



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

# ORDER P-1352

Appeal P\_9600348

Ministry of the Attorney General



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## **NATURE OF THE APPEAL:**

Counsel for the appellant corporation (the appellant), made a request to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to the contents of a file related to criminal charges laid against a named individual (the affected person). The criminal charges were subsequently withdrawn. The affected person has instituted a civil action for wrongful dismissal against the appellant, her former employer.

The Ministry identified the records responsive to the request and denied access to them in their entirety on the basis of the following exemptions in the Act:

- law enforcement - section 14(1)(c)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a)

The appellant filed an appeal of the Ministry's decision to deny access. During mediation, the appellant clarified that it was only seeking access to the following pages of the record:

L	Cover - Crown Counsel Brief (1 page)
M7-M9	Letter to Ontario Provincial Police (OPP) with 1 page attachment
M10-M25	Witness statements
M28-M47	Witness statements
M50-M52	Witness statements
M56-M58	Witness statements
R1-R5	Letter to Crown Attorney, Cobourg

The appellant also raised the possible application of section 23 of the Act, the so-called public interest override.

This office sent a Notice of Inquiry to the appellant and the Ministry. Both parties submitted representations.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed all the pages at issue to determine if they contain personal information and, if so, to whom the personal information relates. I find that all the pages of the record with the exception of pages M7-M9 contain the personal information of identifiable individuals.

Pages M7-M9 consist of a letter and attachment from an individual acting in his professional capacity and therefore, this information does not qualify as “personal information” for the purposes of section 2(1) of the Act.

Because the appellant is a corporation, any information relating to it does not fall under the definition of personal information found in section 2(1). Accordingly, sections 49(a) and (b) are not at issue.

I am mindful that the appellant is seeking access only to that information relating to the affected person. However, this information is so intertwined with that of other individuals involved in the investigation that it is impossible to separate it in any meaningful way.

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. In my view, section 21(1)(f) sets out the only circumstance which may be applicable in this case:

A head shall refuse to disclose personal information to any person other than the individual to whom the individual relates except,

if the disclosure does not constitute an unjustified invasion of personal 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 Ministry 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.

The appellant submits that disclosure of the record is necessary for the purpose of preparing a full and informed defence in the civil suit that the affected person has launched against it. In this manner, the appellant has raised the application of the factor in section 21(2)(d) (fair determination of rights).

The Ministry submits that all of the personal information falls within the presumption in section 21(3)(b) of the Act. It is the position of the Ministry that the personal information was compiled by the OPP as part of its investigation into a possible violation of law, namely various provisions of the Criminal Code.

Having reviewed the record, I find that the personal information contained in pages L, M10-M25, M28-M47, M50-M52, M56-M58 and R1-R5 of the record is subject to the presumption in section 21(3)(b). As I have indicated previously, once a record is found to fall within a section 21(3) presumption, the factors in section 21(2) cannot be used to rebut the presumption (John

Doe v. Ontario (Information and Privacy Commission) (1993) 13 O.R. 767). Section 21(4) is not applicable in the circumstances of this appeal. Accordingly, pages L, M10-M25, M28-M47, M50-M52, M56-M58 and R1-R5 of the record is exempt from disclosure pursuant to section 21(1) of the Act.

The Ministry has also claimed the application of section 14(1)(c) to pages R1-R5 (letter to the Crown attorney). Because I have found these pages of the record to be exempt under section 21(1) above, I need not address the application of section 14(1)(c) of the Act.

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry claims that the solicitor-client privilege exemption applies to pages M7-M9, which consist of a two page letter regarding a technical inspection and a table of readings taken during the inspection. The letter is written by an employee of Consumer and Corporate Affairs Canada and is addressed to the OPP.

Section 19 of the Act 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 that 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 submits that the record qualifies for exemption under Branch 2 of section 19 in that it was part of the Crown brief prepared for the Crown attorney by police for the prosecution of the affected person. The Ministry does not submit, nor are there any facts before me which would suggest that the record was prepared for use in giving legal advice.

The appellant argues that the record was not prepared primarily for the Crown attorney's brief. Rather it was prepared as evidence for potential admission at trial and should not be accorded the same privilege as a Crown attorney's notes or legal research in a Crown brief.

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 use by 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.

Previous orders of the Commissioner have found that duplicate copies of witness statements, notes, correspondence and other materials compiled by or for Crown counsel for use in the prosecution of an offence are properly exempt from disclosure under Branch 2 of the section 19 exemption (Orders P-613 and P-506). I have reviewed the record (pages M7-M9) and I am not satisfied that the **dominant** purpose of the preparation of these pages was for use by Crown counsel in contemplation of or for use in litigation.

I have also reviewed the possible application of solicitor-client privilege in Branch 1 and find that it does not apply in this case. I find, therefore, that pages M7-M9 do not qualify for exemption under section 19 of the Act. The Ministry has not claimed any other discretionary exemptions for these pages and the Ministry should disclose them to the appellant.

### **PUBLIC INTEREST IN DISCLOSURE**

In his letter of appeal, the appellant has raised the possible application of section 23 of the Act. The appellant states that disclosure of the record is necessary to ensure that the civil suit is decided on its merits and therefore, a public interest exists.

Section 23 of the Act states as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called “public interest override”: there must be a compelling **public** interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

In its representations, the Ministry argues that there is no compelling public interest in the disclosure of the record at issue.

I have carefully reviewed the representations, as well as the record at issue in this appeal. In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemption under section 21. Accordingly, I find that section 23 of the Act does not apply in the circumstances of this appeal.

### **ORDER:**

1. I order the Ministry to disclose pages M7 to M9 of the record to the appellant by sending it a copy by **March 12, 1997**.
2. I uphold the decision of the Ministry to deny access to the remaining pages of the record.
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 pages of the record sent to the appellant in accordance with Provision 1.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_ February 25, 1997