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

ORDER P-1582

Appeal P-9800086

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

In 1996, the appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry). The request was for access to copies of records sent by the Ministry to the Law Society of Upper Canada (the Law Society). The records related to the prosecution of fraud charges against the appellant, for which he was acquitted in 1984. The Law Society had disclosed the contents of the file it maintained pertaining to the appellant with the exception of the documents which it received from the Ministry because the Ministry did not consent to the disclosure of the records it had provided.

The Ministry denied access to the four records it identified as being responsive to the request pursuant to the exemption in section 19 (solicitor-client privilege) of the Act. The appellant appealed this decision and Appeal P-9600223 was opened. The issues in this appeal were disposed of by Inquiry Officer Holly Big Canoe in Order P-1342. Essentially, she found that although the records had been prepared for litigation, the litigation had terminated. She found further that, in sharing the records with the Law Society, the Ministry had waived solicitor-client privilege in the records. Based on these findings, she concluded that the Ministry could not rely on the exemption in section 19 of the Act, and she ordered the Ministry to disclose the records to the appellant.

NATURE OF THE APPEAL:

The Ministry subsequently received a request under the Act from the appellant for all documentation with respect to his prosecution in 1984. The Ministry granted partial access to the records it identified as responsive to the request, claiming the exemptions found in sections 13(1), 19, 21(3)(b), 49(a) and 49(b) of the Act to deny access to the remainder. In appealing the Ministry's decision, the appellant asserts that the records which are responsive to his second request were ordered disclosed as a result of Order P-1342.

This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from both parties.

RECORDS:

The records at issue in this appeal consist of 16 pages and contain four witness statements (11 pages, for which sections 21(3)(b) and 49(b) were claimed) and three letters between the District Crown Attorney and the office of the Director of Crown Attorneys (five pages, for which sections 13(1), 19 and 49(a) were claimed).

PRELIMINARY MATTER:

WERE THE RECORDS DISPOSED OF IN ORDER P-1342?

The appellant submits that the records in this appeal have already been ordered to be produced by virtue of Order P-1342. In this regard, the appellant asserts that the records have been

released to the Law Society and as such have already been disclosed. He argues, therefore, that the information can no longer be protected.

The Ministry indicates that the three letters were not sent to the Law Society. Further, they did not form part of the records at issue in the previous appeal and were not ordered disclosed pursuant to Order P-1342. The Ministry indicates further that the 11 pages of witness statements had been sent to the Law Society but were only located following the issuance of Order P-1342. Therefore, they did not form part of the records at issue in that order. The Ministry confirms that it has claimed the application of the mandatory exemption in section 21(1) for these pages and infers that even though they were sent to the Law Society, the reasoning in Order P-1342 is not applicable to them.

I have reviewed the records which were at issue in Order P-1342 and have compared them to the records at issue in the current appeal. I am satisfied that the records are different and that the issues regarding them in the current appeal were not disposed of in Order P-1342. In other words, I find that the decision in Order P-1342 is not, in and of itself, applicable to the records at issue in this appeal.

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. I find that the witness statements contain the personal information of the appellant and other identifiable individuals, including the witnesses. The three letters also contain the appellant's personal information.

DISCRETION TO REFUSE REQUESTER'S OWN 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. Section 49(a) reads:

> 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]

The Ministry claims that sections 13 and 19 of the Act apply to the three letters. I will begin with section 19.

SOLICITOR-CLIENT PRIVILEGE

Section 19 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.

This section 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry 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.

[Order 49]

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.

[See Order 210]

The Ministry claims that Branch 2 of the section 19 exemption applies to all three letters. In prefacing its representations on this issue, the Ministry indicates that these letters were not released to the Law Society and submits that the reasoning in Order P-1342 is, therefore, not applicable in the circumstances.

The Ministry indicates that two of the letters were addressed to the Director of Crown Attorneys and contain the author's legal opinion about the status and significance of the prosecution. The Ministry indicates further that these letters were generated for use in litigation. The Ministry

refers to previous orders of this office which have held that memoranda and correspondence between Crown counsel were held to be exempt under Branch 2 of section 19 (Orders P-368, P-506 and P-1185). In this regard, the Ministry submits that it is crucial that Crown counsel be able to communicate with their superiors regarding matters that are before the criminal courts.
I note that in all three of the orders referred to above, the finding was made that the records were related to on-going litigation. Inquiry Officer Big Canoe addressed the issue of the termination of litigation in Order P-1342. In my view, the reasoning and findings in that order are equally applicable in the current appeal with respect to the Ministry's argument that the records were generated for use in litigation. As the litigation in question no longer exists, the Ministry cannot rely on this part of Branch 2.

In my view, the three letters do not contain, nor do they relate in any way, to the preparing, giving or seeking of legal advice. One record is a reporting letter to the Director of Crown Attorneys in which the Crown Attorney outlines events surrounding the trial. Although the Crown Attorney provides his views regarding the significance of the trial, in my view this is an observation rather than advice of a legal nature. One letter is purely administrative, concerning expenses. The third letter is a request for authorization to undertake a certain activity in relation to the prosecution of the appellant. Accordingly, I find that the Ministry is not entitled to rely on section 19 to exempt this information.

ADVICE OR RECOMMENDATIONS

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118).

The Ministry submits that these three letters do not merely communicate information from one party to the other, nor do they simply set out factual information. Rather, the Ministry argues that they prescribe a "course of action" to be undertaken by the respective parties, such as the Crown Attorney's next course of action in preparation for the continuation of the matter.

I do not completely agree. In my view, the second letter is purely administrative in nature and does not contain any discussion that could be perceived as relating to a suggested course of action. I find that the first letter is primarily a factual accounting of the actions taken with respect to the matter and was intended to share information for the purpose of keeping the Director informed. It does not contain a "suggested course of action" nor is there any indication from the letter itself that there is any expectation that the Director will accept or reject any part of the contents of the letter.

In the third letter, the Crown Attorney is seeking authorization to proceed with an activity. In seeking this authorization, he has provided some information regarding his plans. In my view,

this relates to a suggested course of action which the Director will ultimately accept or reject and thus qualifies for exemption under section 13(1) and is therefore exempt under section 49(a).

In summary, I find that only the third letter qualifies for exemption under section 49(a). As no other exemptions apply to the other two letters, they should be disclosed to the appellant.

INVASION OF PRIVACY

Under section 49(b) of the Act, where a record contains personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the appellant access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to his or her own personal information, the only situation under section 49(b) in which he or she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 21(1), (3) and (4) of the Act provide guidance in determining whether the 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 to the appeal.

The Ministry indicates that the witness statements were compiled as a result of a criminal investigation which resulted in the laying of criminal charges against the appellant. Therefore, the Ministry submits that the release of the personal information in the witness statements would be presumed to be an invasion of personal privacy on the basis of section 21(3)(b) of the Act.

The appellant claims that the factors in sections 21(2)(a) (public scrutiny) and (d) (fair determination of the appellant's rights) are relevant in the circumstances of this appeal. He also indicates that these records should have been disclosed to him during his original prosecution and other proceedings in which he was involved. Finally, he submits that there is a diminished privacy issue with respect to these records as they were created approximately 15 years ago.

I have carefully reviewed the witness statements and I find that the presumption provided by section 21(3)(b) of the Act applies to the personal information in them. As I have indicated previously, once a presumption is found to apply, the only way in which it can be rebutted is if it falls under section 21(4) or where section 23 is found to apply. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767. Consequently, the application of the factors and considerations raised by

the appellant could not override or rebut the presumption I have found to apply. I further find that sections 21(4) and 23 have no application in the circumstances of this appeal. Accordingly, the record is exempt under section 49(b) of the Act.

ORDER:

1. I order the Ministry to disclose the letters dated July 7, 1983 and April 11, 1983 to the appellant by providing him with copies of these letters on or before **July 2, 1998**.

2. I uphold the Ministry's decision to withhold the remaining records.

3. 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: June 11, 1998
Laurel Cropley
Adjudicator
(formerly Inquiry Officer)