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

ORDER PO-2871

Appeal PA09-31

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 Volume 11 of a multi-volume Crown brief in relation to a criminal court proceeding. The request had originated with the Ministry of Community Safety and Correctional Services and was transferred to the Ministry in accordance with section 25 as it appeared to have a greater interest in the record.

The Ministry located the responsive record and denied access to it in full pursuant to sections 14(2)(a) (law enforcement report), 19 (solicitor client privilege), 21(1) (personal privacy) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision. During mediation, the Ministry issued a supplementary decision raising the following additional exemptions to deny access to the responsive record: sections 14(2)(d) (law enforcement), 49(a) and (b) (personal privacy).

As it was not possible to resolve the appeal by mediation, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I began my inquiry by sending a Notice of Inquiry to the Ministry setting out the facts and issues on appeal. The Ministry provided representations in response to the Notice. I then invited the appellant to make representations but did not receive a response from him.

RECORDS:

The record at issue is Volume 11 of a Crown brief which consists of the cover page, a synopsis, statements made by the appellant, Police occurrence reports, a record sheet for the appellant, and correctional and medical records (142 pages in total).

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "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 if 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 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;

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

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, and PO-2225].

The Ministry submits that the record contains the personal information of the appellant and other identifiable individuals. The Ministry explains that the record includes correctional records and information about alleged incidents involving other detention centre inmates and includes witness statements and details of the alleged conduct of other named inmates. The Ministry goes on to describe the type of information in the record that relates to the appellant and the other identifiable individuals, as follows:

> The [pages] primarily containing information about the identifiable individual (in combination with information about the Appellant are [pages] 3, 5-10, 11-14, 17, 18, 24, 25, and 79. These documents contain highly sensitive and very detailed information…The list of examples under the definition of "personal information"

> in s. 2 of [the *Act*] includes "(b) information relating to the …criminal or employment history of the individual…"
>
> The [pages] containing information about not only the Appellant but also about other clearly-identified detention centre inmates, includes [pages] 6, 8, 9, 11, 17, 18, 24, 33 – 35, 38 – 40, 41 – 42, 43, 44, 61 – 62, 63 – 64, 69 – 71 and 78. The information regarding these named individuals is "personal information" within the meaning of s. 2 of [the *Act*], as it shows their criminal history as prisoners in a detention centre, and includes birth dates, inmate identification numbers, reports of the misconduct or criminal acts of named inmates inside the detention centre, witness statements by named inmates regarding the acts of other identified inmates, the name of another inmate besides the Appellant …and inmate's medication names and dosages.
>
> The record also includes information about individuals with some association to the Appellant outside the detention centre. [Pages] containing information about these other individuals include [pages] 55, 73, 90, 91, 99, 131, 136 – 138 and 141. The "personal information" about them includes names, addresses, phone numbers, religion, information relating to an alleged criminal history (e.g. [pages] 136, 141) and information regarding employment history. The information in these records is not in relation to these individuals in an official, professional or business capacity.

Based on my review of the record, I find that it contains the personal information of the appellant within the meaning of paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of "personal information" found in section 2(1).

Some of the record (pages 6, 8, 9, 11, 17, 18, 24, 33 – 35, 38 – 40, 41 – 42, 43, 44, 55, 61 – 62, 63 – 64, 69 – 71, 73, 78, 90, 91, 99, 131, 136 – 138 and 141) contain information that qualifies as the personal information of the appellant and other identifiable individuals within the meaning of paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of "personal information" found in section 2(1).

As I have found that the record at issue contains the personal information of the appellant, his right of access to these records is governed by Part III of the *Act* which gives an individual a general right of access to their own personal information held by institutions.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 47(1) 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. Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 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 sections 14 and 19. I will first consider whether section 19 applies 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.

Section 19(c) does not apply in this appeal. Section 19 contains two branches. The Ministry submits that only section 19(b) is relevant and thus I will consider whether Branch 2 of section 19 applies to the record at issue.

Section 19(b)

Branch 2 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.

The Ministry submits that section 19(b) applies because the records in the Crown brief were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." The Ministry further states:

> The records in issue had been prepared for Crown counsel in contemplation of, and for use in, the criminal court proceedings against the Appellant, and they were located in the possession of the Ministry of the Attorney General. Record 1 (the title page for the volume of records in issue) states in capital letters "Confidential for Crown Counsel", and names the Appellant as the accused person who was the subject of the proceedings, as well as listing the criminal charges that were against the Appellant, and showing the investigating police officer and police force. The Crown brief was used by Crown counsel for the criminal court proceedings; the court proceedings took place; the Appellant was designated a Long-Term Offender at the end of the proceedings, and received a sentence that included the period of incarceration that he is currently serving. It is submitted that regardless of what the status of other copies of these records would have been if located outside the possession of the Crown, section 19(b) of [the

> *Act*] applies to these records in the context of these records being in the Crown brief.

The Ministry refers to Order PO-2733 in support of its position.

The Ministry further submits that it has not waived its privilege under section 19 in relation to the Crown brief. The Ministry states that while records in the Crown brief were disclosed to the appellant's defence counsel pursuant to its disclosure requirements under *R.* v. *Stinchcombe* does not negate the applicability of section 19(b).

As stated above, I did not receive representations from the appellant.

Analysis and finding

In Order PO-2733, referred to by the Ministry, Senior Adjudicator John Higgins considered the application of the section 19(b) statutory privilege to the Crown brief at issue in his appeal and stated:

> A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. These decisions spell out the special status that a Crown brief is given in the legal process. 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]
> …
>
> … 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]
>
> …

Senior Adjudicator Higgins went on to find that:

> … 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. …

And after reviewing the case law of this office relating to section 19(b), the Senior Adjudicator concludes:

> …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.

Senior Adjudicator Higgins reasoning in PO-2733 has been applied in subsequent appeals to this office involving similar records and was most recently applied in Order PO-2824, where it was again held that the Crown brief in the hands of the prosecuting agency, the Ministry of the Attorney General, was exempt from disclosure under section 19(b).

I agree with the reasons of the Senior Adjudicator in Order PO-2733, and adopt these reasons for the purposes of this appeal. The record at issue in the present appeal is a Crown brief. Based on my review of the record and the Ministry's representations, I find that the record was prepared for Crown counsel in contemplation of the criminal proceedings against the appellant and they were in the possession of the Ministry, the prosecuting agency. For the reasons set out above, I find that branch 2 of section 19 applies to the record. As I have found that the record is privileged under section 19, I find that it qualifies for exemption under section 49(a) subject to my finding on the Ministry's exercise of discretion.

In view of my findings in this section, it is not necessary for me to consider the possible application of the other exemptions claimed by the Ministry.

EXERCISE OF DISCRETION

The section 49(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, 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 either 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 54(2)].

In exercising its discretion, the Ministry submits that it considered several factors including the fact that the Crown brief contains sensitive personal information regarding identifiable individuals other than the appellant, including allegations of misconduct and medical records. The Ministry also considered the fact that the record contains information that has the "effect of revealing some of the surveillance and security-related measures and checks inside a detention centre." The Ministry submits that disclosure of this information would potentially disclose the surveillance and security measures to the inmates in the detention centre. Further, the Ministry submits that disclosure of the Crown brief would have the effect of deterring individuals from coming forward to the Police. It states:

> Although the Crown brief volume in issue is only a small portion of the Crown brief that was prepared for the criminal proceedings against the Appellant, this volume includes records of statements by named witnesses regarding potentially criminal acts inside a detention centre, provided during investigations of those acts. The Ministry of the Attorney General has taken into consideration the fact that the effective investigation of alleged criminal offences is highly dependent on the cooperation of witnesses in being willing to come forward to report offences and give law enforcement authorities information that would assist in investigations.

Finally, the Ministry states that communication between the police and the Crown would be hindered by disclosure. It states that the Crown brief is a way of relaying information between the investigating police and the Crown and:

> …often contain(s) written communications of advice or assessments of information between various Crown counsel, and between Crown counsel and the police. It is extremely important to the Crown's ability to handle cases knowledgeably, effectively, and fairly, that the Crown counsel and the police be able to exchange information and advice about a case frankly without being inhibited by the prospect of disclosure of such records to the public at large.

Based on my review of the record, the representations of the Ministry and all of the circumstances in this appeal, I find that the Ministry exercised its discretion appropriately taking into consideration relevant factors. I find that the Ministry properly considered the sensitivity of the information both to the appellant and affected persons, the nature of the information and its sensitivity to the detention centre which continues to house inmates. Finally, I find that the Ministry properly considered the interests that the section 19 exemption seeks to protect. Accordingly, I uphold the Ministry's exercise of discretion.

ORDER:

I uphold the Ministry's decision.

Original Signed By: February 11, 2010
Stephanie Haly
Adjudicator