



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

ORDER P-1278

Appeal P-9600264

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the personal information which relates to the requester contained in a specified Crown file. The requester and another individual were charged with conspiracy to commit murder and, at trial, the charges were ultimately stayed by the Crown. As a result of much discussion between the Ministry and counsel for each of the two co-accused, an agreement was entered into for the payment of the requester's legal fees by the Crown. Following clarification with the Ministry, the requester indicated that he is also seeking access to any records which relate to the negotiation of the agreement as he alleged that he was to have received payment from the Crown directly, rather than through his counsel.

The Ministry identified 154 pages of documents as responsive to the request and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- solicitor-client privilege - section 19
- discretion to refuse requester's own information - section 49(a)

The requester, now the appellant, appealed the Ministry's decision. During the mediation of the appeal, the Ministry disclosed 27 pages to the requester, leaving a total of 127 pages still at issue. A Notice of Inquiry was provided by this office to the appellant, the Ministry and five other individuals whose rights might be affected by the disclosure of the information contained in the records (the affected persons).

As it appeared that the records at issue might contain the personal information of the appellant, as well as the affected persons, the parties to the appeal were also invited to make submissions on the possible application of the invasion of privacy exemptions contained in sections 21 and 49(b) of the Act. Representations were received from the appellant, the Ministry and two of the affected persons.

In its submissions, the Ministry has grouped various documents together which are of a similar nature. I will address the application of the exemptions to each record group, following the numbering system referred to in the Ministry's representations.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records at issue and find that all of them, with the exception of Pages 15-17, 44, 45, 46, 47, 48, 50, 57, 58, 61, 62, 75-92, 101, 102, 120, 121, 199, 200 and 209, contain the personal information of the appellant. Pages 15-17, 47, 48, 50, 61, 62, 75-92, 101, 102, 122-125, 199, 200 and 209 contain only the personal information of the appellant's co-accused. Pages 44, 45, 46, 57, 58, 120 and 121 do not contain any personal information.

Section 47(1) of the Act gives an individual 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.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION

Under section 49(a), the Ministry has the discretion to deny access to records which contain an individual's own personal information where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include section 19 (solicitor-client privilege).

SOLICITOR-CLIENT PRIVILEGE

As noted above, the Ministry claims the application of section 19 to all of the records which are responsive to the appellant's request. Section 19 consists of two branches, which provide the Ministry 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 will address the application of the section 19 exemption in the order in which they are raised in the Ministry's representations.

Pages 3-7

This document consists of a covering letter and investigation report prepared by the Internal Affairs Branch of the Metropolitan Toronto Police Service addressed to the Regional Director of Crown Attorneys. The report addresses certain concerns raised following the appellant's trial about the manner in which the investigation was conducted by the Police. The Ministry submits that this document is exempt under Branch 2 of the section 19 exemption as it was prepared for Crown counsel for use in litigation.

In my view, the dominant purpose for the creation of the report was to document the findings of the Internal Affairs investigation into the conduct of the investigating officer. On its face, the record was not created for either the trial of the appellant or for any other litigation involving the Crown. Rather, the report was prepared to determine whether proceedings under the Police Services Act against the investigating officer should be considered. I find, therefore, that this record does not qualify for exemption under Branch 2 of the section 19 exemption.

Pages 8, 9, 10, 11, 31, 32, 42, 43, 59, 60, 99, 100, 103, 104, 105, 106, 114-117 and 126-134

The Ministry submits that each of these documents qualify for exemption under Branch 2 of section 19 as they were prepared by Crown counsel for use in giving legal advice or for use in

litigation, in this case, the criminal charges against the appellant and his co-accused and the ensuing negotiations over the payment of the costs of the accused.

I have reviewed each of the records and find that Pages 8, 9, 10, 11, 31, 32, 42, 43, 59, 99, 100, 103, 105, 106, 114, 115, 116, 117 and 126-134 are documents prepared by Crown counsel relating to the resolution of the question of costs to the appellant and his co-accused. I find that each of these documents was prepared for use in giving legal advice or for use in the possible litigation which would have been commenced by the appellant and his co-accused for the payment of their legal fees. They qualify, accordingly, for exemption under section 19.

Page 60 is an invoice submitted to the Ministry by the individual who prepared the transcript of the appellant's trial. This document was not prepared for Crown counsel for use in giving legal advice or for use in litigation and does not qualify for exemption under section 19.

Page 104 is a letter from Crown counsel to counsel to the appellant and his co-accused. I find that this record is more appropriately addressed in my discussion below regarding other correspondence between these parties which is at issue in this appeal.

Pages 40, 41, 71-74, 95, 96, 97, 98, 104 and 201-207

The Ministry submits that each of these documents is exempt under both branches of the section 19 exemption as they are communications between Crown counsel and counsel for the appellant which address the possible settlement of the appellant's claim for legal costs against the Crown.

Pages 40-41, 71-74, 95, 96, 97, 98, 104 and 201-207 are letters to and from the appellant's counsel and counsel for the Ministry in which the details of the payment of the appellant's legal costs are described. The words "without prejudice", often used to indicate an intention to invoke the privilege, do not appear on these letters.

The Ministry refers to Order 49 as supporting their position that these records should not be disclosed. Former Commissioner Sidney Linden made the following observation in that order regarding the question of "settlement privilege":

... it is possible for letters or communications passing between opposing lawyers to obtain the status of a privileged communication if they are made "without prejudice" and in pursuance of settlement ...

In this context, I adopt the reasoning of Inquiry Officer John Higgins in Order M-477 and Inquiry Officer Anita Fineberg in Order M-712 in which they held that:

Usually, disclosure of a document to a party adverse in interest would constitute waiver of privilege, but in my view this does not arise with respect to records pertaining to settlement negotiations.

In my view, Pages 40-41, 71-74, 95, 96, 97, 98, 104 and 201-207 document the negotiation of a settlement of the appellant's claim for indemnification of his legal costs by the Crown. As such,

I find that they have acquired the status of a privileged communication. Accordingly, I find each of these records qualify for exemption under section 19 of the Act.

Pages 110-113

The Ministry submits that this document, which consists of handwritten notes made by Crown counsel, was prepared for use in litigation and is, accordingly, exempt from disclosure under Branch 2 of section 19. I find that these notes were prepared for the personal use of the Crown counsel who made them for his own use in the litigation involving the payment of the appellant's legal costs. As such, they qualify for exemption under Branch 2 of the section 19 exemption.

Pages 1, 2, 18 (which is duplicated at Page 51), 19 (which is duplicated at Page 56), 20 (which is duplicated at Page 49), 60, 63-70, 93, 94 and 208.

The Ministry argues that these records are exempt under either Branch 1 or Branch 2 of the section 19 exemption as they were "made for Crown counsel in litigation". I will examine each in greater detail.

Pages 1, 2, 18, 19, 20, 49-56, 63-70 and 208 are copies of various legal accounts, receipts for payment, release documents and a Certificate of Independent Legal Advice signed by the appellant. These documents describe the legal work performed by the appellant's counsel on his behalf and serve to document the agreement entered into between the Crown and the appellant for the payment of his legal fees by the Crown. I find that Branch 1 can have no application in this situation as the solicitor-client relationship which is reflected in the records is between the appellant and his counsel. The privilege belongs to the appellant, therefore. I further find that these records were not created by or for Crown counsel for use in litigation or for use in giving legal advice. Section 19 does not, therefore, apply to these documents.

I will address Pages 60, 93 and 94 in my discussion of the application of section 49(b) below.

Pages 118 and 119

Page 118 is a letter from the Regional Director of Crown Attorneys to the Law Society of Upper Canada's Senior Counsel-Discipline. Page 119 is the reply to that letter. These letters address certain concerns that were raised relating to the conduct of the Assistant Crown Attorney responsible for the appellant's prosecution. I find that they were not prepared by Crown counsel either for use in giving legal advice or for use in litigation and that Branch 2 of section 19 has no application to either piece of correspondence.

Pages 44, 46 and 57

These documents consist of facsimile cover pages. I find that while they may have been prepared by or for Crown counsel, they were not prepared for use in giving legal advice or for use in litigation. They are not, accordingly, exempt under Branch 2 of section 19.

Pages 45, 58, 120 and 121

These records consist of draft submissions which were prepared by or for Crown counsel in preparing his submissions to Court on the issue of the payment of the appellant's costs. I find that they were prepared for use in litigation and are exempt under Branch 2 of section 19.

By way of summary, I have found that all of the records at issue, with the exception of Pages 1, 2, 3-7, 18-20, 44, 46, 49-56, 57, 60, 63-70, 93, 94, 118, 119 and 208 qualify for exemption under section 19 and are, therefore, exempt under section 49(a).

INVASION OF PRIVACY

I have found above that Pages 3-7, 60, 93, 94, 118 and 119 contain the personal information of the appellant, as well as other identifiable individuals. In each of these documents, the appellant's name appears only as part of the style of cause of the criminal proceeding. Pages 15-17, 47, 48, 50, 61, 62, 75-92, 101, 102, 122-125, 199, 200 and 209 contain only the personal information of the appellant's co-accused.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the Ministry to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, records only contain the personal information of other individuals, section 21(1) of the Act prohibits the Ministry from disclosing them except in the circumstances listed in sections 21(1)(a) through (f). Of these, only section 21(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the Ministry must consider the factors listed in section 21(2), as well as all other relevant circumstances.

Pages 15-17, 47, 48, 50, 61, 62, 75-92, 101, 102, 122-125, 199, 200 and 209

These records do not contain the appellant's personal information, only that of his co-accused. I find that, given the nature of the circumstances surrounding the creation of these documents, it is reasonable to expect that the information which they contain would be considered highly sensitive and would have been provided in confidence. Accordingly, I find that sections 21(2)(f) and (h) are relevant considerations favouring privacy protection. The appellant has not raised any factors which might favour the disclosure of these records. Section 21(4) does not apply and the appellant has not raised the application of section 23.

I find, therefore, that the disclosure of these documents would result in an unjustified invasion of the personal privacy of the co-accused and they are exempt under section 21(1).

Pages 3-7

The Ministry submits that this document was compiled as part of a police investigation into the activities of the investigating officer in the appellant's prosecution. It argues that if the investigation report had uncovered any wrong-doing by the officer, he could have been subject to proceedings under the Police Services Act. For this reason, the Ministry submits that the record is subject to the presumption in section 21(3)(b) which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

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;

I have reviewed the contents of Pages 3-7 and find that they properly fall within the section 21(3)(b) presumption. The appellant has not raised the possible application of section 23 of the Act and section 21(4) is not applicable. Pages 3-7 are, therefore, exempt from disclosure under section 49(b).

Pages 60, 93 and 94

These pages consist of the invoices rendered by a court reporter for the transcription of various portions of the appellant's trial. They contain the name and address of the reporter along with the fees payable for the transcripts. The Ministry has not made any representations on the application of section 49(b) to these records. I find that the disclosure of the information contained in these records would not constitute an unjustified invasion of personal privacy and they are to be disclosed to the appellant.

Pages 118 and 119

The Ministry submits that these records were compiled as part of a law enforcement investigation into whether the Assistant Crown Attorney had violated the Law Society of Upper Canada's Rules of Professional Conduct. The Ministry has not provided me with any information as to the nature and extent of the investigation which followed, if any, nor has it stated whether penalties or sanctions may have resulted from proceedings before the Law Society. I am not, accordingly, able to find that these documents fall within the ambit of the section 21(3)(b) presumption.

In my view, however, the records are highly sensitive within the meaning of section 21(2)(f) and their disclosure may unfairly damage the reputation of the person referred to in them (section 21(2)(i)). I find that there are no factors favouring the disclosure of the information contained in these documents. Section 23 was not raised by the appellant and section 21(4) has no application

in the circumstances. The disclosure of Pages 118 and 119 would, therefore, result in an unjustified invasion of personal privacy and they are exempt from disclosure under section 49(b).

ORDER:

1. I order the Ministry to disclose to the appellant Pages 1, 2, 18-20, 44, 46, 49-56, 57, 60, 63-70, 93, 94 and 208 by providing him with a copy by **November 26, 1996** but not before **November 21, 1996**.
2. I uphold the Ministry's decision to deny access to the remaining records at issue.
3. In order to ensure compliance with the terms 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: _____

Donald Hale
Inquiry Officer

October 22, 1996 _____