



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

# **ORDER P-329**

**Appeal P-9200097**

**Ontario Human Rights Commission**



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# ORDER

## BACKGROUND:

The requester's client was a student at a named university from September 1988 to April 1989, where he was enrolled in a "master class" in a specified subject. He filed a complaint with the Ontario Human Rights Commission (the institution) alleging discrimination by the university.

The requester sought access to the following information:

1. Memorandum dated October 17, 1989 to Tony Griffen from Marilyn Ginsberg re [requester's client] v. [a named university] (four (4) pages in length).
2. Memorandum dated October 24, 1989 from Anthony Griffen to Catherine Frazee (four (4) pages in length plus Appendix A).
3. Documentation regarding the procedure of the Commission in respect of the involvement of the legal department prior to the consideration by the Commission of whether to request the appointment of a board of inquiry pursuant to the Code, with a list of eight specific questions attached thereto.
4. Documentation regarding the number of matters which were before the Commission on October 23, 1991, December 13, 1989 and July 19, 1990 and the length of time that the Commission sat in order to consider them.
5. The time spent by the Commission considering [requester's client] v. [a named university] each time it came before the Commission, including the dates noted in item 4.
6. Documentation regarding any written policy in respect of giving priority to the complaints of victims of terminal illnesses.

With respect to Items 3, 5 and 6, the institution provided the requester with an explanation or an answer which was satisfactory to the requester. In response to Item 4, the institution released a copy of the agenda for each meeting date, subject to the severance of personal information relating to identifiable individuals other than the appellant's client. The institution's decision with respect to Items 3-6 of the request was not appealed.

As far as items 1 and 2 of the request are concerned, the institution denied access, and provided the following reasons:

Access is hereby denied to the [records]. These records were prepared by legal counsel to the OHRC and contain their legal opinion and advice to OHRC. They were also prepared for use in giving legal advice or in contemplation of or for use in litigation. They are therefore covered by the solicitor-client privilege and further exempt under Section 19 of the Act.

...

While such records may contain personal information relating to your client, [requester's client], we have decided to exercise our discretion against their release pursuant to subsection 49(a) of the Act because of the application of Section 19 to such records.

The requester appealed the institution's decision to this office.

A copy of the records was obtained and reviewed by the Appeals Officer. They consist of two memoranda, each four pages in length, and dated October 17, 1989 (Record 1), and October 24, 1989 (Record 2). Record 2 has a one-page attachment, identified as "Appendix A". Both records were prepared by the institution's legal counsel.

Attempts to mediate the appeal were not successful, and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Representations were received from both parties.

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the records satisfy the requirements of the discretionary exemption provided by section 19 of the Act.
- C. If the records contain personal information of the appellant and the answer to Issue B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

**ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**

In all cases where the request involves access to personal information, it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information falls within the definition of "personal information" as set out in section 2(1) of the

Act, and to determine whether this information relates to the appellant, another individual or both.

Section 2(1) of the Act reads, in part, 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,  
...
- (e) the personal opinions or views of the individual except where they relate to another individual,  
...
- (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;

I have examined the two records and, in my view, the information contained in these records satisfies the requirements of the definition of personal information. I find that the information is properly considered the personal information of both the appellant and other identifiable individuals.

**ISSUE B: Whether the records satisfy the requirements of the discretionary exemption provided by section 19 of the Act.**

Section 19 of the Act provides as follows:

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 discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); **and**
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1.
  - (a) there must be a written or oral communication; **and**
  - (b) the communication must be of a confidential nature; **and**
  - (c) the communication must be between a client (or his agent) and a legal adviser; **and**
  - (d) the communication must be directly related to seeking, formulating or giving legal advice.

**OR**

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49 and M-2]

Upon receipt of the appellant's complaint, the institution carried out an investigation under the statutory obligations prescribed by the Ontario Human Rights Code (the Code). The first stage of the investigation did not succeed in resolving the complaint. The institution submits that at this stage legal counsel for the institution was asked to review the complaint file, assess the evidence and provide the institution with advice as to whether the evidence warranted a public

inquiry and whether such a procedure was appropriate in the circumstances. This advice was provided to the institution in the two records which are at issue in this appeal.

The institution contends that the advice contained in the two records was given in confidence and that the solicitor-client privilege attached to the records was never waived by the institution.

The appellant submits that a solicitor-client privilege did not exist because the memoranda contain a review of the factual information relating to the case rather than legal advice. In the appellant's view, the information contained in the records is more appropriately characterized as advice of a public servant rather than someone acting in the capacity of legal counsel. The appellant also submits that the contents of the records should be disclosed to him in order to comply with the basic principles of administrative fairness.

In my view, the requirements for the first part of the common-law solicitor-client privilege (Branch 1) have been established by the institution. The records are written communications, between a client and its legal counsel, which are directly related to the seeking, formulating or giving of legal advice. The nature of the records and the circumstances under which they were requested and produced, in my view, support the institution's position that the records are of a confidential nature.

I also find that the records qualify under Branch 2 of the section 19 exemption. In order to qualify under this branch, the record must satisfy the following requirements:

1. The record must have been prepared by or for Crown counsel; **and**
2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The records at issue in this appeal were prepared by employees who qualify as "Crown counsel" in the employ of the institution and, clearly, were prepared for the purposes of giving legal advice. Accordingly, in my view, the two requirements of the Branch 2 test have been satisfied.

Therefore, I find that the records qualify for exemption under both branches of the exemption provided by section 19 of the Act.

**ISSUE C: If the records contain the personal information of the appellant and the answer to Issue B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.**

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is contained in section 49(a) of the Act, which reads as follows:

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

where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) provides the head with the discretion to refuse to disclose to the appellant his own personal information where section 19 applies. In any case in which the head has exercised discretion under section 49(a) I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In reviewing the head's exercise of discretion in favour of refusing to disclose the records, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

**ORDER:**

I uphold the head's decision.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ July 16, 1992