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

ORDER PO-1710

Appeal PA-990045-1

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of the Solicitor General and Correctional Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to information "referred to" by the Ontario Board of Parole (the Board) concerning the denial of parole to the requester on a specific date.

The Ministry identified 69 pages of records in response to the request, and provided partial access to them. Access to certain information was denied on the basis of sections 49(a)/19 and 49(b)/21(1) of the Act. The requester (now the appellant) appealed the Ministry's decision to withhold records, and also indicated in his appeal that he believed additional records responsive to his request should exist.

During the mediation stage of the appeal, the Ministry agreed to disclose some additional information contained in the records. In addition, the appellant confirmed that he was seeking access only to one three-page record, as described below. As a result, the remaining records withheld by the Ministry are no longer at issue. The appellant also indicated that he was no longer pursuing the "existence of records" issue.

I sent a Notice of Inquiry to the Ministry and the appellant setting out the issues in the appeal. I received submissions from both parties.

RECORD:

The record at issue in this appeal consists of a three-page letter to a Probation and Parole Officer employed by the Ministry, from an Assistant Crown Attorney employed by the Ministry of the Attorney General, dated June 5, 1998.

ISSUES:

PERSONAL INFORMATION

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 record contains the personal information of individuals other than the appellant. The Ministry explains that the appellant is in a position to discover the identity of individuals referred to in the record, although they are not named, because of his familiarity with the events discussed in the record. The appellant makes no specific submissions on this issue.

Having carefully reviewed the record, it is my view that the entire record contains the personal information of the appellant. The record describes in detail the nature of the evidence gathered by the Crown Attorney for the purpose of the appellant's prosecution for criminal offences. This information is clearly "about" the appellant. In addition, the record contains information which, although not clearly attributable to specific individuals on its face, could reasonably lead to the identification of specific individuals if disclosed to the

appellant. In turn, other personal information about those individuals would be revealed by disclosure of the record. As a result, I find that either all or portions of the third paragraph on page 1, the first, second, third and fourth paragraphs on page 2 and the first paragraph on page 3 contain personal information of both the appellant and identifiable individuals. The remaining information consists of the appellant's personal information only.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Introduction

Since the record contains the appellant's personal information, the provisions in Part III of the Act regarding the right of access to one's own personal information apply. Section 47(1) provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. However, this right of access under section 47(1) is not absolute; section 49 provides a number of exceptions to this right. In particular, under section 49(a), a head may refuse to disclose to the individual to whom the information relates personal information if section 19 (solicitor-client privilege) (among others) would apply to the disclosure of that personal information.

Branches 1 and 2

This section 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 counsel employed or retained by an institution 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.

[Orders 49, M-2, M-19]

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 counsel employed or retained by an institution; 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]

Scope of Branches 1 and 2 determined with reference to the common law

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> 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.
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> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

Solicitor-client communication privilege

At common law, 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 [Order P-1551].

Neither the Ministry nor the appellant made submissions on the application of solicitor-client communication privilege. In my view, in these circumstances, a solicitor-client relationship did not exist between the

Ministry's Probation and Parole Officer and the Attorney General's Assistant Crown Attorney. Therefore, the record cannot be subject to solicitor-client communication privilege.

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 (1998), 37 O.R. (3d) 790 (Div. Ct.)]. 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.
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> 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.)].

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.

It is unclear in the circumstances whether or not the record was prepared for or obtained by counsel for the Ministry, for the purpose of pending litigation, as required by this privilege. In any event, it is clear that the relevant litigation for which the record may have been prepared or obtained has been completed, and thus the record is not subject to litigation privilege.

Conclusion

The record is not exempt under section 19, pursuant either to solicitor-client communication privilege or litigation privilege.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS' PRIVACY

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(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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of

information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that 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].

The Divisional Court has stated that 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.

In this case, under section 21(2), the Ministry has cited the criteria in paragraphs (e) and (f). Those sections read:

> 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,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;

The appellant's submissions suggest the application of section 21(2)(d), which reads:

> 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 relevant to a fair determination of rights affecting the person who made the request;

In my view, all of the information which can be described as relating to both the appellant and other individuals is "highly sensitive". As stated by Inquiry Officer Mumtaz Jiwan in Order P-926, in similar circumstances to this appeal:

> . . . the nature of the allegation, the fact that the alleged perpetrator was functioning in a position of trust and the age of the complainant are all factors that further distinguish this case from the circumstances considered in previous orders. In addition, the appellant is aware of the identity of the complainant, the nature of the complaint and the results of the investigation conducted . . . Given the particular circumstances of this case, I find that sections 21(2)(f) and (h) are factors that weigh in favour of non-disclosure of any additional personal information.

[IPC Order PO-1710/August 31, 1999]

I find that section 21(2)(f) weighs heavily against disclosure of the "mixed" personal information in the circumstances.

With respect to the appellant's submission regarding section 21(2)(d), I am unable to conclude based on the material before me that this information is relevant to a fair determination of rights affecting the appellant. The Board hearing has been completed, and the appellant has not provided any evidence of a pending or contemplated proceeding in which rights affecting the appellant may be determined (Order MO-1179). Therefore, section 21(2)(d) does not apply here.

As a result, the only applicable factor under section 21(2) is that found at paragraph (f). In the circumstances, I find that disclosure of the "mixed" personal information relating to both the appellant and other individuals would constitute an unjustified invasion of personal privacy within the meaning of sections 21(1)(f) and 49(b) of the Act.

ORDER:

1. I order the Ministry to disclose the record to the appellant, with the exception of the information highlighted in the copy of the record I have provided to the Ministry with this order, no later than **September 21, 1999**.

2. I uphold the Ministry's decision to withhold the information highlighted in the copy of the record I have provided to the Ministry with this order.

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 material disclosed to the appellant pursuant to Provision 1.

Original signed by: August 31, 1999
David Goodis
Senior Adjudicator