Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4097

Appeal PA19-00172

Ministry of the Attorney General

December 21, 2020

Summary: This order deals with an appeal of an access decision made by the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for an expert opinion report on school buses from a Crown Attorney's office in relation to a specific court file. The ministry denied access to the report, claiming the discretionary exemption at section 19 (solicitor-client privilege) and the section 21 personal privacy exemption. In this order, the adjudicator finds that the report is exempt from disclosure under Branch 2 of section 19, as it is subject to the statutory litigation privilege. In addition, the ministry's exercise of discretion is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for "a report that provides an expert opinion on school buses" from a Crown Attorney's office and all depositions in relation to a specific court file.

[2] By way of background, an expert retained by defence counsel in a criminal trial prepared the report for the defence, and defence counsel then provided it to the Crown.

[3] The ministry located the expert report and issued a decision denying access in

full, claiming the discretionary exemptions in sections 49(a) in conjunction with 19(a) (solicitor-client privilege) and 49(b) (personal privacy) and the mandatory exemption in 21(1) (personal privacy) of the *Act.* The ministry further advised the requester that there were no deposition materials.

[4] The requestor, now the appellant, appealed the ministry's decision to this office.

[5] During the mediation of the appeal, the appellant confirmed with the mediator that she accepted the ministry's explanation that no deposition materials exist. The ministry confirmed its position that sections 19, 21(1) and 49(a) and (b) applied to the report. The appellant confirmed that she was seeking access to the report in its entirety.

[6] The file was then transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry under the *Act.* The adjudicator assigned to the file begin her inquiry by seeking the representations of the ministry. The ministry provided representations. In its representations, the ministry advised that the record did not contain the personal information of the appellant and, therefore, the exemptions in sections 49(a) and 49(b) do not apply. The ministry continued to rely on the discretionary exemption in section 19 and the mandatory exemption in section 21(1) to deny access.

[7] The file was then transferred to me to continue the inquiry. I sought and received representations from the appellant.

[8] Based on my review of the record at issue, I find that it does not contain any personal information relating to the appellant. Therefore, it should be more properly considered under sections 19 and 21(1).

[9] For the reasons that follow, I find that the record is exempt from disclosure under Branch 2 of section 19. I uphold the ministry's exercise of discretion and dismiss the appeal.

RECORD:

[10] The record at issue is a 10-page expert report.

ISSUES:

A. Does the discretionary exemption in section 19 exemption apply to the information at issue?

B. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[11] Both the ministry and the appellant provided background information regarding the record.

[12] The appellant advises that she was the victim of a crime that took place on a school bus, which resulted in criminal charges.

[13] The ministry submits that the record at issue relates to the criminal prosecution in which the appellant was a witness. In preparation for the trial, defence counsel retained an expert witness in relation to school buses that were operated by a particular school district. Under the *Criminal Code of Canada*, the defence provided the Crown with a copy of the record at issue (the expert report) before the trial was to commence. The record contains technical information, including specifications of the buses and blueprints.

[14] In this particular case, prior to the trial, the Crown determined that there was not a reasonable prospect of conviction, and subsequently withdrew the criminal charges before the trial was to begin.

Issue A: Does the discretionary exemption in section 19 exemption apply to the information at issue?

[15] Section 19 of the *Act* states, in part:

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

[16] Section 19 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.

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[18] Litigation privilege protects records created for the dominant purpose of

litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[1] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[2] 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.[3] The litigation must be ongoing or reasonably contemplated.[4]

[19] Branch 2 is a statutory privilege that 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." The statutory exemption and common law privileges, although not identical, exist for similar reasons. This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "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.[5]

[20] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.[6] 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.[7] However, the 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."[8]

[21] In contrast to the common law litigation privilege, termination of litigation does not end the statutory litigation privilege in section 19.[9]

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[1] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[2] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[3] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[4] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[5] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[6] Order PO-2733.
[7] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[8] 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.
[9] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

Representations

[22] The ministry submits that the appellant provided information to the police regarding an offence that had taken place. Based on the statement provided by the appellant to the police, they arrested and charged the individual the appellant had identified as the offender. The appellant, the ministry argues, then became a witness in the criminal prosecution and she testified under oath at the preliminary hearing. At the end of the preliminary hearing, the presiding justice found that there was sufficient evidence upon which to commit the accused to trial in the Superior Court.

[23] As previously stated, in preparation for the trial, the defence retained an expert witness in relation to the bus that was used by the school district during the relevant time period. The defence provided the Crown with a copy of the expert's report shortly before the trial was to begin.

[24] The ministry's position is that once the record was received by the Crown, it formed part of the Crown brief and is exempt from disclosure under branch 2 of the solicitor- client privilege in section 19. The ministry submits that expert reports, even if provided by the defence, are used by the Crown for a variety of purposes. For example, if the report exposes weaknesses within the Crown's case, the Crown will strategize how to best negate any perceived weaknesses or perhaps seek to disqualify the expert. Conversely, if the report confirms or supports evidence that is favourable to the case, the Crown will incorporate that evidence into the trial. In addition, the ministry argues that the Crown has an ongoing obligation to evaluate the case at each stage of the trial process, to determine whether the case continues to have a reasonable prospect of conviction. Any new disclosure, including receipt of defence evidence such as an expert report, triggers this assessment. As a result, the ministry argues, the expert report became an integral part of the Crown brief.

[25] As previously stated, in this particular case, prior to the trial, the Crown determined that there was not a reasonable prospect of conviction, and subsequently withdrew the criminal charges.

[26] The ministry advises that the Crown then communicated with the appellant to explain the reasoning behind the decision to withdraw the criminal charges. The appellant sought a copy of the expert report, and the Crown explained that this report formed part of the Crown brief and was, therefore, subject to solicitor-client privilege.

[27] The ministry submits that it is well settled law that branch 2 of the litigation privilege of solicitor-client privilege in section 19 applies to the contents of the Crown

brief,[10] and that this exemption applies to the record at issue.

[28] The appellant states that she is the victim of a crime that took place on a school bus. The appellant submits that section 19 does not support the concealment of information from a victim of crime (here, the appellant). The appellant further submits that the *Canadian Victims Bill of Rights* (*Bill of Rights*) should prevail over the *Act*, and that the *Bill of Rights* states, among other rights, that victims have the right to information and the right to participation.

[29] The appellant further submits that the expert report does not address the specifications of the school bus where the crime took place, and that, as a result, the report is misleading. The appellant then provides extensive detailed technical information why she is of the view that the expert report was inaccurate with regards to the school bus. Further, the appellant argues that the decision to withdraw the charges was based on a completely unreliable report that was not presented to the trial judge.

[30] The appellant also provided representations on the Crown's decision to terminate the prosecution, stating that she had a phone conversation with the Crown, in which the Crown advised her that a decision had been made not to continue with the case, because a transportation expert had been consulted, who concluded that it would not be possible for the offence, as recalled by the appellant, to have taken place. The appellant provided copies of correspondence she had with the Director of Crown Operations, as well as the Minister of Justice and Attorney General of Canada regarding the Crown's decision to withdraw the charges.

Analysis and findings

[31] My jurisdiction is limited to determining whether the *Act* applies to exempt the record at issue from disclosure. While I am empathetic toward the appellant, the *Bill of Rights* has no application in this appeal.

[32] 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.

[33] I find that the record is exempt from disclosure under branch 2 of section 19, subject to my findings regarding the ministry's exercise of discretion. I am satisfied with the ministry's explanation that the record represents part of the confidential Crown brief, despite the fact that the author of the report was retained by defence counsel, as

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[10] See for example, Orders PO-2733 and PO-2871.

opposed to the Crown. I am satisfied that the expert report at issue was actually used by the Crown as part of its fact-finding and as part of the investigation process. I further find that the Crown used the record to exercise its skill and knowledge in the performance of its prosecutorial functions.

[34] In addition, I find that this is not a case where the report was simply copied and placed in the Crown brief; the record was actually used by the Crown to make a decision to withdraw the criminal charges. Consequently, this report was delivered to the Crown as part of the litigation process. Until a decision was made to proceed to proceed with charges in open court, the record, in my view, falls within a zone of privacy. This is also not a case where the exemption 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.[11] Although the report in question originated with defence counsel and was communicated to the Crown, its character changed once the Crown placed it in the Crown brief and used it to make decision about the prosecution.

[35] The Ontario Court of Appeal's decision in *Ontario (Liquor Control Board) v. Magnotta Winery Corp*. is instructive in this regard.[12] In the *Magnotta* case, the records at issue were created by both Crown counsel and Magnotta's counsel for use in mediation and settlement discussions. The Court found these records to be exempt from disclosure under branch 2 of section 19. Specifically concerning the records prepared by Magnotta's counsel, the Court found that these records were "prepared for Crown counsel" because they were provided to Crown counsel for use in mediation and settlement discussions. The Court stated at paragraph 44 that "to limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch."

[36] The Court went on to distinguish between simple correspondence sent between counsel and records used by Crown counsel to, in the *Magnotta* case, assist with mediation and settlement discussions, stating:

> I do not view the Divisional Court decisions in Big Canoe 2006 and Goodis 2008 as inconsistent with the Divisional Court's interpretation of the second branch of s. 19 in the present case. In Big Canoe 2006, simple correspondence between counsel during the course of a prosecution was held to be outside the scope of the second branch. Simple correspondence is not a document that was prepared "for use in the litigation". Rather, it was a document that was prepared during the course of litigation. Nor

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[11] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[12] [2010] O.J. No. 4453 (C.A) (*Magnotta*).

> would counsel reasonably expect that simple correspondence would fall within the "zone of privacy". Contrast that with the Disputed Records in the present case. The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy."[13]

[37] While this case involves a criminal proceeding, and not mediation or settlement discussions, I find that the principles enunciated by the Court of Appeal and set out above, are equally applicable in the circumstances of this case and, applying the Court's principles, I find that the expert report falls within the "zone of privacy" as contemplated in the statutory litigation privilege in section 19.

[38] Lastly, there is no evidence before me that the ministry has either explicitly or implicitly waived the litigation privilege, which continues to apply even if the litigation has concluded.

[39] Because I have found the record to be exempt from disclosure under section 19 in its entirety, it is not necessary for me to consider whether the mandatory exemption in section 21(1) of the *Act* applies to it.

Issue B: Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[40] The section 19 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.

[41] 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, or it fails to take into account relevant considerations.

[42] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[14] This office may not, however,

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[13] *Magnotta*, para. 45.
[14] Order MO-1573.

substitute its own discretion for that of the institution.[15]

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[16]

- 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, and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- 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; and
- the historic practice of the institution with respect to similar information.

Representations

[44] The ministry submits that, in exercising its discretion, it considered the wording of the exemption in section 19 and the interests that it seeks to protect. The ministry argues that in *Alberta (Information and Privacy Commissioner) v. University of Calgary*,[17] the Supreme Court of Canada found that, in the context of freedom of information legislation, solicitor-client privilege should be ". . . jealously guarded and should only be set aside in the most unusual circumstances." The ministry also submits that it has been the historic practice within the ministry that Crown brief records are accorded privacy protection, absent any other compelling factors, and are only released pursuant to the disclosure obligations in a criminal trial. In this case, the ministry argues, the fact that the appellant is seeking a document within a Crown brief is not a circumstance that justifies the setting aside of solicitor-client privilege within the context

[15] Section 54(2).
[16] Orders P-344 and MO-1573.
[17] [2016] 2 S.C.R. 555.

of the *Act*.

[45] The appellant's representations do not address this issue.

Analysis and findings

[46] I have considered the ministry's representations on the factors it took into consideration in exercising its discretion to not disclose the record for which it claimed section 19. I am satisfied that the ministry exercised its discretion within the appropriate parameters, and that it considered relevant factors in doing so. I find that the ministry properly exercised its discretion in this appeal, and I will uphold it.

ORDER:

I find that the record is exempt from disclosure under Branch 2 of section 19. I also uphold the ministry's exercise of discretion. The appeal is dismissed.

Original Signed by: December 21, 2020
Cathy Hamilton
Adjudicator