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

ORDER PO-2769

Appeal PA06-193

Ministry of the Attorney General

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Peel Regional Police Services Board (the Peel Police) received a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) for access to "a complete copy of the Crown disclosure" concerning two specific *Criminal Code* charges related to incidents taking place in 2003.

The Police transferred the part of the request related to "Crown Disclosure" to the Ministry of the Attorney General (the Ministry) under section 18(3) of the municipal *Act* because the Police considered the Ministry to have a greater interest in the records. The portion of the request not transferred to the Ministry was processed by this office as an appeal of the Peel Police's decision (Appeal MA06-300), which resulted in the issuing of Order MO-2210 by Adjudicator Donald Hale.

The Ministry identified 80 pages of records as responsive to the transferred portion of the request. Access to 68 pages was denied pursuant to section 49(a) (discretion to refuse requester's own information), in conjunction with sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), as well as section 49(b) (personal privacy) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The Ministry relied on section 22(a) (publicly available information) to deny access to the remaining 12 pages.

The requester, now the appellant, appealed the Ministry's decision to this office.

A mediator was appointed to resolve the issues. During mediation, the Ministry provided the appellant's representative with an index containing a description of the records and the exemptions claimed for each. The appellant's representative expressed the opinion that additional records related to one of the criminal charges should exist, including a search warrant or search warrant package, and a substance analysis report. Accordingly, the adequacy of the Ministry's search for responsive records was added as an issue in this appeal.

A mediated resolution of this appeal was not possible and it was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially, seeking representations, which I received. I then sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the Ministry, seeking submissions on the issues. Subsequently, I received brief representations directly from the appellant who is no longer represented by counsel.

Very shortly thereafter, the appeal file was put on hold by this office pending the outcome of an application for judicial review of the decisions in Orders PO-2494 and PO-2532-R. These decisions addressed the application of the solicitor-client privilege exemption in section 19 to records comprising a Crown Brief in a criminal proceeding. The records at issue in the judicial review application were similar in nature to those at issue in this appeal.

While the Divisional Court's decision in the judicial review application regarding Orders PO-2494 and PO-2532-R remained outstanding, Senior Adjudicator John Higgins issued Order PO-2733, which addressed in detail the application of section 19 to records contained in a Crown Brief. As the facts of that appeal were quite similar to the facts in the present appeal, I re-

activated this appeal on November 25, 2008 in order to invite comments from the parties on the possible implications of Order PO-2733 to the issues before me. I provided the Ministry and the appellant with a copy of Order PO-2733. The Ministry submitted representations in response, but I did not receive submissions from the appellant. Accordingly, I decided to proceed with my adjudication of the issues in Appeal PA06-193 by issuing this order.

RECORDS:

The records at issue consist of police reports, witness statements, notes and correspondence, "confidential instruction" sheets for counsel, and other records prepared by the Police and provided to Crown counsel (80 pages).

DISCUSSION:

PERSONAL INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. In circumstances where a record contains both the personal information of the appellant and other individuals, the request falls under Part III of the *Act*, and the relevant provision for sections 13 and 19, as claimed in this appeal, is 49(a).

For the purpose of deciding on the application of section 49(a) of the *Act*, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs. The definition of personal information is found in section 2(1) of the *Act* and states:

> "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,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Ministry submits that the records contain detailed personal information about the appellant as an identifiable individual, as well as personal information about other identifiable individuals who were involved in the criminal matters. The appellant did not provide representations on this issue.

I have reviewed the records to determine whether they contain personal information and, if so, to whom the information relates. I find that the records contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a), (b), (c), (d), (g) and (h) of the definition in section 2(1) of the *Act*. In addition, I find that some of the records contain personal information relating to identifiable individuals other than the appellant that satisfies the definition of personal information under paragraphs (a), (b), (d), (e) & (h) of section 2(1).

Since the records contain the mixed personal information of the appellant and other identifiable individuals, I will now consider whether the records are exempt under section 49(a) of the *Act*, taken in conjunction with section 19.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ SOLICITOR-CLIENT PRIVILEGE

As noted, the Ministry relies on section 49(a), read in conjunction with section 19, to withhold most of the records. I will consider whether the records qualify for exemption under these sections as a preliminary step in determining whether they are exempt under section 49(a).

General Principles

Section 19 of the *Act* states as follows:

> 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; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Subsection (c) has no application in the circumstances of this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2: statutory privileges

Branch 2 of section 19 arises from sections 19(b) and (c). Under section 19(b), it is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations

The Ministry submits that with the exception of the court orders for which it relies on section 22(a), all of the records at issue comprise the Crown Brief for the two *Criminal Code* matters. The Ministry explains that the records include police synopses of the charges, witness statements, notes of Crown counsel prepared during the litigation process, and written communications between Crown counsel and the Peel Police. According to the Ministry,

therefore, these records are exempt under Branch 2 of section 19. The Ministry goes to submit that:

> As is evident in the contents of the records themselves, both sets of charges were dealt with in court proceedings for a number of months after the charges were laid. The documents for which the FIPPA s. 19 exemption is claimed are records that were either gather/prepared for Crown counsel or the police for the prosecution regarding the criminal charges, or were prepared by Crown counsel in the litigation of the charges.

The Ministry argues that no action has been taken that would constitute waiver of the section 19 exemption in relation to the two Crown Briefs. The Ministry adds that

> The fact that some of the records in these Crown briefs were already disclosed to the Appellant's lawyer pursuant to the criminal law of disclosure under *R. v. Stinchcombe* does not in any way negate the application of branch 2 of FIPPA s. 19.

The Ministry notes that the privilege which exists in documents found to be exempt under Branch 2 of section 19 is permanent and is not limited temporally based on the conclusion of the criminal matter. The balance of the Ministry's initial representations address the rationale for the permanent protection of the Crown Brief as a class of record, as recognized by the Courts in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2006), 269 D.L.R. (4th) 154 (Div. Ct.) and *Ontario (Attorney General) v. Big Canoe* (2002), 208 D.L.R. (4th) 327 (Div. Ct.).

The representations provided by the Ministry in response to my request for comment on PO-2733 reiterate many of the same points made in the initial representations. Referring to the reasons of Senior Adjudicator John Higgins in Order PO-2733 (at page 10), the Ministry submits:

> … [T]here is no need for the concept of 'two preparations' [discussed by Assistant Commissioner Beamish in Order PO-2494] to be applied in the present situation. It is respectfully submitted that the statutory exemption under branch 2 of FIPPA s.19 applies squarely to the documents in these Crown briefs.

The appellant's representations do not address this issue.

Analysis and Findings

I will begin by stating my agreement with the Ministry's position that the records for which it claims exemption under section 49(a), together with section 19, are Crown Brief materials.

As previously stated, Order PO-2733 contains a detailed analysis of recent judicial consideration of the section 19 solicitor-client privilege exemption. The notable exception is that the Divisional Court's decision in the judicial review application of Orders PO-2494 and PO-2498 has now been issued ([2009] O.J. No. 952, released March 6, 2009), which post-dates Order PO-2733 by four months. I would note, however, that the question in the appeals resulting in Orders PO-2494 and PO-2498 was whether copies of the Crown Brief materials *in the hands of the police* was exempt under section 19. In my view, Order PO-2733 continues to reflect the current approach of this office to Branch 2 of section 19 where a request for a Crown Brief has been submitted under the *Act* to the Ministry of the Attorney General. As the facts of, and principles discussed in, Order PO-2733 are relevant to the appeal before me, I will quote extensively from the Senior Adjudicator's decision.

Senior Adjudicator Higgins begins his discussion of the application of the Branch 2 statutory privilege to the contents of a Crown Brief in Order PO-2733 as follows (at page 4):

> A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. In *Ontario (Ministry of the Attorney General) v. Big Canoe* (2002), 67 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.), ("*Big Canoe* 2002") Justice Carthy applied branch 2 of section 19 to Crown brief materials. In doing so, he observed as follows:
>
> > In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the Freedom of Information Act and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request. [para. 14]
>
> Earlier in the judgment, Justice Carthy rejected an interpretation of branch 2 that would end its application upon the termination of litigation, as would occur under common law litigation privilege. He found that "the intent was to give Crown counsel permanent exemption. … The error made by the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit." Thus, if branch 2 applies to a record, that record remains exempt even after the litigation concludes.

Subsequently, in *Ontario (Attorney General) v. Holly Big Canoe* (2006), 80 O.R. (3d) 761, [2006] O.J. No. 1812 (Div. Ct.), ("*Big Canoe* 2006") Justice Lane considered the application of section 19 to the Crown brief. He stated:

> 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. … [para. 23]
>
> The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37]
>
> The Ministry submitted that there was no reason why a Stinchcombe disclosure should affect the second branch of section 19 exemption, which rests upon an entirely different basis than litigation privilege. Its language contains no reference to the material being privileged at common law as the basis for the exemption. On the contrary, the conditions for the exemption are explicitly related to the purpose for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." 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 section 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. [paras. 44, 45]

Justice Lane also found that branch 2 did not apply to letters between the Crown and defence counsel, for which there was no "zone of privacy" (see para. 45 of the judgment). He rejected the view that branch 2 did not apply to records which were not originally privileged, stating that "in my view this is irrelevant. The issue is not common law privilege, but whether the records meet the description in the second branch of section 19."

P.(D.) v. Wagg sets out a screening process where a party seeks to use the Crown brief in a subsequent civil proceeding. In *Big Canoe* 2006 (cited above), Justice Lane expressly comments on *Wagg* and alternative access:

> The test is the definition in the section. It may be thought that this gives the head an overly broad discretion, but in my view that is what the statute says. Nor does the exercise of that discretion to withhold end the requester's opportunity to obtain the documents he seeks. An application under FIPPA is not the only route to obtain the Crown brief. Where relevant, the Crown brief will be available to parties to litigation via the court, subject only to the *Wagg* screening and without reference to FIPPA.

From these two judgments, it appears that the contents of the Crown brief are, generally speaking, exempt under branch 2. Based on a third judgment of the Divisional Court, *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289, however, it appears that there may be an exception to this view for some records copied for inclusion in the Crown brief.

At paragraphs 65 and 66 of the *Goodis* judgment, Swinton J. (writing for the Court) stated:

> *I need not determine whether the Ministry is correct in the submission that branch 2 protects any document simply copied for inclusion in the Crown brief*. The Adjudicator appropriately applied the test in *Nickmar* and concluded that *the records related to the fact-finding and investigation process of counsel in defending the Ministry in civil actions*. I see no basis to interfere with his conclusions.

> The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. *The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief*. [Emphasis added]

The Divisional Court's case reference in the above-quoted passage is to *Nickmar Pty Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) holding that *copies* of non-privileged documents might become privileged if they were the result of *selective* copying or the result of research or *the exercise of skill and knowledge on the part of the solicitor*. As Swinton J. observed, the Supreme Court of Canada suggested a preference for this approach in *Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39, where it stated:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that *assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect*. (at para. 64) [Emphasis added]

Two principles emerge from the Divisional Court's judgment in *Goodis* and the authorities to which it refers, as follows:

1. records related to the fact-finding and investigation process of counsel and resulting from selective copying, research or the exercise counsel's skill and knowledge *would* fall within branch 2 of the exemption; and

2. branch 2 does *not* reach back to original records in the hands of other parties solely on the basis that they have been copied for inclusion in the Crown brief.

In my view, the import of the two *Big Canoe* decisions I have cited, and the *Goodis* decision, is clear. The contents of the Crown brief in this case are exempt under branch 2 of section 19 as having been prepared by or for Crown counsel in contemplation of, or for use in, litigation. I find that branch 2 of the section 19 exemption applies to the records for which the Ministry has claimed it, all of

which are properly viewed as part of the Crown brief. The following further two points are essential to explain this finding.

First, much of the Crown brief in this case consists of copied materials provided by the Police to assist with the prosecution. It is important to note that these copies of original Police records, selected and forwarded by the Police to assist the Crown, are the foundation of the Crown brief. On this basis, they qualify as records "prepared … for Crown counsel … in contemplation of or for use in litigation", and are exempt under branch 2. In this regard, they differ from records simply copied for inclusion in the Crown brief, and do not need to qualify as "resulting from selective copying, research or the exercise counsel's skill and knowledge" under the rule in *Nickmar* in order to be exempt under branch 2.

Second, other than the copies of records provided by the Police, the remaining records at issue were clearly prepared "by or for Crown counsel … for use in litigation" and qualify for exemption under branch 2 on that basis. Accordingly, it is not necessary to establish that they were copied using counsel's "skill and knowledge." **My decision that the records at issue are exempt under branch 2 does not affect the exempt or non-exempt status of any original records in the hands of the Police.**

In that regard, it is important to distinguish the records at issue here from those at issue in two other orders, both of which are the subject of pending applications for judicial review. In Order PO-2494 (reconsidered in Order PO-2532-R but unchanged on this point), Assistant Commissioner Brian Beamish found that section 19 did not apply to police records on the basis that copies might be found in the Crown brief. He stated:

> With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.
>
> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.
>
> In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second

when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

There is no question that the *Act* contains provisions that protect the process where the police investigate potential violations of law and decide whether to lay criminal charges. This protection is found primarily in section 14 of the *Act*, the comprehensive "law enforcement" exemption.

However, in this case, the Ministry does not rely on section 14 of the *Act*.

If I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the Act. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The broad rationale of public accountability underlying freedom of information schemes . . . requires some degree of openness with respect to the conduct of law enforcement activity . . . (p. 294)

Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege.

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario

[see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (i.e., the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (i.e., investigation files held by the police). However, courts have made findings of this nature with respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), the majority of the court stated:

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not. [emphasis added]
>
> …
>
> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

This approach was also applied in Order PO-2498, which is, like Order PO-2494, subject to an application for judicial review. As noted above, it appears to be consistent with the approach taken by Swinton J. in *Goodis*.

Accordingly, based on the approach taken in *Big Canoe* 2002, *Big Canoe* 2006 and *Goodis*, I conclude that among other records capable of falling within its terms, **branch 2 of the exemption exists to protect the Crown brief from being accessible to the public "upon simple request" and thus provides a form of blanket protection for prosecution records in the hands of Crown counsel,**

> including copies of police records, without the need for showing interference with a particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context [emphasis added].

I agree with the reasons of the Senior Adjudicator in Order PO-2733, and adopt these reasons for the purposes of this appeal. As I have noted previously, the appeal here is of the decision of the Ministry of the Attorney General to deny access to two Crown Briefs under branch 2 of section 19. This appeal does not deal with a request for copies of the original records which are maintained by the Peel Police. For all of the reasons stated above, I find that branch 2 of section 19 applies to the records for which the Ministry claims it.

In view of my findings in this section, it is not necessary for me to review the possible application of section 13 or the personal privacy exemption.

I will now consider whether section 22(a) applies to the remaining records to which the Ministry has not applied section 49(a) with section 19.

INFORMATION AVAILABLE TO THE PUBLIC

The Ministry claims that section 22(a) applies to pages 6-8, 40-41 and 62-68 of the records.

Section 22(a) states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

In order to establish that a "regularized system of access" exists, the Ministry must provide evidence of a system of access through which the record is available to everyone. The Ministry must also establish that there is a pricing structure that is applied to all who wish to obtain the information [Order P-1316].

Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act* [Orders P-327, P-1114 and MO-2280]. The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fee structure under the *Act* [Orders P-159, PO-1655, MO-1411 and MO-1573].

The Ministry explains that the records for which is claims section 22(a) are comprised of recognizances of bail, judicial interim release orders, sentencing prohibition orders, and orders related to the obtaining of DNA. The Ministry submits that since these are all orders issued by the court, they are all available from the courthouse where the proceedings had taken place. Specifically, the Ministry states that it previously advised the appellant's counsel in writing that these records were publicly available at the Brampton Courthouse.

The appellant's representations do not address section 22(a) of the *Act*.

I find that the Ministry has established that pages 6-8, 40-41 and 62-68 are available to the public generally, through a regularized system of access, as is required under section 22(a). In this case, the records can be accessed at the Court office where the appellant's proceedings took place. This system of access is available to anyone and a pricing structure exists for any member of the public who wishes to obtain access to these documents. In my view, this is an instance where the balance of convenience favours this method of access as an alternative to the *Act*. As a result, I find that the records qualify for exemption under section 22(a).

EXERCISE OF DISCRETION

After deciding that a record falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 49(a) exemption is discretionary, which means that the Ministry could choose to disclose information, despite the fact that it could withhold it. At the very least, however, the Ministry was required to exercise its discretion under this exemption.

On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether the Ministry failed to do so. In addition, the Commissioner or her delegate may find that the Ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the Ministry [section 54(2)].

The Ministry maintains that it properly exercised its discretion in deciding to apply section 49(a), together with sections 19 or 22(a) to the records at issue. Most of the Ministry's representations on discretion address the solicitor-client privilege exemption in section 19. The Ministry submits that it considered several important factors, including the fact that the Crown Brief records at issue contain sensitive personal information about the complainant and other witnesses. The Ministry states that it considered the importance of protecting members of the public who cooperate with police investigations so as to ensure the effectiveness of those investigations, and any subsequent criminal prosecutions. The Ministry submits that it also considered the importance of Crown counsel being able to exchange information and opinions about a case with

each other or with the police without being inhibited by the prospect of disclosure of the records to the public.

The appellant did not provide submissions on the Ministry's exercise of discretion.

I have considered the Ministry's submissions on the factors it took into consideration in exercising its discretion to not disclose the records for which it had claimed sections 19 and 22(a). I am satisfied that the Ministry exercised its discretion within appropriate parameters, and that it considered relevant factors in doing so. I find that the Ministry properly exercised its discretion in this appeal, and I will uphold it.

REASONABLE SEARCH

The appellant takes the position that the search undertaken in this case was inadequate because it did not locate copies of a search warrant package or a substance analysis report.

General Principles

In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the Ministry's search will be upheld. If I am not satisfied, further searches may be ordered.

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [Orders M-282, P-458, M-909, PO-1744 and PO-1920]. Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

The Ministry notes that the request in this appeal represents part of one which was originally submitted to the Peel Police, and subsequently transferred following the search for responsive records. The Ministry states:

> The two Crown briefs transferred to the Ministry were for cases that were dealt with in the Brampton courthouse. The Brampton Crown Attorney's office would have kept any Crown brief documents regarding these cases inside their respective Crown brief envelopes. The disposition of one set of charges … appears to have been determined on December 23, 2003, and the disposition of

> the other set of charges … appears to have been determined on October 21, 2004. When the Brampton Crown Attorney's office has finished working with a Crown brief at the completion of a case, the Crown brief envelope and its contents are normally returned to the Peel Regional Police. As such, it is in the custody of the Peel Regional Police that the Crown briefs for these two completed matters would have been found, and indeed, appear to have been found, by the Peel Regional Police. … The Ministry of the Attorney General has preserved all of the contents of these two Crown brief envelopes upon receiving them back from the Peel Regional Police … and has not destroyed anything.

The appellant's representations do not address the adequacy of the search conducted.

Analysis and Findings

In this appeal, the concerns raised about the adequacy of the search involve two specific records: a search warrant and/or warrant package, and a substance analysis report. A similar concern was raised in the appellant's appeal of the Peel Police's decision under the municipal *Act*, which was resolved by Order MO-2210.

In that appeal, the Peel Police submitted that "the search warrant and substance analysis report would have been included in the package with the Crown Brief which is provided to the Courts for use during the trial." This is consistent with the Ministry's submissions in the present appeal. With respect to the question of what happened to those particular records after they were returned by the Brampton Crown to the Peel Police, Adjudicator Donald Hale concluded that:

> the information sought by the appellant, specifically the search warrant package and/or the substance analysis report, may be located in the Crown Confidential Envelope. …
>
> The Police did not maintain a copy of the records which they forwarded to the Ministry on June 6, 2006. In addition, the Police only became aware of the appellant's interest in the search warrant package and substance analysis report during a mediation conference call held on October 16, 2006, several months after the date that the Crown Confidential Envelope was physically transferred to the Ministry.

Based on the information before him in Order MO-2210, Adjudicator Hale was satisfied that the Police's search was reasonable and that, specifically, the Police no longer had copies of the warrant package or the substance analysis report. This finding is based, in my view, on two possible scenarios: that the search warrant package and substance analysis report *may* have been sent, with the Crown Confidential Envelope, upon transfer of that part of the request to the Ministry, or that the records themselves had been destroyed in accordance with the Peel Police's records-retention policy long before the request was even received. The evidence submitted to Adjudicator Hale on that issue was that:

> As a result of the expansion of the request [during the mediation stage of Appeal MA06-3000] to include the search warrant and substance analysis report, the Freedom of Information Analyst contacted [a named police officer], the officer in charge of the investigation which is the subject of the appellant's request. As the investigating officer, [the named officer] would have been responsible for the inclusion of the documents in question into the package prepared for the Crown. He would not be required to keep a copy. [The named officer] advised in his e-mail message to the Freedom of Information Analyst, [a specified individual], that after conducting a thorough search he was unable to locate a copy of the search warrant or substance analysis report (page 4, Order MO-2210):

Adjudicator Hale continued by acknowledging the submissions regarding provisions in the Regional Municipality of Peel's By-law Number 25-96 governing the treatment of warrants and Confidential Crown Instructions, which were said to govern the records in question. Adjudicator Hale stated:

> The Police conclude that the records retention schedule for documents of the sort which are the subject of this request, including any search warrant package or substance analysis reports, is one year following the conclusion of the court proceedings.
>
> Based on my review of the records, it appears that charges relating to one incident involving the appellant were resolved by way of a guilty plea in October 2004, while those relating to the other incident were completed in December 2003. Consequently, the Police argue that in accordance with its Records Retention By-law, the records sought by the appellant are no longer maintained and are no longer available as they have been destroyed.

Based on the evidence before me, and the circumstances of this appeal, it is reasonable, in my view, to conclude that the records sought by the appellant – the search warrant package and the substance analysis report – were not included in the Crown Confidential Envelope forwarded to the Ministry at the time of the transfer of that component of the request, as they had likely been destroyed in accordance with the Peel Police's records retention schedule.

The determination of this issue comes down to whether or not I am satisfied that the Ministry made a reasonable effort to identify and locate any *existing* records that might be responsive to the appellant's request. Based on the information before me, I am satisfied that the Ministry did so. Accordingly, I find that the Ministry's search was reasonable in the circumstances.

ORDER:

1. I uphold the Ministry's decision to deny access to the records on the basis that sections 19 or 22(a) of the *Act* applies to them.

2. I uphold the Ministry's search for responsive records and dismiss that aspect of the appeal.

Order signed by: March 25, 2009
Daphne Loukidelis
Adjudicator