



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

# **ORDER 39**

**Appeal 880033**

**Ministry of the Attorney General**



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## O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) of the Act a right to appeal any decision of a head to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 12, 1988, the Ministry of the Attorney General ("the institution") received a request for access to "the file 'Regina vs [name of the requester]' held by the London Crown Attorney's office. Specifically any and all statements contained in the file with regard to this case".
2. On February 16, 1988, the institution's Freedom of Information Co\_ordinator advised the requester that access had been granted to the following records: \_ Indictment and information; copy of character letters filed by defence counsel; psychiatric reports; copy of criminal record; criminal subpoenas with personal information deleted; Notice of Application for Leave to Appeal; Recognizance of Bail.

The institution also advised the requester that:

"a copy of the preliminary hearing transcript is available. We are denying access under section 22 of the Act. You may request a copy of the transcript from the Court Reporter in the London District Court

Office. Your request for 'any and all statements contained in the file' is denied under section 19, subsection 21(1) and Clause 21(3)(b) of the Act. The records were either prepared by or for Crown counsel in contemplation of or use in litigation and/or contain personal information, the disclosure of which would constitute an unjustified invasion of personal privacy. In addition we feel subsections 14(1) and 14(2) of the Act also apply".

3. By letter to me dated March 10, 1988, the requester appealed the head's decision. The appellant also requested a list of "those documents that I have been denied access to in order that I may prepare for the appeal". I gave notice of the appeal to the institution.
4. Between March 10, 1988 and July 18, 1988, the records relevant to this appeal were obtained and reviewed. Efforts were made by an Appeals Officer to settle the matter.

The appellant indicated that he is not appealing the decision denying access to a copy of the transcript. Both parties sought resolution of the remainder of the issues by way of an inquiry.

5. By letter dated July 18, 1988, I sent notice to the head of the institution, the appellant, and an affected person that I was conducting an inquiry and inviting written representations. Accompanying this notice was the Appeals Officer's Report.
6. Written representations were received from the institution and the appellant. I have reviewed and considered these representations in making my Order.

It should be noted, at the outset, that the purposes of the Act as set out in subsections 1(a) and (b) are:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and,...
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in the Act lies upon the head.

The institution's submission indicates that access to the records was denied under subsections 14(2)(a) and 19 by virtue of the operation of subsection 49(a) and under section 21 of the Act.

The exemption under section 49 deals with records containing personal information about the requester whereas section 21 applies when the requester seeks access to personal information that relates to another individual. Although the general rule as set out in subsection 47(1) is that a requester has a right of access to his or her own personal information, section 49

sets out certain exceptions to this general rule. It provides the head with a discretionary power to refuse to disclose to a requester personal information about himself/herself if the personal information fits into one of the grounds specified under the section.

For example, subsection 49(a) provides that an individual's right of access to personal information about himself/herself is generally subject to the exemptions applying to general records under sections 12, 13, 14, 15, 16, 17, 18, 19, 20 and 22. Subsection 49(b) provides that the head may refuse disclosure where disclosure would constitute an unjustified invasion of another individual's personal privacy.

The issues arising from this appeal are as follows:

A(1) Whether the exemption under subsection 49(a) of the Act applies to deny the appellant access to personal information that relates to him; in particular whether the records for which disclosure by the head was refused under subsection 14(2)(a) is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

A(2) Whether the exemption under subsection 49(a) of the Act applies to deny the appellant access to personal information that relates to him; in particular, whether the records for which disclosure by the head was refused under section 19 is 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.

- B. Whether any record or a part of a record for which disclosure by the head was refused under subsection 21(1) contains personal information as defined in subsection 2(1) of the Act and, if so, whether the release of personal information would constitute an unjustified invasion of the personal privacy of another individual.
- C. Whether the severability requirements of subsection 10(2) apply to any of the records in question.

**ISSUE A(1) :** Whether the exemption under subsection 49(a) of the Act applies to deny the appellant access to personal information that relates to him; in particular whether the records for which disclosure by the head was refusal under subsection 14(2)(a) is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

Subsection 49(a) states:

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

- (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The head has indicated that subsection 14(2)(a) applies to the following records:

1. A history of the offence prepared by a police officer.

2. A list of witnesses including their addresses and telephone numbers.
3. "Will Say" statements of witnesses.
4. A copy of the request by the Crown's office to a municipal police force for the criminal record of the accused.
5. A copy of the police charge sheet setting out a summary of information received from the victim of the alleged offence, the provision of the Criminal Code under which the accused was charged and information about the police investigation of the matter.

Subsection 14(2)(a) reads:

A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The head submits that "this material is by and large the heart of the confidential instructions prepared by the police to inform the Crown attorney prosecuting the case of the circumstances of the alleged offence, what persons are seen as relevant witnesses and what they may be expected to say when testifying, plus any other information which is relevant to the prosecution of the offence".

The head further explains that "Will Say" statements are not formal signed statements of witnesses, but a police officer's

opinion as to what the witness is expected to say in court. These statements may not have been read or approved by the witnesses; they may be merely a police officer's recollection of what a witness indicated he would say or it may reflect a number of conversations with a witness. These statements are prepared by police to assist the Crown by providing an indication of the anticipated evidence of witnesses.

The institution takes the position that the municipal police force is an agency which has the function of enforcing and regulating compliance with the law and that the records prepared for inclusion in the "Crown Brief" constitute, both individually and in totality, reports prepared in the course of law enforcement or investigation. The institution also maintains that the existence of these records is solely a result of the investigation into the allegation of the commission of a criminal offence.

The word "report" as defined by the Concise Oxford Dictionary means: "account given or opinion formally expressed after investigation or consideration or collation of information ...".

"Law enforcement" is defined in subsection 2(1) of the Act as:

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).



My review of the above\_noted records indicates that they were all prepared by members of the municipal police force in the course of law enforcement and investigation of an alleged criminal offence. These records are contained in what is commonly known as a "Crown Brief", a report from the police to the Crown Attorney prosecuting the case informing him/her about the alleged crime, results of the investigation by the police, and other circumstances of the case.

I am satisfied that these records were prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law, and as such are subject to exemption under the provisions of subsection 14(2) (a).

**ISSUE A(2): Whether the exemption under subsection 49(a) of the Act applies to deny the appellant access to personal information that relates to him; in particular, whether the records for which disclosure by the head was refused under section 19 is 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.**

The head has indicated that section 19 applies to the following records:

1. Correspondence to and from members of the Crown law office and local Crown Attorneys regarding an appeal and an application for bail pending appeal brought by the accused, and a request for a Crown appeal against the sentence imposed at trial of the accused.
2. Records referred to under Issue A(1) above, i.e.

- \_ A history of the offence prepared by a police officer.
  - \_ A list of witnesses including their addresses and telephone numbers.
  - \_ "Will Say" statements of witnesses.
  - \_ A copy of the request by the Crown's office to the London Police Force for the criminal record of the accused
  - \_ A copy of the Police charge sheet setting out a summary of information received from the victim of the alleged offence, the provision of the Criminal code under which the accused was charged and information about the police investigations of the matter.
3. The Crown's request to the police for a copy of the accused's criminal record, and a printout of the material produced by the police computer system with respect to this request.
  4. A copy of a form listing the history of the litigation, including notes by Crown counsel regarding the litigation process.
  5. A note from the Crown Attorney's office to the sheriff's office regarding witness availability.
  6. A form filled out by Crown counsel regarding the outcome of the preliminary inquiry, and
  7. The covering document for the Crown brief containing notes by Crown counsel.

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.

The head submits that the above records were prepared by or for Crown counsel before and during litigation to record details of the history of a criminal case, to keep a record of the names and addresses of witnesses, and to provide other information necessary to other Crown attorneys who might deal with the case in court. The head also maintains that, with regard to the correspondence to and from members of the Crown law office and local Crown attorneys, the documents were prepared either by a Crown attorney requesting legal advice regarding the possibility of the Crown appeal or by Crown counsel to advise the Crown attorney of the legal implication of the appeal request. The position of the institution is that all of the records mentioned above are records prepared by or for use in giving legal advice and in contemplation of and for use in litigation. After reviewing each record, and in the circumstances of this appeal, I am satisfied that the exemption under section 19 applies to the records mentioned above.

The head has the discretion under section 49 to release a record even if it meets the test of the exemption. The head must consider the exercise of this discretion based on the particular circumstances of each request. After reviewing the submission of the institution, I am satisfied that the head gave reasonable consideration to his options prior to deciding not to release these records, and this decision should not be disturbed on appeal.

Before leaving this point, I wish to point out that considerable information was disclosed by the Crown to Appellant's legal counsel in connection with the criminal case. I want to make it clear that nothing in this Order is intended to affect or interfere with the disclosure procedure that exists between local Crown Attorneys and other Crown Counsel regarding disclosure by the Crown to an accused person before the courts in a criminal case.

**ISSUE B: Whether any record or a part of a record for which disclosure by the head was refused under subsection 21(1) contains personal information as defined in subsection 2(1) of the Act and, if so, whether the release of personal information would constitute an unjustified invasion of personal privacy of another individual.**

Personal information is defined under subsection 2(1) of the Act 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 records disclosed to the appellant with severances pursuant to subsection 21(1) are:

- (1) A note to the Crown Attorney listing other cases to be adjourned \_ the names of the accused persons were deleted;
- (2) Subpoenas to Crown witnesses \_ the addresses of the Witnesses were deleted.

Having reviewed the information contained in the records for which disclosure was denied under subsection 21(1) I am satisfied that all of the records contain personal information as defined in subsection 2(1) of the Act.

Subsection 21(1) reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except...

The subsection goes on to provide a number of exceptions to the rule of mandatory non\_disclosure; specifically, subsection 21(1)(f) indicates that the information can be disclosed if "disclosure does not constitute an unjustified invasion of personal privacy".

The institution's position is that the personal information contained in these records pertains solely to other individuals and reveals the investigation and prosecution of criminal offences committed by these individuals as well as personal information which identifies witnesses and provides a means of locating them. The head submits that the disclosure of this information would be an unjustified invasion of the privacy of the individuals concerned. The head also submits that in denying access he considered the provisions of subsections 21(2)(f) and (h).

Subsection 21(2) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

...

(f) the personal information is highly sensitive;

...

(h) the personal information has been supplied by the individual to whom the information relates in confidence; ...

Having reviewed the information at issue, I am satisfied that in the circumstances of this appeal there are no reasons to conclude that disclosure of the information would not be an

unjustified invasion of the personal privacy of the individuals to whom it relates.

Certain of the records which I have found are properly subject to exemption from disclosure pursuant to subsection 49(a) contain personal information that relates to both the appellant and other individuals.

Both the head and the appellant have advanced arguments as to why the disclosure of these records would or would not constitute an unjustified invasion of the privacy of the other individuals.

In the circumstances of this case, having found that the records in which such information is contained are properly exempt from disclosure under subsection 49(a), it is unnecessary for me to deal with the issue of whether the protection of the privacy of other individuals outweighs the right of the appellant to access to his own personal information.

**ISSUE C: Whether the severability requirements of subsection 10(2) apply to any of the records in question.**

Subsection 10(2) states:

Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under section 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I have examined all the records with a view to determining whether or not any exempt information can reasonably be severed.

As indicated, the head has already disclosed the records exempted under section 21 with severances. My conclusion after examining all the records, is that the remaining records cannot reasonably be further severed without disclosing the exempt information.

My Order is therefore, to uphold the decision of the head and to dismiss the appeal.

Original signed by: \_\_\_\_\_  
Sidney B. Linden  
Commissioner

\_\_\_\_\_ February 21, 1989  
Date