



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

# **ORDER 57**

**Appeal 880237**

**Ministry of the Attorney General**



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## O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), which gives a person who has made a request for access to personal information under subsection 48(1) of the Act a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On May 16, 1988, the Ministry of the Attorney General (the "institution") received a request for access to certain records relating to interviews between the requester and members of several police forces, together with copies of letters the requester had written to three provincial political party leaders in 1983.
2. The institution transferred parts of this request to the Ministry of the Solicitor General and the Archives of Ontario, pursuant to subsection 25(1) of the Act, and advised the requester accordingly on June 1, 1988.
3. With respect to the remaining part of the request, the institution refused to either confirm or deny the existence of the requested records, pursuant to subsection 14(3) of the Act, and informed the requester by letter dated June 23, 1988 that access had been denied.

4. On July 12, 1988, the requester appealed this decision, and I gave notice of the appeal to the institution.
5. Because mediation was not practicable in the circumstances of this appeal, I sent notices to both parties on September 14, 1988, advising them that I was conducting an inquiry to review the decision of the head. Enclosed with the notices was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.
6. On October 17, 1988, counsel for the institution advised me by letter that the Ministry of the Solicitor General had provided the appellant with severed portions of three of the four records at issue in this appeal, in response to the part of the appellant's original request which had been transferred to that Ministry by the institution. Reference was also made to the fourth record in one of the three severed records, thereby precluding the institution from relying on its claim for exemption under subsection 14(3).
7. Because the institution could no longer refuse to confirm or deny the existence of the records, the head revised his position and claimed sections 13(1), 14(1)(a), 14(1)(b) and 19 of the Act as the basis for exempting the fourth record.

As far as the other three records were concerned, the institution adopted the position taken by the Ministry of the Solicitor General.

8. I advised the appellant of the new exemptions claimed by the institution, and invited him to make further submissions.
9. I received submissions from both the institution and the appellant and have taken them into account in making my Order.
10. During the course of the Appeals Officer's investigation, it was learned that the institution had not responded to the part of the appellant's request relating to correspondence sent to the provincial opposition party leaders. The institution was reminded by my office of their obligation to respond, and I subsequently received a copy of the institution's response to the appellant.
11. Although the appellant filed an appeal with respect to the decision of the Ministry of the Solicitor General, his appeal related to that Ministry's decision to deny access to certain other records, and did not include any reference to the severed documents at issue in this appeal. Therefore, I have restricted this appeal to the proper disposition of the remaining one record which has not been released to the appellant.

The issues arising in this appeal are as follows:

- A. Whether the record at issue in this appeal is exempt from disclosure pursuant to section 19 of the Act; and
- B. Whether the record at issue in this appeal is exempt from disclosure pursuant to subsection 13(1) of the Act;
- C. Whether the record at issue in this appeal is exempt from disclosure pursuant to subsections 14(1)(a) or (b) of the Act;
- D. If any of the above noted issues is answered in the affirmative, whether the record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

The purposes of the Act as set out in section 1 should be noted. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions of the Act lies upon the head.

The sole record at issue in this appeal is a letter from a Director of Crown Attorneys, dated July 16, 1987. As noted above, this was the letter referred to in the severed records disclosed to the appellant by the Ministry of the Solicitor General and has been exempted from disclosure by the institution pursuant to sections 13(1), 14(1)(a), 14(1)(b) and 19 of the Act.

**ISSUE A: Whether the record at issue in this appeal is exempt from disclosure pursuant to section 19 of the Act.**

Section 19 of the Act reads 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.

I discussed the proper application of the section 19 exemption in my Order 49 (Appeal Numbers 880017 and 880048), released on April 10, 1989. At page 12 of that Order I outline the 2 situations in which the discretionary exemption provided by this section applies:

- (1) a head may refuse to disclose a record that is subject to the common law solicitor\_client privilege; or
- (2) a head may refuse to disclose 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.

A record may be exempt under part (2) of this exemption regardless of whether the common law criteria relating to part (1) are satisfied.

To meet the requirements of the second part of the section 19 exemption, the institution must establish that the record in question:

(a) was prepared by or for Crown counsel; and

(b) was prepared (i) for use in giving legal advice; or  
(ii) in contemplation of litigation; or (iii) for use  
in litigation.

Having reviewed the record in question, it is clear that it meets the requirements for exemption under section 19, it was prepared by Crown counsel, and the purpose in preparing the record was for use in giving legal advice.

I have also reviewed the head's representations concerning his exercise of discretion in deciding to withhold the record, and, in my view, there is no basis for interfering with his decision.

Having decided that section 19 of the Act applies to exempt the record in question, it is not necessary for me to consider the application of the other exemptions cited by the institution. Also, in my view, no information can reasonably be severed from the record pursuant to subsection 10(2) of the Act without disclosing information that legitimately falls within the solicitor\_client exemption provided by section 19 of the Act.

Therefore, I uphold the head's decision.

Original signed by: \_\_\_\_\_  
Sidney B. Linden  
Commissioner

\_\_\_\_\_ May 4, 1989  
Date