



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

ORDER PO-2272

Appeal PA-030206-2

Ministry of Community, Family and Children's Services



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community, Family and Children's Services (now the Ministry of Community and Social Services) (the Ministry) for access to records relating to a named operator of autistic homes (the autistic home) from March 1, 2003 to present.

The Ministry identified approximately 200 pages of responsive records and advised the appellant that it was denying access to them on the basis of the exemptions for law enforcement (section 14), economic interests of government (section 18), solicitor-client privilege (section 19) and personal privacy (section 21) under the *Act*.

The appellant appealed the Ministry's decision to this office.

During mediation, according to the mediator's report, two key developments took place during mediation:

- the appellant agreed to remove Record 6 from the scope of the appeal; as a result, section 21 is no longer at issue
- the Ministry disclosed Records 22-33 to the appellant, on the basis that these records are available to the public

Mediation otherwise was not successful in resolving the issues in the appeal and the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, and received representations in response. I then sent the Notice, together with the Ministry's non-confidential representations, to the appellant, who provided representations in turn.

In its representations, the appellant indicates that she did not agree to remove Record 6 from the scope of the appeal. However, the mediator's report quite clearly indicates that the appellant did so. The appellant was invited to notify the mediator of any errors or omissions in the report, but did not do so. Accordingly, I find that Record 6 is not at issue in this appeal, without prejudice to the appellant's right to make another request for access to it.

The appellant also submits that she has not received copies of Records 22-33, despite the fact that the Ministry indicated it was prepared to disclose them. In this order I will require the Ministry to disclose these records to the appellant, but I will not consider the application of any exemptions to these records.

The Ministry, in its representations, indicates it is no longer relying on the section 14(2)(a) law enforcement exemption. Since this was the only exemption claimed for Records 11, 16, 18-20 and 36-43, those records are no longer at issue and must be disclosed to the appellant.

Also, the Ministry advises that it no longer relies on paragraphs (c) and (f) of section 18 to withhold records, and is only relying on paragraph (e) of section 18 as it applies to Records 8, 10, 34, and 35. As a result, Records 12-15 and 17 are no longer at issue and must be disclosed to the appellant.

RECORDS

There are 12 records (Records 1-5, 7-10, 21, 34-35) remaining at issue in this appeal as described in the index the Ministry provided to this office and the appellant.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Introduction

The Ministry claims that portions of Records 8, 10, 34 and 35 are exempt under section 18(1)(e), which reads:

A head may refuse to disclose a record that contains,

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;

Records 8, 10, 34 and 35 are similar documents entitled “management strategy/action plan”. The Ministry submits:

Most government ministries deal with service providers, and it is likely that this ministry funds the greatest variety of services and service providers. Service providers may be large or small organizations; they may be for-profit or non-profit; they may have one local operation or a province-wide presence, or have several locations governed by a central body. Most service providers funded by the ministry are non-profit transfer payment (TP) agencies governed by volunteer boards. Some TP agencies receive most or all of their funding from this ministry, while for others [the Ministry] is one of several funders. Most of these TP agencies deliver services under contract with the ministry.

The Canadian Union of Public Employees (CUPE) represents almost 20,000 members in six jurisdictional groups. These CUPE members work at agencies that provide service to individuals with developmental disabilities (such as [the autistic home]), children’s aid societies, child care centres, municipal social services, community agencies (such as women’s shelters) and the Workers’ Safety and Insurance Board. These TP agencies are primarily funded by the

Ministry of Community and Social Services and/or the Ministry of Children's Services, with the exception of the last group.

The records remaining at issue, consist of information received from other agencies in the community concerning the potential impact caused by the closure of [the autistic home] and identification of the strategies employed during the lead up to the eventual closure. The records themselves set out what these impacts and strategies encompass.

The ministry . . . has an interest in these matters particularly in light of the significant impact of finding alternate community placements for clients affected by the closure of [the autistic home]. The ministry was in the position of having to negotiate revised service contracts with other community agencies who stepped in to provide residential placements and programming for clients.

The ministry has a significant policy interest, mandated by the legislation under which these agencies operate, in ensuring that the clients of these agencies are well served. It has a very real financial interest, because if the negotiations with agencies cannot achieve efficient costs for providing services, the ministry will either have to provide more funds to the agencies or achieve its policy obligations to clients through some other means.

The Ministry takes the position that certain portions of these four records are exempt as follows:

- Record 8 Page 3, section entitled "Governance"
- Record 10 Pages 2-3, section entitled "Governance"
- Record 34 Page 4, section entitled "Governance"
- Record 35 2-3, section entitled "Governance"

The appellant submits:

The information we are seeking is the nature of the Ministry's involvement in the closure of [the autistic home]. The Ministry had asked for a program review as was completely in their mandate to request. The independent review did isolate issues for the operation of [the autistic home]. Yet, this operational review provided a basis for strengthening the agency, and never even suggested closing as an option.

However, on April 15 of last year, the Ministry of Community, Family and Children's Services announced the closure of [the autistic home], the only agency in the Ottawa area providing residential and vocational services to adults with

Autism. The Agency was closed in September, but all the staff were let go in August 2003.

[The autistic home] is not an institution under the *Act*. The Ministry has already carried out the closure. Since the operational review didn't recommend closure of the agency, is there any application of Section 18? There doesn't appear to be any established plan or procedure for the Ministry to become involved in an agency that wasn't at risk.

The appellant goes on to cite the following passages from Order PO-2034 of Adjudicator Laurel Cropley:

In Orders MO-1199-F and MO-1264 I stated the following with respect to the municipal equivalent of section 18(1)(e) of the *Act*:

Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).

In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

Applying this reasoning, I find that there must be some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken.

The appellant continues:

I see nothing in the submissions from the Ministry on Section 18(1)(e) that seem to address the actual test for the exemption . . . All we are seeking is some transparency in the process of a closure of an agency that appeared to be developed in a way that lacked transparency. This information would have been available if it happened in the public sector or the quasi-public sector such as the WSIB, a CAS, or municipal welfare. We are simply seeking to understand better, the reasons behind the closure and the Ministry involvement.

I agree with the appellant that the Ministry has not provided detailed and persuasive representations addressing each aspect of section 18(1)(e). In particular, the Ministry says that it "was in the position of having to negotiate revised service contracts with other community agencies", but frames the submission in the past tense. There is no indication from the Ministry that such negotiations are currently underway or that they will take place in the future, as required by section 18(1)(e). In addition, based on my review of the "governance" portions of the records, I am not satisfied that they qualify as "positions, plans, procedures, criteria or

instructions” as required by the exemption. These passages are more in the nature of background, factual or analytical information, and cannot be considered information that has an “organized structure or definition given to a course to be taken.”

In the circumstances, I find that the Ministry has not provided persuasive evidence that section 18(1)(e) applies to the portions of Records 8, 10, 34 and 35 at issue.

SOLICITOR-CLIENT PRIVILEGE

General principles

The Ministry claims that Records 1-5, 7 and 21 are exempt under section 19 of the *Act*, which reads:

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 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

The Ministry appears to rely on common law solicitor-client communication privilege under branch 1.

Common law solicitor-client communication privilege

General principles

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The Ministry submits:

These records clearly represent consultation between the ministry's legal counsel and staff in the Eastern Regional Office about the resulting legal issues stemming from the [autistic home's] Board's decision to close. The records clearly state that ministry staff, as the client, is seeking a legal opinion on the consequences of the pending closure . .

The ministry continues to claim this exemption. The records include hand-written notes of legal counsel in preparing or giving legal advice to Senior Management of the ministry.

However, the ministry is prepared to release a subset of record 1 . . .

The ministry will release a subset of record 5 . . . The hand-written comments from the ministry's legal counsel will continue to be exempt under s. 19.

These two documents were part of an access request for which s.17, third party information was claimed. Subsequently, the third party raised no objections to the release of these two records. These two records have been released and will be released as well for the purposes of this appeal.

The appellant makes no specific submissions on this point.

It appears that regarding Records 1 and 5, the only information the Ministry wishes to withhold are the handwritten notes that it says were made by its legal counsel. In the circumstances, it appears that these notes were, in fact, made by the Ministry's legal counsel and, based on *Susan Hosiery Ltd.*, I find that the notes are exempt as counsel's "working papers" [see my Order MO-1258]. Since the Ministry is prepared to disclose Records 1 and 5 without the notes, I will order it to do so.

Records 2-4 also appear to be handwritten notes of Ministry legal counsel, and for the same reasons as above, I find this record exempt under section 19.

Record 7 is an email from Ministry legal counsel to a Ministry client, setting out counsel's views of a draft letter provided by the client, and attaching a copy of the draft letter with suggested revisions. The email is marked "confidential legal correspondence". This letter is clearly a confidential communication between a lawyer and a client made for the purpose of giving or receiving legal advice. Therefore, Record 7 also qualifies for exemption under section 19.

Record 21 is a covering memorandum from one Ministry staff person to another, with an attached document. It does not appear that either staff person is legal counsel. The memorandum indicates that the attached document reflects "legal's changes". However, there is no indication in the memorandum or the attachment what changes were made by legal counsel. This record does not contain nor reveal a communication between a lawyer and a client made for the purpose of giving or receiving legal advice. Accordingly, it does not qualify for solicitor-client communication privilege under section 19.

Conclusion

I find that Records 2-4 and 7 are exempt under section 19 in their entirety. Only the handwritten portions of Records 1 and 5 qualify for exemption, in light of the Ministry's representations, and Record 21 does not qualify for exemption under section 19.

ORDER:

1. I order the Ministry to disclose to the appellant Records 8, 10-43 in their entirety, and all of Records 1 and 5 (with the exception of the handwritten portions) no later than **May 21, 2004**.
2. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with copies of the material disclosed to the appellant.

Original Signed by: _____
David Goodis
Senior Adjudicator

_____ April 30, 2004