



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-368

Appeal 900377

Ministry of the Attorney General



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# ORDER

## BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information regarding any charges relating to the requester, including any wiretap application records. In particular, the requester sought access to information relating to arson and fraud investigations, the murder conviction against him, and any appeals of the murder conviction.

The records which the Ministry identified as being responsive to the request were located in two of the Ministry's departments: the Crown Law Office, Criminal (the Crown Law Office file), and the Office of the Director of Criminal Prosecutions (the Criminal Prosecution file).

The Crown Law Office file consists of 25 records plus an additional 102 numbered pages. The Ministry claims section 22(a) of the Act as the basis for exempting the 25 records. As far as the numbered pages are concerned, the requester was provided with access to pages 70-80 (with the exception of pages 78A through 78F); the remaining pages were withheld by the Ministry pursuant to sections 13(1), 14(1)(c), 14(1)(d), 14(1)(e) and 19 of the Act.

The Criminal Prosecution file consists of a 357-page package plus an additional 133 numbered pages. The package was withheld by the Ministry in its entirety under section 15(b) of the Act. As far as the additional pages are concerned, the requester was provided with access to the following pages: 52-55, 62, 64, 68, 69, 72-77, 84 and 97-132; access to the remaining numbered pages, 1-51, 56-61, 63, 65-67, 70-71, 78-83, 85-96 and 133, was denied pursuant to sections 19 and/or 21 of the Act.

The existence of any wiretap application records was neither confirmed nor denied, pursuant to section 14(3) of the Act.

The requester appealed the Ministry's decision to deny access, and to refuse to confirm or deny the existence of any wiretap application records.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decisions was sent to the Ministry, the appellant, the appellant's counsel, the Royal Canadian Mounted Police (RCMP), and Metropolitan Toronto Police (the Police). Written representations were received from all parties.

## PRELIMINARY MATTERS:

### Wiretap Application Records

In Order P-344, I found that the doctrine of federal legislative paramountcy operates so as to exclude requests for wiretap application records from the scope of the Act. A copy of Order P-344 was provided to the appellant's counsel during the course of this appeal.

Therefore, I find that this part of the appellant's request falls outside the scope of the Act, and the rest of this order will deal only with non-wiretap records.

### **Records not responsive to the request**

In its representations, the Ministry states that some of the information contained in certain records is not responsive to the appellant's request. I have reviewed the records, and agree that a number of pages contain information which falls outside the scope of the request and should not be disclosed to the appellant. Specifically, I find that the following pages are not responsive:

- Page 67A in the Crown Law Office file, which consists of a mathematical calculation, the names of members of the Court of Appeal, and personal notes unrelated to the request.
- Pages 78A, 78B, 78B(i), 78C, 78D, 78E and 78F in the Crown Law Office file, which consist of telephone messages, short memoranda and draft letters which pertain to a post-conviction letter from the appellant regarding alleged inaccuracies in his criminal record. The Ministry has expressed a willingness to disclose these non-responsive pages, which is in keeping with the spirit of the Act, and I urge the Ministry to do so.
- Pages 66 and 67 in the Criminal Prosecution file, which consist of a letter and a memorandum dealing with administrative arrangements for the payment of overnight hotel and taxi charges for a witness in the murder trial.
- Page 133 in the Criminal Prosecution file, which is a thank-you note written to one of the Ministry's lawyers after the completion of the murder trial.

### **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 22(a) of the Act applies to any of the records.
- B. Whether the discretionary exemption provided by section 15(b) of the Act applies to any of the records.

- C. Whether the discretionary exemption provided by section 19 of the Act applies to any of the records.
- D. Whether the information contained in any of the records qualifies as "personal information", as defined by section 2(1) of the Act.
- E. If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to any of the records.
- F. Whether the discretionary exemption provided by section 13(1) of the Act applies to any of the records.
- G. Whether the discretionary exemptions provided by sections 14(1)(c), (d) and/or (e) of the Act apply to any of the records.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the discretionary exemption provided by section 22(a) of the Act applies to any of the records.**

The Ministry claims section 22(a) of the Act as the basis for denying access to the 25 records in the Crown Law Office file. These records consist of transcripts of trial proceedings, factums, appeal books, case books, court notices, court forms, an endorsement and a judgement.

Section 22(a) reads as follows:

A head may refuse to disclose a record where,

the record or the information contained in the records has been published or is currently available to the public;

The Ministry's decision letter to the appellant advised him that the 25 records are available to the public and can be obtained from court reporters and the Court of Appeal. The appellant did not address this issue in his representations.

I agree with the Ministry's position that the information contained in these records is currently available to the public, and, as such, the requirements for exemption under section 22(a) have been satisfied. The Ministry has provided representations regarding the exercise of discretion in favour of claiming exemption under this section, and I find nothing improper in the circumstances of this appeal. At the same time, I would draw the Ministry's attention to the fact

that there is nothing in the Act which prevents the Ministry from disclosing records which are properly exempt under section 22(a).

**ISSUE B: Whether the discretionary exemption provided by section 15(b) of the Act applies to any of the records.**

The Ministry claims section 15(b) of the Act as the basis for exempting the 357-page package of records in the Criminal Prosecution file. This package consists of records compiled by the RCMP regarding the arson and fraud investigations relating to the appellant.

Section 15(b) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal information received in confidence from another government or its agencies by an institution;

In Order 210, Commissioner Tom Wright outlined the following test for exemption under section 15(b):

In order to qualify for exemption under section 15(b), the records must meet the following test:

1. The records must reveal information received from another government or its agencies; **and**
2. The information must have been received by an institution; **and**
3. The information must have been received in confidence.

In its representations, the Ministry states that this package of records was compiled by the RCMP and supplied to the Police, who in turn provided it to the Ministry. The RCMP states in its representations that these records were provided in confidence and that "[T]his 'in confidence' trust is still valid ...". The RCMP also states that release of these records "would jeopardize the spirit and willingness of any future exchange of information between the RCMP and Ontario police agencies".

Having reviewed the records and the various representations, I find that the requirements for exemption under section 15(b) have been established. I am satisfied that disclosure of these

records would reveal information received from another government or its agency, namely the RCMP, and that these records were received by the Ministry in confidence. In my view, the expectation and intention of confidentiality survived the passing of the documents from the RCMP to the Police and on to the Ministry, in the circumstances of this appeal.

I have reviewed the Ministry's representations regarding its exercise of discretion in favour of claiming exemption under section 15(b), and I find nothing improper in the circumstances of this appeal.

The rest of this order will deal with the 102 pages in the Crown Law Office file and the 133 pages in the Criminal Prosecution file, with the exception of those pages which have already been released to the appellant or have been found to fall outside the scope of the appellant's request.

**ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to any of the records.**

Section 19 of the Act states:

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

In order for a record to qualify for exemption under the second branch of section 19, the Ministry must meet the following two-part test:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In its representations, the Ministry states that some pages in both the Crown Law Office and Criminal Prosecution files were prepared "by or for Crown Attorneys, Assistant Crown Attorneys, Directors of Crown Attorneys, Appeal Counsel or students-at-law employed by the Ministry during the currency of the investigation and/or following the arrest and during the process of the trial or appeals of [the appellant] on his charge of first degree murder".

Dealing first with the Criminal Prosecution file, the following pages were exempt by the Ministry under section 19:

- pages 1-6, which are described by the Ministry as notes made by a Crown Attorney in preparation for trial;
- pages 39-46, which consist of a memorandum of law prepared by an articling student regarding the admissibility of certain evidence;
- pages 47-51, which consist of memoranda and correspondence to and from Crown counsel pertaining to matters related to the prosecution;
- page 65, which is a duplicate copy of page 39;
- pages 70-71, which are letters from Crown counsel to other Crown counsel, listing the names and place of residence of witnesses who might testify at the preliminary inquiry and trial;
- pages 78-80, which are letters from Crown counsel regarding matters to be done in preparation for trial;
- pages 81-83 and 85-89, which are letters to and/or from Crown counsel regarding a possible witness; and
- pages 90-96, which are correspondence and enclosures between Crown counsel seeking approval and direction in relation to trial preparation.

In my view, each of these pages was prepared by or for Crown counsel in contemplation of litigation, and I find that they clearly qualify for exemption under the second branch of the section 19 exemption.

The Ministry also claims section 19 as the basis for exempting pages 7-38 in the Criminal Prosecution file. However, in my view, these pages appear to contain personal information and are more appropriately dealt with under Issues D and E.

Turning to the Crown Law Office file, the Ministry claims section 19 as the basis for exempting the following pages:

pages 1-67, which are described as appeal preparation and argument notes prepared by Crown counsel or by an articling student to defend the appellant's conviction in the Court of Appeal;

page 68, which is a memorandum from one Crown counsel to another Crown counsel regarding a matter relating to the appeal; and

page 69, which is a memorandum to Crown counsel regarding the preparation of an appeal book.

Again, I am satisfied that each of these pages was prepared by or for Crown counsel in contemplation of litigation, and qualifies for exemption under the second branch of the section 19 exemption.

I have reviewed the Ministry's representations regarding the exercise of discretion in favour of claiming exemption under section 19, and I find nothing improper in the circumstances of this appeal.

**ISSUE D: Whether the information contained in any of the records qualifies as "personal information", as defined by section 2(1) of the Act.**

Section 2(1) of the Act states, in part:

"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,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,  
...
- (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;

Pages 7-38 in the Criminal Prosecution file contain statements of a witness. I find that these pages contain the personal information of individuals other than the appellant, including the name, national origin, address, phone number, age, family status, and/or employment history of identifiable individuals.

The Ministry also claims that parts of pages 56-61 and page 63 of the Criminal Prosecutions file contain personal information. Pages 56-61 consist of an invoice submitted by an accounting firm to the Ministry for work done as part of the murder investigation. In its representations, the Ministry does not explain why the parts of these pages which were not disclosed to the appellant contain personal information. With the exception of the names of certain individuals found on pages 56 and 57, I find that these pages do not contain information about any identifiable individuals, and should be disclosed. I find that the names on pages 56 and 57 are the personal information of individuals other than the appellant.

Page 63 is a covering letter enclosing an invoice from a physician who examined a witness. This page was disclosed to the appellant, with the exception of the name of the witness and the Social Insurance Number of the physician. In my view, the severance made by the Ministry contain personal information of individuals other than the appellant.

**ISSUE E: If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to any of the records.**

In Issue D, I found that pages 7-38 and some parts of pages 56, 57 and 63 in the Criminal Prosecutions file contain personal information of individuals other than the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 21(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In my view, the witness statements on pages 7-38 were "compiled as part of an investigation into a possible violation of law", and satisfy the requirements of section 21(3)(b). As such, I find that disclosure of these pages would result in a presumed unjustified invasion of the personal privacy of persons other than the appellant.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption.

Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the record does not contain any information relevant to section 21(4).

It is possible that a combination of circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under section 21(3); however, in my view, such a case would be extremely unusual [Order 20].

Although the appellant and his counsel did not specifically raise section 21(2)(d), the appellant's counsel states in his representations that: "A growing body of evidence accumulated since the [murder] trial suggests that the Crown may have deliberately left out key evidence that might have substantiated [the appellant's] claim to innocence". He states that the appellant is entitled to "know what the Crown knew at the time of [the appellant's] trial".

Section 21(2)(d) of the Act states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- the personal information is relevant to a fair determination of rights affecting the person who made the request;

In Order M-28, Commissioner Wright, considered section 14(2)(d) of the Municipal Freedom of Information and Protection of Privacy Act, which is identical in wording to section 21(2)(d) of the provincial Act. Commissioner Wright found that "... the application of 14(2)(d) alone is not sufficient to rebut the presumption contained in 14(3)(b) [21(3)(b) of the provincial Act]." I agree with Commissioner Wright's view, and find that, regardless of whether or not section 21(2)(d) is a relevant consideration in the context of pages 7-38, it would not be sufficient to rebut the presumed unjustified invasion of personal privacy.

Therefore, I find that pages 7-38 qualify for exemption under section 21 of the Act.

The institution claims section 21(3)(b) as the basis for exempting the personal information contained on pages 56, 57 and 63. Having reviewed these pages, in my view, there is not a sufficient connection between the invoices submitted by the accounting firm and the physician, and the investigation involving the appellant, to bring these pages within the scope of section 21(3)(b). Therefore, I find that disclosure of the personal information on pages 56, 57 and 63 would not constitute a presumed unjustified invasion of personal privacy.

However, I find that in balancing the various factors under section 21(2) of the Act, disclosure of the names and Social Insurance Number on these pages would constitute an unjustified invasion of the personal privacy of these individuals, and that the remaining parts of pages 56, 57 and 63 should not be disclosed.

Because of the manner in which I have disposed of Issues A through E, it is not necessary for me to consider Issues F and G.

## **ORDER:**

1. I order the Ministry to disclose to the appellant pages 58-61 and those portions of pages 56 and 57 in the Criminal Prosecution file which do not contain the personal information of individuals other than the appellant. I have attached a highlighted copy pages 56 and 57 with the copy of this order sent to the Ministry, which identifies the parts of these pages which should not be disclosed.
2. I uphold the Ministry's decision not to disclose all other records and pages which are at issue in this appeal.
3. I order the head to disclose the records outlined in Provision 1 within fifteen days of the date of this order.
4. In order to verify compliance with this order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 1, only upon my request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

November 18, 1992