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

INTERIM ORDER PO-2357-I

Appeal PA-030011-2

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*) for records pertaining to the requester's recent criminal code offence.

The Ministry responded to the request by granting partial access to the responsive records. Access was denied to certain records under the exemptions found in the following sections of the *Act*: section 49(a) (discretion to refuse requester's own information), 14(2)(a) (law enforcement), 19 (solicitor-client privilege), 22(a) (information published or available), and 49(b) (invasion of privacy) in conjunction with sections 21(2)(f) and 21(3)(b). In the decision letter, the Ministry also referred the requester to a specific Court Office for the documents that were exempted under section 22(a) of the *Act*, and to the Ministry of Public Safety and Security for other identified records.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry provided the appellant with an index of records containing a description of the records and identifying the specific exemptions that were being claimed for each of the records.

Also during mediation, the appellant advised that he did not wish to pursue access to a number of specific records, and those records are no longer at issue. As well, section 22(a) was no longer at issue in this appeal.

Finally, the mediator identified that one page of the records, located between pages 178 and 179, was not numbered. That page was assigned the number 178A.

Mediation did not resolve the issues in this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, inviting representations on the facts and issues. The Ministry provided representations to me, and I sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant. The appellant provided representations in response.

In its representations, the Ministry identified that it is no longer relying on the exemption found in section 14(2)(a) of the *Act*. Accordingly, that section is no longer at issue in this appeal.

RECORDS:

The records remaining at issue in this appeal are pages 1, 161, 168-189, 191-210, 212, 215, 217, 219, 228, 229, 231, 233 and 243. They include court documents and other documents prepared by Crown counsel, both internal and external correspondence and draft correspondence to and from Crown counsel, information supplied by the police to the Crown to assist in the prosecution, and Crown counsel notes to file and notes relating to a number of witnesses.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and 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 [paragraph (h)].

The Ministry submits that all of the records at issue contain the personal information of the appellant. The Ministry also states that some of the records contain the personal information of other individuals, and specifies which pages of the records contain the personal information of other identifiable individuals.

Based on my review of the contents of the records, I find that all of the records at issue contain the personal information of the appellant. Furthermore, Records 176-179, 181-186, 188, 204-208, 215 and 228 also contain the personal information of other identifiable individuals within the meaning of that term in section 2(1).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. However, section 49 provides a number of exceptions to this general right, including section 49(a), which reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

The Ministry takes the position that all of the records at issue "pertain to materials that were created in contemplation of or for use in litigation" and fall within the scope of section 19.

In order to determine whether the records are exempt under section 49(a), I must first determine whether they qualify for exemption under section 19.

As a preliminary note, however, there are a small number of records at issue in this appeal for which I have decided to defer my finding regarding the possible application of sections 19 and 49(a), in order to provide the Ministry with an opportunity to provide further representations on these specific records, particularly in light of an Ontario Court of Appeal decision which was made following the receipt of representations in this file [*G. (N) v. Upper Canada College*, 70

O.R.(3d) 312 (C.A.)]. The records for which I have decided to defer my finding are the following documents: Records 168-170, 174, 175, 187, 191 and 202-203.

SOLICITOR-CLIENT PRIVILEGE

General principles

Section 19 of the *Act* reads:

> 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.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

In this appeal, the Ministry identifies that it "relies on the full ambit of section 19, that is, both branches contained in the provision". The Ministry then identifies that it will "focus its submissions on the litigation privilege in branch 2 … as the records at issue pertain to materials that were created in contemplation of or for use in litigation".

Litigation privilege

The litigation privilege found in branch 1 protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should

> be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The statutory litigation privilege exemption in branch 2 applies to a record that was "prepared by or for Crown counsel … in contemplation of or for use in litigation."

The Ministry identifies that charges were laid in the matter to which the records relate, that a preliminary hearing was held, and that the matter was resolved prior to trial when the appellant entered into a peace bond. The Ministry also identifies that it is not aware of any actions that would constitute waiver of the privilege being claimed.

With respect to the specific litigation privilege claim, the Ministry states:

> These records came into existence as a result of litigation, i.e. the prosecution of a criminal matter. The records at issue pertain to Crown witnesses and potential Crown witnesses, plea negotiations, Crown correspondence, and other aspects of the Crown's work product. The Ministry claims privilege for any and all records relating to the Crown's work product in respect of contemplated or actual litigation. The Ministry submits that branch 2 of section 19 is specifically designed to protect information prepared by or for Crown Counsel in connection with proceedings being conducted by Crown counsel on behalf of the government and that this claim has no temporal limit.

The appellant states that he has had access to a number of records (apparently with certain restrictions through the Crown disclosure process), and that he should therefore be given access to the records.

Findings

As identified by the Ministry, the records came into existence as a result of litigation – that is - the prosecution of a criminal matter. The Ministry therefore claims privilege for any and all records relating to the Crown's work product in respect of contemplated or actual litigation.

In Order PO-2317, Adjudicator Donald Hale dealt with the application of sections 49(a) and 19 in the context of a claim by the Ministry that records relating to an ongoing prosecution of the requester under the *Criminal Code* met the requirements of the Branch 2 statutory litigation privilege. After referring to Order PO-1999, in which he outlined the application of this exemption to records created in the context of a civil action taken against the province, Adjudicator Hale went on to conclude that a number of records, including those documenting the Crown/Police post-arrest contacts with various complainants and witnesses, as well as the Crown Attorney's own research, qualified for exemption under the litigation privilege aspect of Branch 2 of section 19.

I adopt the approach taken by Adjudicator Hale, and apply it in this appeal.

The Ministry takes the position that the records remaining at issue came into existence as a result of the prosecution of the criminal matter. Upon my review of the records, I am satisfied that many of these records were prepared by or for Crown counsel in contemplation of or for use in litigation, in particular, the criminal litigation against the appellant. Specifically, I make the following findings:

- Records 1, 161, 171-173, 188, 189, 192-201, 204-210, 212, 215, 217, 219, 228-229, 233 and 243 are memoranda, correspondence, documents and e-mail messages prepared by or for Crown counsel relating to the prosecution of the criminal matter.
- Records 176-179 (including 178A) and 231 are handwritten notes which the Ministry states were supplied by police to the Crown to assist in the prosecution.
- Record 180 is a draft document prepared by Crown counsel relating to the criminal prosecution.
- Records 181-186 and 231 are Crown counsel's notes relating to the criminal prosecution, and constitute counsel's working papers relating to the litigation.

I am satisfied that all of the records set out above were prepared by or for Crown counsel in contemplation of or for use in litigation, and that they qualify for exemption under branch 2 of section 19 of the *Act*.

In summary, except for Records 168-170, 174, 175, 187, 191 and 202-203, for which I have decided to defer my finding, I find that all of the records remaining at issue qualify for exemption under section 19 of the *Act*.

Loss of privilege through termination of litigation

Termination of litigation does not negate the application of the Branch 2 statutory litigation privilege [*Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)].

The Ministry states as follows concerning the fact that the litigation is no longer ongoing:

> The Ministry submits that the common law principle of termination of litigation has no application to a criminal prosecution. While the general principle in civil litigation is that privilege ends with the litigation for which the information was prepared, it is submitted that this general principle has no application to a criminal prosecution when construing section 19 of the Act. The exemption in section 19, properly interpreted, should reflect the general principle that there be no public access to Crown counsel's litigation work product even after the termination of the criminal proceedings.

In Order PO-2323, Assistant Commissioner Mitchinson applied the reasoning from Order PO-2317 to records relating to a criminal proceedings which had been concluded. Concerning the effect of the conclusion of the proceedings, the Assistant Commissioner stated:

> As the Court of Appeal makes clear in *Ontario (Attorney General) v. Big Canoe*, the common-law rule that litigation privilege terminates when litigation is no longer real or reasonably contemplated does not apply to the statutory litigation privilege component of section 19. The Ministry's submissions on the reasons for this distinction between the common-law and statutory privileges are consistent with the Court's direction. It is also significant to note that the facts in *Ontario (Attorney General) v. Big Canoe* and the facts of the present appeal are similar. They both deal with records originally created in the context of criminal investigations and prosecutions that have been completed, and both involve requesters seeking access to information about themselves that are no longer of any practical use in the criminal law context. As the Ministry points out, and I concur, different considerations may be relevant in the context of civil litigation involving the Crown.

On that basis, the Assistant Commissioner determined that the fact that the criminal investigations and prosecutions of the appellant in that appeal were no longer ongoing did not negate the application of the statutory litigation privilege in Branch 2 of section 19.

I accept the approach to this issue taken by Assistant Commissioner Mitchinson as set out above, and adopt it for the purpose of this appeal. Accordingly, the fact that the criminal prosecution of the appellant is no longer ongoing does not negate the application of the statutory litigation privilege in Branch 2 of section 19.

Waiver

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and

- voluntarily evinces an intention to waive the privilege.

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

- the communication was made to an opposing party in litigation [Order P-1551]

- the document records a communication made in open court [Order P-1551]

The Ministry states that it is not aware of any steps that would constitute waiver in respect of the records at issue.

In his representations the appellant identifies that he has seen the records at issue through the disclosure process during his criminal prosecution. He states that he had access to the records through an identified Crown Attorney, but acknowledges that restrictions were placed on access to and use of the records which he accessed in that process.

Although waiver may apply to some of the records for which I have decided to defer my decision, I am not satisfied that waiver applies to the records which I have found qualify for exemption in this order, as I am not satisfied that these records have been provided to the appellant. Based on my review of the records and the appellant's representations, I do not accept that the appellant has had access to these records in the circumstances of this appeal, and I find that solicitor-client privilege has not been waived.

EXERCISE OF DISCRETION

General principles

The section 19 and 49(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution 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

- it fails to take into account relevant considerations

If any of these circumstances are present, the matter may be sent back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution.

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry identifies that it considered a number of factors in deciding to exercise its discretion not to disclose the records, including the sensitive and confidential nature of the information requested, and the fact that they relate to a criminal matter.

In my view, the Ministry properly exercised its discretion in the circumstances, and Records 1, 161, 171-173, 176-186, 188, 189, 192-201, 204-210, 212, 215, 217, 219, 228-229, 231, 233 and 243 qualify for exemption under section 49(a), in conjunction with section 19 of the *Act*.

In light of this finding, I do not need to consider the possible application of section 49(b).

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 161, 171-173, 176-186, 188-189, 192-201, 204-210, 212, 215, 217, 219, 228-229, 231, 233 and 243.

2. I remain seized of this matter, in order to deal with the outstanding issues related to Records 168-170, 174, 175, 187, 191 and 202-203.

Original signed by: December 30, 2004
Frank DeVries
Adjudicator