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

ORDER 116

Appeal 890026

Ministry of Housing

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November 14, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 116
Appeal Number 890026
Ministry of Housing

This letter constitutes my Order in your appeal of the decision by the Ministry of Housing (the "institution"), regarding your request for records under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On July 10, 1988, the institution received your request for access to the following information:

> All reports, full reports, summary reports, outlines, record of phone calls, investigation reports and notes, any notes handwritten or otherwise, and all internal correspondence and memos relating to, dealing with or touching upon the incident and resolution of the incident between myself and [a named individual] which occurred in the Central Regional Office of the Rent Review Hearing Board (RRHB) on July 21, 1988. Any such information in any form or place in the possession of D. Burnside, R. Ray,

> P. Chudha, the RRHB in general or the Ministry of Housing. Anything received from the Ministry of Housing, the Minister's office and all material generated and received by the appointed fact finder (D. Burnside) related to same. Any information held in electronic storage or recording devices
> related to same.

On February 7, 1989, the institution's Freedom of Information and Privacy Co-ordinator responded to your requests in the following manner:

> Access is granted to the entire file except the following.
>
> Access is denied to the names of the witnesses under section 21(1) of the Act. This provision applies because it would reveal personal information about identifiable individuals. Access is also denied to a memo and notes between David Burnside, legal counsel, Rent Review Hearings Board and the legal counsel at Crown Law Office, Civil, Ministry of the Attorney General under section 19 of the Act. This provision applies because it would reveal solicitor-client privilege.

On February 16, 1989, you wrote to me appealing the institution's decision. In your letter of appeal you state that:

> Access was denied to a memo and notes between D. Burnside and the legal counsel at Crown Law Office, Civil, Ministry of the Attorney General under section 19 of the Act. I maintain that there is no solicitor-client relationship between these parties.
>
> I would be interested in knowing exactly what capacity Mr. Burnside was acting in regarding this matter...
>
> Further, I requested Mr. Burnside's handwritten notes or electronically recorded notes in regard

> to this matter. I did not receive any of this material...
>
> Further, I requested all correspondence between the Ministry of Housing, the Board and the Minister's office. This was not provided.

On February 20, 1989, I gave notice of the appeal to you and the institution.

As you know, as soon as your appeal was received in my office, an Appeals Officer was assigned to investigate the circumstances of the appeal, and attempt to mediate a settlement. You confirmed with the Appeals Officer at that time that you were not appealing the severances made to the record.

The Appeals Officer obtained and reviewed the records at issue in this appeal. They consist of witness statements, fact-finding reports (draft and final), handwritten notes, briefing notes and memos relating to an incident between yourself and another individual in the workplace.

During the mediation of this appeal, the institution provided you with additional records. You subsequently advised the Appeals Officer that you wished to appeal the severance of the names of witnesses from the record. As a result, a full resolution could not be achieved.

Accordingly, an Appeals Officer's Report was prepared and sent to you and the institution on July 26, 1989, together with a Notice of Inquiry. You and the institution were asked to make representations to me concerning the subject matter of the appeal.

I have received and considered representations from you and the institution in making my decision.

The issues in this appeal are as follows:

- the severing of the names of witnesses pursuant to section 21 of the Act;
- the exemption of a note written by David Burnside pursuant to section 19 of the Act; and

- whether the search for records conducted by the institution was adequate. You and the institution have been advised that this issue will not be dealt with in this Order. I therefore remain seized of this matter and will deal with it in a separate Order.

The purposes of the Act as set out in section 1 should be noted. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.
Section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of this Act lies upon the head.

Prior to deciding whether the exemption to disclosure of personal information claimed by the institution applies, it is my responsibility to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act. Further, I must determine whether this information relates to you, another individual or both.

The relevant portion of subsection 2(1) reads as follows:

> 2.--(1) In this Act,
>
> personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (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;

In my view, the names of witnesses in conjunction with the information already disclosed to you i.e. witness statements and reports fall within the definition of personal information under subsection 2(1)(h). I find that these records are properly considered personal information about you and the witnesses.

Subsection 47(1) of the Act gives an individual a general right of access to:

> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates. Specifically, subsection 49(b) provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> ...
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I considered the proper application of subsection 49(b) of the Act in Order 37 (Appeal Number 880074) released on January 16, 1989. At page 9 of that Order I stated:

> The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives him the discretion to deny access to the personal information of the requester.

In deciding what constitutes an unjustified invasion of personal privacy, the head is given guidance by subsections 21(2) and (3) of the Act.

Having examined the records at issue with respect to the severing of the names of the witnesses, the circumstances of this appeal, your representations and those of the institution, it is my view that the disclosure of the names of the witnesses would constitute an unjustified invasion of their personal privacy. As such, the parts of the record which contain the names of witnesses are subject to exemption under subsection 49(b) of the Act.

The head of the institution at the time of this request was the the Honourable Chaviva Hosek. In reviewing the head's application of the subsection 49(b) balancing test to the records of this appeal, it is clear to me that, but for the names of the witnesses and the one note for which a section 19 exemption has been claimed, the head has provided you with full disclosure. I find nothing improper in the way in which the head has exercised her discretion and would not alter it on appeal.

I now turn to a review of the head's decision to exempt a note, written by David Burnside, from disclosure pursuant to
section 19 of the Act.

Section 19 of the Act states that:

> 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.

I dealt with the proper application of the section 19 exemption at page 12 in Order 49 (Appeal Numbers 880017 and 880048) released on April 10, 1989:

> This section provides an institution with a discretionary exemption covering two possible situations: (1) a head may refuse to disclose a record that is subject to the common law solicitor-client privilege; or (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

In its representations, the institution claims that the note is subject to the first part of the section 19 exemption, in that it is a written communication of a confidential nature provided by David Burnside, legal counsel, to his client, the Rent Review Hearings Board (the "Board"). The institution also submits that the record falls within the second branch of the test in that it was prepared by Crown counsel for use in giving legal advice.

After reviewing the record, it is my opinion that it is more appropriate to consider the second branch of the exemption with respect to this record.

At page 10 of Order 52 (Appeal Number 880099) released on April 12, 1989, I stated:

> ...the proper interpretation of "Crown counsel" under section 19 should include any person acting in the capacity of legal advisor to an institution covered by the Act.

I note that the Appeals Officer sent you a copy of Order 52, but that you have disagreed with this interpretation in your representations.
In its representations, the institution submits that David Burnside is a lawyer employed with the Ministry of the

Attorney General and seconded to the Board. Mr. Burnside was asked by the Board's Chairman to conduct a fact-finding investigation into the incident in which you were involved and to submit a report as to his findings. The report was submitted to the Chairman on July 27, 1989. On August 8, 1989 Mr. Burnside contacted a lawyer in the Crown Law Office, Civil, of the Ministry of the Attorney General to discuss various options or actions that could be taken and the legal ramifications of such actions to enable him to provide legal advice to the Board.

After reviewing the record and the circumstances under which it was prepared, I am satisfied that it was prepared by Crown counsel for use in giving legal advice.

Section 19 also provides the head with the discretion to release a record even if it meets the test of an exemption. While the head has exercised her discretion and decided not to release David Burnside's note, she has also exercised her discretion to provide you with the following summary of the contents of the note in question:

> The conversation represented a discussion of possible legal ramifications from various actions which may arise from the fact-finding report dated July 27, 1988, and the recommendations contained in that report.

I find nothing improper in the way in which the head has exercised her discretion and would not alter it on appeal. To the contrary, I would like to commend the institution for not merely adhering to the letter of the Act, but for exercising discretion in a manner which is in keeping with the spirit of the Act. Institutions are encouraged to consider creative solutions of the type demonstrated in this part of the appeal, when the appropriate situation presents itself.

As noted above, the issue of the adequacy of the institution's search will be dealt with by way of a separate order and I remain seized of the matter until all issues in this appeal are resolved.

In summary, I uphold the decision of the head not to disclose the names of witnessess and David Burnside's note.

I remain seized of the issue related to the adequacy of the search for records conducted by the institution.

Yours truly,

Sidney B. Linden
Commissioner

cc: The Honourable John Sweeney
Minister of Housing

Mr. Howard Jones, FOI Co-ordinator