



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

ORDER P-506

Appeal P-9300028

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information in the prosecution and investigation case files related to the death of a named individual. The Ministry granted partial access to the records. The personal information of individuals other than the requester was severed from the records under section 21(1) of the Act. Access was denied to the Crown brief, consisting of Crown notes and Crown counsel working papers and correspondence, under section 19 of the Act. Access to other records was denied under sections 13(1), 19 and 22(a) of the Act. In its decision letter, the Ministry indicated that certain records had not been disclosed because consultation was ongoing with the Ontario Provincial Police and the Port Hope Police with respect to disclosure of these records. The requester appealed the Ministry's decision.

During mediation, it was agreed that the records which were the subject of ongoing consultation would be addressed in a separate decision letter. Records which were exempted under section 22(a) of the Act were removed from the scope of the appeal. The appellant also indicated that he wanted access to all correspondence between his then solicitor and a named Crown Attorney, which he felt should exist and which was not included by the Ministry with the records identified as responsive to the request.

Mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

The records at issue in this appeal are:

- 1) the Crown brief listed as Files A1 and A2 (800 pages) and pages 1-298 in File I (section 19)
- 2) pages K19-22, K26, K41-42, K50-52, K54-56 (section 13(1) and 19)
- 3) all correspondence between the appellant's then solicitor and a named Crown Attorney.

ISSUES:

The issues arising in this appeal are:

- A. Whether the search conducted by the Ministry for correspondence between the appellant's then solicitor and a named Crown Attorney was reasonable in the circumstances.
- B. Whether the discretionary exemption provided by section 19 of the Act applies to the Crown brief; Files A1 and A2 (800 pages) and pages 1-298 in File I, and to pages K19-22, K26, K41-42, K50-52, K54-56 of the record.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to the information in the pages of the record identified as pages K19-22, K26, K41-42, K50-52 and K54-56.
- D. If the answer to issue B or C is yes, whether section 23 of the Act operates to override the exemption of records pursuant to sections 13 or 19 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the search conducted by the Ministry for correspondence between the appellant's then solicitor and a named Crown Attorney was reasonable in the circumstances.

The Ministry has provided the affidavit of a person with personal knowledge of the records being requested and who personally requested the searches undertaken to locate the records responsive to the request. Exhibit "A" to the affidavit is a letter from a member of the Ministry staff which specifically describes the steps taken to search for responsive records.

Having reviewed the representations and the affidavit submitted to me, I am satisfied that the search conducted by the Ministry for records responsive to the appellant's request was reasonable in the circumstances.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies to the Crown brief; Files A1 and A2 (800 pages) and pages 1-298 in File I, and to pages K19-22, K26, K41-42, K50-52, K54-56 of the record.

Section 19 of the Act provides:

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.

This section 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).

A record can be exempt under Branch 2 of the section 19 exemption regardless of whether the common law criteria relating to Branch 1 of the exemption are satisfied. 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 210)

Pages K41-42, K50-52, and K54-56 are letters and other communications which were clearly prepared by Crown counsel in contemplation of litigation. The Crown brief being listed as Files A1 and A2 (800 pages) and pages 1-298 in File I is clearly composed of records prepared in contemplation of or for use in specific litigation by or for Crown counsel. These records, therefore, qualify for exemption pursuant to Branch 2 of the section 19 exemption.

In reviewing the Ministry's representations regarding its exercise of discretion in favour of refusing to disclose pages K41-42, K50-52, and K54-56, Files A1 and A2 (800 pages) and pages 1-298 in File I, I have found nothing to indicate that the exercise of discretion was improper and will not alter it on appeal.

ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to the information in the pages of the record identified as pages K19-22, K26, K41-42, K50-52 and K54-56.

In Issue B, I found that pages K41-42, K50-52 and K54-56 are properly exempt under section 19 of the Act. Accordingly, the only records remaining at issue are pages K19-22 and K26.

Section 13(1) of the Act states:

[IPC Order P-506/July 26, 1993]

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.

"Advice" for the purposes of subsection 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118).

Pages K19-22 and K26 contain advice and/or recommendations of civil servants, along with some interwoven factual material necessary to understand and act upon the recommendations.

In reviewing the Ministry's representations regarding its exercise of discretion in favour of refusing to disclose pages K19-22 and K26, I have found nothing to indicate that the exercise of discretion was improper and will not alter it on appeal.

ISSUE D: If the answer to issue B or C is yes, whether section 23 of the Act operates to override the exemption of records pursuant to sections 13 or 19 of the Act.

A plain reading of section 23 leaves no doubt that section 19 is not included within the ambit of this section (Orders 123 and 124). Therefore, section 23 does not affect the applicability of the section 19 exemption to the records at issue in this appeal.

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question (Orders 163 and 183).

In his representations, the appellant indicates that incidents to which the record at issue relate have become publicly known to some extent. However, in my view, there is nothing in the representations of the appellant to indicate how any interest in the disclosure of the record outweighs the purpose of the exemption. This issue is simply not addressed in the representations of the appellant.

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 23. Where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

Accordingly, I have reviewed the record with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the exemption found in section 13. In the circumstances of this appeal, I am not satisfied that there is a compelling public interest in disclosure of the information in the requested record which clearly outweighs the purpose of section 13 of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by:
Holly Big Canoe
Inquiry Officer

July 26, 1993