



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

ORDER P-842

Appeal P-9400470

Ministry of the Attorney General



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Ministry of the Attorney General (the Ministry). The request was for access to the Crown Brief and Investigation Report in connection with a criminal charge laid against an individual (the affected person) who allegedly broke into the appellant's home. At the affected person's trial, this charge was stayed owing to the disappearance of evidence which was vital to the Crown's case. Subsequently, the appellant attempted to file a complaint with the Police Complaints Commissioner regarding the way the prosecution was handled by the police, but the complaint did not proceed because it was filed beyond the statutory deadline.

The Ministry provided access to some records and denied access to others. The exemptions claimed by the Ministry for the records which remain at issue in this appeal are as follows:

- invasion of privacy - sections 21(1) and 49(b)
- solicitor-client privilege - section 19.

Because it appeared that the records for which section 19 has been claimed could contain the personal information of the appellant, the Commissioner's office also raised the possible application of section 49(a) of the Act (discretion to refuse requester's own information).

The records consist of the Crown Brief and its attachments (including witness statements), correspondence and notes, and are described in more detail in Appendix "A" to this order. Appendix "A" also identifies exemptions claimed by the Ministry and those raised by the Commissioner's office, with respect to each record.

A Notice of Inquiry was sent to the Ministry, the appellant, the affected person, and the author of a valuation relating to some of the stolen property. Representations were received from the Ministry only.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

I have reviewed the records. I find that the only information about any identifiable individual in Records 1e and 4h relates to the appellant. I find that the following records contain the personal information of the appellant and one or more other individuals: Records 1, 1a, 1b, 1d, 1f, 4f and 4g.

I further find that the following records do not contain the personal information of the appellant, but do contain the personal information of one or more other individuals: Records 1c, 3, 4, 4a, 4b, 4c and 4d. In addition, I find that Record 4e does not contain personal information.

Section 47(1), which appears in Part III of the Act, gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access. Where a record contains an individual's personal information, the issue of access must be considered under Part III of the Act (Order M-352). Accordingly, the records which I have found to contain the personal information of the appellant only, and records which I have found to contain personal information pertaining to both the appellant and another individual or individuals, would fall into this category.

The remaining records (i.e. those which contain only the personal information of an individual or individuals other than the appellant, and the one record which does not contain personal information) will be analyzed under Part II of the Act.

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 19 consists of two branches, which provide an institution 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).

I have reviewed the representations submitted by the Ministry, and the records themselves, to determine whether section 19 and, where applicable, section 49(a), applies to the records for which they have been claimed.

Records which contain the appellant's personal information - Sections 19 and 49(a)

Under section 49(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. One of the exemptions mentioned in section 49(a) is the solicitor-client privilege exemption in section 19.

I find that the following records qualify for exemption under Branch 2 of section 19, because they were prepared by or for Crown counsel for use in litigation: Records 1, 1a, 1b, 1d and 1f. Although the litigation has been terminated by the stay of the charge against the affected person, Branch 2 of this exemption may still be claimed (Order P-667).

I also find that pages 1 and 2 of Record 4f qualify for exemption under Branch 2 of the section 19 exemption because they were prepared by or for Crown counsel for use in giving legal advice.

Since these records qualify for exemption under section 19, they are exempt from disclosure under section 49(a) of the Act.

I do not agree with the Ministry's claim that page 1 of Record 1e qualifies for exemption under these sections. This record consists of a summary of the evidence to be given by the appellant. In my view, it is not possible to assert a claim of privilege against a witness concerning a summary of the evidence which that individual has indicated he or she is prepared to give in court.

The Ministry's representations indicate that it is withdrawing its claim of privilege, and thus, its claim for exemption under sections 19 and 49(a), with respect to attachments 2 and 3 (comprising pages 3-8) to Record 4f. The author of attachment 2 was invited to make representations concerning that part of the record and did not do so. Both attachments consist of information about property stolen from the appellant. Since no other exemption has been claimed for attachments 2 and 3 to this record, they should be disclosed to the appellant.

Record 4g is a letter written by the Crown Attorney to the Police Complaints Commissioner. The Ministry's representations assert that this record was created in the context of giving legal advice. Page 2 of this record refers to advice given by another Crown attorney to the author of this record. However, I have not been provided with any evidence to indicate that the author of this record was in a solicitor-client relationship with the Police Complaints Commissioner, and in my view, any privilege which might have attached to the contents of this letter was waived by the act of sending it. Moreover, judging from the contents of this letter, it is the appellant, not the Ministry, who would have been the recipient of the Crown Attorney's advice about how to proceed. The appellant is not the Crown Attorney's client. Accordingly, I find that Record 4g does not qualify for exemption under sections 19 and 49(a).

The Ministry claims that Record 4h was created for Crown Counsel for use in giving legal advice. This record is a letter from the Police Complaints Commissioner to the Crown Attorney, in response to Record 4g. I do not agree with the Ministry's characterization of this record. Judging from its contents, I am of the view that this record relates to the Crown Attorney's attempts to assist the appellant, who is not his client. There is nothing to suggest that it bears any relation to legal advice to be given to the Ministry. Accordingly, I find that it does not qualify for exemption under sections 19 and 49(a). As no other exemption has been claimed for this record, it should be disclosed.

Records which do not contain the appellant's personal information - Section 19

I find that the following records are exempt from disclosure under Branch 2 of the section 19 exemption, because they were prepared by or for Crown counsel for use in litigation: Records 4, 4a, 4b, 4c, 4d and 4e. As previously noted, Branch 2 remains available despite the fact that this litigation has been terminated.

Record 1c consists of a line-up request completed by the police force which investigated the incident. In my view, this record was not created for use in litigation, and accordingly it is not exempt under Branch 2 of section 19. Although it may have been obtained for the lawyer's brief, which in other circumstances might have qualified it for exemption under Branch 1, the litigation to which this document could relate has been terminated, and it is not a communication between solicitor and client. Under these circumstances, Branch 1 cannot apply to it (Order P-667). Accordingly, I find that it is not exempt under section 19.

INVASION OF PRIVACY

In this discussion, I will refer to the records which I have found to contain personal information, and which I have not previously found to be exempt.

Records 4g and page 1 of Record 1e contain the appellant's personal information (and/or the personal information of other individuals). Records 1c and 3 contain exclusively the personal information of another individual or individuals.

As previously noted, records which contain the personal information of the appellant will be analyzed under Part III of the Act, while records which do not contain the appellant's personal information will be analyzed under Part II. With respect to unjustified invasions of personal privacy, the exemptions to consider are sections 49(b) and 21(1), respectively.

In both these situations, 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. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

Records which contain the appellant's personal information - Section 49(b)

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

I have previously found that the only identifiable individual whose information is contained in page 1 of Record 1e is the appellant. Since section 49(b) relates to invasions of the personal privacy of individuals

other than the appellant, it cannot apply to this record. The Ministry has also claimed section 21(1) for this record. Because the record contains the personal information of the appellant, section 21 cannot apply to it (Order M-352). Moreover, because it contains only the personal information of the appellant, its disclosure could not be an unjustified invasion of anyone else's personal privacy and section 21(1) could not apply in any event. Accordingly, this record should be disclosed.

Record 4g, however, contains the personal information of both the appellant and another individual. Although the Ministry did not originally claim this exemption for Record 4g, it has submitted representations to the effect that it is exempt under section 21(1), based on the presumed unjustified invasion of privacy in section 21(3)(b).

In my view, however, since the record does contain the appellant's personal information, this question should be decided under section 49(b). I find that the presumption in section 21(3)(b) applies, but only to the parts of the record which contain information about the affected person obtained during the investigation.

I have highlighted those portions on the copy of this record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. As this is not information to which section 21(4) applies, and there is no evidence to suggest that section 23 applies to it, I find that disclosure of the highlighted parts of the record would be an unjustified invasion of personal privacy, and accordingly, these parts of the record are exempt under section 49(b) of the Act.

In the absence of any factors favouring privacy protection pertaining to the remainder of Record 4g, disclosure of the parts of this record which are **not** highlighted would not be an unjustified invasion of personal privacy, and the section 49(b) exemption does not apply to them. Accordingly, the parts of this record which are **not** highlighted should be disclosed.

Records which do not contain the appellant's personal information - Section 21(1)

Once it has been determined that a record contains personal information, the exemption in section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. The only such circumstance which could apply in this case is the one contemplated in section 21(1)(f), which provides an exception to this exemption if disclosure would not be an unjustified invasion of personal privacy.

As previously noted, both Records 1c and 3 contain only the personal information of an individual other than the appellant. As no factors have been established which favour the disclosure of the information in these records, disclosure would constitute an unjustified invasion of personal privacy, and these records are exempt under section 21(1) of the Act.

ORDER:

1. I order the Ministry to disclose the following records and parts of records to the appellant within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order: Record 4h in its entirety, pages 3-8 of Record 4f in their entirety, page 1 of Record
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le in its entirety, and the portions of Record 4g which are **not** highlighted on the copy of this record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I uphold the Ministry's decision to deny access to the remaining records and parts of records at issue.
3. To verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Higgins
Inquiry Officer

_____ January 18, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

| RECORD NUMBER | DESCRIPTION | EXEMPTIONS AT ISSUE | DECISION |
|-------------------|---|----------------------------|-----------------|
| 1 | Crown Counsel Brief | 19, 21(1), 49(a) and 49(b) | Do not disclose |
| 1a | Synopsis | 19, 21(1), 49(a) and 49(b) | Do not disclose |
| 1b | General Occurrence Report | 19, 21(1), 49(a) and 49(b) | Do not disclose |
| 1c | Photo line-up request | 19, 21(1) and 49(b) | Do not disclose |
| 1d | Witness Statement and "Will Say" summary | 19, 21(1), 49(a) and 49(b) | Do not disclose |
| 1e | Summary of appellant's evidence (only page 1 of this record is at issue) | 19, 21(1), 49(a) and 49(b) | Disclose |
| 1f | "Will Say" summary | 19, 21(1), 49(a) and 49(b) | Do not disclose |
| 3 | C.P.I.C. printout | 21(1) | Do not disclose |
| 4 | Fax transmission sheet, July 14, 1992 | 19 | Do not disclose |
| 4a | Fax transmission sheet re disclosure, July 15, 1992 | 19 | Do not disclose |
| 4b | Fax transmission sheet re additional disclosure, August 12, 1992 | 19 | Do not disclose |
| 4c | Handwritten memo, July 2, 1992, re bail hearing | 19 | Do not disclose |
| 4d | Handwritten memo, July 9, 1992, to Crown Attorney | 19 | Do not disclose |
| 4e | Handwritten memo re motion to stay | 19, 49(a) | Do not disclose |
| 4f | Letter to Crown Attorney from Regional Director of Crown Attorneys, January 8, 1993, re appellant's complaint against police (page 1 of the record) | 19, 49(a) | Do not disclose |
| 4f - attachment 1 | Handwritten memo re appellant's complaint against police (page 2 of the record) | 19, 49(a) | Do not disclose |
| 4f - attachment 2 | Value estimate for stolen property (pages 3-6 of the record) | 19, 49(a) | Disclose |
| 4f - | Completed Insurance Bureau of Canada | 19, 49(a) | Disclose |

| RECORD NUMBER | DESCRIPTION | EXEMPTIONS AT ISSUE | DECISION |
|---------------|---|----------------------------|------------------|
| attachment 3 | Schedule of Loss form (pages 7 and 8 of the record) | | |
| 4g | Letter from Crown Attorney to Police Complaints Commissioner, December 22, 1993 | 19, 21(1), 49(a) and 49(b) | Disclose in part |
| 4h | Letter from Police Complaints Commissioner to Crown Attorney, January 14, 1994 | 19, 49(a) | Disclose |