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

ORDER P-613

Appeals P-9300192 and P-9300479

Ministry of the Solicitor General and Correctional Services

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ORDER

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

> Any and all reports, minutes or records of meetings, statements, memos, letters, notes or any other written material concerning the Ontario Provincial Police investigation of [a named individual], including all police findings of said information; and the name of the person identified by [the named individual] as providing [the named individual] with the criminal records of [a second named individual].

The Ministry located a number of records that were responsive to the request but denied access to these documents in full based on the exemptions contained in sections 14(1)(a), (b) and (f), 14(2)(a), 19 and 21 of the Act. The requester appealed the denial of access, and raised the application of sections 21(2)(a) and 23 as considerations which weighed in favour of disclosure. This appeal was assigned number P-9300192 by the Commissioner's office.

Following the filing of the appeal, the Ministry issued two supplementary decision letters, claiming further exemptions based on sections 14(1)(l) and 14(2)(c) of the Act.

Mediation was not successful. Notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from the Ministry only. The appellant indicated that he would be relying on the reasons for appealing as set out in his letter of appeal.

While these representations were being considered, Commissioner Tom Wright issued Order M_170 which interpreted several statutory provisions of the Municipal Freedom of Information and Protection of Privacy Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Municipal Freedom of Information and Protection of Privacy Act was being adopted and because similar statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the appellant and the Ministry. The parties were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or to supplement the representations which they had previously made. No further representations were received.

The Ministry then received a separate request for access to:

> ... a copy of the statement made by [the named individual] to OPP investigators on or about November 20, 1992, referring to a meeting held between [the named individual] and [two other individuals].

Access was denied to this record on the basis of the exemptions found in sections 14(1)(a), (b) and (f), 14(2)(a) and (c), 19 and 21 of the Act. The requester appealed this decision. The Commissioner's office assigned Appeal Number P-9300479 to this file.

This appeal could not be resolved by mediation. Accordingly, notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Representations were received from the appellant only. The Ministry relied on its submissions in Appeal P-9300192.

THE RECORDS:

The records at issue in Appeal P-9300192 may be described as follows:

(1) Crown brief (pages 1-318)

(2) Witness statements (pages 319-450): pages 322-334, and 359-413 consist of the handwritten versions of typed statements included in the Crown brief;

(3) Police officers' notes (pages 450A-625): small portions of these notes which detail the officers' schedules, etc., are not responsive to the request.

The record at issue in Appeal P-9300479 consists of a nine-page statement which is included in the Crown brief described above. Given the commonality of this record to both files, I have dealt with the two appeals in this one order.

ISSUES:

The issues arising in this appeal are:

A: Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue in both appeals.

B: Whether the records in both appeals contain "personal information" as defined in section 2(1) of the Act.

C: If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records in both appeals.

D: Whether the discretionary exemptions provided by sections 14(2)(a) and/or (c) of the Act apply to the records at issue in both appeals.

E: Whether the discretionary exemptions provided by sections 14(1)(a), (b) and/or (f) of the Act apply to the records at issue in both appeals.

F: Whether the discretionary exemption provided by section 14(1)(l) of the Act applies to the record at issue in Appeal P-9300192.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 19 of the Act applies to the records at issue in both appeals.

The Ministry claims that section 19 of the Act applies to the following pages of the record:

- Pages 1-318 (the Crown brief),
- Pages 319-334 and 359-413 (duplicate statements contained in the Crown brief and
- Pages 500, 516, 518-21, 525-530 and 569 (police officers' notes of meetings with Crown counsel)

Section 19 of the Act states that:

> 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.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

(1) a record that is subject to the common law solicitor-client privilege (Branch 1); and

(2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry submits that the police officers' notes of meetings with Crown counsel fall under the first branch of the section 19 exemption, while the Crown brief and the duplicate copies of statements are exempt pursuant to Branch 2.

Branch 1

In order for the police officers' notes to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that these documents satisfy either of the following tests:

1. (a) there is a written or oral communication; **and**

   (b) the communication must be of a confidential nature; **and**

   (c) the communication must be between a client (or his agent) and a legal advisor; **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

The Ministry claims that the notes are exempt pursuant to the first part of Branch 1. It states its position as follows:

> ... the notes are a written record of oral communications which are of a confidential nature with regard to whether reasonable grounds exist to lay charges. In this case, the client is the OPP and the legal advisors are [the] Director Crown Law Criminal and ... Counsel. The subjects of the discussions are directly related to the police investigators seeking legal advice from counsel on various issues during the investigation ...

In Order M-52 Commissioner Tom Wright considered whether a solicitor-client relationship existed between Crown counsel and the members of a municipal police force. He concluded that it did not.

In my view, the same conclusion can be reached in considering the relationship between Crown counsel and the Ontario Provincial Police (the OPP). The OPP are not the clients of the Crown attorney. As the relationship between the OPP investigators and the Crown attorneys cannot be characterized as one of solicitor and client, the officers' notes of meetings with Crown counsel cannot qualify for exemption under Branch 1 of section 19.

[IPC Order P-613/January 24, 1994]

Branch 2

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied.

Two criteria must be met for a record to qualify for exemption under Branch 2:

1. the record must be 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.

With respect to the Crown brief and the duplicate copies of the witness statements, the Ministry submits that:

> The Crown brief and duplicate copies of statements contained in the brief are prepared by the police for the Crown counsels providing them with advice during the investigation. The brief is the report of the police findings into the investigation and it is the normal manner through which police communicate to Crown counsel when determining whether charges will be laid. The Crown brief is the communication between the police and Crown counsel which is used by the police to seek advice on whether reasonable grounds exist to lay charges and on what charges are appropriate to lay. The brief is used by Crown counsel in the formulating and provision of advice with regard to the laying of charges. The documents contain the underlying factual material and considerations in relation to giving legal advice for this investigation.
>
> As well, the Crown brief was created especially for contemplated litigation. The ministry submits that had charges been laid against [named individuals], that the record would have been used by Crown counsel in the prosecution of those individuals ...

In my view, it is clear that the Crown brief was prepared by members of the OPP for Crown counsel. I also accept the submissions of the Ministry that it was prepared in contemplation of litigation. In my opinion, the fact that the litigation did not subsequently materialize does not undermine the purpose for which the record was initially prepared. Therefore, I find that the Crown brief (pages 1-318) and the duplicate copies of statements (pages 319-334 and 359-413) are exempt from disclosure pursuant to the second branch of the section 19 exemption.

Section 19 is a discretionary exemption and, on this basis, I have considered the Ministry's representations regarding its decision to rely on this provision to exempt the Crown brief and copies of the statements. I find nothing improper in the determination which has been made.

[IPC Order P-613/January 24, 1994]

ISSUE B: Whether the records in both appeals contain "personal information" as defined in section 2(1) of the Act.

The Ministry submits that all of the information contained in the pages of the record remaining at issue constitute personal information. This term is defined in section 2(1) of the Act which states, in part, that:

> "personal information" means recorded information about an identifiable individual, ...

In its representations, the Ministry submits that information contained in the record contains the views and opinions of witnesses, and of the individuals being investigated. In addition, the Ministry submits that the statements contain personal information about the witnesses themselves and others who were involved in the investigation.

Having carefully reviewed the remaining pages of the record, I am satisfied that the information contained in these documents qualifies as personal information as defined in section 2(1) of the Act. This personal information relates to individuals other than the appellants.

ISSUE C: If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records in both appeals.

Once it has been determined that a record contains personal information, section 21 of the Act provides a general rule of non-disclosure of the personal information to any person other than the individual to whom the personal information relates. Section 21(1) provides some exceptions to this general rule of non-disclosure, one of which is section 21(1)(f) of the Act. This provision 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.

In order for section 21(1)(f) to apply, I must find that the release of the personal information at issue would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Wright addressed the interrelationship between sections 14(2), (3) and (4) of

the Municipal Freedom of Information and Protection of Privacy Act (which are similar to sections 21(2), (3) and (4) of the Act) in the following way:

> ... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of the circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.
>
> The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which their personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

In its representations, the Ministry specifically relies on the presumptions contained in sections 21(3)(a), (b), (d) and (g) of the Act. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (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;
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

As far as the application of section 21(3)(b) of the Act is concerned, the Ministry reiterates that all of the personal information was compiled as part of the OPP investigation into the activities of certain named individuals, activities which were possibly in violation of various sections of The Criminal Code and/or other federal and provincial statutes. As has been stated in previous

orders, the application of this section of the Act is not dependent upon whether charges are actually laid (Orders P-223 and P-237).

Based on the representations provided to me, and on my review of the record, I am satisfied that the personal information contained in those witness statements not found in the Crown brief and the relevant portions of the police officers' notes was compiled as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) have been established.

I therefore need not consider the application of sections 21(3)(a), (d) and (g).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision.

The appellant in Appeal P-9300192 has raised the application of section 21(2)(a) to the facts of this case. He claims that "disclosure is desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny". Even if I were to find that section 21(2)(a) is a relevant consideration in the circumstances of this appeal, it would not be sufficient to rebut the section 21(3)(b) presumption (Order M-170).

In summary, the mandatory exemption provided by section 21 of the Act applies to the personal information contained in those witness statements not found in the Crown brief and the relevant portions of the police officers' notes.

Both appellants suggest that public interest override set out in section 23 of the Act applies to the facts of this case.

Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

As this section does not apply to information which has been found to be exempt under section 19 of the Act, I will restrict my discussion of section 23 to those pages which I have found to be exempt under section 21. With respect to Appeal P-9300479, I have determined that all of the records responsive to that request are exempt pursuant to section 19 of the Act. Accordingly, I will not consider the submissions of the appellant in that case on the application of section 23.

Two requirements must be satisfied in order to invoke the application of section 23 (the so-called "public interest override"): There must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Orders 163 and 183).

While the onus of proof as to whether an exemption applies is on the institution, the Act is silent as to who bears the onus in respect of section 23. Where the application of section 23 has been raised by an appellant, it is my view that the onus of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested records before making submissions in support of the application of section 23. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

With respect to the issue of public interest, the appellant in Appeal P-9300192 specifically notes that:

> Even Premier Rae has recognized this, as news reports of April 28, 1993 point out: "Premier Bob Rae has agreed to consider releasing the results of a police investigation into [the named individual]."

The Ministry submits that the mandatory exemption contained in section 21 should not be overridden by section 23. Much of its argument is based on how the media would make use of the information.

I have carefully reviewed the representations of the parties. I agree that the public has an interest in the incident which lead to the creation of the records. It must also be pointed out, however, that the incident in question was subject to an OPP investigation. At the conclusion of the investigation, a decision was made not to lay any charges. Both the undertaking of the investigation and the result were widely covered and analyzed by the media.

In the circumstances of this appeal, it is my view that there does not exist a **compelling** public interest in the disclosure of the personal information which would **clearly** outweigh the purpose of the section 21 exemption, which is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Because of the manner in which I have dealt with Issues A, B and C, it is not necessary for me to address Issues D, E and F.

ORDER:

I uphold the decisions of the Ministry.

Original signed by: January 24, 1994
Anita Fineberg
Inquiry Officer