



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

# **ORDER P-585**

**Appeal P-9300317**

**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 relating to a specific criminal charge against the requester which was dismissed by the court. Partial access was granted. Access was denied to a total of eleven pages pursuant to sections 13(1), 19 and 49(a) and (b) of the Act. The requester appealed the Ministry's decision.

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 appellant and the Ministry.

The records at issue in this appeal consist of eleven pages, numbered in accordance with the index of records prepared by the Ministry. For ease of reference, the records are numbered from 1 to 8 with the additional identification of the Ministry's page number, as follows:

Record 1 being page 4, a letter from Crown counsel (section 19)

Record 2 being page 5, a memorandum from a Crown Attorney (section 19)

Record 3 being page 6, a letter from a Crown Attorney (section 19)

Record 4 being pages 7, 8 and 9, a letter to a Crown Attorney (section 13(1) and 19)

Record 5 being page 10, a memorandum to file (section 19)

Record 6 being page 20, a handwritten memorandum (section 19)

Record 7 being pages 63 and 64, an occurrence report (section 21)

Record 8 being page 61, an occurrence report (section 21)

## ISSUES:

The issues arising in this appeal are:

- A. Whether the records contain personal information that relates to the appellant, as defined in section 2(1) of the Act.

- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 4.
- C. Whether the discretionary exemption provided by section 19 of the Act applies to Records 1, 2, 3, 4, 5 and 6.
- D. If the answer to Issue A, and Issues B and/or C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the records.
- E. If the answer to Issue A is yes and Records 7 and 8 contain personal information that also relates to individuals other than the appellant, whether the discretionary exemption provided by section 49(b) of the Act applies to these records.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the records contain personal information that relates to the appellant, as defined in section 2(1) of the Act.**

Section 2(1) of the Act states, in part:

"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,  
...
- (d) the address, telephone number, fingerprints or blood type of the 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;

Having reviewed all of the records at issue in this appeal, I find that they contain information which qualifies as personal information under one or more of the above-mentioned paragraphs of

section 2(1) of the Act. I find that the personal information in Records 1, 2, 3, 4 and 5 relates to the appellant only, and that the personal information in Records 6, 7 and 8 relates to both the appellant and other individuals.

**ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 4.**

The Ministry claims that section 13(1) applies to Record 4. Section 13(1) of the Act states:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-348 and P-356).

The record is a letter from a police officer in the Gananoque detachment of the Ontario Provincial Police to a Crown Attorney in Brockville. It was prepared in response to a request by the Regional Director of Crown Attorneys for background information relating to the appellant's complaint to the Attorney General that he was dealt with unfairly by the criminal justice system and officials who conducted his prosecution. The information was required to help the Regional Director draft a reply for the Attorney General to respond to the appellant's letter of complaint.

The Ministry submits that the information in the letter is advice given by one public servant to another and that it formed the basis for the advice and recommendations ultimately given by the Regional Director to the Attorney General.

I have reviewed the record carefully, and in my view, it contains factual information about the author's response to the questions raised in the appellant's letter of complaint. The record does not contain advice or recommendations on a suggested course of action. Accordingly, I find that section 13(1) does not apply to this record.

**ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to Records 1, 2, 3, 4, 5 and 6.**

The Ministry claims that Records 1, 2, 3, 4, 5 and 6 are exempt from disclosure under section 19 of the Act.

Section 19 of the Act provides as follows:

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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 that 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 section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. In its representations, the Ministry claims that the records fall within Branch 2 of the section 19 exemption.

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.

Having reviewed the records, I find that Records 1, 2, 3, 5 and 6 were prepared by Crown counsel and Record 4 was prepared for Crown counsel. Therefore, I find the records satisfy the first part of Branch 2.

In its representations, the Ministry submits that all of the records were prepared for the purpose of giving legal advice, and in contemplation of litigation.

Branch 2 of the section 19 exemption requires that the record be prepared **for use** in giving legal advice, or in contemplation of or **for use** in litigation. This is a narrower wording than if the requirement were that the record be prepared **for the purpose** of giving legal advice. In my view, it contemplates that the record itself will be used in giving legal advice (Order 210).

In Order 210, then Assistant Commissioner Tom Wright stated:

The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a

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legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I agree with the above interpretation and adopt it for the purposes of this appeal. I have carefully reviewed the records and I am not convinced that they were prepared for use in giving, seeking or in formulating legal advice. Record 1 contains factual information about the case and the author's opinion on the process. Record 2 is a direct request for a report and contains no legal advice. Record 3 again contains factual status information. Record 4 contains factual information given in response to questions raised in the appellant's letter to the Attorney General. Records 5 and 6 are notes made by Crown counsel to file.

In reviewing Records 1, 2, 3 and 4, I find that they were prepared to help the Regional Director of Crown Attorneys draft a response for the Attorney General to respond to the complaint of the appellant. In my view, the records do not contain a legal opinion about a legal issue nor do they contain legal advice on a recommended course of action, regarding a matter with legal implications.

The Ministry also states that the records were prepared in contemplation of litigation. The question of what constitutes "in contemplation of litigation" was considered by former Commissioner Sidney B. Linden. In Order 52, he stated that, in order for a record to qualify as being prepared "in contemplation of litigation", the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** there must be a reasonable prospect of such litigation at the time of the preparation of the record - litigation must be more than just a vague or theoretical possibility.

However, it would appear, from the dates of Records 1, 2, 3 and 4, that they were prepared after the completion of the appellant's trial and in order to respond to his complaint. The Ministry claims that it was concerned that the appellant might file a civil suit against the Ministry and the records were prepared in contemplation of this litigation. Having reviewed the records, and the circumstances under which they were created, I am not convinced that the dominant purpose for their creation was litigation. In my view, the dominant purpose of the preparation of the records was to provide information so that a letter could be prepared for the Attorney General to respond to the appellant's complaint. Therefore, the second requirement has not been met and Records 1, 2, 3 and 4 do not qualify for exemption under section 19.

With regard to Records 5 and 6, I have already found that they satisfy the first part of Branch 2. Having reviewed the contents of these records, I am also satisfied that they were prepared by Crown counsel for use in existing litigation. Accordingly, I find that these records qualify for exemption under section 19 of the Act.

**ISSUE D: If the answer to Issue A, and Issues B and/or C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the records.**

Under Issue A, I found that all of the records contain personal information that relates to the appellant. Under Issue C, I found that Records 5 and 6 qualify for exemption from disclosure under section 19 of the Act.

Section 49(a) of the Act reads:

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 an exception to the general rule that a requester has a right of access to his or her own personal information in the custody or under the control of a government institution. In this case, the section provides the Ministry with the discretion to withhold from the appellant his own personal information where section 19 applies to the record.

The Ministry has provided representations regarding its decision in favour of denying access to Records 5 and 6. I have reviewed the representations and find nothing improper in the Ministry's exercise of discretion, and would not alter it on appeal.

**ISSUE E: If the answer to Issue A is yes and Records 7 and 8 contain personal information that also relates to individuals other than the appellant, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.**

Under Issue C, I found that Records 7 and 8 contain personal information that relates both to the appellant and other individuals.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of provincial institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access. One such exception is found in section 49(b) of the Act, which reads as follows:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to protection of his/her personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of the personal privacy of the individual to whom the information relates.

The Ministry submits that Records 7 and 8 fall under the 21(3)(b) presumption. Section 21(3)(b) of the Act provides:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In its representations, the Ministry states that records 7 and 8 are occurrence reports compiled by the Gananoque Ontario Provincial Police Detachment as part of an investigation into a possible violation of law. Based on a review of the records and the representations provided to me, I am satisfied that the records were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) have been established.

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the exemption (Orders P-519 and M-170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued

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that the public interest override set out in section 23 of the Act applies to the facts of this case. I am satisfied that disclosure of the records would constitute an unjustified invasion of the personal privacy of another individual in the circumstances of this appeal.

Since section 49(b) is a discretionary exemption, I have reviewed the Ministry's representations regarding its exercise of discretion to withhold the records and I find nothing improper in the circumstances of this appeal.

**ORDER:**

1. I order the Ministry to disclose to the appellant Records 1, 2, 3 and 4 in their entirety within 15 days of the date of this order.
2. I uphold the Ministry's decision to withhold Records 5, 6, 7 and 8.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Asfaw Seife  
Inquiry Officer

\_\_\_\_\_ November 24, 1993