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

ORDER PO-2790

Appeal PA09-3

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 access to records relating to the issuance of an arrest warrant for an identified occurrence involving the requester. Specifically, the request was for "any and all records leading to the issuance of the arrest warrant in December 2006".

In response to the request, the Ministry issued a decision letter in which it granted partial access to the documents requested. Access to the remaining records was denied on the basis of a number of exemptions, including the exemption in section 19 (solicitor-client privilege) of the *Act*. The requester (now the appellant) appealed the decision of the Ministry.

During mediation, the appellant advised that she was only seeking access to a document identified as the "Information for Bail Hearing", to which access had been denied on the basis of the exemption in section 19. As it appeared that the record may contain the personal information of the appellant, the possible application of the discretionary exemption in section 49(a) was also raised as an issue in this appeal.

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

RECORDS:

The record remaining at issue is a two-page document entitled "Information for Bail Hearing".

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in section 49 applies only to information that qualifies as personal information. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including the individual's address [paragraph (d)], or 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)].

On my review of the record at issue and the representations of the parties, I find that the record contains the personal information of the appellant, as it contains her address [paragraph (d)] as well as other information relating to her [paragraph (h)].

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While 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 exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with section 19 to deny access to the record.

SOLICITOR-CLIENT PRIVILEGE

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), hereafter *Blank*].

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.

Furthermore, as identified in the Notice of Inquiry sent to the parties, the Ontario Court of Appeal has held that termination of litigation does not affect the application of statutory litigation privilege under branch 2 (see below) [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)].

Representations

The Ministry relies on branch 2, and in particular, appears to rely on the "litigation privilege" aspect of branch 2, which applies to a record "that was prepared by or for Crown counsel … in contemplation of or for use in litigation." The Ministry states:

> … Branch 2 of section 19 was 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. The plain meaning of the words used in section 19 was to give Crown counsel *permanent exemption*. Moreover, 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 proceedings. The records prepared by or for Crown counsel "in contemplation of or for use in litigation" in the criminal law context, by their very nature, deal with sensitive matters, and these matters continue to be sensitive after a prosecution is terminated.

The Ministry then refers to the decision of the Court of Appeal in *Ontario (A.G.) v. Ontario* (cited above) in support of its position. The Ministry then states:

> Consequently, the Ministry submits that section 19 affords exemption to a wide range of materials obtained and prepared in anticipation of existing or contemplated litigation, including communications to and from third parties and documents compiled in connection with litigation.
>
> In this case, the record at issue was prepared by a police officer for use by the Crown at the appellant's bail hearing. As such, it is the Ministry's position that the record is protected by statutory litigation privilege, as it was prepared for Crown counsel for use in litigation.

The appellant responded to the Ministry's representations by providing representations of her own, as well as a number of attachments, in support of her position that the section 19 exemption does not apply. The appellant's representations focus on the following two main arguments:

1) Based on the Supreme Court of Canada's decision in *Blank* (cited above), "litigation privilege" has been found to be distinct from "solicitor-client privilege", and litigation privilege ends when the litigation ends. As the litigation relating to the record at issue in this appeal has ended, the litigation privilege can no longer apply.

2) Also in the *Blank* decision, the Supreme Court of Canada held that there exists a general exception to litigation privilege that this privilege would not apply to protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct.

The appellant also provides additional material in support of her position that there is evidence of actionable misconduct on the part of an individual in relation to the record at issue, and that the appellant therefore ought to have access to the record.

Analysis and findings

In this appeal the Ministry has identified that the record at issue was prepared by a police officer specifically for use by the Crown at the appellant's bail hearing, and that it was prepared for Crown counsel for use in litigation. The appellant does not appear to contradict this position. In the circumstances, and subject to my findings below, I am satisfied that the record was prepared for Crown counsel for use in litigation.

As set out above, the appellant takes the position that, even if the litigation privilege applies to the record, it can no longer apply as the litigation to which the record relates has ended. She relies on the *Blank* decision in support of her position.

In *Blank*, the Supreme Court of Canada does confirm that common law litigation privilege ends when the litigation ends. However, in this appeal, the Ministry has relied on the statutory litigation privilege in branch 2 of the section 19 exemption. As identified above, in circumstances where the statutory litigation privilege is claimed, the Court of Appeal in *Ontario (A.G.) v. Ontario* rejected an interpretation of branch 2 that would end its application upon the termination of litigation, as would occur under common law litigation privilege. In that case the court stated that the "the intent was to give Crown counsel permanent exemption". The court also found that the adjudicator who had determined that statutory litigation privilege ended when the litigation ended "… erred ... in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit." As a result, if the statutory litigation privilege in branch 2 applies to a record, that record remains exempt even after the litigation concludes. (See also Order PO-2706).

Accordingly, in the circumstances of this appeal, I reject the appellant's position that the litigation privilege does not apply to the record because the litigation is concluded.

The appellant's second argument is that litigation privilege cannot apply to the record because there is *prima facie* evidence of actionable misconduct on the part of an individual in relation to the record at issue. The appellant again relies on *Blank* in support of her position.

Some background to this matter may be helpful. The appellant was charged with an offence and, in December of 2006 an identified constable [Constable M] attended before a Justice of the Peace to obtain a warrant for the applicant's arrest. Based on the grounds provided by Constable M, the Justice of the Peace issued the arrest warrant, and the appellant was arrested and taken into custody. The charges against the appellant were eventually withdrawn by the Crown in January of 2008.

The appellant then laid informations against two police officers (one of whom is Constable M) charging them with perjury, public mischief and obstructing justice. The appellant appeared before a Justice of Peace to request that summonses or warrants be issued against two police officers; however, the Justice of the Peace denied the appellant's request, and found that the appellant had not made a out a *prima facie* case against either officer.

The appellant then brought an application by way of *certiorari* (to quash the order made by the Justice of Peace) and *mandamus* (for an order directing that the process be issued). In the endorsement by the Superior Court Justice hearing (and subsequently dismissing) that application, the Justice states that Constable M appeared before a Justice of the Peace in his capacity as warrant officer, and testified under oath based on information gained from other sources. The Justice then states that, although Constable M "may have made incorrect statements … in my respectful view there is no evidence that the officer had intent to mislead as required by the charges of perjury and public mischief. Likewise it is my view that there is no evidence to support a conclusion that the officer wilfully attempted to obstruct, pervert or defeat the course of justice."

In this appeal, and based on the history of this matter as set out above, and on the *Blank* decision, the appellant states:

> Therefore, the appellant is requesting any and all information relating to the issuance of the arrest warrant for the purpose to investigate actionable misconduct and abuse of process by the Police.

Finding

I agree with the appellant that the *Blank* decision suggests that litigation privilege would not protect from disclosure evidence of a claimant party's abuse of process or similar blameworthy conduct. As stated by the Court:

> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which the litigation privilege is claimed. Whether

> privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

However, I note that, in the *Blank* decision, the Supreme Court was dealing with common law litigation privilege. Without making a determination as to whether the same considerations would apply to the statutory litigation privilege under branch 2 of the *Act*, I find that I have not been provided with sufficient evidence to satisfy me that a *prima facie* showing of actionable conduct exists in the circumstances of this appeal. In fact, the information provided by the appellant (which does not include the decision of the Justice of the Peace) confirms that both a Justice of the Peace and a Superior Court Justice have reviewed this matter, and that no *prima facie* case against the officers has been made out. Although I understand that the appellant wishes to have access to all information in order for her to continue to investigate this matter, even if the considerations in *Blank* would apply to the statutory litigation privilege under branch 2 of the *Act* (on which I make no finding), on my review of the representations and the record, I am not satisfied that *prima facie* showing of actionable conduct exists in the circumstances of this appeal.

Accordingly, I am satisfied that the record at issue qualifies for exemption under section 19 and 49(a).

Exercise of Discretion

As noted, sections 19 and 49(a) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner 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

In such a case this office may send the matter 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 [section 43(2)].

In response to the issue of whether the Ministry properly exercised its discretion in the circumstances of this appeal, the Ministry provided representations identifying why it chose to exercise its discretion to apply the exemptions, and have identified the factors it considered in deciding to exercise its discretion to withhold access. The appellant did not address this issue. On my review of all of the circumstances surrounding this appeal, I am satisfied that the Ministry

has not erred in the exercise of its discretion to apply sections 19 and 49(a) to the record. Accordingly, I uphold the Ministry's exercise of discretion.

ORDER:

I uphold the decision of the Ministry.

Original Signed by: June 10, 2009
Frank DeVries
Adjudicator