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

ORDER P-1002

Appeals P-9400781 and P-9400782

Ministry of the Attorney General

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NATURE OF THE APPEALS:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of the Attorney General (the Ministry) received a seven-part request for information concerning the investigation and prosecution of two named individuals. The Ministry divided the request into seven files, and responded to each part separately. This order addresses the issues raised with respect to two of the parts.

Appeal Number P-9400781 relates to Part 7, which was a request for issue sheets and briefing notes for the years 1993 and 1994 pertaining to the two individuals, specifically with respect to the preliminary hearing and publication ban issues.

Appeal Number P-9400782 concerns Part 1 of the request, and pertains to all costs associated with these two cases for the years 1992 through 1994, including key breakdown of major cost items, such as costs associated with the investigation and trial preparation.

The Ministry located 102 pages which were responsive to Part 7, and 7 pages which were responsive to Part 1, and relies on the following exemptions to deny access in full:

P-9400781

- advice or recommendations - section 13(1)
- law enforcement - section 14(1)(a)
- right to fair trial - section 14(1)(f)
- solicitor-client privilege - section 19;

P-9400782

- law enforcement - sections 14(1)(a) and (b)
- right to fair trial - section 14(1)(f)
- solicitor-client privilege - section 19.

With respect to Part 1 of the request, the Ministry also advised the requester that it was not tracking the costs associated with these cases and that it interpreted the request not to include individual personal expense claims submitted by Ministry employees.

The appellant appealed the denial of access in both decisions. In his letters of appeal, the appellant indicated that he also seeks an order requiring the Ministry to provide a chart of the exempt records by titles, record type and number of pages.

Because the parties to this appeal are the same and the requested records pertain to the same individuals, this order will dispose of both appeals.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from the Ministry only. In its representations, the Ministry indicated that it was no longer relying on the exemption

in section 14(1)(b) to deny access to the records in Appeal Number P-9400782. Accordingly, this section will not be considered further in this order.

In its representations, the Ministry also alluded to the possible application of section 21 to one of the records in Appeal Number P-9400782. It appeared to the Commissioner's office that some records relating to Appeal Number P-9400781 might also contain personal information.

Finally, the Ministry indicated in its representations that some records relating to Appeal Number P-9400781 were not responsive to the request.

Subsequent to the receipt of representations, and in part as a result of new issues raised in the Ministry's representations, the Commissioner's Office determined that further representations were required. A supplemental Notice of Inquiry was sent to the parties. Representations were received from the Ministry only.

PRELIMINARY MATTER:

NON-RESPONSIVE RECORDS

In its representations, the Ministry states that page 100 (which is a newspaper article), and pages 28 and 29 (which relate to an access request made by another person) are not responsive to the request. The Ministry submits that page 100 is not an issue sheet and that pages 28 and 29 are not specifically about the cases referred to above.

I have reviewed these records and I note that page 100 is attached to a Critical Issue Sheet which deals with the issues raised in the article. In my view, the article was intended to be used to expand on the information provided in the Critical Issue Sheet and has been, therefore, incorporated into that record. Accordingly, page 100 is responsive to the request.

In reviewing pages 28 and 29, however, I agree with the Ministry that these pages are not responsive to the request as worded. Accordingly, I will not consider these two pages further in this order.

RECORDS

The records relating to Appeal Number P-9400781 consist of 67 Critical Issue Sheets regarding a number of issues which were raised in the media during the time period specified in the request. Each record sets out the background and Ministry response. Some of the records identify possible questions which might be posed in connection with the Ministry's response to the issues raised.

The records in Appeal Number P-9400782 consist of three invoices, two notes regarding costs and a memorandum to the Assistant Deputy Attorney General from the Director of Crown Attorneys, dated August 25, 1994, regarding costs pertaining to one of the individuals identified in the request, including the exact salaries of three individuals.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 of the Act applies to exempt all of the records in Appeal Number P-9400781 and pages 6 and 7 in Appeal Number P-9400782 from disclosure.

Under section 19 of the Act, the Ministry may 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 relies on both branches of section 19 to withhold access to the information.

For a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record either constitutes a written or oral communication of a confidential nature between a client (or the clients's agent) and legal advisor which relates directly to seeking, formulating or giving legal advice, or that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel and that the record was prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

Appeal Number P-9400781

As I indicated above, the records at issue in this appeal consist of 67 Critical Issue Sheets. The Ministry submits that these records constitute written communications between a former Attorney General (the client) and a legal advisor (who is also Crown counsel), and that they were prepared for the purpose of advising the Attorney General as to how she should respond to questions pertaining to the matter involving the two named individuals.

I have carefully reviewed the Critical Issue Sheets. It is clear that they were prepared by Crown counsel. I am satisfied that these records were prepared for the purpose of giving legal advice to senior staff, including the Attorney General, about the manner in which they should respond to questions regarding the two named individuals. On that basis, the requirements for exemption under both Branches 1 and 2 have been met, and section 19 of the Act applies.

Accordingly, it is not necessary for me to consider the application of sections 13(1), 14(1)(a), 14(1)(f) or 21 of the Act to the records relating to Appeal Number P-9400781.

Appeal Number P-9400782

Pages 6 and 7 consist of a memorandum from the Regional Director of Crown Attorneys to the Assistant Deputy Attorney General in which the Regional Director has provided information pertaining to Crown costs associated with the matter identified in the request. This memorandum was prepared as a direct result of this access request. In the last paragraph on page 7, the Regional Director sets out his views regarding disclosure of this information.

The Ministry submits that, because the memorandum was prepared by Crown counsel, it qualifies for exemption under section 19, in that it contains legal advice to the Assistant Deputy Attorney General regarding what responsive records were located and how the head should exercise his discretion with respect to any available exemptions.

In reviewing the memorandum, I cannot agree with the Ministry's characterization of this document. With respect to the first branch of section 19, I find that the memorandum constitutes a written communication. I do not find, however, that it is a communication between a client and a legal advisor, nor that it was of a confidential nature. I find that, although it was prepared by Crown counsel, the purpose of the memorandum was to provide information in response to an access request. Moreover, the Regional Director's views on disclosure do not reflect legal analysis of a legal issue and they are not related to the seeking, formulating and giving of legal advice within the meaning of section 19 of the Act.

Similarly, with respect to the second branch of section 19, I find that the Ministry has not tendered any evidence in support of its position that the document was "prepared for use in giving legal advice". Rather, the document was prepared by Crown counsel for the purposes of providing information in response to an access request at the behest of the Freedom of Information Unit.

Accordingly, pages 6 and 7 do not qualify for exemption under either branch of section 19.

The Ministry claims that sections 14(1)(a) and (f) also apply to this record as well as to the other responsive records at issue in Appeal Number P-9400782, and that section 21 applies to the exact salary figures of individuals identified on page 6. I will now turn my discussion to these exemptions.

LAW ENFORCEMENT/RIGHT TO FAIR TRIAL

The Ministry claims that sections 14(1)(a) and (f) of the Act apply to exempt all of the information contained in the records at issue from disclosure. As I have disposed of the issues in Appeal Number P-9400781, it is not necessary for me to consider the application of section 14 to the records in that appeal. I will, therefore, restrict my discussion in this part to the records relating to Appeal Number P-9400782, which consist of records relating to the costs associated with the two cases identified in the request.

Sections 14(1)(a) and (f) of the Act state as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication.

The Ministry's arguments under both section 14(1)(a) and 14(1)(f) relate to concerns about one of the individuals referred to in the request being able to have fair and impartial trials. With respect to section 14(1)(a), the Ministry submits that "... prejudice to the fairness of a trial clearly constitutes interference with a law enforcement matter". Although this appears to relate primarily to section 14(1)(f), I will also consider whether the Ministry has established the application of section 14(1)(a).

The Ministry has raised a number of arguments in its discussion of sections 14(1)(a) and (f) concerning its interpretation of these sections. Inquiry Officer John Higgins recently dealt with very similar arguments presented by the Ministry of the Solicitor General and Correctional Services in Order P-948, which concerns a request for records pertaining to the overall cost of a police "joint-forces" team to investigate child pornography and exploitation in Ontario. Because of the similarity of the arguments presented in Order P-948 to the current appeal, I have set out these arguments and Inquiry Officer Higgins' approach in dealing with them below.

The Meaning of "Could Reasonably Be Expected To"

The Ministry has made extensive submissions on the meaning of the phrase "could reasonably be expected to" in the preamble to this section. The Ministry disagrees with several previous interpretations of this phrase, as set out in past orders of this agency. This phrase modifies both exemptions at issue here, namely sections 14(1)(a) and (f).

For instance, rather than interpreting "could reasonably be expected to" as requiring a reasonable expectation of probable harm, the Ministry argues that a reasonable expectation of **possible** harm will be sufficient.

The Ministry also submits that the common law "sub judice" rule means that courts are concerned to avoid the premature disclosure of information which **could** affect the fairness of a trial.

The Ministry refers to a passage in Order 188, where then Assistant Commissioner Tom Wright interpreted "could reasonably be expected to" as requiring that the expectation of harm not be "... fanciful, imaginary or contrived, but one that is based on reason". The Ministry states that this passage in Order 188 is "... a more faithful interpretation of 'could reasonably be expected to'". As in this appeal, Order 188 considered the meaning of these words in the context of the preamble to section 14(1).

With respect to these arguments, Inquiry Officer Higgins states:

> Without accepting the Ministry's submissions concerning other interpretations of the phrase "could reasonably be expected to", I am prepared to decide this case based upon the interpretation just cited from Order 188. In my view, the requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying the exemption.

The Canadian Charter of Rights and Freedoms

The Ministry submits that the overriding factor supporting its decision to exercise its discretion to refuse access to the responsive records is its concern about safeguarding one individual's right to a fair trial, as well as society's interest in conducting a fair trial. The Ministry bases its position on the Canadian Charter of Rights and Freedoms and on the common law.

The Ministry states that as the accused's right to a fair trial is guaranteed by sections 7 and 11(d) of the Charter, section 14(1)(f) must be interpreted so as to ensure that the accused's Charter right is protected from any reasonable possibility of harm. The Ministry argues further that where there is a conflict between the right of public access to information pertaining to a criminal matter and the right of an accused to a fair trial, the right to a fair trial must be paramount.

With respect to these arguments, Inquiry Officer Higgins states:

> I am prepared to accept that section 14(1)(f) of the Act should be interpreted in a way that affords no less protection to the right of an accused to a fair trial than do sections 7 and 11(d) of the Charter. In light of the similarity of the Ministry's submissions on the application of sections 14(1)(a) and (f), I will also take this approach to section 14(1)(a).
>
> In my view, however, whether the standard being applied is found in the Act or the Charter, sufficient information and reasoning are required to support the application of the provisions relied upon to justify non-publication or non-disclosure.

He then went on to consider the standards to be applied in deciding whether the Ministry provided sufficient evidence of the harms mentioned in sections 14(1)(a) and (f).

Harms in Sections 14(1)(a) and (f)

As I indicated above, the Ministry's arguments concerning both subsections deal with the right of one of the named individuals to a fair trial. Using the Supreme Court of Canada's decision in Dagenais v. Canadian Broadcasting Corp., 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.), which relates to a publication ban, as guidance, Inquiry Officer Higgins states:

> The main issue addressed is whether the infringement of the Charter right to freedom of expression was justified in order to ensure that the accused individuals receive fair and impartial adjudication as contemplated in section 11(d) of the Charter. Speaking for the majority, Lamer C.J.C. said:

> The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a **real and substantial risk** of interference with the right to a fair trial (emphasis added) (page 875)
>
> [P]ublication bans are not available as protections against remote and speculative dangers. (page 880)

In separate reasons, McLachlin J. said:

> What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.
> ...
>
> Rational connection between a broadcast ban and the requirement of a fair and impartial trial require demonstration of the following ... [I]t must be shown that publication might confuse or predispose potential jurors ... (page 950).

In the circumstances of that appeal, Inquiry Officer Higgins found that the Ministry had provided insufficient evidence to support a conclusion that disclosure of the financial information at issue could reasonably be expected to result in any prejudice to the ongoing investigation, or to the trial of any individual. As this was the basis for the Ministry's claim under both sections 14(1)(a) and (f), he found that a reasonable expectation of harm had not been established for either of these exemptions.

I agree with the approaches taken by Inquiry Officer Higgins in Order P-948 regarding the Ministry's arguments discussed above, and I adopt them for the purposes of this appeal. In the circumstances of the current appeals, I will now decide whether the information and reasoning provided by the Ministry are sufficient to substantiate the application of the exemptions provided by sections 14(1)(a) and/or (f) to the records at issue.

Appeal Number P-9400782

In its representations, the Ministry expresses concern that these cases have received an unprecedented amount of pre-trial media coverage. It indicates that the courts have been particularly concerned about the nature and extent of this coverage, as evidenced by the court's decision to issue a Publication Deferral Order. In this respect, the Ministry also refers to a special "Media Package" which was prepared by the Communications and Courts Administration Branches of the Ministry under the direct supervision and control of the Executive Legal Officer for the Chief Justice of the Ontario Court (General Division), and argues that this demonstrates the Court's desire to prevent the publication of information which could prejudice the outcome of the proceedings and result in a mistrial.

The Ministry indicates that jury selection for the trial of one of the individuals began in May, 1995. At the time the Ministry submitted its representations, the trial had not yet begun. I note that the trial of this individual has recently concluded. The Ministry indicates, however, that this individual remains before the courts on three other indictments.

The Ministry submits that disclosure of the records at issue could result in the publication of inadmissible and extraneous information about the case, and that this could distract the jury from rendering a verdict based solely on the evidence admitted during the course of the trial.

The Ministry argues further that jurors are fallible human beings who can be influenced by logically irrelevant considerations, and who do commonly draw unreasonable inferences. The Ministry submits that publication of this information could lead the jurors to draw unreasonable inferences not based on the evidence. The Ministry submits that what may or may not have been appropriate debate in the media one or two years ago is now inappropriate, as the risks of prejudice are heightened and the corresponding standards as to what may be published become more stringent on the eve of trial, and as the trial proceeds.

Moreover, the Ministry contends that consequences that could flow from disclosure of the requested information are serious and potentially irreparable, whereas, the only prejudice suffered by the requester is that disclosure may be delayed until the criminal proceedings are concluded. The Ministry states that the "conclusion of criminal proceedings" refers to the date at which all pending prosecutions on the other three indictments presently before the courts, and all avenues of appeal have been exhausted.

Finally, the Ministry submits that in the context of an ongoing trial, by requiring the requester to wait until the conclusion of the criminal proceedings to obtain access to records related to the case, section 14(1)(f) provides a limited and specific exception to the public's general right of access to government records. In this context, the Ministry has indicated in its representations that some of the expenditures incurred by the authorities in investigating and/or prosecuting these individuals can be released once the criminal proceedings are complete without risk of causing harm.

I have reviewed the records at issue in Appeal P-9400782. I am mindful of the degree of media attention these cases have attracted, and I appreciate the Ministry's concerns that the current and future trials of one of the named individuals proceed with as little outside interference as possible.

In my view, however, the Ministry has failed to provide sufficient information and reasoning to support a conclusion that disclosure of the costs associated with the investigation and prosecution of the two individuals could reasonably be expected to result in any interference with a law enforcement matter, or to deprive a person of the right to a fair trial or adjudication. In particular, I do not find that the information contained in these records could or would, if made known, impinge on the production and/or testing of evidence in such a way as to undermine the trial process. Nor am I persuaded that the mere disclosure of information in the custody or under the control of a government organization immediately prior to, or during a criminal trial would necessarily prejudice an accused's right to a fair trial.

Returning to my discussion of the meaning of the words "could reasonably be expected to", above, the Ministry has not demonstrated any logical connection between disclosure of the information at issue and the harms mentioned in section 14(1)(a) or (f). Moreover, even if I were persuaded that the proper interpretation of these words is that a "reasonable expectation of **possible** harm will be sufficient" to establish the application of these exemptions, or that they would apply if disclosure of the information at issue "**could** affect the fairness of a trial", I would find that I have not been provided with sufficient information and reasoning to meet those standards.

Accordingly, I find that the Ministry has failed to meet the burden of proof imposed on it by section 53 of the Act, and I am not satisfied that a reasonable expectation of the harm contemplated in either section 14(1)(a) or (f) has been established. Therefore, I find that these exemptions do not apply to the information in the records at issue.

INVASION OF PRIVACY

As I have disposed of the issues in Appeal Number P-9400781, it is not necessary for me to consider the application of section 21 to the records in that appeal. I will, therefore, restrict my discussion in this part to the records relating to Appeal Number P-9400782.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Page 6 of the records relating to Appeal Number P-9400782 contains the exact salaries of three named lawyers who worked on the prosecution of one of the individuals identified in the request. I find this to be the personal information of the three lawyers. None of the remaining records relating to this appeal contain personal information. As I have found that the remaining records in Appeal Number P-9400782 do not qualify for exemption under either sections 14(1)(a) or (f) or section 19, they should be disclosed to 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. The only exception to the mandatory exemption which may apply in the circumstances of this appeal is section 21(1)(f), 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.

The effect of section 21(1)(f) is that the section 21(1) exemption will not apply if disclosure of the personal information would not be an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions 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 if 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 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 circumstances that are relevant in the circumstances of the case.

In reviewing the records I find that the information on page 6 pertaining to salaries describes the lawyers' incomes (section 21(3)(f)). Accordingly, disclosure of this information would constitute a presumed unjustified invasion of personal privacy. Furthermore, I find that section 21(4) does not apply to this information, and the appellant has not raised the possible application of the so-called "public interest override" in section 23. The exact salaries of the three lawyers are, therefore, properly exempt under section 21(1) of the Act.

DESCRIPTION OF RECORDS

As I indicated above, the appellant also seeks an order requiring the Ministry to provide a chart of the exempt records by titles, record type and number of pages.

When an institution denies access to a record, in whole or in part, pursuant to section 26 of the Act, it is required to issue a notice of refusal to the requester setting out the elements enumerated in section 29(1)(b) of the Act. This provision states that:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The portion of the Ministry's decision letter concerning Appeal Number P-9400781 indicates that access is denied to approximately 102 pages consisting of critical issue notes, and sets out the exemptions, as worded in the Act as the basis for this decision.

The portion of the decision letter relating to Appeal Number P-9400782 indicates that seven pages consisting of invoices and a memorandum are denied pursuant to sections 14(1)(a), (b) and (f). The letter further indicates that two of the seven pages are also exempt under section 19. As in the first appeal, the Ministry simply reiterates these sections of the Act as an explanation of its reasons.

I find that this decision letter does not meet the requirements of section 29(1)(b)(ii) of the Act. While the decision letter indicates, in a general way, why the records will not be released, it does not contain any description whatsoever of these records either in narrative form or in the form of an index.

The purpose of an adequate decision letter is to put a requester in a position to make a reasonably informed decision on whether to seek a review of an institution's decision. In this case, the requester has already decided to appeal the substantive aspects of this appeal.

I have provided a summary description of the records at issue in this appeal. Moreover, as I have disposed of all issues relating to the records in this order, there would be no useful purpose served by requiring the Ministry to provide a revised decision letter at this time.

Accordingly, I will not order the Ministry to provide a chart of the exempt records.

ORDER:

1. I order the Ministry to disclose to the appellant all of the records which are responsive to the request in Appeal Number P-9400782, with the exception of the exact salaries of the three lawyers identified on page 6. The salaries of these three individuals are **not** to be disclosed to the appellant.

2. I order the Ministry to disclose the records referred to in Provision 1 within fifteen (15) days after the date of this order.

3. I uphold the Ministry's decision with respect to the records which are responsive to the request in Appeal Number P-9400781.

4. In order 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: September 20, 1995
Laurel Cropley

Inquiry Officer