Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

RECONSIDERATION ORDER MO-2953-R

Appeals MA-040045-1 and MA-040094-1 to MA-040105-1

Interim Order MO-1908-I and Reconsideration Order MO-1968-R

Toronto Police Services Board

September 26, 2013

Summary: In this reconsideration order, the adjudicator finds that there are accidental errors or omissions in Interim Order MO-1908-I and Reconsideration Order MO-1968-R and a fundamental defect in the adjudication process that led to these decisions, and he then proceeds to correct them. In addition, he provides the police with a severed copy of the records ordered disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 4(2), 9(1)(d), 12, 38(a) and 38(b); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19(b) and 49(a).

Orders and Investigation Reports Considered: Orders PO-2317, PO-2494 and MO-1663-F.

Cases Considered: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)*, (2002), 62 O.R. (3d) 167 (C.A.).

OVERVIEW:

[1] This order is the result of a new reconsideration that I have conducted of Interim Order MO-1908-I and Reconsideration Order MO-1968-R. Both the Toronto Police Services Board (the police) and the Ministry of the Attorney General (the ministry) have sought a judicial review of these decisions with the Ontario Divisional Court.[1] This judicial review is currently "on hold" pending the outcome of this new reconsideration.

[2] The rules governing a reconsideration of a decision issued by the Information and Privacy Commissioner (IPC) are set out in section 18 of the IPC's *Code of Procedure* (the *Code*). Under section 18.03 of the *Code*, the IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative. This new reconsideration is being conducted at the IPC's own initiative.

[3] Section 18.01 of the *Code* sets out the grounds for reconsideration. It states:

> The IPC may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.

[4] I have reviewed the records at issue and all of the representations that the parties submitted to the original adjudicator during both his initial inquiry that led to Interim Order MO-1908-I and his reconsideration of that order. I find that there are accidental errors or omissions in Interim Order MO-1908-I and Reconsideration Order MO-1968-R and a fundamental defect in the adjudication process that led to these decisions, and I then proceed to correct them. In my view, the records themselves clearly reveal the accidental errors or omissions and the fundamental defect in the adjudication process.

DISCUSSION:

Accidental errors or omissions

[1] Court File Nos. 422/05 and 433/05.

Background

[5] The appellant filed a number of access requests with the police under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records relating to an investigation into sexual assault allegations made against him and his subsequent prosecution under the *Criminal Code*.

[6] The police denied access to the requested records under the discretionary exemption in section 38(a) (refusal to disclose an individual's own personal information), read in conjunction with the law enforcement exemptions in sections 8(1)(a), (c), (l) and 8(2)(c), and under the personal privacy exemptions in sections 14(1) and 38(b) of *MFIPPA*. The appellant appealed the police's decisions to the IPC.

[7] In the vast majority of appeals, the institution provides the IPC with a copy of the records at issue. In this particular case, the police located approximately 4,200 pages of responsive records but did not provide the IPC with a copy of these records. Instead, it asked the adjudicator assigned to the above appeals to come to their office to review the records.

[8] In Interim Order MO-1908-I, the adjudicator found that the majority of the records at issue contained the personal information of individuals other than the appellant, particularly those individuals who alleged that the appellant had sexually assaulted them. He concluded that this personal information was exempt from disclosure under section 38(b) of *MFIPPA* because disclosing it to the appellant would be an unjustified invasion of the other individuals' personal privacy. However, he found that some records that contained only the appellant's personal information did not qualify for exemption under section 38(b). He stated, in part:

> . . . the 11 pages of press releases, newspaper articles and wire copy from Appeals MA-040103-1 and MA-040105-1, as well as Records 6 (Pages 185 to 210), 13 (Pages 575 to 600), 16 (Pages 683 to 749), 18 (Pages 790 to 844), 27, 41 and 43 (Pages 1065 to 1088), 46 (Pages 1726 to 1738) and 63 (Pages 2620 to 2625) from Appeal Number MA-040099-1 contain only the personal information of the appellant. The disclosure of this information cannot, therefore, result in an unjustified invasion of personal privacy under section 38(b).[2]

[9] With respect to the records containing the personal information of both the appellant and other individuals, he found that some of these records could be reasonably severed while others could not. He stated, in part:

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[2] Interim Order MO-1908-I at p. 6.

> Addressing those records that contain the personal information of the appellant along with other identifiable individuals, I find that it is not reasonably possible to sever some of them, specifically the transcribed interviews and notes taken during the interviews conducted by the Police with various witnesses and victims. Similarly, those records containing a detailed description of the events giving rise to the charges as related by the victims and witnesses, such as the Appearance Notices that appear at Pages 19 to 24 of Appeal Number MA-040094-1, also cannot reasonably be severed. Accordingly, I find that those records which contain a recitation of the allegations from the witnesses and victims are exempt in their entirety under section 38(b) because the personal information of the appellant and the other individuals contained in these records are too closely intertwined to allow for severance.
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> Other records, however, such as the many occurrence reports, records of arrest, Informations and other forms that comprise a large portion of the records in all of the appeals are more readily severable. I will, accordingly, order the Police to disclose those portions of these records that contain only the personal information of the appellant, as this information is not exempt under section 38(b). However, the personal information contained in these records that relates solely to individuals other than the appellant qualifies for exemption under section 38(b) and ought not to be disclosed. . . .[3]

[10] In addition, he found that the police had not provided the detailed and convincing evidence required to prove that those records or parts of records containing only the appellant's personal information qualified for exemption under the law enforcement exemptions in section 8 claimed by the police or under section 38(a).

[11] As a result, he ordered the police to disclose some records and parts of records to the appellant. In particular, order provision 2 stated:

> I order the Police to disclose to the appellant:
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> (a) copies of the press releases, newspaper articles and wire copy which comprise a portion of the records at issue in Appeals MA-040103-1 and MA-040105-1;
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> (b) Records 6 (Pages 185 to 210), 13 (Pages 575 to 600), 16 (Pages 683 to 749), 18 (Pages 790 to 844), 27 (Pages 1065 to 1088), 41, 43, 46 (Pages 1726 to 1738) and 63 (Pages

[3] *Ibid.*

> 2620 to 2625) in Appeal Number MA-040099-1, in their entirety; and
>
> (c) those portions of the remaining records that contain only the personal information of the appellant in accordance with the instructions set out in page 6 of this order.[4]

[12] In my view, when order provision 2 and the previously quoted paragraphs from Interim Order MO-1908-I are read together, it is clear that the adjudicator's intention was to order the police to disclose only those records and parts of records that contain the appellant's own personal information. He found that the personal information of individuals other than the appellant qualifies for exemption under section 38(b) and must not be disclosed.

Correction of errors – Records 6, 13, 16, 18, 27, 41, 43, 46 and 63 in Appeal MA-040099-1

[13] In conjunction with their judicial review application of Interim Order MO-1908-I and Reconsideration Order MO-1968-R, the police provided the IPC with a copy of the approximately 4,200 pages of responsive records. Based on my review of these records, I have found some accidental errors or omissions in both decisions which resulted from the fact that the adjudicator was only able to view the records at the police's office and did not have the records before him when he later prepared his decisions.

[14] First, the adjudicator identified some records as containing only the appellant's personal information when, in fact, they contain the personal information of both the appellant and other individuals. Second, he did not apply the mandatory exemption in section 9(1)(d) to a specific record that clearly qualifies for exemption under this provision.

Personal information/invasion of privacy

[15] In the "Personal Information" section of Interim Order MO-1968-I, the adjudicator made the following finding:

> . . . Record 6 (Pages 185 to 210) consisting of a statement taken from the appellant by the Police, Records 13 (Pages 575 to 600) and 16 (Pages 683 to 749), consisting of a search warrant, charge sheets, an exhibit list and a Recognizance of Bail . . . *contain only the personal information of the appellant*. Record 18 (Pages 790 to 844) of Appeal Number MA-040099-1 consist of the appellant's record of arrest, warrants, driver's licence and

[4] *Ibid.* at p. 11.

> various financial records belonging to him. Record 46 (Pages 1726 to 1738), consists of the appellant's resume. Record 63 (Pages 2620 to 2625) is an excerpt from a published book that includes a reference to the appellant. *All of this information constitutes only the personal information of the appellant*.[5] [emphasis added]

[16] As noted above, in the "Invasion of Privacy" section of Interim Order MO-1908-I, he found that those records that contain only the appellant's personal information cannot qualify for exemption under section 38(b) and stated, in part:

> . . . Records 6 (Pages 185 to 210), 13 (Pages 575 to 600), 16 (Pages 683 to 749), 18 (Pages 790 to 844), 27, 41 and 43 (Pages 1065 to 1088), 46 (Pages 1726 to 1738) and 63 (Pages 2620 to 2625) from Appeal Number MA-040099-1 *contain only the personal information of the appellant*. The disclosure of this information cannot, therefore, result in an unjustified invasion of personal privacy under section 38(b).[6] [emphasis added]

[17] Given his finding that Records 6, 13, 16, 18, 27, 41, 43, 46 and 63 in Appeal MA-040099-1 only contain the appellant's personal information and do not qualify for exemption under section 38(b) or any other exemption claimed by the police, he ordered the police to disclose these records to the appellant in their entirety under order provision 2(b).

[18] I have reviewed these records and many of them contain only the appellant's personal information. However, a number of these records contain the personal information of both the appellant and other individuals. For example, the "Information" on pages 707 and 710 contains the appellant's personal information but also contains the names of several individuals whom the police allege were assaulted by the appellant.

[19] Consequently, I find that the paragraphs quoted above from the "Personal Information" and "Invasion of Privacy" sections of Interim Order MO-1908-I contain accidental errors or omissions, as contemplated by section 18.01(c) of the *Code*, and I will now correct them. In doing so, I will apply the same general principles articulated by the adjudicator in Interim Order MO-1908-I.

[20] On the issue of "Personal Information," I find that Records 6, 13, 16, 18, 27, 41 and 43, 46 and 63 from Appeal MA-040099-1 include a number of different records. Some of these records contain only the appellant's personal information, while others contain the personal information of both the appellant and other individuals.

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[5] *Ibid*. at p. 4.
[6] *Supra* note 2.

[21] On the issue of "Invasion of Privacy," I find that disclosure to the appellant of those records that contain only his own personal information cannot constitute an unjustified invasion of other individuals' personal privacy. Consequently, these records do not qualify for exemption under section 38(b). With respect to those records that contain the personal information of both the appellant and other individuals, I find that disclosing the personal information of individuals other than the appellant to him would constitute an unjustified invasion of their personal privacy under section 38(b).

[22] Section 4(2) of *MFIPPA* requires the police to disclose as much of the records as can reasonably be severed without disclosing the information that falls under one of the exemptions. It is not reasonable to sever a record containing the personal information of both the appellant and other individuals if this information is too closely intertwined. In addition, it is not reasonable to sever a record if doing so would result in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information.[7]

[23] For those records that contain the personal information of both the appellant and other individuals, it must be determined whether they can reasonably be severed in a manner that provides the appellant with his own personal information without disclosing the personal information of other individuals that is exempt under section 38(b).

[24] I find that some of these records cannot be reasonably severed because the personal information of the appellant and the other individuals is too closely intertwined or because doing so would only provide the appellant with disconnected snippets of information, such as a page with only his own name, or meaningless information.

[25] However, in other records, the personal information of the appellant and other individuals is not closely intertwined and severing them would provide the appellant with his own personal information in a coherent form, not disconnected snippets or meaningless information. Accordingly, these records can reasonably be severed. I find that those portions that contain the appellant's personal information must be disclosed to him, while the personal information of individuals other than the appellant in such records must be severed because it is exempt under section 38(b).

[26] I have also considered whether it would be an absurd result to refuse disclosure of the personal information of other individuals, particularly their names, if the appellant is aware of their identities.

[27] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the

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[7] Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

exemption.[8] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[9]

[28] The appellant is clearly aware of the names of those individuals whom he was charged with sexually assaulting, in part because he had access to a large number of police investigation records under the disclosure process in the criminal proceedings that he faced. In addition, he is also aware of other individuals who are identified in the records, such as his mother.

[29] In the particular circumstances of these appeals, however, I find that disclosing the personal information of other individuals would be inconsistent with the purpose of the sections 14(1) and 38(b) exemptions, which is to protect the privacy of individuals other than the requester. Consequently, I find that it does not produce an absurd result to refuse disclosure of the personal information of other individuals to the appellant.

Section 9(1)(d) – VICLAS booklet

[30] Section 9 of *MFIPPA* is a mandatory exemption that states:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
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> (a) the Government of Canada;
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> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

[8] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[9] Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

[31] The purpose of the mandatory section 9(1) exemption is "to ensure that governments under the jurisdiction of *MFIPPA* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure".[10]

[32] In their decision letters, the police did not claim that section 9(1) applies to any records and this exemption was therefore not considered in Interim Order MO-1908-I. In Reconsideration Order MO-1968-R, the adjudicator considered the application of section 9(1)(d), which was raised by the ministry, and found that those portions of the "Crown Notes" which originated with the ministry and were shared with the police are exempt under section 9(1)(d). However, he did not have the approximately 4,200 pages of records directly before him and was therefore not able to consider whether any other records might qualify for exemption under that provision.

[33] Given that section 9(1) is a mandatory exemption and is designed to protect information that the institution has received in confidence, I have a duty to consider whether it applies to any records. In my view, the substance of one record makes it clear that this mandatory exemption applies to that record.

[34] Page 1228 of Appeal MA-040099-1 comprises a 35-page Violent Crime Linkage Analysis System (VICLAS) booklet ("Crime Analysis Report") that was filled out by a police investigator and contains the appellant's personal information. VICLAS is a national crime database managed by the Royal Canadian Mounted Police (RCMP) but the Ontario Provincial Police (OPP) operates a provincial VICLAS centre.

[35] The OPP's VICLAS centre provides this booklet to police services in Ontario, including the Toronto police. The front page of this booklet, is marked "Confidential" and contains the following statement: "This record and the information contained therein is being provided in confidence and shall not be disclosed to any person without the express written consent of the Commissioner of the [OPP]."

[36] In my view, it is abundantly clear from this statement that the OPP provided this booklet to the Toronto police "in confidence." Consequently, I find this record falls squarely within the mandatory exemption in section 9(1)(d), because its disclosure could reasonably be expected to reveal information that the Toronto police have received in confidence from an agency of the Ontario government. In my view, the fact that the adjudicator did not apply section 9(1)(d) to this record in Interim Order MO-1908-I or Reconsideration Order MO-1968-R constitutes an accidental error or omission.

[37] In their decision letters, the police claimed that a number of records are exempt under section 38(a), which allows an institution to refuse to disclose a requester's own personal information to him if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would

[10] Order M-912.

apply to the disclosure of that personal information. The police claimed section 38(a) in conjunction with several section 8 exemptions, but not section 9, for the VICLAS booklet. However, given that I have found that the mandatory exemption in section 9(1)(d) clearly applies to the VICLAS booklet, I find that the police may refuse to disclose the appellant's own personal information to him, which is found in this record, under section 38(a).

[38] In accordance with section 4(2), I have considered whether this booklet can reasonably be severed in a manner that provides the appellant with his own personal information without disclosing the information that is exempt under section 9(1)(d). In my view, this record cannot reasonably be severed because the appellant's personal information and the information in the booklet that qualifies for exemption under section 9(1)(d) is too closely intertwined.

Fundamental defect in adjudication process

Background

[39] Prior to making an access request under *MFIPPA* to the police, the appellant had submitted an access request to the ministry under *FIPPA* for records relating to his prosecution by the Crown under the *Criminal Code*. In Order PO-2317, the adjudicator upheld the ministry's decision to deny access to some of the requested records under the personal privacy exemptions in sections 21(1) and 49(b) of *FIPPA*. In addition, he found that the remaining records, including those that make up the "Crown brief," were exempt under the litigation privilege aspect of section 19(b) of *FIPPA* or under section 49(a) in conjunction with section 19(b).

[40] Section 19(b) of *FIPPA* states:

> 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*; [emphasis added]

[41] A similar litigation privilege aspect is found in section 12 of *MFIPPA*, which states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or *that was prepared by or for counsel employed or retained by an institution* for use in giving legal advice or *in contemplation of or for use in litigation.* [emphasis added]

[42] The same adjudicator who issued Order PO-2317 later issued Interim Order MO-1908-I, which addressed the police's decision to deny the appellant access to the records that he requested under *MFIPPA*. The police did not claim that section 12 of *MFIPPA* applied to any of the records at issue either in their decision letters or in their initial representations at the adjudication stage. During his initial inquiry, the adjudicator did not notify the ministry of the appeals and provide it with the opportunity to submit representations.

[43] After Interim Order MO-1908-I was issued, the police brought this order to the ministry's attention. The ministry then wrote to the adjudicator and submitted that it was an affected person within the meaning of section 39(3) of *MFIPPA* and the adjudicator should have notified it of the appeal and given it an opportunity to submit representations. It requested a reconsideration of Interim Order MO-1908-I and asked the adjudicator to provide it with an opportunity to submit representations. The police also asked the adjudicator to reconsider his order.

[44] The adjudicator subsequently advised the ministry that he had made a preliminary decision to grant the ministry the opportunity to submit representations. He provided the ministry with a Notice of Inquiry, setting out the issues in the appeals. In response, the ministry submitted representations to the adjudicator.

[45] In its representations, the ministry acknowledged that the police had not claimed the discretionary exemption in section 12 of *MFIPPA* or the mandatory exemption in section 9. However, it stated that with a few exceptions, the records ordered disclosed in Interim Order MO-1908-I "formed part of the Crown brief" and had previously been found exempt under sections 19 and 49(a) of *FIPPA* in Order PO-2317. It submitted that these same records should be found exempt under sections 12 and 38(a) of *MFIPPA*. It further submitted that section 9 of *MFIPPA* applies to records that include confidential communications from Crown Counsel to the police.

[46] In his representations, the appellant submitted that the ministry should not be allowed to speak for the police on the issues that were adjudicated in Interim Order MO-1908-I, including whether the litigation privilege aspect of section 12 of *MFIPPA* applies to the records.

[47] In a letter to the parties, the adjudicator did not accept the ministry's submission that the records held by the police should be found exempt under sections 12 and 38(a) of *MFIPPA*. He stated:

> . . . I find that the fact that the records which are the subject of these requests may have also been addressed in the earlier appeal involving the Ministry is not determinative of whether they are therefore automatically exempt from disclosure in the hands of the Police. These requests were made to a different institution from the Ministry and different exemptions

> were claimed to apply to the responsive records. In my view, the records that are the subject of the requests to the Police are not automatically exempt from disclosure solely because they were found to be exempt when in the hands of another institution, in this case the Ministry.
>
> In addition, section 12 is a discretionary exemption and the Police determined not to apply it to the records. In my view, it is not appropriate for me to allow a third party, in this case the Ministry, to require the institution in these appeals, the Police, to apply a discretionary exemption to records which are in the custody or control of the Police. I find that these records belong to the Police and they (and only they) are entitled to make the determination about whether to apply a discretionary exemption to them.[11]

[48] In the same letter, the adjudicator invited the parties to submit further representations on a relatively narrow, single issue – whether some or all of the records at issue were subject to the mandatory exemption in section 9(1)(d) of *MFIPPA*. After receiving representations from the parties, he issued Reconsideration Order MO-1968-R, in which he found that those portions of the "Crown Notes" which originated with the ministry and were shared with the police were exempt under the mandatory exemption in section 9(1)(d) of *MFIPPA*. In particular, order provision 1 stated, in part:

> I reiterate the disclosure requirements set out in Order Provision 2 of Order MO-1908-I with the following amendments:
>
> > (a) the Police are not required to disclose those portions of the Crown Brief records described as 'Crown Notes', which originated with the Ministry, rather than the Police;
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> . . .

Correction of fundamental defect – Crown brief records

[49] For the reasons that follow, I find that the adjudicator's decision to not consider whether litigation privilege attaches to any of the records at issue in Interim Order MO-1908-I and Reconsideration Order MO-1968-R constitutes a fundamental defect in the adjudication process. I then proceed to correct that fundamental defect.

[50] The 4,200 pages of records include copies of original police investigation records[12] and also copies of assembled packages of the same records that the police

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[11] Letter dated July 28, 2005, at pp. 1-2.

[12] For the purpose of this order, I am defining "police investigation records" to include police officers' notes, witness statements, civilian witness lists, exhibit lists, informations to obtain search warrant, search warrants, CPIC records, records of arrest, supplementary records of arrest, supplementary records of appearance notice, charge screening forms, etc.

forwarded to the Crown for inclusion in the Crown brief. In Order PO-2494, Assistant Commissioner Brian Beamish addressed whether the original versions of Ontario Provincial Police (OPP) investigation records, such as police officers' notes and witness statements, are exempt under section 19(b) of *FIPPA*. In his analysis, he rejected the Ministry of Community Safety and Correctional Services' position that the original records should be found exempt under section 19(b) if copies made their way into the Crown brief. He stated:

> . . . 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.
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> 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.
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> 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 . . .
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> . . . 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]

I note that in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 360-361, 370 (C.A.), the majority of the Court of Appeal, in

> *obiter dicta*, agreed with the above statement [see also *R. v. CIBC Mellon Trust Co.* [2000] O.J. No. 4584 (S.C.)].
>
> 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].
>
> . . .
>
> To conclude, I find that all of the records remaining at issue were not "prepared for Crown counsel in contemplation of or for use in litigation" and are not exempt under branch 2 of section 19.[13]

[51] In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*,[14] the Ontario Divisional Court upheld Assistant Commissioner Beamish's decision in Order PO-2494.[15] Speaking for the Court, Swinton J. stated:

> The [Ministry] submits that the IPC erred in the interpretation of s. 19(b), having misunderstood the role of the police: they are the investigative arm of the state, with the responsibility for investigating crime and compiling evidence for charges prosecuted by the Attorney General. Once copies of police records arising from an investigation are found in the Crown brief after criminal or quasi-criminal charges are laid, the records are exempt pursuant to s. 19(b). Such records were "prepared" for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.
>
> The respondent IPC submits that s. 19(b) applies only where the requester seeks access to the copies of the records contained in the Crown brief. It does not apply to records remaining in the hands of the police. To exempt those records from disclosure, the police must rely on other provisions of the *Act*, such as s. 14, which specifically deals with law enforcement.
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> I agree with the submissions of the IPC. The [Ministry's] interpretation of s.19 of the *Act* is inconsistent with the terms of that provision and fails to take into account other provisions of the *Act* which provide exemptions that directly address the interests of the police in effective law enforcement.

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[13] Order PO-2494 at pp. 14-16.
[14] [2009] O.J. No. 952.
[15] The Court also upheld Reconsideration Order PO-2532-R and Order PO-2498.

> Section 19 has been held to have two branches, Branch 1 being solicitor-client privilege and Branch 2 (now s. 19(b)) being a statutory form of litigation privilege.
>
> The Court of Appeal, in its 2002 decision in *Ontario (Information and Privacy Commission), supra*, held that Branch 2 of s. 19 extends a permanent protection to records comprising Crown counsel's work product contained in the Crown brief. It protects material gathered in preparation for litigation (at paras. 11-13). See also *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) and *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.). By its terms, Branch 2 of s. 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.
>
> The records sought by the two requesters are held in police files, and they were gathered in the course of criminal investigations. The IPC in Order [PO-]2494 properly found that the records were created by police officers for the purpose of criminal investigation. The decision maker correctly understood the different, albeit related roles of the police and Crown prosecutors in the criminal justice system.
>
> . . .
>
> In my view, the IPC orders to disclose the disputed records in the possession of the Ministry were correct. The fact that copies of the police records were in the possession of Crown counsel does not exempt the records from disclosure by the Ministry of Community Safety and Correctional Services, even though the same documents in the possession of the Ministry of the Attorney General would likely have been protected by Branch 2 of s. 19.[16]

[52] In accordance with Assistant Commissioner Beamish's analysis in Order PO-2494, I find that the police investigation records[17] at issue in Orders MO-1908-I and Reconsideration Order MO-1968-R were "prepared" twice: first, when the records were brought into existence by the police (the "originals"), and second, when the police assembled individual records for inclusion in the Crown brief, and then made copies of those records to deliver to Crown counsel.

[53] Based on the Divisional Court's decision in *Ontario (Attorney General)* and Order PO-2494, I find that the originals of the police investigation records at issue in Interim Order MO-1908-I and Reconsideration Order MO-1968-R cannot qualify for exemption

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[16] *Supra* note 14, paras. 13-18 and 24.
[17] As defined in note 12, *supra*.

under sections 12 and 38(a) of *MFIPPA* or sections 19(b) and 49(a) of *FIPPA*. These records were created by police officers for the purpose of their criminal investigation of the appellant and other policing activities. The fact that copies of some of these records later found their way into the Crown brief does not alter the purpose for which the records were originally prepared and held by the police.

[54] However, the records also include assembled copies of records that the police forwarded to the Crown for inclusion in the Crown brief. In other words, the police retained copies of several packages of records that they assembled and sent to the Crown. For example, pages 575 to 600 of Appeal MA-040099-1 include a "Confidential Crown Envelope" that contains records that the police assembled and forwarded to the Crown. Similar packages of assembled copies of police records that appear to have been forwarded to the Crown appear elsewhere in the 4,200 pages of records and usually have a cover page that reads, "Regina vs. [name of appellant]." These assembled groups of records were clearly prepared for Crown counsel in contemplation of or for use in criminal litigation against the appellant.

[55] In Order PO-2317, the adjudicator found that "Crown brief" records, which are the assembled records that the Crown received from the police for inclusion in the Crown brief, were exempt under sections 19(b) and 49(a) of *FIPPA*. However, in Interim Order MO-1908-I and Reconsideration Order MO-1968-R, he did not consider whether copies of the same assembled packages of records that were retained by the police in their own record holdings are subject to litigation privilege and therefore exempt either under sections 12 and 38(a) of *MFIPPA* or sections 19(b) and 49(a) of *FIPPA*.

[56] In Order MO-1663-F, Adjudicator Sherry Liang found that records prepared by the police for the Crown are subject to litigation privilege and this privilege belongs to the Crown, not the police. She stated:

> I am satisfied that the severed portions of pages 122 and 123 were created for the dominant purpose of litigation, namely the prosecution of the appellant. They contain notes created by a police officer and directed to the Crown Attorney, intended to be used in the prosecution of the appellant. Applying the test enunciated in *Waugh v. British Railways Board*, they are documents "produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to … to aid in the conduct of litigation".
>
> It is unnecessary to consider whether the Police share a "common interest" with the Crown in the prosecution of the accused. My finding that the litigation privilege applies is based on the conduct of litigation by

> the Crown, and communications with the Police in the context of that litigation. *The privilege at issue is that of the Crown, and not of the Police*.[18] [emphasis added]

[57] The same principle applies to the records at issue in Interim Order MO-1908-I and Reconsideration Order MO-1968-R. The police's failure to claim section 12 of *MFIPPA* or section 19 of *FIPPA* for the copies of assembled records retained by the police cannot be determinative as to whether these exemptions apply, because it is the Crown's privilege that attaches to such records. I find that the adjudicator's decision to not consider whether these records are subject to litigation privilege is a fundamental defect in the adjudication process that should be corrected.

[58] In Order PO-2317, the adjudicator found that Crown brief records, which include the assembled records that the Crown received from the police, were exempt under sections 19(b) and 49(a) of *FIPPA*. In my view, the privilege with respect to copies of the same assembled packages of records retained by the police belongs to the Crown, not the police. In short, these records were prepared for Crown counsel in contemplation of or for use in litigation, as stipulated in section 19(b). I find, therefore, that the adjudicator's finding in Order PO-2317 that the assembled records that the Crown received from the police were exempt under sections 19(b) and 49(a) flows through and applies to the copies of the same assembled packages of records retained by the police.[19]

[59] I will be ordering the police to disclose to the appellant his own personal information but not the personal information of other individuals in the records. Consequently, the appellant is entitled to access his own personal information in the originals of the police records but not copies of the assembled packages of records sent to the Crown that were retained by the police. These latter assembled packages are exempt under sections 19(b) and 49(a) of *FIPPA*.

[60] For example, each supplementary record of arrest contains a legend at the bottom of each page that shows where the police keep the original and the copies of this record:

> Original – Records & Information Security (R.I.S.)
> Copy – Insert in Confidential Crown Envelope
> Copy – For Printable Offences – to appropriate Central Lock-Up, then to Criminal Records Update
> – For All Other Offences – to Criminal Records Update
> Copy – Retain at Unit

[18] Order MO-1663-F at pp. 5-6

[19] Those records that do not contain the appellant's personal information are exempt under section 19(b) alone, while those that contain his personal information are exempt under section 49(a), read in conjunction with section 19(b).

Copy – For Drug Offences – forward to Drug Repository

[61] The appellant has a right of access under *MFIPPA* to his own personal information in the original, which is kept in the police's Records and Information Security Department. However, he is not entitled to access any copies in the packages of records retained by the police that they assembled and sent to the Crown for inclusion in the Crown brief, because those records qualify for exemption under sections 19(b) and 49(a) of *FIPPA*.

[62] Finally, I note that the records at issue also include some correspondence between the Crown and the police that was not necessarily part of the Crown brief. In my view, even though these records may not have been included in the Crown brief, they were nevertheless created for the dominant purpose of prosecuting the appellant. Consequently, I find that this correspondence, regardless of whether it is held by the Crown or the police, is subject to litigation privilege and therefore exempt under sections 19(b) and 49(a) of *FIPPA*, because it was created by or for Crown counsel in contemplation of or for use in criminal litigation against the appellant. The privilege with respect to such records belongs to the Crown, not the police.

Other record subject to solicitor-client privilege

[63] In my view, there is one police record that qualifies for exemption under sections 12 and 38(a) of *MFIPPA*. Sections 19(b) and 49(a) of *FIPPA* cannot flow through and apply to this record because it is an email from the police's internal legal counsel to a detective. Consequently, the Crown's interests are not engaged with respect to this particular record.

[64] As noted above, section 38(a) allows an institution to refuse to disclose the appellant's own personal information to him if a number of listed exemptions, including section 12, apply to that information. Section 12 states that an institution's head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[65] The police did not claim that section 12 applied to any of the records at issue either in their decision letters or in their initial representations at the adjudication stage. They attempted to claim section 12 as part of their request that the original adjudicator reconsider Interim Order MO-1908-I, but he refused to allow the police to apply the section 12 exemption to any records at that stage of the appeal.[20]

[20] Reconsideration Order MO-1968-R, p. 2.

[66] The adjudicator's decision to not allow the police to raise section 12 at the reconsideration stage was discretionary[21] and based, in part, on the need to resolve the appeals as expeditiously as possible to avoid prejudicing the appellant. This discretion now resides with me and in considering whether I should exercise my discretion differently, I have taken into account the importance that the Supreme Court of Canada has attached to solicitor-client privilege.

[67] The Supreme Court has found that solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance, and that it is in the public interest that the free flow of legal advice be encouraged.[22] Given the high importance that the Supreme Court has ascribed to solicitor-client privilege, I have decided to exercise my discretion to consider whether section 12 applies to any of the records at issue, even though the previous adjudicator had declined to consider it. However, I am exercising my discretion narrowly and only applying section 12 if it is absolutely clear from the substance of a particular record that it falls within this exemption.

[68] Section 12 contains two branches: a common-law solicitor-client privilege and a statutory one. Solicitor-client privilege under section 12 encompasses two types of privilege:

- solicitor-client communication privilege; and
- litigation privilege

[69] The records in Appeal MA-040095-1 include an email from the police's internal legal counsel to a detective. It appears on pages 1 and 10-11 (in part). In my view, the type of privilege that is applicable to this email is solicitor-client communication privilege.

[70] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[23] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[24] The privilege applies to "a continuum of communications" between a solicitor and client:

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[21] Under section 11.01 of the *Code*, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. However, if the appeal proceeds to the adjudication stage, the adjudicator *may* decide not to consider a new discretionary exemption claim made after the 35-day period.
[22] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9.
[23] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[24] Orders PO-2441, MO-2166 and MO-1925.

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[25]

[71] In my view, the email from the police's internal legal counsel to a detective is clearly subject to solicitor-client communication privilege because it reveals direct communications of a confidential nature between a solicitor and his client. It is part of the continuum of communication aimed at keeping both informed so that advice may be sought and given as required. In short, I find that this email qualifies for exemption under sections 12 and 38(a) of *MFIPPA*.

Severed records

[72] I am providing the police with a severed copy of the records that reflects the adjudicator's intent in Interim Order MO-1908-I and Reconsideration Order MO-1968-R and my correction of the accidental errors or omissions in those decisions and the fundamental defect in the adjudication process that led to those decisions. I have highlighted the information that must be severed (i.e., not disclosed to the appellant).

[73] Reviewing and severing the 4,200 pages of records provided by the police was a lengthy and challenging exercise, because of the voluminous number of records and the significant number of duplicate records. In ideal circumstances, the original of a police investigation record and the copy inserted into the Confidential Crown Envelope, for example, would be easy to locate. However, given the voluminous number of records, this is not the case.

[74] There are some records from the Confidential Crown Envelope and from other similar assembled packages of records sent by the police to the Crown that I have included in the severed copy of records that I am providing to the police, because I cannot find the "originals" of these records elsewhere in the 4,200 pages of records. This may be the result of the police having failed to locate all original records in their possession. However, I have included such records simply for illustrative purposes to indicate to the police where severances should be made to the originals.

[75] I reiterate that these records are exempt under sections 19(b) and 49(a) of *FIPPA*. The police should not disclose the assembled copies but rather locate the originals and disclose copies of the originals to the appellant. To be clear, the police must provide the appellant with copies of the originals of all such records containing his own personal information (with necessary severances), even if the only copies in the 4,200 pages of records that the police provided to the IPC are those that appear in the Confidential Crown Envelope or other similar packages of records assembled for the Crown.

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[25] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

ORDER:

I direct that order provision 2 of Interim Order MO-1908-I and order provisions 1 and 2 of Reconsideration Order MO-1968-R be replaced with the following provisions:

1. I order the police to disclose to the appellant his own personal information but not the personal information of other individuals in the records.

2. I order the police to sever the personal information of individuals other than the appellant from all of the records ordered disclosed.

3. The police are not required to disclose records from copies of the Confidential Crown Envelope and other similar packages of records retained by the police that they assembled and sent to the Crown for inclusion in the Crown brief, because these records are exempt under sections 19(b) and 49(a) of *FIPPA*. However, the police must disclose copies of the originals (with necessary severances) of any such records that I have ordered disclosed under order provision 1 above.

4. The police are not required to disclose an email from the police's internal legal counsel to a detective (pages 1 and 10-11 (in part) of Appeal MA-040095-1), because this record qualifies for exemption under sections 12 and 38(a) of *MFIPPA*.

5. The police are not required to disclose the following records, which qualify for exemption under sections 9(1)(d) and 38(a) of *MFIPPA*:

   (a) those portions of the records described as "Crown Notes," which originated with the ministry rather than the police; and

   (b) the 35-page VICLAS booklet (page 1228 of Appeal MA-040099-1).

6. I am providing the police with a severed copy of the records that have been ordered disclosed (see paras. 72 to 75 of this order). The information that must be severed and not disclosed is highlighted in green.

7. I order the police to disclose the severed records to the appellant by **November 27, 2013**.

8. I remain seized of any compliance issues that may arise with respect to this order and reserve the right to require the police to provide me with a copy of the severed records that they disclose to the appellant.

Original signed by: September 26, 2013
Colin Bhattacharjee
Adjudicator