



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

# **ORDER P-546**

**Appeal P-9300274**

**Ministry of the Attorney General**



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# ORDER

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 "a copy of all memos and Directives issued by the Attorney General of Ontario concerning the prosecution of offenses involving the ALERT J3A units". The Ministry identified a 13-page memorandum as the responsive record and denied access in total pursuant to section 19 of the Act. The requester appealed.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Representations were received from the Ministry only.

The sole issue in this appeal is whether the discretionary exemption provided by section 19 of the Act applies to the record. This section 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.

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).

The Ministry submits that the record is exempt under Branch 2.

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

The record is a memorandum from the Director of the Crown Law Office, Criminal to all Regional Directors and Directors of the Crown Law Office, Criminal in the province of Ontario. In my view, it is apparent that the record was prepared by "Crown counsel", thereby satisfying the first criterion.

The Ministry submits that the record was prepared for use in litigation - to provide assistance to counsel in dealing with the legal issues that would likely arise in the prosecution of drinking and driving offenses as a result of the recall of the ALERT J3A screening devices. It provides an interpretation and analysis of various cases involving these issues, and offers suggestions on how to address them in the context of litigation. Therefore, I am satisfied that the record was prepared for use in litigation.

In my opinion, the record falls within the second branch of the section 19 test and is properly exempt from disclosure.

Section 19 is a discretionary exemption and, on this basis, I have considered the Ministry's representations regarding its exercise of discretion to not disclose the record. I find nothing improper in the determination which has been made and would not alter it on appeal.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ October 6, 1993