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

ORDER PO-2878

Appeal PA09-375

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request from an individual under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for:

> . . . copies of all documents provided by the Crown's Office to [a named individual].

The Ministry located a number of responsive records and denied access to them, in their entirety, pursuant to the discretionary exemptions in sections 14(2)(d) (correctional record), 19(a) and 19(b) (solicitor client privilege), as well as the mandatory exemption in section 21(1) of the *Act* (personal privacy).

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

During the mediation of the appeal, the mediator assigned to the file raised the possible application of sections 49(a) and 49(b) to the records at issue, since they appeared to contain the personal information of the appellant. The Ministry subsequently confirmed that it relied on section 49(a), taken in conjunction with sections 14(2)(d) and 19 of the *Act*, and section 49(b), taken in conjunction with section 21(1), to withhold the records. Accordingly, the application of sections 49(a) and (b) to the records was identified by the mediator as an outstanding issue.

After receiving the Mediator's Report, the appellant advised that he wished to add the issue of reasonable search to the issues on appeal, contending that additional records beyond those identified by the Ministry exist.

I sought and received the representations of the Ministry in response to a Notice of Inquiry. In its submissions, the Ministry indicated that it was relying on the discretionary exemptions in sections 14(1)(e) and 14(2)(a), in addition to the section 14(2)(d) exemption claimed above. I then provided a complete copy of the Ministry's representations, along with a copy of the Notice, to the appellant, who declined to make submissions. Because of the manner in which I have addressed the application of sections 14(1)(e) and 14(2)(a) to the records, it is not necessary for me to consider the appropriateness of the Ministry's decision to raise these discretionary exemptions at the representations stage of the appeal process.

RECORDS:

The records at issue consist of a five-page memorandum, to which are attached an additional 29 pages of records, designated as:

- Attachment A, a four-page letter from the appellant to a Ministry employee, who is a Crown Attorney;
- Attachment B, a one-page letter to the Crown Attorney from an employee of the Ministry of Community Safety and Correctional Services (MCSCS);
- Attachment C, 19 pages of email correspondence;
- Attachment D, a further four pages of email correspondence; and

- Attachment E, a one-page printout from an online directory assistance service.

DISCUSSION:

REASONABLENESS OF SEARCH

At the conclusion of the mediation of the present appeal, the appellant advised the mediator that he was of the view that additional records beyond those identified by the Ministry ought to have been located as responsive to his request. In an email addressed to the mediator, the appellant enumerated the records he is seeking. I note that the records listed by the appellant in his email coincide exactly with the records that have been identified by the Ministry as responsive to the request, all of which will be addressed in this order. This is not surprising as the appellant is involved in a labour arbitration involving the termination of his employment. The arbitrator hearing that case ordered that the appellant be granted the right to view, but not copy or otherwise use the records, except for the purposes of preparing his case for the arbitration. Clearly, the appellant is aware of the nature of the records he is seeking, as well as their content generally, and was therefore able to describe them with a fair degree of accuracy.

I further note that the records identified by the Ministry are described in the Notice of Inquiry which I provided to the appellant in such a way as to make it clear that the records sought by the request are identical to those identified by the Ministry as responsive.

Because the records identified by the appellant at the request and mediation stage as responsive to his request are identical to those which the Ministry found to be responsive, the issue of whether the Ministry conducted a reasonable search for these records is moot and I will not address it further in this order. I will now determine whether the records are subject to the exemptions claimed for them by the Ministry.

PERSONAL INFORMATION

The Ministry takes the position that the records contain the personal information of the appellant, along with a number of other identifiable individuals, including the Ministry employee, who is an Assistant Crown Attorney, and is the individual who wrote the five-page memorandum which is one of the requested records. The Ministry argues that although the circumstances that gave rise to the creation of this particular record occurred as a result of the employee's professional responsibilities, the information it contains is of a personal nature. Specifically, it submits that the five-page memorandum outlines the Ministry employee's concerns about his own personal circumstances and safety, as well as that of other identifiable individuals. For this reason, the Ministry suggests that this particular record contains the personal information of these individuals within the meaning of that term as defined in paragraphs (d), (f) and (g) of the definition of that term in section 2(1) of the *Act*. These sections state:

> "personal information" means recorded information about an identifiable individual, including,

> (d) the address, telephone number, fingerprints or blood type of the 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

I have carefully reviewed each of the documents that comprise the records in this appeal and find that the five-page memorandum contains the personal information of the appellant, the Ministry employee and a number of other staff persons employed by the Ministry, along with other identifiable individuals who are employed by the MCSCS' Probation Office. I find that the information qualifies as the personal information of these individuals because it meets the criteria in all three of the paragraphs set out above from the definition of the term "personal information".

Attachment A is a 4-page letter from the appellant addressed to the Ministry employee that contains the personal information of both these individuals, as well as other identifiable individuals who were involved in the criminal proceeding discussed in the letter.

Attachment B is a letter from the appellant's probation officer to the Ministry employee who was the intended recipient of Attachment A. I find that Attachment B contains the personal information of the appellant, the Ministry employee and the MCSCS probation officer.

Attachment C consists of a series of emails passing between the Ministry employee, who is an Assistant Crown Attorney, and another Crown Attorney to which are attached a lengthy email chain of correspondence between the appellant and several Crown Attorneys, including the Ministry employee referred to above. All of these emails are concerned with the resolution of certain disclosure of documents issues arising from the criminal proceedings against the appellant.

I find that the emails between two Crown Attorneys at pages 11, 12 and part of page 13 of Attachment C contain their personal information, as well as that of the appellant. The remainder of Attachment C, consisting of part of page 13 and pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 contain only the personal information of the appellant. Any references to the Crown Attorneys, including the Ministry employee who prepared the five-page memorandum which is the subject record, that appear in these emails pertain to them in their professional capacities. I find that the emails beginning at the middle of page 13 and concluding with page 29 of Attachment C address various disclosure inquiries and issues raised by the appellant with respect to the disclosure of documents prior to his criminal trial and contain only the personal information of the appellant.

Attachment D consists of a brief email message between the Ministry employee and another Crown Attorney which is attached to four pages of email correspondence between the appellant and the Crown Attorneys involved in the prosecution of a criminal proceeding involving the appellant in which they discuss further disclosure issues. I find that these documents contain only the personal information of the appellant, as the Crown Attorneys named therein are performing their professional responsibilities throughout the exchange with the appellant. In my view, the references to them contained in Attachment D do not include a personal element which would move them from the realm of their professional responsibilities to a personal one.

Attachment E is a one-page printout from an online directory assistance service. I find that this record contains the personal information of the individuals listed therein, including their names, addresses and telephone numbers, as contemplated by paragraph (d) of the definition described above. This record does not contain any personal information relating to the appellant.

INVASION OF PRIVACY

General Principles

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. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy". In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. I have examined the records and determined that none of the exceptions in section 21(4) apply. In addition, the appellant has not claimed the possible application of section 23, the "public interest override" provision, and I find that it does not apply.

Even if no criminal proceedings were commenced against any individuals, as was the case in the present appeal, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235].

Analysis and Findings

I have found above that emails beginning at the middle of page 13 to page 29 of Attachment C and all of Attachment D contain only the personal information of the appellant. The disclosure of a record which contains only the personal information of the person who is requesting it cannot result in an unjustified invasion of another individual's personal privacy. As a result, I find that pages 13 to 29 of Attachment C and all of Attachment D are not exempt under either section 21(1) or section 49(b).

The Ministry argues that the presumption against disclosure in section 21(3)(b) applies because the records were compiled and are identifiable as part of an investigation into a possible violation of law. As a result, the Ministry submits that the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy and is exempt under either section 21(1) (Attachment E) or section 49(b) (the five-page memorandum and Attachments A, B, C and D).

Section 21(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Based on my review of Attachment E, I find that it was compiled by staff of the Ministry as part of its determination whether to ask the Police to consider laying criminal charges against the appellant. As a result, I find that it falls within the ambit of the section 21(3)(b) presumption. As I have found above that the personal information contained in Attachment E relates only to identifiable individuals other than the appellant, it is properly exempt from disclosure under section 21(1).

In addition, I find that the personal information in the five-page memorandum and Attachments A and B were also compiled as part of the Ministry's determination as to whether the appellant's conduct warranted a request for an investigation by the Police, which may have led to the laying of criminal charges against him. Accordingly, I find that it falls within the section 21(3)(b) presumption, and is exempt from disclosure under section 49(b). Pages 11-13 of Attachment C were not compiled as part of this investigation, however. This email exchange between two Crown Attorneys, one of whom was the author of the five-page memorandum, involved a discussion of an issue pertaining to the disclosure of documents to the appellant in the course of

his criminal proceedings involving other charges. I will address the application of sections 49(a) and 19 to this portion of Attachment C below.

Absurd Result

Based on my review of the records, I note that Attachment A is a four-page letter that was written by the appellant. Previous orders of this office have addressed the application of the section 49(b) exemption to a situation where the requester originally supplied the information, or the requester is otherwise aware of it. In these circumstances, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414 and MO-2266]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1676, PO-1679, MO-1755 and MO-2257-I]

Attachment A is a four-page letter written by the appellant. In my view, withholding access to this document to the individual who originally supplied it to the Ministry would be absurd and inconsistent with the purpose of the exemption. Section 47(1) provides an individual with a right of access to their own personal information so long as doing so does not result in an unjustified invasion of another individual's personal privacy under section 49(b). In my view, refusing to disclose to the appellant a letter written by him would give rise to an absurd result that is not consistent with section 47(1). Accordingly, I find that Attachment A is not exempt from disclosure under the discretionary exemption in section 49(b).

To summarize, I find that the five-page memorandum and Attachments B and E are exempt from disclosure under the personal privacy exemptions at sections 21(1) and 49(b).

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that all of the records at issue in this appeal are exempt from disclosure under section 49(a), taken in conjunction with section 19(b), which reads:

> A head may refuse to disclose a record,
>
> > 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 arises from the common law and section 19(a) while Branch 2 is a statutory privilege and arises from section 19(b). Branch 2 applies to a record that was prepared by or for Crown counsel for use in giving legal advice "in contemplation of or for use in litigation."

The Ministry argues that the five-page memorandum and all of the attachments to it were prepared by a Ministry employee, a Crown Attorney, to provide information to assist another Crown counsel to determine whether to ask the Police to begin a criminal investigation into the appellant's behaviour. It goes on to add that if criminal charges had been laid against the appellant, the second Crown Attorney would have conducted the prosecution.

Because I have found above that the five-page memorandum is exempt from disclosure under section 49(b), it is not necessary for me to consider whether it also qualifies for exemption under section 19(b).

Pages 11 to 13 of Attachment C represent email communications passing between two Crown counsel, one of whom was the Ministry employee who prepared the five-page memorandum. In this email exchange, the two Crown counsel consulted with each other regarding the appropriate disposition of a disclosure issue involving the initial criminal prosecution of the appellant, which resulted in his conviction in June 2007. In my view, the email communications reflected in pages 11, 12 and the top half of page 13 of Attachment C fall within the ambit of Branch 2 litigation privilege, as they were prepared both by and for Crown counsel for use in the existing criminal litigation involving the appellant, which resulted in his conviction. This exchange of emails took place prior to the appellant's conviction, in April 2007, some five months before the preparation of the five-page memorandum, which is the record at issue in this appeal. Because pages 11 to 13 of Attachment C qualify for exemption under section 19(b), I find that they are exempt under section 49(a).

However, I cannot extend the operation of the section 19(b) exemption to include the remainder of Attachment C (pages 13 to 29) or to Attachments A and D. Attachment A is a letter written by the appellant while pages 13 to 29 of Attachment C, along with all of Attachment D, represent email communications in April and May of 2007 passing between the appellant and various Crown Attorneys involved in the prosecution of criminal charges against him. I find that the litigation privilege that existed in the email communications between two Crown counsel does not extend to include communications passing between the Crown's office and the appellant. As a result, section 19(b), and therefore section 49(a), has no application to these records.

LAW ENFORCEMENT

The Ministry submits that all of the records at issue are exempt under section 49(a), taken in conjunction with the discretionary exemptions in sections 14(1)(e) and 14(2)(a) and (d). I have found above that the five-page memorandum and pages 11-13 of Attachment C, as well as all of Attachments B and E are exempt under sections 19(b) or 21(1)/49(b). As a result, I will only address the possible application of the law enforcement exemptions to pages 13-29 of Attachment C and Attachments A and D, in their entirety.

Sections 14(1)(e) and 14(2)(a) and (d) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
> >
> > (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

Section 14(1)(e)

The Ministry did not claim the application of this discretionary exemption to the records until it submitted its representations to me. Because of the manner in which I will address how section 14(1)(e) applies to the records, it is not necessary for me to consider whether it is appropriate for me to consider it at this stage of the appeals process.

The Ministry relies on the decision of the Ontario Court of Appeal in *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.). The Ministry submits that:

> . . . unlike other exemptions in section 14, harm to an individual need not be probable to successfully invoke clause 14(1)(e). Rather, the Ministry must simply demonstrate that the reason for withholding disclosure is not a 'frivolous or exaggerated expectation of endangerment to safety'. Put otherwise, this Court of Appeal decision means that the Ministry does not have to meet the same standard that applies to other exemptions in section 14, because it is appropriate to do so given the public safety interest at stake.

It goes on to indicate that the "disclosure of records relating to the personal security of a Crown Attorney is not a frivolous or exaggerated expectation of endangerment to safety".

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (cited above)].

I must reiterate that the only records I am considering in this discussion are pages 13 to 29 of Attachment C, and Attachments A and D in their entirety. This is important because these records are composed of communications to or from the appellant, all of which are known to him and address issues that relate not to the safety concerns of any Ministry employees, but rather to evidentiary and disclosure issues around the criminal proceedings underway against the appellant in April and May of 2007. In my view, a distinction can be made between the contents of the five-page memorandum, prepared in September of 2007 and Attachments B and D, and the information contained in pages 13 to 29 of Attachment C, and Attachments A and D that are not subject to one of the exemptions discussed above. In the circumstances, I find that I have not been provided with sufficient evidence to enable me to make a finding that the disclosure of pages 13 to 29 of Attachment C and Attachments A and D could reasonably be expected to result in endangering the life or physical safety of a law enforcement officer or any other person, as contemplated by section 14(1)(e).

Sections 14(2)(a) and (d)

The Ministry appears to be claiming the application of section 14(2)(d) only for the five-page memorandum and Attachment B. Because I have found above that these records are exempt from disclosure under section 49(b), it is not necessary for me to consider whether they also qualify for exemption under section 14(2)(d).

With respect to section 14(2)(a), the Ministry takes the position that the records represent "a report prepared in the course of law enforcement by a Crown Attorney seeking to uphold the *Criminal Code* and protect the safety of himself and other Crown Attorneys".

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added),

rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

In this case, I find that section 14(2)(a) has no application to the remaining records at issue. These records do not contain "a formal statement or account of the results of the collation and consideration of information" and do not, therefore, qualify as a "report" for the purposes of section 14(2)(a). Accordingly, I find that this exemption has no application to pages 13 to 29 of Attachment C and Attachments A and D and they are not, therefore exempt under section 49(a), taken in conjunction with section 14(2)(a).

By way of summary, I find that the five-page memorandum and Attachment B are exempt from disclosure under section 49(b) while Attachment E qualifies under section 21(1). In addition, I find that the information in the top half of page 11 and pages 12 and 13 of Attachment C are exempt under section 19(b). However, I conclude that the information in the bottom half of page 13 to page 29 of Attachment C, and all of Attachments A and D are not exempt from disclosure and I will order that they be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the information in the bottom half of page 13 to page 29 of Attachment C and all of Attachments A and D to the appellant by providing him with copies no later than **May 4, 2010** but not before **April 29, 2010.**

2. I uphold the Ministry's decision to deny access to the remaining records and parts of records.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records which it discloses to the appellant.

Original signed by: March 26, 2010
Donald Hale
Adjudicator