Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4147

Appeal PA19-00252

Ministry of the Attorney General

May 20, 2021

**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 information relating to two specific criminal prosecutions. The ministry denied access, in full, citing the exemptions at sections 19 (solicitor-client privilege), 21(1) (personal privacy) and 49(b) (personal privacy). During mediation, the ministry issued a revised decision and granted partial access to some of the previously withheld information. The appellant continued to seek access to the withheld information and raised the issue of reasonable search. In this order, the adjudicator finds that the records at issue are exempt under section 49(a) in conjunction with section 19 or 19 only based on the nature of the records. She also finds that the ministry conducted a reasonable search.

**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"), 19, 24(1) and 49(a).

**Orders Considered:** Orders PO-2733, PO-2871, MO-3276, PO-3927-I and PO-3950.

## BACKGROUND:

[1] The appellant was prosecuted for criminal offences. He subsequently submitted the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General:

> Re Court File #0611-998-17-1510, copies of correspondence between the Crown's office and the defence attorney [named individual] the Shelburne Police, or [named individual], including emails or recorded conversations between October 17, 2017 and Dec 31, 2017.
>
> Specifically a meeting occurred on December 12, 2017 between [name individual] (the assistant Crown attorney who had carriage of this case) and

> [named individual] of the Shelburne Police and the so called "victim" [named individual]. Is there a transcript of that meeting or notes taken during the meeting.
>
> Copies of notes in the "Crown Attorney's file" on this case.
>
> With respect to court filing 0611-998-18-154-00 and 0611-998-18-153-00 these were a peace bond against [named requester] and [named individual] (as co-accused). I am requesting copies of all notes in the Crown attorney's file with respect to this private information filing by [named individual].
>
> I would like copies of all correspondence between the Crown attorney, [named individual] and [named individual] or either of the 2 defence attorneys, namely [named individual] and [named individual]. There may also be copies of correspondence between crown attorney [named individual] and the defence attorney on or about May 29, 2018.
>
> I am asking for any recorded notes or a transcript of any recorded conversations between assistant crown attorney [named individual] and the chief of the Shelburne Police on Mar 22, 2018 and March 23, 2018.
>
> I am asking for copies of any correspondence or verbal conversations that occurred between the crown attorney's office and any members of the OPP Dufferin Detachment or notes recorded as a result of those communications.

[2] The ministry issued a decision denying access to the responsive records. Access to the withheld information was denied pursuant to the exemptions at section 19 (solicitor-client privilege), the mandatory personal privacy exemption at section 21(1) and the discretionary personal privacy exemption at section 49(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to the IPC.

[4] During mediation, the ministry issued a revised decision granting partial access to some of the previously withheld information. Access to the withheld information remained denied pursuant to sections 19, 21(1) and 49(b) of the *Act.*

[5] The mediator contacted the appellant, who confirmed receipt of the revised decision. The appellant advised the mediator that he wishes to pursue access to the withheld information. The appellant also advised the mediator that he believes that further records responsive to his request exist at the ministry. Accordingly, reasonable search was added as an issue in this appeal.

[6] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[7] I commenced my inquiry by seeking representations from the ministry and the appellant. Pursuant to section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*, the parties' representations (in their entirety) were shared.

[8] I added the possible application of section 49(a) (discretion to refuse access to

one's personal information) in conjunction with section 19 (solicitor-client privilege exemption) to the scope of the appeal as some of the records contain the personal information of the appellant and other individuals.

[9] For the reasons that follow, I uphold the ministry's application of section 49(a) in conjunction with section 19 for the records that contain the appellant's personal information and section 19 only for the records that relate to other individuals. I also find that the ministry conducted a reasonable search for records.

## RECORDS:

[10] The ministry states that the responsive records are Crown brief records as they were created as part of two criminal prosecutions. It explains that the police laid charges in one file and a private complaint was launched against two individuals in the other file.

[11] More specifically, the records at issue consist of emails/email chains and correspondence. They are identified as records 1, 3, 5, 7, and 9, in accordance with the ministry's index of records.[1]

[12] With respect to Record 1, it contains a number of emails and email chains. As numerous previous orders of the IPC have stated, this office takes a record-by-record analysis, which means examining each record (here, each email or email chain) and determining whether it contains an individual's own personal information or not.2 The ministry did not separate each email or email chain in Record 1 but numbered them all together as one record. In this case, as discussed in further detail below, page 16 of Record 1 is an email chain that does not contain the appellant's personal information, unlike the other emails and email chains contained in Record 1.

## 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 exemption at section 49(a) in conjunction with the solicitor-client privilege exemption at section 19, or the section 19 exemption standing alone apply to the information at issue?

C. Did the ministry exercise its discretion under sections 49(a) and 19 for the exempt records? If so, should this office uphold the exercise of discretion?

D. Did the ministry conduct a reasonable search for records?

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[1] During the inquiry, the ministry confirmed that it had disclosed the following records to the appellant during mediation: records 2, 4, 6, 8, 10, 11 and 12. As such, I have removed these records from the scopeof the appeal.

[2] Order M-352.

## DISCUSSION:

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

[13] The ministry claims the application of the personal privacy exemptions at sections 21(1) and 49(b) to the withheld information contained in the records at issue. In order to determine whether the personal privacy exemption at section 21(1) or section 49(b) of the *Act* applies, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. It is also necessary to determine whether the records contain the appellant's own personal information, in order to examine the ministry's exemption claims under the appropriate part of the *Act*.

[14] Relevant paragraphs of the definition of "personal information" are the following:

> "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,
>
> (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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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;

[15] 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.[3]

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[17] The ministry submits that the records contain "personal information" as defined in

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[3] Order 11.

[4] Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

section 2(1) of the *Act*. Specifically, it submits that there is information about the name, address, email address, marital status, medical information, character traits and habits, prior police contact and occupation of identifiable individuals other than the appellant.

[18] Although the appellant submitted representations, his representations did not address this issue.

[19] On my review of the records, I find that they contain "personal information" of identifiable individuals as defined by the *Act*. Specifically, they contain personal information of the appellant and other individuals, which would qualify as their personal information within the meaning of paragraphs (a), (b), (d), (e), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[20] I also find that records 5 and 7, along with an email chain contained on page 16 of Record 1, contains only the personal information of individuals other than the appellant. Accordingly, because these records do not contain the personal information of the appellant, Part II of the *Act*, containing a requester's general right of access to records applies to them, and the correct exemptions to consider are found in that Part.

[21] In addition, I find that the withheld information in records 3 and 9, along with Record 1 (excluding the email chain on page 16), contain the personal information of the appellant along with other identifiable individuals. Accordingly, Part III of the *Act* applies to these records, and the correct exemptions to consider are those in that Part.

[22] The ministry has claimed the application of section 49(a) in conjunction with section 19 (under Part II) or, alternatively, section 19 only (under Part II) for all the records. I will proceed to consider the application of these exemptions below.

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

[23] Section 47(1), found in Part III of the *Act*, gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads as follows:

> 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, 15.1, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information

[24] Section 49(a) of the *Act* ("may refuse") 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.[5] When access is denied under section 49(a), an institution must demonstrate that, in exercising its discretion, it considered whether it should release the record to the requester because the record contains his or her personal information.

[5] Order M-352.

[25] Section 19 of the *Act* states as follows:

> 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
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

***Representations***

[26] The ministry submits that all the responsive records form part of the Crown briefs in the two prosecutions. It relies on Order PO-2323, where Assistant Commissioner Tom Mitchinson accepted that "correspondence within a Crown Brief often includes confidential correspondence between Crowns, correspondence between Crowns and Defence Counsel, memos to file related to the prosecution, subpoenas, documents summarizing the evidence of Crown witnesses and potential Crown witnesses, a list of potential jurors" and concluded that these records were exempt under section 19. The ministry submits that Crown notes (electronic or hardcopy) relating to a Crown brief are also protected under section 19. It points out that these notes will disclose the Crown's thought process, legal analysis and prosecution strategy. The ministry also submits that communications of this nature clearly constitute the Crown's "work product" in relation to litigation and are protected under section 19.

[27] In response, the appellant alleges that there have been some inappropriate communications and/or lack of instructions in the Crown briefs. He asserts that the Assistant Crown Attorney in question acted in an inappropriate manner by continuing with the Peace Bond application when she had no case. The appellant disagrees that the notes in the Crown briefs should be subject to solicitor-client privilege. He states that the blurred lines: existing between the Assistant Crown Attorneys at the Dufferin Court House and the police are inappropriate. He also submits that the Assistant Crown Attorney in question is not a solicitor for the police or the alleged victim.

[28] In addition, the appellant submits that he requires all the records at issue as he plans to use them in a civil litigation action against the police, the police services board, the Crown and the alleged victim.

[29] In response, the ministry agrees that the Crown is not in a solicitor-client relationship with the alleged victim or the police. It explains that in a criminal prosecution the Crown represents the state. The ministry submits that past IPC orders have identified the "client" as being the Attorney General and this flows downward to the Deputy Minister and the Assistant Deputy Attorney General.

[30] In addition, the ministry reiterates that the records at issue are Crown communications and written notes, essentially Crown work product, that form part of the Crown brief and were prepared during the litigation of the appellant's criminal charges. It

also reiterates that requests for Crown brief records in contemplation of a civil action does not, in any way, meet the threshold of being an unusual circumstances that warrants the non-application of section 19.

[31] In response, the appellant provided lengthy sur-reply representations in which he disputes that he committed any offence. He explains why he requires the records at issue. The appellant also explains, from his perspective, how the events unfolded relating to these two criminal prosecutions.

### *Analysis and findings*

[32] 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 ministry must establish that one or the other (or both) branches apply.

[33] 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."

[34] I find that the Branch 2, the statutory litigation privilege, applies to the records at issue because they were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation." Records that form part of the Crown brief, as is the case in this appeal, include copies of email communications between the prosecutors, the police and Crown agencies, and other materials created by or for counsel, all of which have been found to be exempt under the statutory litigation privilege.[6]

[35] I find the records at issue in this appeal, which are records that comprise the Crown briefs, are subject to Branch 2 statutory litigation privilege in section 19(b) because they were all prepared by or for Crown counsel for use in litigation. In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[7] As such, the termination of the litigation related to this matter does not end the statutory litigation privilege in section 19.

[36] Given my conclusion that the records are subject to the Branch 2 privilege, there is no need for me to review whether they are also subject to the Branch 1 privilege.

[37] The appellant did not raise the issue of waiver of the privilege claimed and in this case I find that there is no evidence to suggest that the privilege has been waived.

[38] Subject to my review of the ministry's exercise of discretion, records 1 (excluding the email chain on page 16), 3 and 9 are exempt under section 49(a), in conjunction with section 19. Records 1 (the email chain on page 16), 5 and 7 are exempt under section 19.

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[6] Order PO-2733.
[7] Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer), cited above.

**C: Did the ministry exercise its discretion under sections 49(a) and 19 for the exempt records? If so, should this office uphold the exercise of discretion?**

[39] The sections 49(a) and 19 exemptions are 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.

[40] 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.

[41] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[8] This office may not, however, substitute its own discretion for that of the institution.[9]

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[10]

- 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
- 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

[8] Order MO-1573.
[9] Section 54(2).
[10] Orders P-344 and MO-1573.

- 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.

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

- the wording of the exemption and the interests it seeks to protect;
- nature of the records sought;
- the extent to which the records were significant and sensitive to the ministry;
- the appellant's interest in gaining access to the records against the privacy interests of other individuals in the records;
- the scope of the section 19 privilege as applied to Crown brief materials;
- the nature of the information contained in the records and determination that it was sensitive to the ministry, parties involved in the criminal prosecution (including the appellant, victim/complainant and co-accused);
- the disclosure of such sensitive records in response to an access request would potentially have an adverse impact on the public's confidence in the administration of justice;
- historic practice of the ministry to withhold this information; and

[44] The appellant argues that the records will demonstrate that the Assistant Crown Attorney in question acted inappropriately in not staying the criminal charges against him earlier and in continuing/intervening with the private complaint for a total of five court appearances when it was unwarranted. The appellant also argues that the Assistant Crown Attorney inappropriately interfered or instructed the police to stand down on a criminal offence of public mischief under section 140 of the *Criminal Code of Canada*[11] against the alleged victim.

[45] In addition, the appellant argues that the records will demonstrate that there have been some inappropriate communications and/or lack of instructions in the Crown brief materials.

[46] In reply, the ministry reiterates that it analyzed and took into consideration numerous factors when making its decision to deny access to the records on the basis of section 19. It says that access to the records for the purposes of potential civil proceedings is not an unusual circumstances that warrants the waiving of the section 19 privilege in this particular case.

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[11] R.S.C. 1985, c. C-46.

[47] In response, the appellant argues that the Crown notes contained in the records will show the lack of attention the Assistant Crown Attorney gave to his prosecution files.

[48] Based on my review of the parties' representations and the records, I find that the ministry properly exercised its discretion. I find that the ministry took into account the above-listed numerous factors. It also appears that the ministry re-considered its exercise of discretion during the mediation process and decided to disclose an additional 14 pages of responsive records to the appellant. I am satisfied that the ministry did not act in bad faith or for an improper purpose. I am also satisfied from my review of the ministry's representations that it took into account the fact that some of the records contain the personal information of the appellant. Accordingly, I uphold the ministry's exercise of discretion in deciding to withhold the exempt records pursuant to section 49(a) in conjunction with section 19 or section 19 standing alone.

**D: Did the ministry conduct a reasonable search for records?**

[49] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24(1).[12] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[50] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[13] To be responsive, a record must be "reasonably related" to the request.[14]

[51] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[15]

[52] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[16]

[53] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[17]

***Representations***

[54] In its representations, the ministry asserts that it conducted a reasonable search for responsive records. In support of its assertion, the ministry attached an affidavit sworn by an Assistant Crown Attorney, who has been tasked with responding to access

[12] Orders P-85, P-221 and PO-1954-I.
[13] Orders P-624 and PO-2559.
[14] Order PO-2554.
[15] Orders M-909, PO-2469 and PO-2592.
[16] Order MO-2185.
[17] Order MO-2246.

requests since February 2019 on behalf of the Criminal Law Division.

[55] The affiant states that the Criminal Law Division received the appellant's access request in March 2019. The next day, she contacted the Assistant Crown Attorney referenced in the request, to let her know that an access request had been received, that the affiant would be forwarding her a copy of that request to her attention, and that the affiant would be seeking copies of the records relevant to that request. The affiant states that she immediately learned that she had reached the Assistant Crown Attorney in question on her last day of work as she was retiring at the end of that day.

[56] The affiant states that, shortly thereafter, she sent an email to the Assistant Crown Attorney in question and the Crown Attorney of the Dufferin County Crown's Office (the Dufferin Crown Attorney), providing them with a copy of the request. She asked the Dufferin Crown Attorney to reach out to another Assistant Crown Attorney (the Other Assistant Crown Attorney) who had been involved in one of the prosecutions with respect to the request for records relating to correspondence from the defence on or about May 29, 2018. Additionally, the affiant asked the Dufferin Crown Attorney to work with the Assistant Crown Attorney in question to ensure that records in her possession relating to this request could be identified and accessed after her retirement date.

[57] In April 2019, the affiant was advised by the Dufferin Crown Attorney that she had requested the physical Crown files from storage and would review them. The Dufferin Crown Attorney also confirmed that she had reached out to the Other Assistant Crown Attorney, whose computer records search did not yield any responsive records. Finally, the Dufferin Crown Attorney advised that the Assistant Crown Attorney in question had placed all of the email records in her possession into a file so that they could be easily located for review.

[58] Also in April 2019, an office administrator at the Dufferin County Crown's Office provided the following records to the affiant at the request of the Dufferin Crown Attorney:

- a scanned copy of the handwritten Crown notes in the Crown brief
- scanned copies of email correspondence that were located in the hard copy Crown brief

[59] Although the office administrator advised the affiant that most of the email records within the file on the shared drive, as created by the Assistant Crown Attorney in question, could not be accessed, with the assistance of the ministry's System's Coordinator they were accessed, retrieved and printed from the archive vault.

[60] Subsequently, the Dufferin Crown Attorney contacted the ministry to indicate that additional records were expected as the physical records located in the Crown brief were provided for only the charges that related to a Peace Bond Hearing involving the same parties. There was a second Crown brief involving the same appellant and complainant that related to a police-laid criminal prosecution. The Dufferin Crown Attorney later reviewed that Crown brief, gathered these additional eight pages together and forwarded them to the affiant.

[61] In response, the appellant questions whether all of the records saved on the file drive by the Assistant Crown Attorney in question were in fact sent to the affiant, and ultimately to the IPC. He also questions why the Dufferin Crown Attorney, rather than the Assistant Crown Attorney in question, sent the responsive records to the affiant. The appellant further questions the competency of the Dufferin Crown Attorney as it took her a month to realize that she had not addressed the second Crown brief involving the police- laid criminal prosecution. He suggests the Dufferin Crown Attorney only located the second Crown brief due to his complaint made to Director of Crown Operations Office in Hamilton.

[62] In response, the ministry acknowledges that there was some minimal delay in accessing the emails of the Assistant Crown Attorney in question that were archived in a protected electronic "vault", but that those delays did not result in any records being lost or overlooked. It submits that all files pertaining to the appellant's request were ultimately located, opened and printed. The ministry also submits that the further records located by the Dufferin Crown Attorney, from a separate prosecution relating to the appellant, were included in the ministry's list of responsive records and they are complete.

### *Analysis and finding*

[63] I have carefully reviewed the records and the ministry's affidavit. I find that the appellant's question about whether all the records saved on the file drive were in fact sent to the affiant to be speculative. There is no evidence to suggest that they were not all sent. I also find that it is not relevant whether the responsive records were sent directly by the Assistant Crown Attorney in question versus the Dufferin Crown Attorney to the affiant. I recognize that the affiant reached the Assistant Crown Attorney in question on her last day of work (prior to her retirement). Understandably, the Assistant Crown Attorney in question would have numerous tasks to complete prior to leaving her office permanently that day. As such, she may not have had the time to send the responsive records directly to the affiant. In any event, I am not satisfied that the search was compromised in any way as a result of these circumstances.

[64] In my view, the ministry has conducted a reasonable search. An institution is not required to prove with absolute certainty that additional responsive records do not exist. Rather, institutions are required to demonstrate that they have made a reasonable effort to locate records. I have formed this view because I accept that the ministry understood the request and conducted appropriate searches for the records. I uphold the reasonableness of the ministry's search.

## ORDER:

1. I uphold the ministry's search for responsive records.

2. I uphold the ministry's decision to withhold records the records at issue.

Original signed by: May 20, 2021

Lan An
Adjudicator