Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-4041-F

Appeal PA16-590

Ministry of the Attorney General

April 29, 2020

Summary: 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* 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 Interim Order PO-3927-I, the adjudicator found the Crown brief exempt under the discretionary section 49(a) exemption, but ordered the ministry to re- exercise its discretion concerning the witness statements of the individuals who witnessed the interaction between the appellant and the deceased.

In a second order, Interim Order PO-3957-I, the adjudicator found that the ministry did not properly re-exercise its discretion in response to Interim Order PO-3927-I and ordered it to re-exercise its discretion again. In response, the ministry continued to withhold access to the records.

In this final order, the adjudicator finds that the ministry re-exercised its discretion in a proper manner and dismisses the appeal.

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

Orders Considered: Orders PO-3927-I, and PO-3957-I.

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) and the discretionary solicitor-client exemption in section 19 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 was 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 may conduct an inquiry.

[5] After the exchange of representations, I issued Interim Order PO-3927-I. In that order, I found that the records were exempt from disclosure under section 49(a), in conjunction with section 19.

[6] However, I ordered 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 (the witness statements) in accordance with the reasons in Interim Order PO-3927-I. The ministry subsequently affirmed that it was exercising its discretion to withhold access to the witness statements.

[7] I sought and received the appellant's response to this response of the ministry. I then issued Interim Order PO-3957-I, where I ordered the ministry to re-exercise its discretion again. The ministry continued to withhold access to the witness statements on the basis that they are part of a Crown brief.

[8] Next, I sought and exchanged representations between the ministry and the appellant on the ministry's second re-exercise of its discretion.

[9] In this order, I find that the ministry re-exercised its discretion in a proper manner and dismiss the appeal.

RECORDS:

[10] At issue in this appeal are the witness statements of the individuals who

witnessed the appellant's interaction with the deceased that are contained in the Crown brief.[1]

DISCUSSION:

Did the ministry re-exercise its discretion in a proper manner under section 49(a), in conjunction with section 19?

[11] 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.

[12] In Order PO-3297-I, I found that the records, which were contained in a Crown brief, were exempt under section 49(a) in conjunction with section 19(b). These sections read:

> 49(a) A head may refuse to disclose to the individual to whom the information relates personal information, 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.
>
> 19. A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[13] I found in Order PO-3927-I that the ministry did not exercise its discretion in a proper manner under section 49(a), in conjunction with section 19, in relation to certain witness statements in the Crown brief.

[14] After the ministry re-exercised its discretion, I found again, in Order PO-3957-I, that the ministry did not exercise its discretion in a proper manner with respect to these statements.

[15] 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

---

[1] The contents of the Crown brief are more particularly described below. The ministry's Crown brief consists of records used by the ministry at appellant's trial, as well as on appeal to the Ontario Court of Appeal and the Supreme Court of Canada.

grant requesters access to their personal information.[2]

[16] 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.

[17] 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.

[18] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[3] This office may not, however, substitute its own discretion for that of the institution.[4]

[19] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[5]

- 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
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

---

[2] Order M-352.
[3] Order MO-1573.
[4] Section 54(2).
[5] Orders P-344 and MO-1573.

- 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.

Interim Order PO-3927-I

[20] In Interim Order PO-3927-I, I set out the appellant's position as to why he needed access to the witness statements.

[21] In reply to the appellant's initial representations, the ministry stated 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 because no limits or restrictions can be placed on the records disclosed under *FIPPA* in terms of use or sharing with other parties.

[22] The ministry also noted that since the appellant had exhausted his routes of appeal, he could 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 pointed out that convicted individuals are free to make a request to the relevant police service for copies of their investigative files.

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

[24] In Interim Order PO-3927-I, I made the following findings:

> 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.

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.

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*...[6]

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 was 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.

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

---

[6] Section 696.1 of the *Criminal Code* 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.

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

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…

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…

As stated [by] the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[7] …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.

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."

---

[7] *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). I quoted from paragraphs 66 to 72 of the *Criminal Lawyer's case*.

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].

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 19.[8] 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…

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…

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.

Interim Order PO-3957-I

[25] The entirety of the ministry's response to Interim Order PO-3927-I stated:

> In accordance with the Notice of Interim Order issued by the Office of the Information and Privacy Commissioner of Ontario, dated February 14, 2019, the Ministry was to reconsider its exercise of discretion with respect to specific witness statements as contained in the Crown brief. The

[8] See Interim Order MO-2552-I.

> Ministry has now had the opportunity to do so and continues to maintain that the statements should be withheld as part of the Crown brief pursuant to ss. 19, 21 and 49 of the *Freedom of Information and Protection of Privacy Act.*

[26] The appellant responded to this letter by stating:

> In my view, the ministry[9] is doing whatever possible to prevent me from viewing potential exculpatory information that could be utilized in exonerating me of second degree murder. Instead of allowing justice to continue to run its course, they build road blocks to prevent me from uncovering important evidence. I have been found not guilty of this charge previously, which is a true and tangible testament that there is at a minimum much plausibility that I may very well be innocent. That being said, one would reasonably think that the ministry would happily turn over all disclosure and other important information…

[27] In Interim Order PO-3957-I, I found that the ministry, in its response to Interim Order PO-3927-I, took into account the same improper consideration as it had previously: that the witness statements at issue should be withheld only because they are part of the Crown brief.

[28] In Interim Order PO-3957-I, I found for a second time that by taking the position that the witness statements should be withheld as part of the Crown brief, the ministry had fettered its discretion and, in fact, had failed to exercise it at all. I stated:

> By determining that nothing at all can be disclosed from the Crown brief, I find that the ministry has failed to consider the Crown brief's contents, as well as having failed to consider that sections 19 and 49(a) are discretionary exemptions, each of which permit the ministry to disclose information from the Crown brief, despite the fact that it could withhold it.
>
> I find that the ministry has not re-exercised its discretion in a proper manner in accordance with the reasons set out in Interim Order PO-3927-I. Specifically, in its response to the order, there is no indication in its letter of March 21, 2019 that it took into account the considerations noted in Interim Order PO-3927-I, including the following:
>
> - that the appellant was initially acquitted of the second degree murder for which he is now serving a life sentence,

[9] The ministry is also referred to as the Attorney General or the Ministry of the Attorney General in the appellant's response.

> • that 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
>
> • that 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."

[29] In Interim Order PO-3957-I, I found that the ministry's response to Interim Order PO-3927-I demonstrated that it did not properly re-exercise its discretion, as it was required to do. As such, I ordered the ministry to re-exercise its discretion again and to take into account the considerations set out in Interim Orders PO-3297-I and PO-3957-I.

The ministry's response to Interim Order PO-3957-I

[30] In response to Interim Order PO-3957-I, the ministry continued to withhold access to the witness statements. The ministry states that in re-exercising its discretion again, it considered the appellant's situation. It submits that the freedom of information appeal process is not the forum to re-argue the validity of trial issues raised by the appellant. The ministry states that there is little utility in using the freedom of information forum to discuss issues that were fully considered at both the trial and appeal stages in a criminal prosecution.

[31] The ministry submits that the issues and determinations with respect to the adequacy of criminal disclosure, who the aggressor was, the propensity of violence of the victim or the accused, criminal antecedents, self-defense, DNA evidence or circumstantial evidence are not properly within the jurisdiction of the IPC. That being said, the ministry states that it recognizes that a wrongful conviction is a very serious matter and the use that the appellant wishes to make of the records.

[32] The ministry states that it is also aware of the use that the appellant wishes to make of the records and has taken all of this information into account in coming to it conclusion with respect to the release of the records, both in previous submissions and within this current set.

[33] The ministry states that it continues to rely upon its prior analysis. It states that it took into account the significance of the wording in section 19 and the interests it seeks to protect, the importance of the privilege attached to solicitor-client records (as defined by the courts and the IPC), the historic practices of the ministry in relation to the nature of the records sought, the privacy considerations of witnesses in criminal prosecutions, and the investigative interests of police with respect to witness cooperation. The ministry states that it has again evaluated and assessed these and other factors in exercising its discretion to withhold the records.

[34] The ministry again urges the appellant to address his concerns through an application for Ministerial Review pursuant to section 696.1 of the *Criminal Code of Canada*.

[35] In response, the appellant reiterated that he was never provided with relevant witness statements that are in the possession of the Crown and submits that these statements are essential to his efforts to overturn his conviction through the Ministerial Review process.

[36] The appellant states that the ministry is keeping a wrongly convicted person in prison rather than handing over material that the ministry wrongly asserts that he previously received. The appellant reiterates his earlier position that the ministry can redact sensitive information from the witness statements.

Analysis/Findings

[37] As noted above, I have issued two interim orders[10] ordering the ministry to re-exercise its discretion with respect to certain witness statements I found exempt by reason of the statutory litigation privilege in section 19 in conjunction with section 49(a).

[38] The statutory litigation privilege in section 19 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. The request at issue in this appeal, however, was made to the ministry and the records at issue in this appeal are in the possession of the ministry, not the police.

[39] The appellant maintains that he has never received copies of the witness statements at issue, either as part of his criminal proceedings or through an access request to the ministry. The ministry maintains that the appellant should seek access to these statements not though the ministry's Crown brief but through the police that investigated the murder charge laid against him. The appellant claims that he was unable to access these statements through the police.

[40] I have ordered the ministry to re-exercise its discretion concerning access to the witness statements in the Crown brief twice. I find in this order, in its second re-exercise of its discretion, the ministry has exercised its discretion in a proper manner. In particular, I find that in exercising its discretion, the ministry has reviewed the circumstances listed above by considering:

- the purposes of the *Act*, including the principles that:

---

[10] Interim Orders PO-3927-I and PO-3957-I.

    - information should be available to the public;
    - the appellant should have a right of access to his own personal information;
    - the discretionary nature of the solicitor-client privilege exemption in section 19;
    - the privacy of individuals who provided the witness statements should be protected;

- the wording of the section 19 exemption and the interests it seeks to protect, including the importance of the privilege attached to solicitor- client records (as interpreted by the courts and the IPC);
- the appellant's need to receive the information for a 696.1 of the *Criminal Code of Canada* application;
- that the appellant is an individual;
- the relationship between the appellant and the individuals who provided the witness statements;
- whether disclosure will increase public confidence in the operation of the ministry, taking into account the importance of witnesses providing statements to the police to assist in the prosecution of offences;
- the nature of the information and the extent to which it is significant and/or sensitive to the ministry, the appellant and the witnesses; and,
- the historic practice of the ministry with respect to disclosure of information from Crown briefs.

[41] In summary, unlike my findings in Interim Order PO-3297-I and PO-3697-I, I am satisfied that in its second re-exercise of discretion, the ministry's properly considered:

- the Crown brief's contents, including the witness statements,
- the appellant's circumstances, and
- the purposes of the sections 19 and 49(a) discretionary exemptions.

[42] Accordingly, as I am satisfied that the ministry has now properly re-exercised its discretion concerning the remaining information at issue in the Crown brief, the witness statements. Therefore, I am upholding the ministry's exercise of discretion.

ORDER:

I uphold the ministry's re-exercise of discretion and dismiss the appeal.

April 29, 2020

Diane Smith
Adjudicator