



Information and Privacy  
Commissioner/Ontario

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

# **ORDER P-780**

Appeal P-9400232

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 requested access to records from the Ministry of the Attorney General (the Ministry). The requested records relate to allegations that the appellant had committed the offences of sexual interference and invitation to sexual touching under the Criminal Code. The charges of sexual interference were ultimately withdrawn, but the appellant was tried and acquitted on the charge of invitation to sexual touching. The alleged offences related to the appellant's children (the children).

The Ministry relies on the following exemptions to deny access to the requested records:

- invasion of privacy - sections 49(b) and 21(3)(b)
- solicitor-client privilege - section 19.

In addition to these exemptions, the Ministry's decision letter also indicates that it denied access to some of the records pursuant to a publication ban ordered during the trial on the charge of invitation to sexual touching.

Because the records for which section 19 has been claimed contain the appellant's personal information, section 49(a) is also a relevant consideration with respect to them.

A Notice of Inquiry was provided to the appellant and the Ministry. This notice was also sent to the solicitor for the appellant's wife, who is the custodial parent of the children. The notification of the appellant's wife was in her personal capacity (since she is named in a number of the records) and also on behalf of the children, who are all under the age of sixteen years.

Where an individual is less than sixteen years of age, section 66(c) of the Act permits any right or power conferred on such an individual under the Act to be exercised "by a person who has lawful custody of the individual". Accordingly, in my view, the appellant's wife was authorized to make representations on behalf of the children in this appeal.

In response to the notice, representations were submitted by the Ministry, and on behalf of the appellant's wife and the children by the wife's counsel. The appellant indicated that the information in his letter initiating the appeal should be considered as his representations in the inquiry.

The records at issue, and the exemptions claimed for particular records, are set out in Appendix "A" to this order. The records at issue include police officers' notebook entries, interview statements, correspondence, memoranda, a preliminary inquiry transcript, psychological reports and court documents.

## **PRELIMINARY ISSUE:**

### **LATE RAISING OF DISCRETIONARY EXEMPTION**

The Ministry's representations indicate that it wishes to claim section 19 for a number of additional records for which it was not initially claimed. Appendix "A" specifies the exemptions initially claimed for each record, and also shows the records for which the Ministry now seeks to rely on section 19.

Because of my findings with respect to these records under section 49(b), it is not necessary for me to consider whether to permit the Ministry to rely on section 19 with respect to them. Accordingly, I will only consider the application of section 19 to the records for which it was originally claimed by the Ministry.

## **DISCUSSION:**

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

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 relevant records and representations.

I find that Record 2F was prepared for Crown counsel for use in litigation and accordingly, it qualifies for exemption under Branch 2 of this section.

I find that Records 4, 4A, 4B, 4H, 4K, 4M, 4O and 4Q do not qualify under Branch 1 of the exemption. In my view, they would not be privileged at common law, since they are not communications between a solicitor and client, nor were they obtained especially for the lawyer's brief for litigation. Even if they could be construed as having been obtained for Crown counsel's brief, they could not be privileged at common law vis à vis the appellant, since they were written by his own counsel.

I will now consider whether Records 4, 4A, 4B, 4H, 4K, 4M, 4O and 4Q qualify for exemption under Branch 2. It is clear that they were not created by Crown counsel. In my view, because they were prepared by defence counsel (i.e. on behalf of another party to the litigation, rather than on behalf of Crown

counsel), these records were also not created "for" Crown counsel for use in litigation, in the sense contemplated by section 19. Accordingly, these records also do not qualify under Branch 2.

I find that Records 4C, 4D, 4E, 4F, 4G and 4L qualify for exemption under Branch 2 of this exemption, since they were prepared by Crown counsel for use in litigation.

Records 4I, 4J, 4N, 4P and 4R are letters from Crown counsel to the appellant's solicitor. Since these communications were sent to a third party with an adverse interest in litigation, any privilege which might have attached to them has been waived. Therefore, the exemption in section 19 cannot apply to them.

In summary, I have found that Records 2F, 4C, 4D, 4E, 4F, 4G and 4L qualify for exemption under section 19.

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.

The records which I have found to qualify for exemption under section 19 all contain the personal information of the appellant.

Section 47(1) 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.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 19, would otherwise apply to that information.

Accordingly, I find that Records 2F, 4C, 4D, 4E, 4F, 4G and 4L are exempt under section 49(a).

## **INVASION OF PRIVACY**

I have reviewed the records for which section 49(b) has been claimed by the Ministry and I find that all of them contain the personal information of the appellant. In addition, all of these records also contain the personal information of one or more other individuals.

In order to ensure that personal privacy is adequately protected, I have also reviewed the records for which the Ministry claimed only section 19, and which I did not find to be exempt under that section, to determine whether they contain personal information of individuals other than the appellant. I find that Records 4, 4J, 4K, 4N, 4O, 4P, 4Q and 4R contain the personal information of other individuals. Accordingly, I will consider whether disclosure of all or part of these records would constitute an unjustified invasion of

personal privacy. Since they also contain the personal information of the appellant, the issue to consider in this context is whether the exemption in section 49(b) applies.

A number of the records include the names of individuals who are clearly acting in their professional capacity, such as Crown counsel, defence counsel, and several psychologists. Information in the records relating to these individuals is not their personal information.

As previously indicated, section 47(1) 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.

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

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 Ministry 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 for which the Ministry claimed section 49(b)**

The Ministry submits that the records for which it claimed this section are exempt because they were compiled, and are identifiable, as part of an investigation of a possible violation of law. Therefore, the Ministry submits, the presumed unjustified invasion of personal privacy found in section 21(3)(b) applies. The Ministry also submits that the information is highly sensitive and, therefore, the factor in section 21(2)(f) is relevant.

The Ministry's representations also refer to a publication ban ordered by the presiding judge in the appellant's trial on the charge of invitation to sexual touching. This ban, made pursuant to section 486(3) of the Criminal Code, relates to anything which might identify the complainant. The Ministry submits that this ban supports its contention that the records relating to that particular charge are highly sensitive. In addition, the Ministry argues that if access is to be granted to Records 2G, 2H and 2I, disclosure ought to be made through the court office in order to give effect to this ban.

The Ministry has also indicated that it would not object to disclosure of Records 1E, 1F, 3 and 3A, subject to the removal of the names and personal identifiers of other individuals who are named in these records.

By her solicitor, the appellant's wife submits, on her own behalf and on behalf of the children, that the presumptions in section 21(3)(a) (medical, psychiatric or psychological history, diagnosis or treatment) and section 21(3)(b) (possible violation of law) apply to the records. In addition, she submits that the factors favouring privacy protection in sections 21(2)(e) (unfair exposure to pecuniary or other harm) and 21(2)(f) are relevant in this appeal. With regard to section 21(2)(e), the alleged harm relates to possible exposure to civil liability.

The appellant submits that he has commenced "legal proceedings" to which the records at issue are related. The appellant's wife's representations confirm that the appellant has in fact commenced a lawsuit against her and the Ontario Provincial Police (the OPP) for malicious prosecution, relating to the allegations referred to in the appellant's request. This raises the possible relevance of the factor in section 21(2)(d), which applies where the personal information is relevant to a fair determination of rights affecting the requester.

The appellant also states that he is aware of the identities of all the individuals mentioned in the records and, therefore, this information should not be withheld from him.

I have reviewed the records and the representations, and I find as follows:

- (1) The presumed unjustified invasion of personal privacy provided by section 21(3)(a) is not applicable to any of these records. The only information to which this presumption could apply relates to the appellant only, and for that reason, disclosure of this information to him could not be an unjustified invasion of personal privacy.
- (2) Records 1, 1A, 1B, 1C, 1D, 2, 2A, 2B, 2C, 2D and 2E were compiled, and are identifiable, as part of an investigation into possible violations of the Criminal Code, and the presumed unjustified invasion of personal privacy under section 21(3)(b) applies. However, part of Record 2D consists of a police officer's interview notes with the appellant, and disclosure of this portion of the record to the appellant could not be an unjustified invasion of personal privacy. With respect to the names and other information which could identify the other individuals mentioned in this part of Record 2D, however, my finding in paragraph (4) below is applicable.
- (3) I do not agree with the appellant's wife's submissions regarding section 21(2)(e). In my view, any civil liability which might arise would be assessed by the court in the appellant's litigation, and therefore could not be construed as "unfair" exposure to harm as required by this section. Since no other evidence has been provided with respect to section 21(2)(e), I find that its relevance to this group of records has not been established.

- (4) Although the appellant is aware of the identities of the individuals named in the records, in the circumstances of this appeal I find that disclosure of this information in written form would cause excessive embarrassment to these individuals. Accordingly, the factor in section 21(2)(f) is relevant to their names and other information which could identify them.
- (5) In my view, although it has been established that the appellant has commenced a lawsuit against his wife and the OPP, the appellant has not provided any evidence to indicate that the records under consideration are required to prepare for the hearing, nor to ensure that the hearing is impartial (Order P-312). Accordingly, I find that the relevance of section 21(2)(d) has not been established with respect to this group of records.
- (6) Accordingly, disclosure of Records 1, 1A, 1B, 1C, 1D, 2A, 2B, 2C, 2E and part of Record 2D would constitute an unjustified invasion of personal privacy and the exemption in section 49(b) applies. I have highlighted the portions of Record 2D which are exempt 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.

In addition, the disclosure of names and other information which could identify individuals other than the appellant in Records 1E, 1F, 2D, 2G, 2H, 2I, 3 and 3A would constitute an unjustified invasion of personal privacy and the exemption in section 49(b) applies to that information. I have highlighted the portions of these records which are exempt on the copy of the records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

- (7) None of the information which I have found to be exempt under section 49(b) is information to which section 21(4) relates.
- (8) The appellant has not made any submissions to substantiate the application of section 23 and I find that it does not apply to these records.
- (9) Even if I were to find that the publication ban mentioned by the Ministry applies to any of these records, removal of the complainant's name and other information which could identify him, as outlined above, would meet the terms of this ban. Therefore, it is not necessary for disclosure to be effected through the court office. For the same reason, it is not necessary for me to decide whether the ban actually applies to preclude disclosure of this information in the circumstances of this appeal.

#### **Records for which the Ministry has not claimed section 49(b)**

I have reviewed the records and submissions relating to this group of records. In my view, the same arguments advanced by the parties which are summarized in the foregoing analysis are also relevant here.

For the same reasons outlined above with respect to records for which the Ministry claimed section 49(b), I find that section 21(3)(a) does not apply to any of the information in this group of records. I also find that none of these records was compiled as part of an investigation into a possible violation of law, and the presumed unjustified invasion of personal privacy in section 21(3)(b) does not apply to any of them. Otherwise, my findings set out in paragraphs (3), (4), (5), (7), (8) and (9) above are equally applicable to this group of records.

Accordingly, I find that disclosure of the names and other information which could identify individuals other than the appellant in Records 4, 4J, 4K, 4N, 4O, 4P, 4Q and 4R would constitute an unjustified invasion of personal privacy and the exemption in section 49(b) applies to that information. I have highlighted the portions of these records which are exempt on the copy of the records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

As previously mentioned, section 49(b) was not claimed by the Ministry with respect to these records. I have considered it in order to protect privacy interests relating to these records. It is a discretionary exemption. The Ministry denied access to these records under another discretionary exemption and I am satisfied that the factors which it considered in doing so are equally applicable to section 49(b).

## **ORDER:**

1. I uphold the Ministry's decision to deny access to Records 1, 1A, 1B, 1C, 1D, 2, 2A, 2B, 2C, 2E, 2F, 4C, 4D, 4E, 4F, 4G and 4L in their entirety. I also uphold the Ministry's decision to deny access to the portions of Records 1E, 1F, 2D, 2G, 2H, 2I, 3, 3A, 4, 4J, 4K, 4N, 4O, 4P, 4Q and 4R which are highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose Records 4A, 4B, 4H, 4I and 4M in their entirety to the appellant within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order. I further order the Ministry to disclose to the appellant, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order, those portions of Records 1E, 1F, 2D, 2G, 2H, 2I, 3, 3A, 4, 4J, 4K, 4N, 4O, 4P, 4Q and 4R which are **not** highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.



3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ October 14, 1994

## APPENDIX "A"

### INDEX OF RECORDS

RECORD NUMBER	DESCRIPTION	EXEMPTIONS INITIALLY CLAIMED	EXEMPTIONS CLAIMED DURING INQUIRY	PUBLICATION BAN CLAIMED? Y/N	DISPOSITION
1	Summary of offence re: sexual interference	49(b)/21(3)(b)	19	N	Decision upheld
1A	Witness interview notes - 91/11/24	49(b)/21(3)(b)	19	N	Decision upheld
1B	Witness interview notes - 91/11/24	49(b)/21(3)(b)	19	N	Decision upheld
1C	Witness interview notes - 91/11/24	49(b)/21(3)(b)	19	N	Decision upheld
1D	Witness interview notes - 91/11/24	49(b)/21(3)(b)	19	N	Decision upheld
1E	Information - sexual interference charges	49(b)/21(3)(b)		N	Disclose in part
1F	Promise to appear - sexual interference charges	49(b)/21(3)(b)		N	Disclose in part
2	Synopsis re: invitation to sexual touching	49(b)/21(3)(b)	19	Y	Decision upheld
2A	Witness interview notes - 92/12/10	49(b)/21(3)(b)		Y	Decision upheld
2B	Interview tape and transcript - 92/12/10	49(b)/21(3)(b)		Y	Decision upheld
2C	Typed and handwritten witness interview notes - 92/12/10	49(b)/21(3)(b)		Y	Decision upheld
2D	Police officer's notes re: interviews, 92/12/10, and arrest, 93/01/07	49(b)/21(3)(b)		Y	Disclose in part
2E	"Will say" of police officer re: charge of invitation to sexual touching	49(b)/21(3)(b)		Y	Decision upheld

RECORD NUMBER	DESCRIPTION	EXEMPTIONS INITIALLY CLAIMED	EXEMPTIONS CLAIMED DURING INQUIRY	PUBLICATION BAN CLAIMED? Y/N	DISPOSITION
2F	Information sheet re: bail hearing re: charge of invitation to sexual touching	19		Y	Decision upheld
2G	Information, remand warrant and Recognizance of Bail re: charge of invitation to sexual touching	49(b)/21(3)(b)		Y	Disclose in part
2H	Transcript of preliminary hearing (includes publication ban)	49(b)/21(3)(b)		Y	Disclose in part
2I	Indictment	49(b)/21(3)(b)		Y	Disclose in part
3	Psychological report - Dr. Shapiro	49(b)/21(3)(b)		Y	Disclose in part
3A	Phallometric test results - Dr. Langevin	49(b)/21(3)(b)		Y	Disclose in part
4	Letter and consent, from defence counsel to Crown, 92/04/07	19		N	Disclose in part
4A	Letter from defence counsel to Crown, 92/03/24	19		N	Disclose
4B	Letter from defence counsel to Crown, 92/01/14	19		N	Disclose
4C	Letter from Crown's office to OPP, 92/01/27	19		N	Decision upheld
4D	File notes prepared by Crown Attorney, 92/04/10	19		N	Decision upheld
4E	Memo from one Crown Attorney to another, 92/04/21	19		N	Decision upheld
4F	Memos to file by two Crown Attorneys, 92/04/23	19		N	Decision upheld

<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>	<b>EXEMPTIONS INITIALLY CLAIMED</b>	<b>EXEMPTIONS CLAIMED DURING INQUIRY</b>	<b>PUBLICATION BAN CLAIMED? Y/N</b>	<b>DISPOSITION</b>
4G	Memo from Crown Attorney to clerical staff, 94/04/24	19		N	Decision upheld
4H	Letter from Defence Counsel to Crown, 93/01/26	19		Y	Disclose
4I	Letter from Crown to Defence Counsel, 93/01/28	19		Y	Disclose
4J	Letter from Crown to Defence Counsel, 93/09/10	19		Y	Disclose in part
4K	Letter from Defence Counsel to Crown, 93/09/08	19		Y	Disclose in part
4L	Letter from Crown to OPP, 93/09/10	19		Y	Decision upheld
4M	Letter from Defence Counsel to Crown, 93/03/04	19		Y	Disclose
4N	Letter from Crown to Defence Counsel, 93/03/30	19		Y	Disclose in part
4O	Letter from Defence Counsel to Crown, 93/04/01	19		Y	Disclose in part
4P	Letter from Crown to Defence Counsel, 93/04/14	19		Y	Disclose in part
4Q	Letter from Defence Counsel to Crown, 93/04/21	19		Y	Disclose in part
4R	Letter from Crown to Defence Counsel, 93/05/18, with attached statement by social worker, 93/01/14	19		Y	Disclose in part