Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3927-I

Appeal PA16-590

Ministry of the Attorney General

February 14, 2019

Summary: The appellant submitted an access request to the Ministry of the Attorney General under the *Freedom of Information and Protection of Privacy Act* for the Crown brief regarding his murder conviction. The ministry denied access, citing the application of section 49(a) (discretion to refuse requester's own information), in conjunction with the section 19 solicitor-client privilege exemption. In this interim order, the adjudicator finds the Crown brief exempt under section 49(a), but orders the ministry to re-exercise its discretion concerning the witness statements of the individuals who witnessed the interaction between the appellant and the deceased.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 49(a), 19; *Criminal Code* R.S.C., 1985, c. C-46, sections 696.1, 696.3, 696.4.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The appellant submitted an access request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). The request was for "all disclosure relevant to the prosecution of second degree murder charge in relation to the death of [name]". The appellant indicated in his request that he had been convicted on the murder charge.

[2] The ministry issued a decision denying access, citing the discretionary personal

privacy exemption in section 49(b)[1] and the discretionary solicitor-client exemption in section 19(a) of the *Act.*

[3] The appellant appealed the ministry's access decision.

[4] During the mediation stage, the ministry advised that the requested information forms part of the Crown brief. The ministry also confirmed it is claiming section 49(a) (discretion to refuse requester's own information) in conjunction with the solicitor-client privilege exemption in section 19 of the *Act.* A mediated resolution of the appeal was not possible. Accordingly, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[5] Representations were sought, received and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] In this order, I find that the records are exempt from disclosure under section 49(a), in conjunction with section 19. I order the ministry to re-exercise its discretion with respect to the witness statements of the individuals who witnessed the appellant's interaction with the deceased.

RECORDS:

[7] The ministry states that the records relate to the appellant's previous criminal prosecution, convictions, and appeals in relation to the charge of second degree murder, all forming part of a single Crown brief. It states that the records include all of the records typically found in a Crown brief: synopses, civilian witness lists, police will-says/statements/notes, supplementary police reports, witness interviews/statements, Centre of Forensic Sciences Reports, expert reports, videos, audio tapes, photographs of the victim's injuries, police diagrams, Crown notes, CPIC checks, Crown correspondence, legal research, appeal materials, and other documents.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary solicitor-client privilege exemption at section 49(a), in conjunction with the section 19 solicitor-client privilege exemption, apply to the information at issue?

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[1] As I have found that the records are subject to the discretionary exemption in section 49(a), in conjunction with section 19, there is no need for me to consider whether section 49(b) also applies.

C. Did the ministry exercise its discretion under section 49(a), in conjunction with section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] 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,
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> > (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;

[9] 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.[2]

[10] 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.[3]

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[13] The ministry states that the records include all of the records typically found in a Crown brief: synopses, civilian witness lists, police will-says/statements/notes, supplementary police reports, witness interviews/statements, Centre of Forensic Sciences Reports, expert reports, videos, audio tapes, photographs of the victim's injuries, police diagrams, Crown notes, CPIC checks,[6] Crown correspondence, legal research, appeal materials, and other documents.

[14] The ministry further states that while some of the information about other individuals relates to them in their public work capacity as experts, investigators or forensic analysts, there are direct and indirect references to civilian witnesses. The personal information about civilian witnesses includes their names, DNA profiles, contact information, and knowledge of the incident in which the appellant was involved.

[15] The appellant did not address this issue in his representations.

Analysis/Findings

[16] The ministry has provided an index of the records at issue, which relate to the murder charges brought against the appellant. I find that the Crown brief would contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a), (b), (c), (d), (g) and (h) of the definition in section 2(1)

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[6] The ministry advises that CPIC is a computerized information system operated by the RCMP, under the stewardship of the National Police Services. The information contained on CPIC includes a person's criminal record. CPIC records are the property of the RCMP.

of the *Act*.

[17] In addition, I find that some of the records would contain personal information relating to identifiable individuals other than the appellant that fits within the definition of personal information in paragraphs (a), (b), (d), (e) and (h) of section 2(1). Since the records contain the personal information of the appellant, I will now consider whether the records are exempt under section 49(a) of the *Act*, in conjunction with section 19. As a result of my findings below, it is not necessary for me to address the section 49(b) personal privacy exemption for the personal information of other individuals.

Issue B: Does the discretionary solicitor-client privilege exemption at section 49(a), in conjunction with the section 19 solicitor-client privilege exemption, apply to the information at issue?

[18] 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.

[19] Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[20] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[7]

[21] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[22] In this case, the ministry relies on section 49(a), in conjunction with sections 19(a) and (b). The latter read as follows:

> A head may refuse to disclose a record,
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> > (a) that is subject to solicitor-client privilege;

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[7] Order M-352.

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

Representations

[23] The ministry states that the records include synopses, evidence prepared/collected specifically for Crown counsel, legal analyses of the evidence, as well as the Crown's own work product. It submits that confidential prosecution files, such as Crown briefs, have been held by numerous IPC orders[8] and court judgements to be non-disclosable in their entirety. The ministry refers to Ontario *(A.G.) v. Big Canoe*,[9] where the court stated the following with respect to Crown briefs and *FIPPA*:

> 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…
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> In Wagg,[10] Rosenberg J.A. … added that there were additional policy reasons for protecting the Crown brief, including that it may contain documents over which the Crown could claim public interest immunity, or might attract privilege or which, broadly speaking, it would not be in the public interest to produce. All of these considerations justified "the adoption of the screening process where the Crown brief, for whatever reason, finds its way into the hands of a party in a civil case". In my view, these same considerations must inform the analysis of the scheme of FIPPA and of s. 19 in particular.
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> The importance of the protection of the Crown brief has thus been emphasized at the highest judicial levels, as well as being the subject of at least three sections of FIPPA; ss. 14, 19 and 49(a). It is also important to observe that FIPPA is not the only source of protection for the Crown brief; the common law has addressed the subject in Wagg in the context of the use of the brief in civil proceedings. Equally, ss. 14 and 19 of FIPPA are confined within their Act; they offer no protection in the civil litigation context: that is the preserve of the courts...
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> The real issue before us is not what the requester intends to do with the information, but whether, as a member of the public, he is entitled to

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[8] The ministry relies on Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.), and Order MO-124.
[9] *Ontario (A.G.) v. Big Canoe*, [2006] O.J. No. 1812 (S.C.J.) at paras. 23-24, 36, 43-44.
[10] *P.(D.) v. Wagg,* [2004] O.J. No. 2053 (C.A.).

> obtain it in the face of the refusal of the head to release it. Since I am persuaded that the language of section 19 does not require the production of the Crown brief under FIPPA, that issue is also for another day…
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> [T]he conditions for the exemption are explicitly related to the purpose for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended.
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> 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.

[24] The ministry claims exemption under Branches 1 and 2 of section 19 as the records represent part of a confidential Crown brief prepared for, or by, Crown counsel in contemplation of, or for use in, litigation.

[25] The appellant submits that as the subject matter of the records, the records are not privileged because he is the client. He also argues that he should receive full access to the records by reason of the case of *Stinchcombe*.[11] He acknowledges that there might be some information in the Crown brief that he would not be entitled to receive, such as:

> …confidential witnesses, or in camera hearings that both the accused and public are not allowed to have certain information on. Another example may be certain techniques that are utilized by the authorities to procure evidence in relation to an investigation…"

[26] In reply, the ministry states that the appellant is not the "client" for the purpose of considering the application of section 19. The ministry explains that records disclosed to an accused during a criminal trial, as part of *Stinchcombe* disclosure, are subject to either an express or implied undertaking by the accused or their counsel that the disclosed records are only to be used for the purposes of making full answer and

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[11] *R. v. Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.).

defence. The ministry provided a copy of a sample of a Crown disclosure release that is currently used, in some manner or form, in various jurisdictions across the province.

[27] The ministry also states that it is accepted practice that once all criminal proceedings have concluded, defence counsel are required to either return the disclosure materials to the Crown or have them destroyed, but not provide them to the accused.

[28] In sur-reply, the appellant states that the form provided by the ministry does not say anything about returning disclosure to the Crown after the completion of court proceedings.

Analysis/Findings

[29] Firstly, I would like to address the ministry's claim, as a justification for not allowing any of the Crown brief to be disclosed under section 19, that defence counsel are required to either return the disclosure materials to the Crown or have them destroyed, but not provide to the accused. The ministry provided a copy of its form entitled "Disclosure Request." The only statement on this form about returning materials to the Crown relates to a change in counsel. This part of the form states:

> …If there is a change of counsel retained by the accused, the former counsel will return all disclosed material to the Crown forthwith at the end of that counsel's retainer…

[30] Therefore, I disagree with the ministry that this form requires all material from the Crown brief to be returned to the Crown at all times and dismiss this argument as a valid basis for claiming non-disclosure of the Crown brief in its entirety.

[31] Concerning the claimed exemption, section 19, this section contains two branches, Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[32] The statutory privilege, Branch 2, applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing

counsel.[12]

[33] The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[34] I find that Branch 2, the statutory privilege, applies to the records because they were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation."

[35] Records that form part of the Crown brief, as is the case here, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, have been found to be exempt under the statutory litigation privilege.[13] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[14]

[36] The statutory litigation privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[15] However, in this appeal, the request was made to the ministry and the records are the possession of the ministry, not the police.

[37] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[16]

[38] Furthermore, it has been held that disclosure by Crown counsel to defence counsel during a criminal proceeding does not result in waiver of the statutory privilege.[17] In this appeal, the statutory privilege in section 19 has not been lost through waiver as a result of any disclosure the Crown made to the defence during the criminal proceedings.

[39] I find the records at issue in this appeal, which are records that comprise the Crown brief, are subject to Branch 2 statutory litigation privilege in section 19(b). These records were all prepared by or for Crown counsel for use in litigation. As I noted above, the termination of the litigation related to this matter does not end the statutory litigation privilege in section 19. Given my conclusion that the records are subject to Branch 2, there is no need for me to review whether they are also subject to Branch 1.

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[12] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[13] Order PO-2733.
[14] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[15] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[16] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[17] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[40] Subject to my review of the ministry's exercise of discretion, the records are exempt under section 49(a), in conjunction with section 19.

Issue C: Did the ministry exercise its discretion under section 49(a), in conjunction with section 19? If so, should this office uphold the exercise of discretion?

[41] 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.

[42] 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.

[43] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[18] This office may not, however, substitute its own discretion for that of the institution.[19]

[44] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[20]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

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[18] Order MO-1573.
[19] Section 54(2).
[20] Orders P-344 and MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[45] The ministry states that the factors considered in coming to its decision to deny access to the records include, but are not limited to, the following:

- the interests inherent within the section 19 exemption;
- the appellant's legitimate interest in gaining access to the records;
- the sensitive nature of the records' contents and the confidential context behind their creation;
- the fact that Crown brief materials are not available to the public at large and were specifically created for the purpose of a prosecution/appeal;
- the ability of a prosecutor to protect sensitive materials and administer justice in a fair, equitable, and effective manner;
- that the ministry took the law and principles as stated by the courts into consideration when exercising its discretion not to disclose records clearly protected by solicitor-client privilege;
- individuals should have access to their own personal information except in those circumstances where the ministry is required to withhold such information under the *Act* or it remains in the public interest to deny access;
- the appellant's interest in gaining access to the records against the privacy interests of other individuals in the records;

- the fact that previously received disclosure materials were subject to express/implied undertakings not to disseminate the materials to any other persons or to use the records for any other purposes (which lies in stark contrast to freedom of information (FOI) disclosure which would allow the appellant to disseminate the materials to the public in whatever manner, or for whatever purpose, they chose);

- the creation of the records for criminal proceedings (including appeals); and

- and the public interest in fostering an ongoing relationship of confidence between the ministry and law enforcement agencies.

[46] The appellant states that being able to view the requested information may assist him in being vindicated regarding the murder conviction for which he is serving a life sentence. The appellant notes that he was initially acquitted of this charge.

[47] In seeking access to the records, the appellant states that there may be some minimal information in the records that may need to be redacted, such as confidential law enforcement techniques or other confidential information.

[48] The appellant is seeking, in particular, access to the witness statements concerning his interaction with the deceased. He asserts that neither he nor his counsel ever received copies of these witness statements.

[49] In reply, the ministry states that the FOI process is not the proper avenue for accessing the records because they are protected by section 19 solicitor-client privilege in perpetuity, and no limits or restrictions can be placed on the records disclosed under *FIPPA* in terms of use or sharing with other parties.

[50] The ministry states that as the appellant has exhausted his routes of appeal, he may have his criminal convictions reviewed pursuant to a process in place under section 696.1 of the *Criminal Code*. According to the ministry, this process offers a means by which previous criminal disclosure may be accessed. The ministry also points out that convicted individuals are free to make a request to the relevant police service for copies of their investigative files.

[51] In sur-reply, the appellant states that he is in the midst of applying for a section 696.1 *Criminal Code* review and that is the reason he has made this access request. He states that he needs "new and significant" information for his section 696.1 review process, which he submits would be contained in the witness statements of the individuals who witnessed his interaction with the deceased. He further states that he has not received anything of significance from his access request to the police.

Analysis/Findings

[52] The appellant was initially acquitted, but later convicted of second degree

murder, and he is serving a life sentence. He claims that he was wrongfully convicted and requires access to the records to assist him in seeking to overturn his wrongful conviction. In particular, he believes that the witness statements of the individuals who witnessed his interaction with the deceased may be relevant.

[53] The records in the Crown brief at issue include those witness statements. As noted above, however, the ministry's evidence is that the records overall consist of the records typically found in a Crown brief: synopses, civilian witness lists, police will-says/statements/notes, supplementary police reports, witness interviews/statements, Centre of Forensic Sciences Reports, expert reports, videos, audio tapes, photographs of the victim's injuries, police diagrams, Crown notes, CPIC checks, Crown correspondence, legal research, appeal materials, and other documents.

[54] The appellant's position is that the witness statements regarding his interaction with the deceased contain significant information that would assist him in his quest for a review of his conviction under section 696.1 of the *Criminal Code*. This section reads:

> (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.
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> (2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

[55] The powers of the Minister of Justice concerning an application under section 696.1 are set out in section 696.3(3), which reads:

> On an application under this Part, the Minister of Justice may
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> > (a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,
> >
> > > (i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or
> > >
> > > (ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

> (b) dismiss the application.
>
> (4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

[56] The considerations to be taken into account in an application under section 696.1 are set out in section 696.4, which reads:

> In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including
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> > (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
> >
> > (b) the relevance and reliability of information that is presented in connection with the application; and
> >
> > (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy. [Emphasis added by me]

[57] As stated, the appellant seeks access, in particular, to copies of the witness statements of the individuals who witnessed his interaction with the deceased. He states that neither he nor his counsel were provided with copies of these statements. He wishes to utilize these statements in support of his section 696.1 application to obtain a new trial or appeal hearing under section 696.3(3). He submits that he has been wrongfully convicted of murder and that the witness statements of those who witnessed his interaction with the deceased will exonerate him. He claims to have been denied access to these witness statements. The ministry did not respond to the appellant's submission that the appellant has been denied access to these witness statements. In other words, in its representations, the ministry did not respond to the appellant's representations as to what specific information he is seeking from the records and why he is seeking that information in particular.

[58] Based on the information before me, I find that in exercising its discretion, the ministry considered all of the various records at issue in this appeal as essentially comprising one record and did not consider whether any of the records at issue could be disclosed individually. In particular, in denying access to the undisclosed witness statements sought by the appellant, I find that the ministry did not consider with respect to these statements that:

- the appellant has a sympathetic or compelling need to receive the information, and

- the nature of the information in the witness statements and the extent to which it is significant to the appellant.

[59] Although the ministry submits that the process under section 696.1 of the *Criminal Code* offers a means by which previous criminal disclosure may be accessed, it did not provide particulars in this regard. I note, too, that the appellant states that he never received the witness statements in question as part of his disclosure in the context of the criminal trial. If the appellant's right under the section 696.1 process is limited to access to material he already received, this would not be helpful if the witness statements in question were not provided to him. In any event, I note that the availability of another process for disclosure is not a barrier to obtaining access under the *Act*.[21] Overall, I find that the appellant's sympathetic need to receive the information through the FOI process remains a relevant consideration notwithstanding the ministry's apparent assertion that he has another means of obtaining it.

[60] Accordingly, I will order the ministry to re-exercise its discretion concerning the specific information from the Crown brief that the appellant has identified as significant to his section 696.1 application, namely the witness statements that contain information about the appellant's interaction with the deceased.

[61] In arriving at this decision to order the ministry to re-exercise its discretion regarding the witness statements that contain details about the appellant's interaction with the deceased, I have considered the findings of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[22] In that case, the court stated that:

> ...the "head" making a decision under ss. 14[23] and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.
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> The Duty of the "Head" (or Minister)

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[21] Order M-1146.
[22] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, (also referred to in this order as the *Criminal Lawyers'* case).
[23] The law enforcement exemption in *FIPPA*.

The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

The Duty of the Reviewing Commissioner

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *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.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

> In the case before us, the Commissioner concluded that since s. 23[24] was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's[25] decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion…

[62] As stated in the *Criminal Lawyers'* case, the ministry has a residual discretion under section 19 to consider all relevant matters, and it is open to the IPC to review the ministry's exercise of his discretion. Therefore, I am reviewing the ministry's exercise of discretion under section 19.

[63] In this case, I find that the ministry did not consider whether to disclose the witness statements notwithstanding the privilege attached to them in the circumstances. These circumstances include the fact that:

- the appellant was initially acquitted of the second degree murder for which he is now serving a life sentence,
- he needs to present "new matters of significance that were not considered by the courts" to the Minister of Justice in support of his section 696.1 of the Criminal Code application to review his conviction, and
- the witness statements he is seeking as to his interactions with the deceased may contain information that qualifies as evidence of "new matters of significance that were not considered by the courts."

[64] It appears that the ministry did not consider these factors in exercising its discretion. In addition, I find that the ministry has fettered its discretion by indicating that:

> … the FOI process is not the proper mechanism for accessing such records given that: (i) they are protected by s. 19 solicitor-client privilege in perpetuity, and; (ii) no limits or restrictions can be placed on the records disclosed under *FIPPA* in terms of its use or to whom it can be shared with subsequent to its disclosure. [Emphasis added by me].

[65] In doing so, the ministry has taken into account an improper consideration and I find that this constitutes an error in the exercise of its discretion in applying section

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[24] The public interest override section in *FIPPA*.
[25] In that case, the Minister of Public Safety and Security, as the minister was then known.

19.[26] The ministry, by determining that the FOI process was not a means to access the records sought, failed to take into account that section 19 is a discretionary exemption. The ministry stated that it was "required" to withhold the information under section 19. This is not the case.

[66] According to the ministry's representations, there are many documents that comprise the Crown brief. As well, the ministry provided an index of records which lists the types of records at issue in this appeal and categorizes these records by the level of court they were used by the ministry.

[67] I accept that the Crown brief is comprised of many records. By not considering whether any of the records could or should be disclosed to the appellant, in particular the specific information that the appellant seeks, the witness statements that contain information about the appellant's interaction with the deceased, I find that the ministry has not exercised its discretion in a proper manner. Accordingly, I will order the ministry to re-exercise its discretion under section 49(a), in conjunction with section 19, with respect to the witness statements of the individuals who witnessed the appellant's interactions with the deceased.

[68] As noted above, the appellant specifically disputed the ministry's exercise of discretion concerning the witness statements that contain information about his interaction with the deceased. He has not explicitly challenged the ministry's exercise of discretion concerning any other specific records in the Crown brief. Based on my review of the parties' representations, I find that the ministry exercised its discretion in a proper manner concerning the remaining information in the Crown brief.

ORDER:

1. I order the ministry to re-exercise its discretion under section 49(a) in conjunction with section 19, and in accordance with these reasons, with respect to the witness statements that contain information about the appellant's interaction with the deceased. I order the ministry to issue a decision with respect to its exercise of discretion, treating the date of this order as the date of the access request for the purpose of its decision.[27]

2. I order the ministry to provide me with a copy of its decision at the same time that it provides its decision to the appellant. I remain seized of this appeal to review the ministry's re-exercise of discretion.

Original signed by: February 14, 2019

[26] See Interim Order MO-2552-I.
[27] The ministry may need to notify affected persons under 28 of the *Act*.

Diane Smith
Adjudicator