



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

ORDER P-1064

Appeal P-9500425

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the Crown file pertaining to a trial in which he was the defendant. The request was submitted to the Ministry of the Attorney General (the Ministry).

The Ministry identified 64 responsive records and denied access to them in their entirety, based on the following exemptions in the Act:

- solicitor-client privilege - section 19
- law enforcement - section 14(2)(a)
- information published or available - section 22(a)
- discretion to refuse requester's own information - section 49(a)
- invasion of privacy - section 49(b).

In response to the Ministry's decision to deny access, the appellant filed an appeal with the Commissioner's office.

During mediation, the Ministry disclosed two records in full and part of a third one (Documents 61 and 62, and part of Document 56A to D). The disclosed information is not at issue in this appeal.

The records at issue consist of court documents, photocopied extracts from Ontario statutes, a transcript of the reasons for sentence given at trial, and the Crown brief relating to the trial.

The Commissioner's office sent a Notice of Inquiry to the appellant and the Ministry. It was also sent to four other individuals mentioned in the records (the affected persons). This Notice invited the parties to submit representations with respect to the issues in the appeal. Representations were received from the appellant, the Ministry and two affected persons.

DISCUSSION:

THE APPELLANT'S REPRESENTATIONS

In his representations, the appellant raises several matters which do not relate to the application of the exemptions claimed by the Ministry. I will address these now.

First, he makes a number of unsubstantiated allegations about the conduct of the prosecutor and the Ministry. None of these allegations has any bearing on the issues in this appeal.

Second, he refers to the decision of the Supreme Court of Canada in R. v. Stinchcombe [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 130 N.R. 277, 1 W.W.R. 97. The Stinchcombe decision deals with disclosure by the Crown to an individual charged with a criminal offence. This reference is intended to support the appellant's contention that he should have received full access to the records he requested.

In the circumstances of this appeal, the issue which I must decide is whether the exemptions in section 19 or 22 of the Act apply. In my view, the Stinchcombe case does not have any bearing on the application of these exemptions. Rather, it relates to procedural issues in a criminal prosecution.

I will now consider the application of the exemptions which the Ministry has claimed.

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.

In this case, the requested records pertain to the appellant’s trial. I have reviewed the records and I find that all of them (with the exception of a number of reported case decisions and excerpts from the Revised Statutes of Ontario) contain the appellant’s personal information. Some of the records also contain personal information pertaining to other individuals.

DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION

I have found that many of the records contain the appellant’s personal information. 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 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. Section 49(a) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or **22** would apply to the disclosure of that personal information. (emphases added)

In order to determine whether the exemption provided by section 49(a) applies to the records which contain the appellant’s personal information, I will begin by considering the Ministry’s claims that those records qualify for exemption under section 19 or 22, both of which are referred to in section 49(a).

As part of that discussion, I will also consider whether the records which do **not** contain the appellant’s personal information are exempt under section 19 or 22, without reference to section 49(a).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that the solicitor-client privilege exemption applies to the undisclosed parts

of Documents 14-63. This collection of documents comprises the Crown brief for the appellant's trial.

This exemption is set out in section 19 of the Act, which 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.

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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies 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.

The Crown brief is, in essence, a lawyer's brief for litigation. This raises the possible application of the second part of Branch 1 (see item 2, above). I am satisfied that the records for which this exemption has been claimed were created or obtained especially for the Crown brief with respect to the criminal litigation involving the appellant. I am also satisfied that this brief qualifies as a "lawyer's brief for litigation" for the purposes of Branch 1 of this exemption.

Some of the records in the brief (such as copies of selected case reports) were not originally prepared for the Ministry's prosecution of the appellant. In Order P-667, I made the following comments about when privilege may attach to such records, which are not normally privileged, but are often found in a lawyer's brief:

A number of the records do not represent communications between solicitor and client and were not originally prepared for litigation purposes. An example of such a record would be an administrative policy document. ... [U]nder Branch 1, such records, although not by nature subject to solicitor-client privilege, become privileged as a result of being copied for inclusion in the lawyer's brief for litigation, as long as there was an intention to keep them confidential. In one of the leading cases on this subject, Hodgkinson v. Simms, 55 D.L.R. (4th) 577 (1988), McEachern, C.J.B.C. states as follows at page 589:

It is my conclusion that the law has always been, and in my view it should continue to be, that ... where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection ...

Order P-667 also established that, once litigation has been terminated, this aspect of solicitor-client privilege ceases to exist. The Ministry's representations indicate that the trial referred to by the appellant has been completed, as several convictions were entered, and in addition, the Ministry indicates that the appellant has launched appeals of these convictions.

With respect to materials in the brief which would not normally be privileged at common law, I find that they fall within the "lawyer's brief" provision under the rationale quoted above from Hodgkinson v. Simms. Moreover, I am satisfied that, because appeals are underway, the litigation is ongoing. Therefore, the privilege attaching to these documents continues to exist.

Accordingly, I find that all of the records for which section 19 has been claimed (i.e. the undisclosed parts of the Crown brief) qualify for exemption under Branch 1.

In the result, I find that the undisclosed parts of Documents 14-63 are exempt under sections 19 and 49(a). The documents in this group which contain the appellant's personal information are exempt under section 49(a), and the remainder are exempt under section 19.

INFORMATION PUBLISHED OR AVAILABLE

The Ministry relies on this exemption with respect to Documents 1A - 13. Documents 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 1J, 1K and 1L consist of informations alleging offences by the appellant. Documents 2 through 9 consist of Notices of Motion, Notices of Appeal and Court Orders relating to the appellant's trial and appeal. Document 11 is the court's Reasons for Sentencing with respect to the

appellant's trial. Documents 10, 12 and 13 consist of excerpts from the Revised Statutes of Ontario (in particular, these records consist of parts of the Family Law Act, the Provincial Offences Act and the Trespass to Property Act).

The "information published or available" exemption appears in section 22(a) of the Act, which states:

A head may refuse to disclose a record where,

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

I have reviewed the records and I am satisfied that all of them are publicly available. Therefore, I find that they all qualify for exemption under this section. The records which contain the appellant's personal information are exempt under section 49(a), and those which do not are exempt under section 22(a).

However, Order 123 and many subsequent orders have indicated that, whenever an institution relies on section 22(a), the institution has a duty to inform the requester of the specific location of the records or information in question. Where the institution does not discharge its responsibility to do so, the Commissioner or his delegate may order the institution to provide the appellant with information sufficient to identify the precise location of the records or information in question.

In this case, the Ministry has advised the appellant of the location where Documents 1A through 1L, Documents 2 through 9, and Document 11, may be obtained. However, I have not been provided with any documentation to indicate that this was done for the other records for which section 22(a) has been applied. Therefore, I will order the Ministry to provide this information with respect to Documents 10, 12 and 13.

Because of the way I have resolved the issues in this appeal, it is not necessary for me to consider the application of sections 14(2)(a) and 49(b).

ORDER:

1. I uphold the Ministry's decision to deny access to the records at issue.
2. I order the Ministry to advise the appellant, by means of written correspondence, of the location where Documents 10, 12 and 13 may be obtained, to be sent to the appellant not later than December 11, 1995. In this regard, I order the Ministry to advise the appellant not only of the address where the Revised Statutes of Ontario may be purchased, but of a publicly accessible library location in the London area where they may be viewed.
3. I further order the Ministry to send a copy of the correspondence referred to in Provision 2 to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Toronto, Ontario, M5S 2V1, at the same time it is sent to the appellant.

Original signed by: _____
John Higgins
Inquiry Officer

November 27, 1995