



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1538**

**Appeal P-9700328**

**Ministry of the Attorney General**



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## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for all documents and records concerning a named individual and an organization with which the individual had been associated. The appellant provided the written consent of the individual to the disclosure of his personal information to her. For the sake of simplicity, in this order I will refer to the individual to whom the records relate as the appellant, rather than the person who made the request.

The Ministry located a large number of records and disclosed 56 pages to the requester, in whole or in part, denying access to a further 87 pages in their entirety. The Ministry claimed that these records, or parts of records, were exempt from disclosure under the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- law enforcement - sections 14(1)(a), (b), (c), (d) and (g)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)
- discretion of refuse requester's own information - section 49(a)

The Ministry sent the appellant a second decision letter in which it advised that it intended to rely on the exemptions set out above, as well as section 20 of the Act (danger to safety or health). The appellant appealed the Ministry's decision. The appellant also confirmed with this office that the request was limited to exclude any personal information of identifiable individuals other than the appellant.

The Commissioner's office then provided the appellant and the Ministry with a Notice of Inquiry soliciting their submissions on the application of the exemptions to the subject records. Representations were received from the Ministry only. Because the records appeared to contain the personal information of other identifiable individuals, representations were solicited from a further five persons. I received submissions by telephone on behalf of three of these individuals objecting to the disclosure of any information which relates to them. One Notice was returned as undeliverable.

The Ministry also made submissions on the application of section 15(b) of the Act to several pages of records. This exemption is intended to exempt records whose disclosure could reasonably be expected to result in harm to intergovernmental relations. Because of the manner in which I have addressed the application of the law enforcement exemptions to these records, it is not necessary for me to decide whether section 15(b) applies to them, or to address the propriety of its application by the Ministry at the inquiry stage of the appeal.

## **DISCUSSION:**

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, as "recorded information about an identifiable individual". I have carefully reviewed each of the records at issue and find that:

- the undisclosed portions of Records 1-1, 1-3, 1-4 and 3-32 to 3-33, as well as Records 3-31, 3-34 to 35, 5-4 to 5-5, 5-9 to 5-11, 5-34 to 5-36 and 5-45, contain only the personal information of individuals other than the appellant;
- the undisclosed portions of Records 4-2 to 4-4, 4-15 to 4-16 and 4-33 to 4-34, as well as Records 3-20, 3-27 to 3-28, 3-30, 4-1, 4-5, 4-6, 4-8, 4-9, 4-10 to 4-11, 4-13 to 4-14, 4-17, 4-23 to 4-24, 4-29 to 4-31 and 4-35 to 4-39 contain only the personal information of the appellant;
- Records 5-1 to 5-3, 5-6 to 5-8, 5-12 to 5-27, 5-29 to 5-33, 5-37 to 5-44, 5-46 to 5-48 and -49 to 68 contain the personal information of the appellant, as well as that of other identifiable individuals;
- Records 2-3, 3-1 to 3-6, 3-8, 3-9 to 3-13, 3-15 to 3-19, 3-22 to 3-23 and 5-28, as well as the undisclosed portions of Records 3-36 to 3-37 do not contain any personal information.

I have found that the undisclosed portions of Records 1-1, 1-3, 1-4 and 3-32 to 3-33, as well as Records 3-34 to 35, 5-4 to 5-5, 5-9 to 5-11, 5-34 to 5-36 and 5-45, contain only the personal information of individuals other than the appellant. As noted above, the appellant has confirmed that he is not seeking access to any personal information which relates solely to another individual. Accordingly, I find that these portions of the records are not responsive to the request. I will not, therefore, consider them further.

Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 contain references to other identifiable individuals. In my view, however, because these individuals are referred to in their capacities as professionals or as a spokesperson for a particular organization, the information cannot be characterized as their personal information (Orders P-157, P-270, M-1036, P-1523, P-1524 and P-1535).

The sole exemptions claimed for Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 were the invasion of privacy exemptions in sections 21(1) and 49(b). I have found that these records either do not contain any personal information or contain only the personal information of the appellant. No other mandatory exemptions have been claimed for these documents. Accordingly, because their disclosure would not constitute an unjustified invasion of personal privacy under section 49(b), they should be disclosed to the appellant.

#### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

I have found that most of the remaining records contain the appellant's personal information. Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states 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]

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the Ministry's claims that particular records qualify for exemption under sections 13(1), 14(1), 19 and 20, which are referred to in section 49(a).

## **LAW ENFORCEMENT**

The Ministry submits that Records 3-20, 4-6, 4-10 to 4-11, 4-13 to 4-14, 4-17, 4-23 to 4-24, 4-29 to 4-32 and 4-35 to 4-39 are exempt from disclosure under section 14(1)(g) as they contain law enforcement intelligence information received by the Ministry from several law enforcement agencies.

The Ministry also submits that Records 5-1 to 5-68 are exempt under sections 14(1)(a) to (d) as they consist of records whose disclosure could reasonably be expected to interfere with a law enforcement matter or investigation, would reveal investigative techniques or would disclose the identity of a confidential source of information in respect of a law enforcement matter. The Ministry indicates that the investigation which is the subject of these documents remains ongoing and relates directly to a law enforcement matter.

Sections 14(1)(a) to (d) and (g) provide:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

In order to qualify for exemption under sections 14(1)(a) to (d) and (g), the matter to which the records relate must first satisfy the definition of the term “law enforcement” found in section 2(1) of the Act. Section 2(1) of the Act defines “law enforcement” in the following manner:

“law enforcement” means,

- (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).

Following my review of all of the records to which the Ministry has applied the section 14(1) exemptions, I find that they relate to matters which fall within the definition of “law enforcement” found in section 2(1).

I have reviewed Records 3-20, 4-6, 4-10 to 4-11, 4-13 to 4-14, 4-17, 4-23 to 4-24, 4-29 to 4-32 and 4-35 to 4-39 and I find that their disclosure could reasonably be expected to reveal law enforcement intelligence information respecting certain organizations and persons. Because of the nature of the information contained in these records, I am unable to describe them in detail. Because these records qualify for exemption under section 14(1)(g), they are exempt from disclosure under section 49(a).

The purpose of the sections 14(1)(a) and (b) exemptions is to provide the Ministry with the discretion to preclude access to records in circumstances where disclosure would interfere with an **ongoing** law enforcement investigation [Orders P-324 and P-403]. I find that the matter addressed in each of Records 5-1 to 5-68 relate to an ongoing law enforcement investigation. I further find that the disclosure of this information could reasonably be expected to interfere with the investigation. Records 5-1 to 5-68 qualify for exemption under section 14(1)(b) and are, therefore, exempt under section 49(a).

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry submits that Records 3-8, 3-14, 3-27 to 3-28, 3-30, 3-31, 4-1, 4-5 and 4-8 are exempt from disclosure under section 19 of the Act. 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 argues that these records fall within the ambit of Branch 2 of section 19. 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]

The Ministry submits that each of these records were prepared by or for Crown counsel for use in giving legal advice and/or in contemplation of litigation in relation to a police investigation and possible charges being laid.

I have reviewed each of the documents to which section 19 has been applied and find that Records 3-8, 3-14, 3-27 to 3-28, 3-30, 3-31, 4-1, 4-5 and 4-8 were prepared by or for Crown counsel for use in giving legal advice or were prepared in contemplation of litigation. These records qualify, therefore, for exemption under Branch 2 of the section 19 exemption. I further find that the privilege in these documents is maintained as they contain information which may give rise to criminal litigation against the appellant or other individuals in the future (Order P-1342).

Accordingly, Records 3-8, 3-14 and 3-31 qualify for exemption under Branch 2 of section 19 and because Records 3-27 to 3-28, 3-30, 4-1, 4-5 and 4-8 contain the personal information of the appellant, they are exempt under section 49(a) of the Act.

### **DANGER TO SAFETY OR HEALTH**

The Ministry submits that Records 3-22 and 3-36 to 3-37 are exempt from disclosure under section 20 of the Act. It argues that because these materials are rife with offensive, inflammatory and hateful comments and images directed at identifiable groups, their publication can reasonably be expected to seriously threaten the health and safety of members of those groups who have been targeted by such hate propaganda.

The Ministry urges me to rely on the wording of the prohibitions against the dissemination of hate propaganda which are found in the Criminal Code to find that these records fall within the ambit of section 20. It indicates that it is reluctant to participate in the further dissemination of this type of material, particularly pursuant to a request under the Act. The Ministry also refers to a decision of the Supreme Court of Canada, R v. Keegstra (1990), 61 C.C.C. (3d) 1, quoting former Chief Justice Brian Dickson at pp. 36-37 of the decision as follows:

Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is the harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence.

...

The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance.

...

The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada.

Finally, the Ministry points out that the disclosure of information under the Act which is not "personal information" is considered to be disclosure to the world, and not just to the requester. I am disturbed by the subject matter of these records and find abhorrent the messages which they convey. Records 3-22 and 3-36 to 3-37 state that they originated with the organization which is the subject of the request. Presumably, the appellant is aware of their content and may have even participated in their creation. I agree with the comments of the former Chief Justice of Canada with respect to the negative impact which hate propaganda such as that reflected in Records 3-22 and 3-36 to 3-37 has on the minorities targeted by such material and on Canadian society generally. I also acknowledge that the disclosure of this information to the appellant under the general access provisions of the Act may be considered to be disclosure to the world, as was recently reiterated by Assistant Commissioner Tom Mitchinson in Order P-1499 in the context of section 14(1)(e) of the Act.

In my view, the Act was not intended to assist individuals in the propagation and dissemination of hate propaganda, nor to put the government in the position of being required to do so, whether by disclosure to the individual or group responsible for creating it or to others seeking access as members of the general public.

In Order P-1482, Inquiry Officer Laurel Cropley addressed the application of section 20 to records containing hate propaganda. The offensive nature of the material at issue in the appeal which gave rise to Order P-1482 and the present appeal are similar. In that order, Inquiry Officer Cropley held that because these records had already been published and the appellant in that case was aware of their nature, their disclosure could not reasonably be expected to seriously threaten the safety or health of any individual.

With respect, I must disagree with this finding. In my view, the fact that this type of material has already been published would provide no defence to a charge of willfully promoting hatred under the Criminal Code and is irrelevant for the purpose of establishing that the harm contemplated by section 20 is reasonably likely to occur should the information be disclosed. In addition, I find that the fact that this particular appellant was aware of the **nature** of the information contained in the records similarly has no bearing on the issue of harm under section 20.

The Supreme Court of Canada in the Keegstra case recognized that harm to individuals and identifiable groups within Canadian society can reasonably be expected to flow from the dissemination of such material. In my view, the promotion of hatred against identifiable groups in Canadian society is the purpose behind the publication of information like Records 3-22 and 3-36 to 3-37 by groups such as that led by the appellant. Accordingly, I find that the disclosure of this information could reasonably be expected to result in precisely the type of harm contemplated by section 20 of the Act. Because of the scurrilous nature of the information

contained in Records 3-22 and 3-36 to 3-37, I accept that its disclosure could reasonably be expected to seriously threaten the health or safety of the minority groups so cruelly maligned in these documents. They are, accordingly, exempt from disclosure under section 20.

Because of the manner in which I have addressed the records to which the Ministry has applied section 13(1) of the Act, it is unnecessary for me to discuss the application of this exemption to those records.

**ORDER:**

1. I order the Ministry to disclose to the appellant Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 by providing him with a copy by **April 9, 1998** but not before **April 6, 1998**.
2. I uphold the Ministry's decision with respect to access to the remaining records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ March 5, 1998