



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

# **ORDER P-1279**

**Appeal P-9600275**

**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 copies of all witness statements, the Crown brief and any other records related to a specified criminal prosecution. The requesters are siblings who have undertaken a legal action against the estate of their now-deceased step-father for damages arising as a result of the abuse they suffered as children. The records sought relate to a criminal proceeding brought against the step-father which was stayed prior to trial as a result of his death.

The Ministry located a large number of responsive records and denied access to 351 pages, claiming the application of the following exemptions contained in the Act:

- law enforcement - section 14(2)(a)
- solicitor-client privilege - section 19
- invasion of privacy - section 21
- information published or available - section 22(a)

The requesters (now the appellants) appealed only that portion of the Ministry's decision which denied access to 29 pages of records containing witness statements and lists. This office sent a Notice of Inquiry to the appellants, the Ministry and to seven individuals whose interests may be affected by the disclosure of the information contained in the records (the affected persons). Because it appeared that the records might contain the personal information of individuals other than the appellants, the Notice of Inquiry also invited the parties to address the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy).

One of the affected persons consented, and two others objected to the disclosure of their personal information. Submissions were also received from the Ministry and the appellants.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

"Personal information" is defined in section 2(1) of the Act to mean, in part, recorded information about an identifiable individual. I have reviewed the 29 pages of responsive records and make the following findings:

- (1) Pages D2-1 to D2-6 contain the personal information of one of the affected persons, the appellants' step-father and one of the appellants.
- (2) Pages D2-8, D2-9, D2-23, D2-24, D8-51, D8-52 and D8-53 contain the names and addresses of the witnesses who testified in an earlier criminal proceeding which ended in a mistrial, or were to testify in the now-stayed criminal proceeding against the appellants' step-father. These pages contain the names and addresses of the appellants, the police officers involved in the step-father's arrest, a probation officer for one of the appellants,

the two affected persons who objected to the disclosure of their personal information and the affected person who consented to the disclosure of her personal information.

I find that the names and business addresses of the police officers and probation officer contained in these records do not qualify as their personal information as they were provided by and relates to them only in their professional capacities as police or probation officers.

The names and addresses of the appellants and the affected persons are their personal information.

- (3) Page D2-36 contains only the personal information of one of the appellants. Although reference to other individuals is made in this record, these persons are referred to only in their professional capacities and it is not, therefore, to be considered their personal information.
- (4) Pages D2-37 to D2-45 contain the personal information of the two affected persons who objected to disclosure and the appellants' step-father only.
- (5) Pages D2-46 and D2-47 are statements made by the police officers who attended at the arrest of the appellants' step-father. They contain only the personal information of the step-father.

## INVASION OF PRIVACY

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this right.

Where a record contains the personal information of both the appellants 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 appellants are not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits the Ministry from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Section 21(1)(f) permits disclosure if it "does not 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 Ministry 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.

The Ministry submits that the release of the personal information contained in the documents should be presumed to be an invasion of personal privacy under section 21(3)(b) because they

contain the personal information of witnesses in a criminal trial. It argues that the information was compiled by the Police as a result of their investigation into whether the appellants' step-father had violated the criminal law. For this reason, the Ministry submits that the witness statements and lists clearly fall within the purview of section 21(3)(b).

I have reviewed the records together with the representations of the parties and make the following findings:

1. The disclosure of the information which was provided to the Police by the appellants, the police and probation officer and the affected person who consented to the disclosure of her personal information would not result in an unjustified invasion of personal privacy under either sections 21 or 49(b). The information provided by the police and probation officers is not their "personal information" within the meaning of section 2(1), as found above. The personal information relating to the consenting affected person falls within the exception contained in section 21(1)(a).
2. The disclosure of the records containing only the personal information of the two non-consenting affected persons would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b). Section 21(4) has no application to this information and the appellants have not raised section 23. I find, therefore, that the personal information relating to these affected persons, which is contained in Pages D2-37 to D2-45, is exempt from disclosure under section 21.
3. Balancing the appellants right of access to information against the affected persons' right of privacy, I find that the disclosure of the personal information of the affected persons who have objected to the disclosure of their personal information which is found in Pages D2-1 to D2-6, D2-24, D2-9, D8-51, D8-52 and D8-53 would result in an unjustified invasion of their personal privacy. The circumstances surrounding their involvement in the prosecution of the appellants' step-father may be characterized as "highly sensitive" within the meaning of section 21(2)(f). As sections 21(4) and 23 have no application, I also find that this information is exempt from disclosure under section 49(b).

It is not necessary for me to address the application of section 19, accordingly, to Pages D2-37 to D2-45 as they are exempt under section 21. Nor will I further consider those portions of Pages D2-1 to D2-6, D2-24, D2-9, D8-51, D8-52 and D8-53 which I have found are exempt under section 49(b).

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

I have found above that Pages D2-23, D2-24, D2-36, D2-8, D2-9, D2-98 to D2-100, D8-51, D8-52 and D8-53 contain the personal information of one or more of the appellants.

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 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. (emphasis added)

In order to determine whether the exemption provided by section 49(a) applies in this case, I will consider the application of section 19 to these records.

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).

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied.

The Ministry submits that the records qualify for exemption under Branch 2 of the section 19 exemption. It argues that the witness statements and lists were part of the Crown brief prepared for the Assistant Crown Attorney by the police for the prosecution of the appellants' step-father on various charges under the Criminal Code.

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. The record must have been prepared by or for Crown counsel; and
2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Ministry relies on Orders P-368 and P-1185, arguing that these orders stand for the proposition that material in the Crown brief such as witness statements or witness lists fall within Branch 2 of the section 19 exemption. I have reviewed these authorities and find that the records which were found to fall within the ambit of Branch 2 of the exemption in those cases consisted of memoranda and correspondence between Crown counsel or articling students with the Crown Law office. They did not include materials prepared for the Crown by the investigating police service. These authorities are not, therefore, particularly persuasive.

In Order P-613, Inquiry Officer Anita Fineberg found that materials contained in a Crown brief, including duplicate copies of witness statements, which had been prepared for Crown counsel by the Ontario Provincial Police for use in a prosecution fell within Branch 2 of the section 19 exemption. In Order P-506, Inquiry Officer Holly Big Canoe found that notes, correspondence and other materials compiled by or for Crown counsel for use in the prosecution of an offence were properly exempt from disclosure under Branch 2 of the section 19 exemption.

In reviewing the remaining records, I find that all were prepared for Crown counsel by the Police for inclusion in the Crown brief relating to litigation, the prosecution of the appellants' step-father. Accordingly, I find that Pages D2-23, D2-24, D2-36, D2-8, D2-9, D2-98 to D2-100 and D8-51 to D8-53 qualify for exemption from disclosure under Branch 2 of section 19. They are, therefore, exempt under section 49(a). Pages D2-46 and D2-47 do not contain any of the appellants' personal information and are, therefore, exempt under Branch 2 of section 19.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_

Donald Hale  
Inquiry Officer

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October 23, 1996