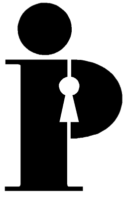

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1664

Appeal PA-980251-1

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

NATURE OF THE APPEAL:

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 a copy of the Crown brief, doctors' certificates, the appellant's wife's affidavit, the appellant's daughter's statements and all other relevant information pertaining to charges laid against the appellant. The appellant was charged with two counts of assault with a weapon and four counts of assault causing bodily harm contrary to the Criminal Code of Canada. The charges pertain to allegations of physical abuse by the appellant on his wife, who is now deceased.

The Ministry located 324 pages of records relating to the appellant's request, and denied access to all records pursuant to sections 19, 21, 22(a), 49(a) and 49(b) of the Act.

The appellant appealed the Ministry's decision to deny access to the records.

During mediation of this appeal, the appellant confirmed that he is not seeking access to records which are publicly available. Accordingly, Records 10, 12, 16, 17, 24-30, 140(a), 140 and 141-324 are not at issue in this appeal, and consideration of the application of section 22(a) is not necessary.

RECORDS:

The records remaining at issue consist of Crown notes, correspondence, police officers' notebook entries, witness statements, court documents and handwritten material.

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.

The Ministry submits that the records contain the personal information of the appellant and other individuals.

The appellant submits that the only thing he requested is a copy of his personal file, nobody else, and that he has a right to look at his own file.

I have reviewed all of the records at issue. In my view, Records 2, 3, 5, 6, 8, 9, 11, 13-15, 19, 22, 23, 31-38, 45, 49-51, 53, 54, 82, 84-87, 89, 91, 93, 95-99, 104,105, 120, 121, 125, 126, 128, 129-131 and 133-139 do not contain the personal information of anyone other than the appellant. Accordingly, sections 21 and 49(b) cannot apply.

Records 1, 4, 7, 18, 20, 21, 39, 52, 100-103 and 116 contain personal information of the appellant, as well as the name of the victim, or her address. The name of the victim appears in the context of the charges

laid against the appellant and her address was, at the time, the appellant's address as well. In my view, these records contain the personal information of the appellant and the victim.

Records 39-44, 46-48, 56-81, 83, 88, 90, 92, 94, 102-103, 106-113, 117-119, 123-124, 127 and 132 are the statements of the victim and the appellant's daughters, the information provided by three of the doctors who saw the victim, and the notes made by the police officers and the Crown Attorney about the statements provided by the victim and the appellant's daughter. In my view, these pages contain the personal information of the appellant, the victim and/or their daughters.

Records 55 and 114-115 are letters from two doctors who saw the victim, and contain the personal information of the victim only.

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.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits an institution from releasing this information.

In both these situations, 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 head 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. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)]. 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 Ministry submits that disclosure of Records 1, 4, 7, 15, 18-21, 33-34, 39-44, 46-81, 83, 88, 90, 92, 94, 98-112 and 137 would constitute an unjustified invasion of personal privacy. The Ministry states that

sections 21(3)(a) and (b) apply to the personal information found within these records. These sections state:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
> >
> > (b) 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;

Records 55, 106-107 and 112-115 are letters from the doctors who saw the victim. All of these letters relate to a medical diagnosis, condition, treatment or evaluation. Because these records are the type of records described in section 21(3)(a), their disclosure is presumed to be an unjustified invasion of the victim's privacy, and sections 21 and 49(b) apply.

Records 40-44, 46-48 and 117-119 are the statements provided by the victim and the daughters to the police, and Records 123-127 are notes made by the police officers while they were speaking to the victim and the daughters. I am satisfied that these records were compiled and are identifiable as part of an investigation into a possible violation of law. As above, because these records are the type of records described in section 21(3)(b), their disclosure is presumed to be an unjustified invasion of the victim and/or the daughters' privacy, and section 49(b) applies.

Records 56-81, 83, 88, 90, 92, 94, 108-111 and 132 are all notes made by the Crown Attorney about the statements and/or testimony of the victim and one of the daughters. These records do not qualify for section 21(3)(b) because they are an identifiable part of the prosecution of the violation of law as opposed to the investigation of it. However, these records do contain intimate details of specific incidents which occurred in the home, and the effect the incidents had on the victim and the daughter. In my view, this information is properly considered "highly sensitive" (section 21(2)(f)). Section 21(1)(f) is a factor which weighs in favour of protection of privacy. I find that this factor outweighs the appellant's interest in obtaining access to his personal information in these circumstances, and section 49(b) applies.

Records 1, 4, 7, 18, 20, 21, 39, 52, 100-103 and 116 contain personal information of the appellant, as well as the name of the victim, or her address. The name of the victim appears in the context of the charges laid against the appellant and her address was, at the time, the appellant's address as well. In my view, the appellant's interest in obtaining access to his personal information outweighs the interest in privacy protection in these circumstances, and section 49(b) does not apply.

In summary, I find that Records 40-44, 46-48, 56-81, 83, 88, 90, 92, 94, 106-113, 117-119, 123-127 and 132 are exempt under section 49(b), and Records 55 and 114-115 are exempt under section 21. I will not consider these records further in this order.

I find that Records 1-9, 11, 13-15, 18- 23, 31-39, 45, 49-54, 82, 84-87, 89, 91, 93, 95-105,116, 120, 121, 125, 126, 128, 129-131 and 133-139 do not qualify for exemption under section 21 or 49(b). I will go on to consider whether these records qualify for exemption under sections 19 and 49(a).

SOLICITOR-CLIENT PRIVILEGE

Branches 1 and 2

Section 19 consists of two branches, which provide a head 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 institution 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 Records 1-9, 11, 13-15, 18- 23, 31-39, 45, 49-54, 82, 84-87, 89, 91, 93, 95-105,116, 120, 121, 125, 126, 128, 129-131 and 133-139 fall under Branch 2 of section 19.

In Order P-1342 I considered whether Branch 2 of the section 19 exemption would be available in cases where a record would not qualify for solicitor-client privilege at common law under Branch 1. After reviewing the legislative history of section 19, I concluded (at page 8):

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

In that case, four records were at issue. The Ministry claimed that the Branch 1 litigation privilege applied to two of the four, and that the Branch 2 litigation privilege applied to all four. I found that none of the records qualified for litigation privilege under either branch, since the relevant litigation had terminated and, alternatively, since the Ministry had waived any privilege which might have attached through disclosure to a third party. This order was sustained by the Ontario Court (General Division) Divisional Court on judicial review [Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)].

Despite this court decision, the Ministry submits that common law principles enunciated in cases such as Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C.), have no application to the disclosure of information by Crown counsel in the context of a criminal prosecution. The Ministry submits that when I superimposed the common law rules for solicitor-client privilege onto Branch 2 of the section 19 exemption, I failed to take into account the unique nature of a prosecution conducted by Crown counsel.

The principles regarding the disclosure of information in the possession of the Crown were developed by the Supreme Court of Canada in R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326. These principles were summarized in R. v. O'Connor (1995), 103 C.C.C. (3d) 1 at 45 (S.C.C.) as follows:

> In that case, it was determined that the Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege.

> The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused. When such a request is made, the Crown has a discretion to refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. Where the Crown chooses to exercise this discretion, the Crown bears the burden of satisfying the trial judge that withholding the information is justified on the grounds of privilege or irrelevance.

Whether the Crown would be obligated to disclose this information in the context of a criminal proceeding does not assist in the determination of whether the information would be subject to the laws of privilege.

The Ministry argues that the disclosure of the records in question could discourage prospective witnesses from co-operating with the Crown and the police. The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (the Martin Report) considered the sensitive nature of the records in the possession of Crown counsel and the harm that can result to the administration of justice if "disclosure materials" are improperly disseminated during a prosecution. The Ministry includes the following quote from page 180 of the Martin Report in its representations:

> The administration of justice is highly dependent upon witnesses coming forward to provide information that will lead to the proper conviction and punishment of those who have committed crimes.... Therefore, even occasional misuse of disclosure materials could potentially persuade large numbers of already reluctant witnesses to refrain from co-operating for fear that they will suffer the consequences of similar misuse.

Solicitor-client privilege is not the only reason for maintaining confidentiality in the context of criminal disclosure, but it is the only one recognized under the section 19 exemption. In my view, the interests guarded by the other types of privilege are adequately protected by other exemptions within the Act (specifically sections 14, 20 and 21). So, while the Ministry argues under section 19 that the records deal with very sensitive matters, and that their disclosure would inhibit future witnesses from coming forward and co-operating with the police and the Crown Attorney's office, it is my view that the sensitivity issue is (and was in this case) adequately considered and addressed in sections 21(2)(f), 21(3)(a) and (b) of the Act.

The Ministry also argues that because the judicial review of Order P-1342 was dismissed on the basis that the Ministry had waived the privilege, not because litigation had terminated, that it is implicit in the Court's decision that the section 19 privilege did not end when the litigation ended because if it had there would be no need for the Court to consider the waiver issue.

In Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.), the court found that the common law principle of waiver applies to Branch 1 and Branch 2 of section 19 of the Act. In my view, consistent with this Court decision, other common law principles which define the scope of solicitor-client and litigation privilege should apply equally to both branches. This preserves for government institutions the full scope of the privilege extended to private litigants.

Accordingly, I must consider whether the common law principles which define the scope of Branch 1 of the privilege, and apply equally to Branch 2, are present in the circumstances of this appeal in order to determine whether the records remaining at issue qualify for exemption under Branch 2 of section 19.

Aside from arguing that I erred in importing the common law principles governing privilege into Branch 2 of the exemption in Order P-1342, the Ministry has not argued that any of the records at issue in this appeal would survive the common law limitations to solicitor-client privilege.

- **Solicitor-Client Communication Privilege**

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

Having reviewed the records for which section 19 has been claimed, I am satisfied that they are not direct communications between a solicitor and client, or their agents or employees. Accordingly, this part of the exemption does not apply.

- **Litigation Privilege**

Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508-511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424-425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), reversed on other grounds]. As the Ontario Court (General Division) Divisional Court explained in Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result

> would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175-177; In re Sealed Case, 676 F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Having reviewed all of the records for which the section 19 exemption is claimed, I am satisfied that each was prepared or obtained for the dominant purpose of existing or reasonably contemplated litigation. I am also satisfied that each record was prepared or obtained with an intention that it be confidential in the course of the litigation.

- **Loss of Privilege Through Termination of Litigation**

Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

As indicated above, "opinion" work product, which consists of counsel's mental impressions, conclusions, opinions or legal theories, enjoys a heightened protection over ordinary work product. Having reviewed the records at issue, I find that most of what I would consider to be opinion work product is no longer at issue because of the manner in which I have dealt with section 21 of the Act. Record 34, however, contains notes made by the Crown which consist of "opinion" work product. In the circumstances, I am satisfied that the rationale for litigation privilege is present with respect to this record. Accordingly, despite the termination of litigation, I find that Record 34 qualifies for exemption under section 19 of the Act. Having reviewed the other records remaining at issue, I find that none consists of "opinion" work product.

All litigation involving the Crown is now at an end regarding these matters and, on the basis of the representations and the contents of the records, I am not satisfied that disclosure of these records will harm the adversarial process by hindering the investigation and preparation of future cases of this nature. Therefore, the rationale for litigation privilege is no longer present and, accordingly, I find that these records do not qualify for exemption under Branch 1 of section 19.

- **No Privilege Where Communication Between Opposing Parties**

Although, in my view, the above is sufficient to dispose of the application of section 19, I also note that Records 35-39, 45, 49, 50, 138 and 139 are letters from the Crown Attorney to the appellant's lawyer, and Records 31-33 are a letter sent from the appellant's lawyer to the Crown Attorney.

At common law, communications between opposing parties, even in contemplation of litigation, are not considered privileged unless made with a view to settlement [see, for example, Flack v. Pacific Press Ltd. (1971), 14 D.L.R. (3d) 334 (B.C. C.A.); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 426-427 (Alta. C.A.)]. In Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993), R.D. Manes et al. explain the rationale for not extending privilege to cover this circumstance (at page 148):

> The key to holding that privilege cannot possibly attach to communications between opposing parties is that in the making of such a communication, there cannot have been an intention of confidentiality, and that the production ... cannot violate a confidential relationship between the defendants and their solicitors. Thus, there is no room for privilege to attach. The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the other side, the communicating party could be said to have waived privilege with respect to that communication.

In my view, this common law principle also applies to Records 31-33, 35-39, 45, 49, 50, 138 and 139, and therefore no privilege attaches to these records.

- **Waiver**

Finally, I note that Records 98-105, 116, 120, 121, 125, 126, 128-131 each bear a stamp reading "Peel Crown Attorney's Office, Brampton, Ontario DISCL". Although I have already disposed of the application of section 19 to these records, it appears that each of these records was disclosed to the appellant's lawyer during the trial. In such circumstances, any privilege which may have attached to these records would be considered to have been waived by the Crown Attorney.

In summary, I find that Records 1-9, 11, 13-15, 18- 23, 31-39, 45, 49-54, 82, 84-87, 89, 91, 93, 95-105,116, 120, 121, 125, 126, 128, 129-131 and 133-139 do not qualify for exemption under section 19 of the Act, and section 49(a) does not apply.

ORDER:

1. I order the Ministry to disclose Records 1-9, 11, 13-15, 18- 23, 31-39, 45, 49-54, 82, 84-87, 89, 91, 93, 95-105, 116, 120, 121, 125, 126, 128, 129-131 and 133-139 to the appellant by sending him a copy by **April 23, 1999**.

2. I uphold the Ministry's decision not to disclose Records 40-44, 46-48, 55-81, 83, 88, 90, 92, 94, 106-115, 117-119, 123-127 and 132.

3. In order to verify 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: April 1, 1999
Holly Big Canoe
Adjudicator