

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

---

## ORDER PO-4710

Appeal PA23-00127

Archives of Ontario

August 22, 2025

**Summary:** The appellant asked the Archives of Ontario for records about his father's death, which occurred in 1967. The archives gave him some records but refused to give him Crown brief records because it claims that they are exempt from disclosure under section 19 of the *Freedom of Information and Protection of Privacy Act*, which protects records subject to solicitor-client or litigation privilege.

In this order, the adjudicator finds that the records are exempt from disclosure under section 19(b), and he dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 19(b).

**Orders Considered:** Order PO-2733.

**Cases Considered:** *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC)

### OVERVIEW:

[1] In 1967, when the appellant was 10 years old, his father was killed by another man in North Bay. The appellant says that this incident has caused "much anxiety" in his life and he wants to find out more about the circumstances that led to his father's death, and why the individual responsible was found not guilty in the criminal trial that subsequently took place.

[2] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Archives of Ontario (the archives) for access to the following records:

RG [number] Nipissing District Crown Attorney prosecution case files

I am seeking all records for a court case that took place in March 1968. Case against [named person] charged with capital slaying to a man named [named person] of Thornhill . . . The murder took place on Sept 2nd, 1967.

Accused: [named person] of Widdifield Township

Murdered: [named person] of Thornhill

Mr. Justice [named person]

Crown attorney [named person]

Defense lawyer: [named person]

Time period: 1967/09/01 to 1968/03/31

[3] The archives located responsive records and sent a decision letter to the appellant that granted him access to some of these records. However, it denied access to 24 Crown brief records in full (75 pages) under the discretionary exemption in section 19 (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[4] The appellant appealed the archives' access decision to the Information and Privacy Commissioner of Ontario (IPC). The IPC assigned a mediator to this appeal to assist the parties in resolving the issues in dispute.

[5] This appeal was not resolved during mediation and was moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*. I decided to conduct an inquiry and sought representations from both the archives and the appellant. I received representations from the archives but not the appellant.

[6] In this order, I find that the Crown brief records are exempt from disclosure in full under the statutory litigation privilege in section 19(b) of the *Act*.

## **RECORDS:**

[7] The records remaining at issue in this appeal are 24 Crown brief records comprising 75 pages.

## **DISCUSSION:**

[8] The main issue to be determined in this appeal is whether the discretionary solicitor-client privilege exemption at section 19 of the *Act* applies to the 24 Crown brief records that the archives withheld from the appellant.

[9] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege,

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

. . .

[10] Section 19 contains different exemptions, which the IPC has referred in previous decisions as making up two “branches.”

[11] The first branch, found in section 19(a), (“subject to solicitor-client privilege”) is based on common law. The second branch, found in section 19(b) (“prepared by or for Crown counsel”) contains statutory privileges created by the *Act*.

[12] The institution must establish that at least one branch applies.

[13] In the circumstances of this appeal, the archives submits that the Crown brief records are exempt from disclosure under the second branch in section 19(b) of the *Act*.

### **Representations, analysis and findings**

[14] For the reasons that follow, I find that the 24 Crown brief records are exempt from disclosure under section 19(b) of the *Act*.

[15] The latter part of the statutory privilege in section 19(b) applies to records prepared by or for Crown counsel “in contemplation of or for use in litigation.”

[16] Both IPC orders and court decisions have consistently found that records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.<sup>1</sup> Documents not originally created for use in litigation, which are copied for a Crown brief as the result of counsel’s skill and knowledge, are also covered by this

---

<sup>1</sup> Order PO-2733.

privilege.<sup>2</sup>

[17] The archives states that the records at issue in this appeal are clearly part of the Crown brief and are properly exempt from disclosure under section 19(b). It submits that these records came into existence because of criminal litigation (the trial of the individual accused of murdering the appellant's father) and were clearly "prepared by or for Crown counsel in contemplation of litigation," as stipulated in section 19(b).

[18] The archives cites the following passages from the Divisional Court's decision in *Ontario (Attorney General) v. Holly Big Canoe*<sup>3</sup> to support its position that the 24 Crown brief records are exempt from disclosure under the statutory litigation privilege in section 19(b), and that this privilege still exists today for these records:

The scheme of the *Act* clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth.

. . .

. . . The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the language of s. 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. There should be no generalized public access to the Crown's work product even after the case has ended.

. . .

For the reasons already set out, I agree with this position, for there is a clear need to protect the information in the Crown brief from dissemination to the public as a matter of course upon "simple request", which could lead to undesirable disclosure of police methods and the like. The limited waiver of the Crown's litigation privilege by a Stinchcombe disclosure cannot be turned into a waiver of the s. 19 exemption so as to entitle any person to insist upon access to the records. Crown counsel has no authority to waive the FIPPA exemption.

---

<sup>2</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.

<sup>3</sup> 2006 CanLII 14965 (ON SCDC) at paras. 23, 43 and 44.

[19] I have reviewed the 24 records that have been withheld by the archives under section 19(b) and I agree that they constitute Crown brief records. They consist of copies of records that the North Bay Police provided to Crown prosecutors in preparation for the trial of the individual accused of murdering the appellant's father. I find that these records are exempt from disclosure under section 19(b) of the *Act*, because they were prepared for Crown counsel in contemplation of or for use in criminal litigation.

[20] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.<sup>4</sup> Consequently, even though the criminal trial of the individual who killed the appellant's father ended almost 60 years ago, the termination of this criminal litigation does not end the statutory litigation privilege that attaches these records. They remain exempt from disclosure under section 19(b).

[21] The section 19(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the archives could decide to disclose the Crown brief records even though they qualify for exemption under that provision. The archives must exercise its discretion. In this appeal, I may determine whether the archives failed to do so.

[22] In addition, I may find that the archives erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[23] The archives submits that it exercised its discretion in applying section 19(b) to the Crown brief records and did so appropriately. It states that in exercising its discretion, it took into account the following relevant considerations:

- the interest inherent within the section 19 exemption;
- the appellant's sympathetic need and legitimate interest in gaining access to the records;
- the sensitive nature of the records' contents and the confidential context behind their creation;
- the privacy interests of other individuals in the records;
- the fact that Crown brief material are not available to the public at large and were specifically created for the purpose of a criminal proceeding;

---

<sup>4</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

- the ability of a prosecutor to protect sensitive materials and to administer justice in a fair equitable and effective manner;
- that Crown counsel must be able to communicate and receive information from a wide variety of government personnel in order to provide legal advice and guidance on a matter; and
- certain records relate to the prosecutor's exercise of discretion.

[24] The archives states that any abrogation of solicitor-client privilege can only be justified in the rarest of circumstances and by reference to the most stringent test of whether it was absolutely necessary to do so. It adds that this threshold is difficult to meet and is of the utmost importance in considering whether to disclose records subject to solicitor-client privilege. It submits that in exercising its discretion, it properly considered these criteria, in good faith and for a proper purpose, and correctly decided not to disclose the records.

[25] I am satisfied that the archives exercised its discretion and did so appropriately in withholding the 24 Crown brief records under section 19(b). It considered a series of relevant factors, and there is no evidence before me to suggest that it exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. In short, I uphold the archives' exercise of discretion in deciding to withhold the Crown brief records under section 19(b).

[26] Because I have found that the 24 Crown brief records are exempt from disclosure in full under section 19(b) of the *Act*, it is not necessary to consider whether they are also exempt from disclosure under the personal privacy exemption in section 21(1).

## **ORDER:**

I uphold the archives' decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_

Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_  
August 22, 2025