilege exemption provided by section 19 of the Act is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption.

With respect to those records which I have found to be exempt under section 13(1) of the Act, the appellant submits that the records are important for both the Jewish and German communities in Canada.

In this regard, the appellant states that his circumstances are unique because they concern the struggle between two ethnic groups in Canada regarding their history, which ultimately became the subject of hate charges. The appellant states further that as a result of pressure from various lobby groups and charitable organizations he was subjected to violent repercussions for his views. He argues that the Ministry itself had become involved in this matter, actively and through its funding of these organizations. He submits that this raises a public interest in having these documents released.

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling **public** interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

I have considered the appellant's representations in this regard. In my view, there is no public (as opposed to private) interest in disclosure of any information in the record. Accordingly, section 23 has no application in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to withhold the severed portions of Record 33, and Records 9, 62, 151, 153, 166, 192, 198, 219, 283, 295 and 303 in their entirety.

2. I order the Ministry to disclose the remaining records in accordance with the highlighted copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions of the records are not at issue in this appeal and should not be disclosed to the appellant.

3. The records which are to be disclosed should be sent to the appellant by **October 24, 1997** but not earlier than **October 20, 1997**.

4. 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 Provisions 2 and 3.

Original signed by: September 19, 1997
Laurel Cropley
Inquiry Officer