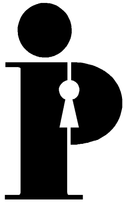

ORDER P-1535

Appeals P-9700297, P-9700298, P-9700299, P-9700300, P-9700301 and P-9700302

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NATURE OF THE APPEALS:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all information relating to the requester, located in various areas within the Ministry. The Ministry divided the request into eight parts and assigned each a separate request number (970132 to 970136 and 970138 to 970140).

The Ministry then issued three decision letters (dated June 5, 1997, August 6, 1997 and September 29, 1997) in which it granted access to some records and denied access to others based on exemptions under the Act, on the lack of Ministry custody or control or the non-existence of records. It imposed fees in some cases and waived fees in some but not others. The requester (now the appellant) appealed the Ministry's decisions. This office did not open appeal files for Requests 970132 and 970138 because there were no outstanding issues. Appeals P-9700297 through P-9700302 were opened, respectively, for the remaining requests.

This office provided a Notice of Inquiry to the Ministry, the appellant and one person whose interests may be affected by the disclosure of information at issue in Appeal P-9700302 (the affected party). Representations were received from the Ministry only.

In its representations, the Ministry waived all the remaining fees at issue. Therefore, I will not consider the issues of fees and fee waiver in this order. As a result of the Ministry's revised fee decisions, the only issue remaining in Appeal P-9700297 is whether court records which may be responsive to the request are within the Ministry's custody or control and subject to the Act. Furthermore, all outstanding issues in Appeal P-9700301 have now been resolved.

Also in its representations, the Ministry states that it has decided to release additional records. In Appeal P-9700300 it is disclosing pages 5-11, 42-45, 47-53, 63 and 64 in their entirety and page 65, with the exception of one paragraph for which it is claiming the exemption found in section 21 of the Act. In Appeal P-9700298, the Ministry is disclosing page 49 in its entirety. Page 49 was the only page to which the Ministry applied section 15(b) of the Act. Because this page was disclosed in its entirety, I will not address the application of section 15(b) in this order. Finally, the Ministry is disclosing portions of pages 22 and 63 in Appeal P-9700302.

The following is a list of the appeals to be dealt with in this order, with the outstanding issues identified for each appeal:

Appeal P-9700297 (Request 970133):

The Ministry informed the appellant that court records are not in its custody or control and are not subject to the Act.

The issue in this appeal is whether court records are in the Ministry's custody or control and subject to the Act.

Appeal P-9700298 (Request 970134):

The appellant was granted partial access to the records. The photocopying fee was waived.

The issue in this appeal is the denial of access to portions of the records under sections 13 (advice or recommendations), 19 (solicitor-client privilege) and 49(a) (discretion to refuse requester's own information) of the Act.

The records remaining at issue consist of six pages comprising an Active Letters and Actions form, a Minister's Correspondence Routing Slip, memoranda and correspondence.

Appeal P-9700299 (Request 970135):

The Ministry informed the appellant that no records exist in its custody or control which respond to the request.

The issue in this appeal is whether the Ministry conducted a reasonable search for records which respond to the request.

Appeal P-9700300 (Request 970136):

The Ministry granted partial access to some of the records and denied access to others based on the exemptions found in sections 13, 19 and 49(a) of the Act. As mentioned earlier, the Ministry has now disclosed additional records and has claimed section 21 (invasion of privacy) to exempt the severance remaining on page 65 of the records. All fees were waived. The Ministry further advised the appellant that court records which may respond to the request are not in its custody or control and are not subject to the Act.

The issues in this appeal are: a) the denial of access to certain pages under sections 13, 19, 21 and 49(a), as well as the exemption in section 49(b) (invasion of privacy) of the Act, which I am adding as an issue because the records may contain the appellant's personal information, and b) whether court records are in the Ministry's custody or control and subject to the Act.

The records consist of 36 pages, denied in whole or in part, and comprise correspondence and memoranda.

Appeal P-9700302 (Request 970140):

The Ministry granted partial access to the records and denied access to the remainder based on the exemptions found in sections 21 and 49(b) of the Act.

The issue in this appeal is the denial of access under sections 21 and 49(b) of the Act to portions of the records.

The information remaining at issue consists of the name, address, the date of birth, and insurance policy number of individuals other than the appellant as well as portions of a two-page Motor Vehicle Accident Report.

DISCUSSION:

REASONABLENESS OF SEARCH

Appeal P-9700299

The request was for records relating to the appellant at the Crown Attorney's offices at Old City Hall and the East Mall.

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant did not submit representations.

In its representations, the Ministry outlines the search that was conducted to identify records responsive to the request. An Assistant Crown Attorney searched the General Division files, both open and closed. The Ministry explains that any files that are dealt with in the provincial courts are not retained by the Crown's office but are returned to the Metropolitan Toronto Police Force (the Police). This was confirmed by the Director of Crown Operations, Toronto Region and the former Assistant Deputy Attorney General, Criminal Law Division. The Ministry adds that in preparation of its representations, it contacted the Assistant Crown Attorney who again confirmed that no responsive records were located after a search of the Crown Attorney's Offices.

The Ministry points out that it informed the appellant that the information sought may be in the custody or control of the Police and that it offered to forward his request to the Police on his behalf. The Ministry suggested to the appellant that he provide additional information and clarification to enable the Police to conduct the search. There is no indication that the appellant complied with the Ministry's request for additional information.

Having reviewed the Ministry's submissions, I am satisfied that the Ministry has conducted a reasonable search for records responsive to the request.

CUSTODY OR CONTROL

Appeals P-9700297 and P-9700300

This issue relates to whether the Ministry has custody or control of court records which may respond to the requests.

In its representations, the Ministry states that the court records at issue in Appeal P-9700297 consist of court transcripts, affidavits of service, endorsements of the Court of Appeal, a notice of appeal, photocopies of exhibits from the appeal and factums. In Appeal P-9700300, the court records consist of eleven files at the Ontario Court (General Division) and one file at the Court of Appeal and include bound volumes of motion records and other court documents pertaining to civil litigation involving the appellant. The Ministry submits that the records at issue form part of a "court file".

Section 10(1)(a) of the Act states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the record or the part of the record falls within one of the exemptions under sections 12 to 22.

It is clear from the wording of section 10(1)(a) that in order to be subject to an access request under the Act, a record need only be under the custody **or** the control of an institution.

In its representations, the Ministry makes reference to Order P-994 in support of its position.

In Order P-994, I considered whether an "information" (a document used to initiate a criminal prosecution) in a court file was a "court record", and therefore fell outside the scope of the Act. I made the following findings which, in my opinion, are equally applicable in this appeal:

(1) the Act does not define a class of records called "court records", nor are records in this category expressly excluded from the Act by any of its provisions;

(2) the question of whether a so-called "court record" comes within the scope of the Act must therefore be determined based on the general principles enunciated in the Act, and in particular, the principle set out in section 10(1) that a record must be in the custody **or** under the control of an institution to fall within the scope of the Act;

(3) courts are not "institutions" under the Act, and, based on the constitutional separation of the judiciary from the other branches of government, courts are not part of any Ministry;

(4) by virtue of the Courts of Justice Act and the common law, courts have a right to supervise and protect their own records (i.e. records that are directly related to a court's adjudicative function);

(5) records of the type at issue in Order P-994 (an "information") found within a court file are in the possession of the Ministry, but it is only bare possession, and they are not under the Ministry's control;

(6) based on Order P-239, "bare possession" does not amount to custody for the purposes of the Act; rather, there must be "some right to deal with the records ...";

(7) as a result of points (5) and (6), neither custody nor control were established for "informations" found in court files, and they fall outside the scope of the Act;

(8) copies of such records which exist independently of a "court file" may be within the custody or control of an institution and, in that event, would be subject to the Act; and

(9) all of the above findings apply as well to records held by Justices of the Peace.

I also considered what records may be said to fall within a court file in Order P-995. That order dealt with a request for "evidence" used against an appellant in a prosecution under the Provincial Offences Act. I stated:

> Similar to my findings in Order P-994, I find that evidence produced at trial, whether in the nature of documentary exhibits or by way of recorded oral testimony, is clearly the type of information which would fall within the scope of documents which would properly be contained in a court file related to an action. In accordance with my reasons in Order P-994, therefore, I find that the requested records, to the extent that they exist in the court file, are not in the custody or under the control of the Ministry, and are therefore not subject to the Act.

The reasoning in Orders P-994 and P-995 was adopted by former Inquiry Officer Anita Fineberg in Order P-1397, which involved a request for the tape recording of the testimony and evidence from a trial. In Order P-1397, the Inquiry Officer found that the tape of the trial testimony formed part of the court records and, therefore, was not in the custody or under the control of the Ministry. In Order P-1416, Inquiry Officer Marianne Miller found that the tape of a Small Claims Court proceeding is "a record in a court file relating to a court action" and as a result, the Ministry does not have custody and/or control of it. I adopt the principles enunciated in Orders P-994, P-995, P-1397 and P-1416 for the purposes of this appeal. The Ministry in this appeal is the same institution whose decisions were under appeal in Orders P-994, P-995, P-1397 and P-1416.

On the basis of the above principles, the determination of the issues in these appeals turns on whether the relevant records are records which relate to a court action and which are in a court file.

The Ministry submits that the records at issue are the result of litigation proceedings in which the appellant was a participant. According to the Ministry, they are records which relate to a court action and form part of a court file. The court record is not created in content by the Ministry's Courts Administration Division nor does the content relate to the Division's business. The court record is not regulated by the Division. The record is held separately as a record of its own and not integrated with other Courts Administration Division records. Finally, the Ministry submits that it is the judiciary, not the Ministry, that has the power to direct, manage and govern the records. Accordingly, it is the Ministry's position that the records are court records which are located in the official court file and, as such, are not subject to the Act.

As mentioned earlier, the appellant did not submit representations.

Having considered the information provided, I find that the records at issue are records in a court file relating to a court action. In my view, the Ministry does not have custody or control of them. Accordingly, the court records which may be responsive to the requests in these two appeals are not subject to the Act.

PERSONAL INFORMATION/DISCRETION TO REFUSE APPELLANT'S OWN INFORMATION

Appeals P-9700298, P-9700300 and P-9700302

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I find that the records in Appeal P-9700298 contain the personal information of the appellant only. With the exception of the severance on page 65, the records in Appeal P-9700300 also contain the personal information of the appellant only. Information pertaining to other individuals is found in the records in these two appeals, however, these individuals are acting in their professional capacities. Numerous orders have stated that information relating to individuals acting in their professional capacity does not constitute "personal information". I agree and find that this information does not qualify as personal information. Finally, I find that the severance on page 65 contains the personal information of an individual other than the appellant although the record also contains the appellant's personal information. However, I do not agree with the Ministry that all of the information in the severed paragraph at issue is personal information. In my view, the information relates primarily to the individual acting in her professional capacity. The exception is a portion of a sentence which I have highlighted and will provide to the Ministry with a copy of this order.

I find that in Appeal P-9700302, the records contain the personal information of the appellant and other individuals.

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 Ministry has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. The Ministry has claimed sections 13 and 19 in addition to section 49(a) of the Act to records in Appeals P-9700298 and P-9700300. I have found that the appellant's personal information is contained in the records in both of these appeals.

ADVICE OR RECOMMENDATIONS

Appeals P-9700298 and P-9700300

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 claims that section 13 of the Act applies to pages 2, 56, 75 and 138 in Appeal P-9700298 and page 15 in Appeal P-9700300.

In its representations with respect to Appeal P-9700298, the Ministry submits that the records contain the advice and recommendations of civil servants and provide a suggested course of action. I agree with the Ministry that pages 2 and 138 satisfy the requirements of section 13(1) of the Act and are therefore exempt under section 49(a) of the Act.

With respect to pages 56 and 75, I find that they do not provide a suggested course of action, but contain a summary of decisions already made. As such, these pages do not reveal advice or recommendations which will ultimately be accepted or rejected by the recipient and therefore do not qualify for exemption under section 13(1) of the Act. Because the Ministry has not claimed other exemptions for these pages and I find that no mandatory exemptions apply, pages 56 and 75 should be disclosed to the appellant.

With respect to page 15 in Appeal P-9700300, the Ministry submits that the author of the memorandum provides advice on a point of law and recommends that certain action be taken. I disagree. In my view, the document does not provide advice or recommendations which would ultimately be accepted or rejected by the recipient, but contains a direction or instructions on a particular matter. Moreover, in my view, the instructions in the memorandum do not call for acceptance or rejection by the recipient as part of the deliberative process.

I find that page 15 does not satisfy the requirements of section 13(1) of the Act. Because the Ministry has not claimed other exemptions for this page and I find that no mandatory exemptions apply, page 15 should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Appeals P-9700298 and P-9700300

The Ministry has applied section 19 of the Act to pages 103 and 133 in Appeal P-9700298. In Appeal P-9700300, section 19 has been claimed for pages 1-4, 12-14, 16-26, 33-41, 46 and 54-59. This section 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 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.

[Order 210]

The Ministry claims that both branches of section 19 apply in the circumstances of this appeal in that the records are subject to solicitor-client privilege and they were prepared by Crown counsel for use in giving legal advice.

In Appeal P-9700298, the Ministry submits that pages 103 and 133 were created by Crown counsel of the Ministry and are communications of a confidential nature.

The records are signed by Crown counsel. Even if I were to accept that the communications are of a confidential nature, in my view, they do not relate to the seeking, formulating or giving of

legal advice. Furthermore, according to the Ministry's representations, the Ministry was not a party to litigation involving the appellant which was taking place or about to take place. In my opinion, these two pages are administrative in nature and do not relate to the seeking or giving of legal advice. I find, therefore, that pages 103 and 133 do not qualify for exemption under either branch of section 19 of the Act. Because the Ministry has not claimed other exemptions for these two pages and I find that no mandatory exemptions apply, pages 103 and 133 should be disclosed to the appellant.

In Appeal P-9700300, I find that the Ministry has properly applied the section 19 exemption to pages 1-4, 12-14, 16-26, 34-41, 46 and 54-59. In my view, these records were prepared by or for Crown counsel for use in giving legal advice or were written communications of a confidential nature between a client and a legal advisor and directly related to seeking, formulating or giving legal advice.

With respect to pages 20 and 24, I find that they reveal the legal advice provided by Crown counsel in the pages listed above and which I found to be exempt under section 19 of the Act. Accordingly, I find that they are also properly exempt under section 19.

Page 33 is a communication from Crown counsel to the judiciary pertaining to a court endorsement regarding the appellant. In my view, this correspondence is informational only. I find further that there is no solicitor-client relationship between the author and recipient. Nor would disclosure of this record reveal any advice that might have been given by counsel to her client. Accordingly, this record is not exempt under either branch of section 19 and should be disclosed to the appellant.

In summary, I find that section 19 of the Act has been properly applied to pages 1-4, 12-14, 16-26, 34-41, 46 and 54-59 and these pages are exempt under section 49(a) of the Act.

INVASION OF PRIVACY

Appeals P-9700300 and P-9700302

The Ministry has claimed the exemptions found in sections 21 and 49(b) to deny access to portions of pages 22, 24, 32, 33, 35, 39, 63, 69 and 123 in Appeal P-9700302 and to a severed portion of page 65 in Appeal P-9700300. I have already found that these pages contain the personal information of the appellant and other individuals. I note that the appellant has been granted access to the information specifically relating to him. The information remaining at issue relates to individuals other than the appellant and is clearly severable from the information directly pertaining to the appellant.

Under section 49(b) of the Act, where a record contains the 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.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to

whom the information relates. Section 21(2) provides some criteria for the Ministry to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption.

The records remaining at issue in Appeal P-9700302 relate to the appellant's claim filed with the Criminal Injuries Compensation Board and deal with a motor vehicle accident involving the appellant and the affected party. The Ministry disclosed the affected party's name to the appellant, but denied access to the affected party's home address and other information such as date of birth (pages 22, 24, 32, 33, 35, 63 and 69). Also not disclosed are the names and other similar personal information of other individuals (pages 22, 39, 63 and 123).

Section 21(2)(f) of the Act states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is highly sensitive.

Included in the records is an incident report which summarizes what transpired during and immediately after the motor vehicle accident involving the appellant and the affected party. It includes a description of a physical confrontation between the two parties.

Based on the volatile and adversarial nature of the relationship between the appellant and the affected party and the emotional intensity of the situation which is apparent from the records, I am satisfied that the personal information remaining at issue in Appeal P-9700302 is highly sensitive.

With respect to the highlighted portion of page 65 in Appeal P-9700300, I also find, in part based on the information contained in the records themselves, that the highlighted information is highly sensitive.
As mentioned earlier, the appellant has not provided input on the issues to refute the claimed exemptions and to assist me in reaching my findings.

Accordingly, I find that pages 22, 24, 32, 33, 35, 39, 63, 69 and 123 in Appeal P-9700302 and the highlighted portion of page 65 in Appeal P-9700300 are exempt under section 49(b) of the Act.

ORDER:

1. I order the Ministry to disclose to the appellant pages 56, 75, 103 and 133 in Appeal P-9700298 and pages 15 and 33 and the non-highlighted portion of page 65 in Appeal P-9700300 by sending him a copy of these pages by **April 7, 1998** but not earlier than **April 2, 1998**.

2. I uphold the Ministry's decision to deny access to pages 2 and 138 in Appeal P-9700298; pages 1-4, 12-14, 16-26, 34-41, 46, 54-59 and the highlighted portion on page 65 in Appeal P-9700300; and the severed portions on pages 22, 24, 32, 33, 35, 39, 63, 69 and 123 in Appeal P-9700302.

3. I dismiss the appeals with respect to the issues of the reasonableness of the Ministry's search and custody and control of court documents.

4. 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 pages which are disclosed to the appellant pursuant to Provision 1 of this order.

Original signed by: March 3, 1998
Laurel Cropley
Inquiry Officer