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

INTERIM ORDER PO-1742-I

Appeal PA-980245-1

Ministry of Health and Long Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (formerly the Ministry of Health) (the Ministry) received a 15-part request under the Freedom of Information and Protection of Privacy Act (the Act) from two requesters for records in relation to the licensing, certification, registration and regulation of osteopathic practitioners in the Province of Ontario.

The Ministry located 323 responsive records and, upon payment of the requested fee of $456.71, granted access in full to approximately 65 records and denied access in whole or in part to the remainder. For those records to which access was denied, the Ministry claimed the following exemptions contained in the Act:

- sections 12(1)(b), (c), (d) and (e) - Cabinet records
- section 13(1) - advice and recommendations
- sections 18(1)(c), (d), (e) and (g) - economic and other interests of Ontario
- section 19 - solicitor-client privilege
- section 21(1) (in conjunction with sections 21(2((f) and (h), and 21(3)(a) and (f) - personal privacy

The Ministry also claimed that some of the information contained in the records was not responsive to the request.

The requesters (now the appellants) appealed the Ministry's decision and also claimed that the Ministry's decision letter was inadequate in that it did not provide a sufficient description of the records to which access had been denied. The appellants also indicated in their letter of appeal that they were not disputing the Ministry's denial of partial access to 53 of the records.

During mediation, the appellants further agreed not to pursue access to several records to which section 19 of the Act had been applied, all of the non-responsive records, and any records which consisted of the appellants' own correspondence with the Ministry.

At the close of mediation, 131 records remained at issue, either in whole or in part. These records consist of Cabinet Submissions, "'ction Requests", background papers, briefing notes, internal memoranda, e-mails, draft documents, correspondence and other related documents.

I sent a Notice of Inquiry to the Ministry and the appellants. Because some records contained the personal information of the appellants, I included the possible application of sections 49(a) and (b) of the Act ("discretion to refuse the requesters' own personal information" and "invasion of privacy') as issues in the appeal. The Ministry submitted representations. The appellants responded to the Notice by stating that they "have not been provided with sufficient information on the exempted records of any of the remaining 131 records to provide an informed response".

The Ministry included an index of records as an attachment to its representations, and I will use the Ministry's numbering scheme in this order.

Record C116 in its entirety and parts of Records C110, C114, D13, D14 and D15 include the appellants' own correspondence with the Ministry. Because the appellants have agreed not to pursue access to records of this nature, I have removed Record C116 and the appellants' own correspondence contained in Records C110, C114, D13, D14 and D15 from the scope of this appeal.

PRELIMINARY MATTER:

Adequacy of the Ministry's decision letter

The appellants complain that the Ministry's decision letter did not satisfy the requirements of section 29 of the Act. Specifically, they object to the fact that the decision did not include a general description of the withheld records. This issue was raised in the Notice of Inquiry and the appellants have re-iterated their position in stating:

> The Ministry's decision letter merely sets out the records being withheld and the section number of the Act being applied. The Ministry's decision letter was wholly inadequate in that no attempt was made to identify the records being withheld.

The Ministry states:

> ... any index which may have accompanied its decision letter would necessarily have been incomplete, since any specific description of certain of the responsive records would have risked disclosing information that fell under the application of the exemptions being cited ... particularly as it relates to documents for which the mandatory exemptions contained in section 12 have been claimed.
>
> Nonetheless, the Ministry considered that, in describing why certain information had been severed, and advising whether the exemptions claimed were mandatory or discretionary, the nature of the severed information would be sufficiently described to allow the appellant to come to an informed decision on whether to appeal the Ministry's decisions.

The Ministry submits that, while no index of responsive documents was provided, all four basic requirements of section 29(1)(b) were met: it set out the sections of the Act being applied, the reasons why the records qualified for exemption, the name and the position of the person making the decision, and advised the appellants of their right of appeal to this office.

In one of the early orders of this Office, Order P-158, former Commissioner Sidney B. Linden discussed section 29(1)(b) of the Act, and the rationale behind the requirement for reasons in section 29(1)(b)(ii). The former Commissioner's comments are useful to repeat in the present appeal.

To a large extent, subsection 29(1)(b) of the Act reflects recommendations made by the Williams Commission in a Report entitled Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy,/1980. The Commission's recommendations regarding the content of a notice of refusal when access to a record has been denied are set out in Volume 2, of the Report at p. 268:

1. the statutory provision under which access is refused;

2. an explanation of the basis for the conclusion that the information sought is covered by an exempting provision; (emphasis added in original)

3. the availability of further review and how it can be pursued;

4. the name and office of the person.

The Williams Commission went on to state at p. 268 that:

> Although the obligation to provide reasons for denials may appear to be burdensome, we believe it will be instrumental in encouraging careful determinations of decisions to deny access.

In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

It has been the experience of this Office that the more information a requester possesses about the basis for a head's decision, the more likely a mediated settlement of the appeal can be attained. This experience reflects a comment that appears on p. 268 of the Report of the Williams Commission that "... conscientious explanations of the basis for refusal may reduce the number of situations in which the exercise of appeal rights will be thought to be necessary".

In my view, the notice of refusal of the institution in this appeal does not meet the requirements of subsection 29(1)(b)(ii) of the Act. However, as I have dealt with the

> application of the exemptions to the records in issue in this appeal, I do not see any purpose that would be served by ordering the head to send a new notice of refusal to the appellant. The appellant has raised an issue of general importance to the operation of the Act and I have accepted his position with respect to the obligations of the institution under subsection 29(1)(b)(ii) of the Act.

This Office has had to address the issue of the inadequacy of decision letters in a number of past orders, making its views of the proper interpretation of the requirements of sections 29(1)(b)(I) and (ii) of the Act clear. These sections require institutions to outline "the specific provision of this Act under which access is refused" and "the reasons the provision applies to the record". To simply quote the section reference and restate the wording of the exemption claim is not sufficient. Requesters are entitled to know the reasons why a request has been denied so, among other things, they are in a position to decide whether or not to appeal.

In the present appeal, I find myself in a situation similar to that faced by former Commissioner Linden in Order P-158. Although I accept the general statement made by the Ministry that the description of records included in decision letters must not disclose the actual content of records subject to the exemption claim, in my view, additional details could have been given in the particular circumstances of this appeal without compromising this legitimate consideration. The best evidence of this is the fact that additional details were in fact communicated during the course of mediation, resulting in the removal of some records from the scope of the appeal.

I find that the Ministry's decision letter in this appeal was inadequate and did not satisfy the requirements of section 29(1) of the Act. That being said, through the actions of this Office during both mediation and in the course of this inquiry, I find that the appellants have been provided with sufficient information to enable them to address the issues in this appeal and, in my view, no useful purpose would be served in taking any further action at this point.

Institutions and the Commissioner's Office both have clearly articulated roles to play in administering Ontario's freedom of information scheme, and it is vital that both discharge their statutory responsibilities properly. When institutions do not comply with the requirements of section 29 of the Act, the Commissioner's Office must step in and make up for these deficiencies during mediation. This invariably adds time to the process, at the expense of the appellant, who is entitled to a prompt and comprehensive decision. I encourage the Ministry, in the strongest terms possible, to adhere to its statutory responsibilities under section 29 when responding to requests in respect of which access is denied.

DISCUSSION:

As noted earlier, the appellants contend that they have not been provided with sufficient information to enable them to provide an informed response to the Notice of Inquiry. For the reasons outlined above, I do not accept this position.

In the absence of detailed substantive representations from the appellants, my decisions in this order will be based on the representations provided by the Ministry, together with my independent review of each record and other file documents gathered during the course of processing the appeal.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual and states as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Ministry submits that several of the records contain the personal information of the appellants and/or other identifiable individuals. This information includes opinions, addresses, education and employment history, age, financial transactions, personal correspondence, names where disclosure of the names would reveal other personal information, and information provided in confidence.

In Order P-230, former Commissioner Tom Wright stated:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

The Ministry claims that the number of osteopaths registered in Ontario, general billing information, and the age of the youngest registrant at a given point in time which is contained in Records C76, C77-C80, C81, C83, C95, C103, C104, C107, C121, C124, C126, C134, C150-C153, C164, C174 and D7 qualifies as "personal information". None of this information refers to any named individuals, nor has the Ministry provided any evidence to establish how any individual could reasonably be expected to be identified through disclosure of this particular information. Accordingly, I find that this information does not qualify as personal information under section 2(1) of the Act.

Records C64, C66, C76, C80, C81, C83, C95, C107, C110, C114, C121, C124, C126, C134, C150, C151, C152, D7, D13-15, D35 and D50 all contain information regarding one of the appellant's efforts to obtain registration as an osteopath, and Records D13-D15 contain similar information about the other appellant. I find that this information is "about the appellants" and qualifies as their personal information under section 2(1).

The information severed from Record C35 is the personal opinion of an identifiable individual with respect to a specific issue, and qualifies under paragraph (e) of the definition of personal information. Record D2 is a letter from another registrant to the Ministry in respect of this individual's own registration as an osteopath (Record C174 includes a copy of this same letter); and Record C173 is a letter from the College of Physicians and Surgeons of Ontario to a named individual providing a response to that individual's personal inquiry regarding registration of osteopaths. I find that these records contain the personal information of these two individuals. None of these records contain the personal information of either of the appellants.

Records C114 and D13-D15 include references to the vacation schedule of a Ministry employee. I find that these references are the personal information of this employee.

Records C31, C80, C81, C110, D13-D15, D37, D46, D47, D48, D49, D50 and D51 contain information relating to three identifiable individuals who have communicated with the Ministry on the subject of the registration of osteopaths in Ontario. Because of the manner in which I will be disposing of Records C80, C81, C110, D13-D15, D46, D47 and D50 later in this order, it is not necessary to further address this information here. As far as Records C31, D37, D48, D49 and D51 are concerned, it would appear that the two individuals identified in theses records may have communicated with the Ministry as a member or representative of an organization and, as such, may have been acting in their professional rather than personal capacities. However, these individuals were not made parties to this appeal and provided with an opportunity to submit representations on the proper treatment of these records. I have decided not to delay my decisions with respect to the other records, but will defer consideration of Records C31, D37, D48, D49 and D51 pending notification.

In summary, I find that Records C64, C66, C76, C80, C81, C83, C95, C107, C110, C121, C124, C126, C134, C150, C151, C152, D7, D35 and D50 contain the personal information of the appellants;

Records C114 and D13-D15 contain the personal information of the appellants and other identifiable individuals; Records C35, C173, D2 and the duplicate letter to D2 as it appears in Record C174 contain the personal information of individuals other than the appellants; and Records C77-C79, C103, C104, C153 and C164 do not contain any personal information.

Because section 21 only applies to records containing personal information, I find that section 21 does not apply to Records C77-C79, C103, C104, C153 and C164.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information of individuals other than the appellants, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. One of these circumstances is found in section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In order for this section to apply, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

The appellants provided no representations on this particular issue. I have considered the various factors favouring disclosure in section 21(2) of the Act, and I find that none are evident from the content of the records themselves. In the absence of evidence weighing in favour of a finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that it would. Therefore, the exception contained in section 21(1)(f) does not apply in the circumstances of this appeal, and Records C35, C173, D2 and the duplicate letter to D2 as it appears in Record C174 qualify for exemption under the mandatory requirements of section 21 of the Act.

CABINET RECORDS

The Ministry claims that some or all of Records A62, A63, A64, B4-B9, B11-B14, C1, C11, C15i, C15ii, C17, C18, C19, C21, C27, C37, C81, C83, C100, C101, C125, C127, C137, C138, C139, C140, C146, C155, C158, C159, C161, C162, C164, C165, C167, C169, C170, C172, C175 and C176 qualify for exemption under the introductory wording of section 12(1) and/or sections 12(1)(b), (c), (d) and/or (e) of the Act. These sections read as follows:

> 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,

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) 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;

Because I will be dealing with Records C11, C15i, C19, C21, C27, C37, C81, C83, C100, C101, C125, C155, C158, C159, C161, C162, C165, C167, C169, C170, C172, C175 and C176 under my discussion of the application of sections 13(1) and/or 19 of the Act, I have decided not to consider these records in the context of section 12.

The Ministry's representations on the application of section 12 of the Act consist solely of the following statements:

> As is amply demonstrated by the content of the records at issue in this appeal, the question of regulation of osteopathy in Ontario remains unresolved, despite submissions to cabinet, and to the cabinet committee on social policy, dating back to at least 1985. Many of the documents at issue in the current appeal illustrate the difficulties experienced over more than a decade in trying to bring this matter to a satisfactory conclusion. Past submissions to cabinet and/or its committees are therefore still very much part of the background that will form the basis of a future cabinet submission. The Ministry submits that all documents indicated in [the Ministry's index] to have been exempted under section 12 of the Act, if disclosed to the appellants, would reveal not only the substance of past deliberations of cabinet or its committees, but also much of the substance of future deliberations since another submission to cabinet with respect to the regulation of osteopathy remains an objective of the Ministry.

Previous orders have determined that use of the term "including" in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1). It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This will occur where an institution establishes that disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees.

Records B12 and C1 are on their face identified as Cabinet submissions, and Record B13 is titled "Cabinet Committee on Social Policy". I find that these records were clearly submitted to Cabinet for consideration and qualify for exemption pursuant to the introductory wording of section 12(1) of the Act.

Record B14 includes a Cabinet Submission and other documents that either accompanied that submission or contain information about the deliberations reflected in the submission. Records B4, B5 and B7 are all records that form part of the Cabinet Submission in Record B14. I find these also qualify for exemption pursuant to the introductory wording of section 12(1) of the Act.

Record C15ii is an internal Ministry memorandum which sets out the details of Cabinet deliberations on a specific issue respecting the registration of osteopaths. I am satisfied that disclosure of this record would reveal the substance of deliberations of Cabinet on this topic, and I find that it qualifies for exemption under the introductory wording of section 12(1) of the Act.

Records A62, A63 and A64 are documents that were prepared by an outside consulting firm for presentation to the Minister of Health in 1985 and 1987. There is no indication on the face or in the contents of these records that their substance formed part of Cabinet's deliberations, and the representations provided by the Ministry are not sufficient to establish a connection between the contents of these records and the substance of any Cabinet deliberations. Based on the evidence before me, I am also unable to conclude that disclosure of these records would permit the drawing of accurate inferences with respect to any Cabinet deliberations. Therefore, I find that Records A62, A63 and A64 do not qualify for exemption under the introductory wording of section 12(1) of the Act.

Records B6, B8, B9, B11, C17 and C18 are all either briefing notes to the then-Minister of Health or the then-Premier, or minutes of meetings held during the 1988-89 time period to brief the Minister of Health on the issue of the regulation of osteopaths. Records C138, C140, C146 and C164 are internal Ministry memoranda discussing this same issue. None of these records is identified as a Cabinet Submission and there is no indication on the face or in the contents of Records B6, B8, B9, B11, C138, C140, C146 or C164 that their substance formed part of any Cabinet deliberations. The general nature of the Ministry's representations on the section 12 exemption claim are not sufficient to establish that the parts of these records for which section 12(1) was claimed were the subject of substantive deliberations by Cabinet, or that disclosure of this information would permit the drawing of accurate inferences with respect to any such deliberations. Records C17 and C18 make reference to a Cabinet decision which was communicated

publicly in the late 1980's, but otherwise contain information which fits the description of the other records outlined in this paragraph. For these reasons, I find that Records B6, B8, B9, B11, C17, C18, C138, C140, C146 and C164 do not qualify for exemption pursuant to the introductory wording of section 12(1) of the Act.

Records C127, C137 and C139 are interoffice memoranda, primarily containing factual information regarding the issue of the regulation of osteopaths. Again, the Ministry has not explained how any of this information relates directly to the substance of Cabinet deliberations on this issue nor is any such connection evident from the contents of the records themselves. Consequently, in my view, disclosure of these records would neither reveal the substance of deliberations of Cabinet nor permit the drawing of accurate inferences regarding the substance of any deliberations, and I find that Records C127, C137 and C139 do not qualify for exemption under the introductory wording of section 12(1) of the Act.

Previous orders have held that sections 12(1)(c) (Orders P-60, P-323 and P-1623) and section 12(1)(e) (Orders P-22, P-40, P-946 and P-1182) are both prospective in nature. The use of the present tense in these sections preclude their application to matters that have already been considered by Cabinet or its committees. The Ministry acknowledges that the records date back as far as 1985 (November 1985 to be exact), with the most recent of these records being dated September 1996, more than three years ago. Although the Ministry states that disclosure of these records would reveal the substance of future deliberations of Cabinet, the Ministry's representations on this issue do not indicate any detailed plans or timetable for any future consideration of this issue by Cabinet. Based on the very brief and general representations provided by the Ministry, and my independent review of the records, I find that the records for which sections 12(1) (c) and/or (e) has been claimed concern matters already considered by Cabinet at various periods between 1985 and 1996 when the issue of regulation of osteopaths was under active consideration by governments of the day. Any subsequent consideration of the issue, should it occur in future, would clearly require new and updated information and policy options which reflect current government priorities. As such, I find that none of the records qualifies for exemption under sections 12(1)(c) and/or (e) of the Act.

The Ministry further claims that Record B6 qualifies for exemption pursuant to section 12(1)(b) and Record C18 qualifies for exemption under section 12(1)(d) of the Act. No specific representations on these exemption claims were included by the Ministry in its representation. I have already determined that neither of these records qualifies for exemption under the introductory wording of section 12(1).

The two criteria which the Ministry must satisfy in order to exempt Record B6, a briefing note, under section 12(1)(b) are:

1. the record must contain policy options or recommendations; and

2. the record must have been submitted or prepared for submission to the Executive council or its committees.

[Order 73]

I find that the second criteria for this exemption claim has not been established by the Ministry. As stated earlier, this record (minutes of a meeting of the senior management committee at the Ministry) is not identified as a Cabinet Submission, and there is no indication on its face or in its contents to indicate that it formed the substance of any Cabinet deliberations. The general nature of the Ministry's representations on the section 12 exemption claim are not sufficient to establish that the information contained in this record was "submitted or prepared for submission" to Cabinet. Therefore, I find that Record B6 does not qualify for exemption pursuant to section 12(1)(b) of the Act.

In order for Record C18 to qualify for exemption under section 12(1)(d), the Ministry must establish that it:

> (a) was used for consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; or
>
> (b) reflects consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

[Order P-1621]

Record C18 is a briefing note to the Premier. The record reports on events that had taken place concerning the regulation of osteopaths, including matters that had already been announced publicly by the government of the day. There is no indication in the record itself nor in the Ministry's representations to establish that the record "was used for consultation" or "reflects consultation" and therefore, I find that it does not qualify for exemption pursuant to section 12(1)(d) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that the following records, or parts thereof, qualify for exemption pursuant to section 19 of the Act:

> C5, C6, C7, C8, C11, C16, C19, C21, C27, C33, C34, C37, C51, C64, C66, C76, C77-C80, C81, C83, C95, C101, C107, C121, C123, C124, C125, C126, C134, C136, C150-C153, C155, C161, C162, C165, C169, C170, C172, C175, C176, C177, D4, D7, D31, D33, D35, D38, D45, D46, D47, D50, the undisclosed responsive parts of Records C110, C114, D13, D14 and D15 and the first page of Record C100.

Section 19 of the Act 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 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 Ministry 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]

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 P-1342]

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
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> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (see Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not,

> tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
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> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729]

All of the records relate to communications regarding the issue of the registration of osteopaths in Ontario, including issues related to the Health Professions Legislation Review.

The Ministry's representations on this exemption consist of the following statements:

> The Ministry submits that all records indicated in Appendix "A" [the Ministry's index] to have been severed in whole or in part pursuant to section 19 of the Act are either records in which Crown counsel has been asked for or has given legal advice with respect to a course of action or a communication proposed by a client program area within the Ministry or government or records the contents of which are the result of consultation with and/or review by Crown counsel. It must be emphasized that the issues being addressed in the records responsive to the appellants' request are essentially ones of legislative regulation of osteopathy. This being so, free and frank exchange between program area clients and their counsel is essential at all stages of the policy development process and in preparation for all negotiation with individuals or organizations having an interest in the future of osteopathy. Hence, among the records at issue in this appeal, all briefing materials prepared for the Minister and/or Cabinet and/or Cabinet committees, as well as all correspondence with persons and/or organizations outside the Ministry or government have come under close scrutiny by Crown counsel in the course of their preparation. Every update of briefing materials was reviewed by Crown counsel before being finalized. Legal advice and input has been a major factor in all the responsive records at issue in this appeal where section 19, as indicated in Appendix "A", has been applied to exempt them from access.
>
> The Ministry acknowledges that, in many of the records at issue, communication between Crown counsel and client program area(s) is not directly apparent. Nor were records such as briefing materials or correspondence prepared by or for Crown counsel in person. Nonetheless, the Ministry maintains that in all such instances, the information in the records reflects the conveyance of legal advice from counsel to the program area client who received it and, further, to clients-by-extension such as the Minister and/or Cabinet or a Cabinet committee. Thus, these records, as the instruments of communication from counsel to client, are covered by solicitor-client privilege as envisaged in section 19 of the Act.

Records C5, C6, C7, C8, C11, C16, C19, C21, C27, C33, C34, C37, C101, C123, C136, C155, C165, C169, C170, C172, D4 and D31 are all internal memoranda or other internal communications from Ministry staff to Ministry counsel and/or to other Ministry staff and copied to Ministry counsel. It is clear from the content of these records that one of the purposes in creating them was to seek confidential legal advice respecting various aspects of the issue of the registration and regulation of osteopaths or to provide legal direction on these same issues. Therefore, I find that these records are subject to solicitor-client communication privilege.

Record D46 (D47 is a duplicate of Record D46) is an "Action Request" from a Ministry employee to counsel for the Ministry. It seeks direction in responding to a letter, which was attached, asking for legal advice on an issue relating to the regulation of osteopathy. I find that this record is a communication between a solicitor (counsel for the Ministry) and a client (Ministry staff) for the purpose of seeking confidential legal advice, and these records are subject to solicitor-client communication privilege.

Records C76, C77-C80, C81, C83, C95, C107, C121, C124, C125, C126, C134, C150-C153, C161, C162, C175, C176, C177, D7 and D45 are all various drafts of briefing notes regarding various legal aspects of the regulation of osteopathy. I accept the Ministry's characterization of the nature of these records, and find that they are the type of documents that would be subject to review and comment by legal counsel during discussions on this topic. They consist of background information, opinions and/or advice, and provide the Minister with options regarding possible actions respecting the regulation of osteopaths in this province. In my view, this information falls within the category of confidential legal advice, and these records qualify for exemption under section 19.

Records D33 and D38 consist of handwritten notes that appear to have been created by Ministry counsel for use and reference in providing legal advice regarding the above-noted issues. Records C64, C66, D35, D50 and the undisclosed responsive parts of Records C110, C114, D13, D14 and D15 are all internal memoranda regarding letters received from the appellants regarding their registration as osteopaths. These records are not in themselves communications to or from a lawyer and a client. However, these records fall within the "continuum of communications" as described in Balabel, and could be described as part of the solicitor's "working papers" [Susan Hosiery Ltd.]. Further, I am satisfied that these records were prepared with an intention to keep them confidential. Therefore, I find that these records qualify for exemption under the section 19 solicitor-client communication privilege.

Record C51 consists of handwritten notes of the minutes of a meeting regarding the status of the Board of Directors of Osteopathy. The Ministry claims section 19 only for the portions that refer to the various legal issues that arose during this meeting and the legal advice to be sought from counsel in relation to these issues. I find that these portions of Record C51 are subject to solicitor-client communication privilege.

The first page of Record C100 is an internal memorandum, and the Ministry has claimed section 19 as the basis for exempting two lines of information on this page. This information refers to the fact that a legal opinion was obtained, but makes no reference to the content or substance of that opinion. In my view, a general reference to the existence of a legal opinion, and nothing more, does not represent a confidential

communication between a solicitor and a client for the purposes of seeking, formulating or providing legal advice, and I find that these two lines of information in Record C100 do not qualify for solicitor-client communication privilege. Because section 19 was the only exemption claimed for the first page of Record C100, it should be disclosed to the appellants.

ADVICE OR RECOMMENDATIONS

The records remaining at issue for which the Ministry has claimed exemption under section 13(1) are Records A62, A63, A64, the undisclosed responsive portions of B6, B8 in part, B9, B11 in part, C15i, C15iii, C17, C18, C20, C23, C24, C29, C31, C32, C36, C45, C51, C63, C98, C100 (with the exception of the first page), C102, C103, C104, C105, C106, C117, C119 in part, C120, C129 in part, C138, C146 in part, C147, C154, C158, C159, C164, C167 in part, C171, C174 in part, C178, C179, C180, C181 and C183.

Section 13(1) of the Act 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.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or 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 reveal a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

The Ministry's one-paragraph representations on the application of section 13(1) read as follows:

> Clearly, in the Ministry's attempts over the years to resolve the issues still surrounding the practice of osteopathy in Ontario, many records have accumulated that contain the advice of successive civil servants. That advice is still contributing to today's deliberations on this topic and is therefore still to be considered valid. This is reflected in each of the documents at issue in this appeal that have been exempted from access pursuant to subsection 13(1) of the Act. The advice contained in the documents could still be reconsidered and acted upon in the future, leading to another submission to Cabinet or to one of its executive committees.

> This fact has resulted in the Ministry's extensive use of its discretionary authority under the Act to exempt all the records listed in Appendix "A" [the Ministry's index] as having been severed in part or in whole under section 13.

The records as identified above appear to be various presentations, policy papers, handwritten notes, draft correspondence, memoranda and meeting minutes. In some instances it is not clear who authored the documents, and the limited representations provided by the Ministry provide little assistance in clarifying the context or establishing the requirements of the exemption claim for these records. With certain exceptions discussed below, none of the information contained in these records appears in the form of advice or recommendations. The majority of information contained in these records is either factual in nature (section 13(2)(a)) or deals with requests or directions for the provision of advice as opposed to actual advice itself. The Ministry has failed to provide the required detailed and convincing evidence to establish the requirements of the section 13(1) exemption claim, nor are they evident from my independent review of these records. Therefore, I find that information contained in Records A63, the undisclosed responsive portions of B6, B9, C15iii, C17, C18, C20, C23, C24, C29, C31, C32, C36, C45, C51, C63, C98 in part, C138, C146 in part, C147, C154, C164, C171, C174 in part, C178, C179, C180, C181 and C183 does not reveal a suggested course of action which will be ultimately be accepted or rejected by its recipient during the deliberative process of government decision-making and policy-making, nor would disclosure of these records permit the drawing of accurate inferences as to the nature of any advice or recommendations. For these reasons, I find that these records or parts of records do not qualify for exemption under section 13(1) of the Act. No other discretionary exemptions have been claimed for Records C45 and C174 and no mandatory exemptions apply (with the exception of the two-page letter in Record C174 which I found to be exempt under section 21 of the Act). Therefore, these records should be disclosed to the appellants.

Records A62 and A64, as noted earlier, are documents that were prepared by an outside consulting group retained by the Ministry and used for a presentation to the then-Minister of Health. Both of these records contain specific recommendations to the Minister on the issues regarding the regulation of osteopaths together with the rationale for those recommendations.

Record C100, with the exception of the first page, contains the advice and recommendations of a Ministry staff member concerning amendments to a Ministry policy paper, and Records C15i, C102, C103, C104, C105, C106, C117, C120, C158, C159 and the information severed from Records C119, C129, C167, page 2 of Record B8 and pages 4 and 5 of Record B11, all provide various options to be considered in dealing with the Ministry's review of the status and/or regulation of osteopaths. In each case, a recommended course of action is provided which could be accepted or rejected by its recipient.

Although the Ministry's representations on the application of section 13(1) are limited and general, I am satisfied, based on my review of Records A62, A64, C100 (with the exception of the first page), C15i, C102, C103, C104, C105, C106, C117, C120, C158, C159 and the information severed from Records C119, C129, C167, page 2 of Record B8 and pages 4 and 5 of Record B11, that their disclosure would reveal the advice or recommendations of a public servant or a consultant retained by the Ministry, and I find that these records or parts of records qualify for exemption pursuant to section 13(1) of the Act.

ECONOMIC AND OTHER INTERESTS

The Ministry submits that section 18(1)(g) of the Act applies to the information which has been severed from Records A63, the undisclosed responsive portions of B6, B9, B10, C10, C15iii, C17, C18, C20, C23, C24, C29, C31, C32, C36, C51, C57, C63, C98 in part, C127, C137, C138, C139, C140, C146 in part, C147, C154, C164, C171, C178, C179, C180, C181, C182 and C183, and that sections 18(1)(c), (d) and (e) also apply to Records C171, C181 and C182.

Sections 18(1)(c), (d), (e) and (g) read as follows:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Once again, the Ministry has provided minimal representations on the application of these exemption claims. The Ministry states:

> Among the issues confronting the Ministry in its continuing efforts to fit osteopathy into the spectrum of regulated health professions in Ontario, either as a self-regulated stand-alone body of practitioners or as part of a larger body such as the College of Physicians and Surgeons of Ontario, is the economic issue of whether osteopathy will be included in the services insured and paid for, in part or in whole, under OHIP, and if so to what extent. Among factors to be considered will be the amount of money available for coverage of osteopathy. This will relate directly not only to the number and types of osteopathic services that may be offered in any future regulated scheme but also to the number of

> practitioners who may be licensed to practise in Ontario under such a scheme. Both factors are of great economic relevance as the Ministry continues to consider all its options in this regard. In its response to the request under the Act made by the appellants, the Ministry has applied the discretionary exemption available pursuant to subsection 18(1) to all records (in part or in whole as indicated in Appendix "A" [the Ministry's index]) where the contents relate, directly or indirectly, to these economic factors. The Ministry submits that disclosure of these records or parts of records, by revealing the direction in which the Ministry and/or the government is proceeding, would prematurely reveal pending policy decisions on the issue of osteopathy and, in some instances, disclose positions, criteria and/or instructions to be applied to future negotiations with the [College of Physicians and Surgeons of Ontario] and/or osteopathic practitioners.

The Notice of Inquiry that was issued to the parties in this appeal requested detailed representations on the application of the exemptions claimed by the Ministry, including the application of section 18(1) of the Act. Where previous precedent had been established, the Notice set out those precedents in the form of tests and, in addition, asked several questions in respect of the application of each of the exemption claims. In my view, the Ministry has failed to adequately respond to those precedents and questions and, in so doing, has, in essence, left it up to me to make decisions on the application of these exemptions, based on my independent review of the various records and other relevant file documents.

Section 18(1)(g)

In order to qualify for exemption under section 18(1)(g) of the Act, an institution must establish that the records:

1. contain information including proposed plans, policies or projects; **and**

2. that disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

[Order P-229]

Each element of this two-part test must be satisfied.

In Order P-726, former Assistant Commissioner Irwin Glasberg considered the application of section 18(1)(g) to two reports which together constituted a business review of the provincial parks system. In this order, former Commissioner Glasberg stated:

> I will turn first to the second part of the [section 18(1)(g)] test. In Order M-182, Inquiry Officer Holly Big Canoe considered the municipal equivalent of section 18(1)(g) of the Act. In this decision, she found that the term "pending policy decision" contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution.
>
> The Ministry disagrees with this interpretation and submits that the appropriate definition of a pending policy decision "contemplates a situation that has started but remains unfinished." I have carefully reflected on this argument.
>
> The intent of section 18(1)(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In my view, it follows that for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. In addition, the first part of the section 18(1)(g) test makes specific reference to proposed policy decisions. In my view, the nature of this wording also contemplates that the type of decision referred to in the second part of the test will be one that has already been made.
>
> For these reasons, I do not accept the interpretation which the Ministry has advanced and prefer to follow the approach articulated in Order M-182.
> ...
>
> Since the Ministry has failed to establish that either the first or second aspects of the second part of the section 18(1)(g) test have been met, it follows that this exemption does not apply to the information found in the two reports.

I agree with the approach taken by former Assistant Commissioner Glasberg. Applying that approach to the present appeal, I find that disclosure could not reasonably be expected to result in premature disclosure of a pending policy decision since, as acknowledged by the Ministry, a policy decision on the regulation of osteopaths has not yet been reached. The Ministry states that the matter of regulation is currently under consideration and/or review, but provides no details. Consequently, I find that the requirements of paragraph (i) of the second part of the test have not been established. I also find that the Ministry has failed to provide evidence sufficient to support the requirements of paragraph (ii) of the second part of the section 18(1)(g) test. The Ministry's representations make general reference to possible costs associated with the manner in which the osteopathic profession is regulated but, in my view, these representations do no relate directly to any specific information contained in the records, and in any event, do not establish a reasonable expectation that disclosure of any information could result in "undue financial benefit or loss to a person", as required by section 18(1)(g).

Because the Ministry has failed to satisfy the requirements of the second part of the test, I find that the information which has been severed from Records A63, the undisclosed responsive portions of B6, B9, B10, C10, C15iii, C17, C18, C20, C23, C24, C29, C31, C32, C36, C51, C57, C63, C98 in part, C127, C137, C138, C139, C140, C146 in part, C147, C154, C164, C171, C178, C179, C180, C181, C182 and C183 do not qualify for exemption under section 18(1)(g) of the Act.

Sections 18(1)(c) and (d)

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of the record could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441). In my view, therefore, the purpose of this exemption is to protect the ability of institutions to earn money in the marketplace.

Similarly, to establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

The Ministry has provided no details concerning financial or economic implications which could arise from disclosure of any records exempted under sections 18(1)(c) or (d). None of the records are less than three years old, and many date back more than a decade. In the absence of sufficient evidence to the contrary, I am not persuaded that disclosure of financial data calculated on the basis of economic conditions that existed some time ago could "prejudice" the economic interests or competitive position, or be "injurious" to the financial interests of the Ministry or the Government of Ontario. The concerns expressed in the Ministry's representations demonstrate some of the difficulties that might be faced in grappling with the regulation of osteopathy but, in my view, they are insufficiently detailed or convincing to establish a reasonable expectation of any of the harms outlined in sections 18(1)(c) and (d) should the information contained in these records be disclosed.

Accordingly, I find that Records C171, C181 and C182 do not qualify for exemption under section 18(1)(c) or (d) of the Act.

Section 18(1)(e)

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the records must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

Other than stating in its representations that disclosure of the records "in some instances, disclose positions, criteria and/or instructions to be applied to future negotiations with the [College of Physicians and Surgeons of Ontario] and/or osteopathic practitioners", the Ministry provides no specific representations on the application of section 18(1)(e) to the information contained in Records C171, C181 and C182. None of the records, on their face, contain "positions, plans, procedures, criteria or instructions", and in any event, the Ministry has not established or explained how any of this information will be applied in negotiations.

Accordingly, I find that Records C171, C181 and C182 do not qualify for exemption under section 18(1)(e) of the Act.

DISCRETION TO REFUSE REQUESTERS' OWN 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. Because of the manner in which I have dealt with various records, it is not necessary for me to consider the possible application of section 49(b).

Section 49(a) of the Act reads:

> 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]

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

I have previously found that Records C64, C66, C76, C80, C81, C83, C95, C107, C110, C114, C121, C124, C126, C134, C150, C151, C152, D7, D13, D14, D15, D35 and D50 contain the personal information of the appellants, and also that these records satisfy the requirements of the section 19 exemption claims. Consequently, I find that these records also exempt under section 49(a) of the Act.

INTERIM ORDER:

1. I order the Ministry to disclose Records A63 (with the exception of the non-responsive information), the undisclosed responsive portions of B6, B9, B10, C10, C15iii, C17, C18, C20, C23, C24, C29, C32, C36, C45, C57, C63, the first page of Record C100, C127, C137, C138, C139, C140, C147, C154, C164, C171, C174 (with the exception of the two-page letter dated November 10, 1996 contained in this record which I found to be exempt under section 21 of the Act), C178, C179, C180, C181, C182, C183, to the appellants in their entirety. I further order the Ministry to disclose Records B8, B11, C51, C98 and C146 to the appellants in accordance with the highlighted copy of these records which I have attached to the Ministry's copy of this Interim Order. The highlighted portions of Records B8, B11, C51, C98 and C146 are not to be disclosed. This provision must be complied with by the Ministry by **February 9, 2000**.

2. I uphold the Ministry's decision to deny access to the remainder of the records.

3. I remain seized of this appeal in order to deal with the exemptions claimed by the Ministry for Records C31, D37, D48, D49 and D51 pending notification to the affected parties in respect of these records.

4. In order to verify compliance with Provision 1 of this Interim 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: January 19, 2000
Tom Mitchinson
Assistant Commissioner