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

ORDER PO-1759

Appeal PA-990089-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to the Crown Attorney's file relating to a particular criminal matter. In her request, the appellant detailed the "First Appearance" regarding this matter, the fact that there may be a related "checklist" of "diversions", and the telephone calls and meetings she had had with various staff in the Ministry's Crown Offices in Guelph, London and Kitchener, and the Office of the Assistant Deputy Attorney General, Criminal in Toronto.

The Ministry located and identified 59 records in response to the request. The Ministry granted full access to Records 8 to 37. Access to the remaining records was denied pursuant to sections 19/49(a), 21(3)(b), 22(a)/49(a) and 49(b) of the Act. With respect to section 22(a), the Ministry provided the appellant with the court address at which certain records could be located. In its "Document Control List" provided to this Office along with a copy of the records that were withheld, the Ministry also stated that Records 56 to 59 contain information that is not responsive to the request.

In appealing the Ministry's decision to deny access, the appellant also indicated that she understands that the responsive records on which the Ministry had based its decision are from the Crown Office in Guelph only. The appellant explained in detail why she believes her request encompasses the other offices, as well. The appellant also believes that additional records should exist in the Guelph Office.

Results of mediation

During mediation, the Ministry confirmed that in addition to Records 56 to 59 containing information that is not responsive to the request, the last ten lines of Record 51 are also not responsive to the request. The appellant agreed that she is not seeking access to information that the Ministry has claimed is not responsive to her request. Therefore, the responsiveness of records is not at issue in this appeal.

The appellant also indicated during mediation that she is no longer seeking access to Records 38 to 42 since she agrees they are records currently available to the public at the court office in Guelph.

In her request, the appellant specified that she was seeking records of telephone calls and meetings she has had with various staff of the Crown Offices in London and Kitchener, and the Office of the Assistant Deputy Attorney General, Criminal in Toronto. During mediation, the appellant simplified her request by stating that she wants anything related to the particular criminal matter in the Ministry's custody or control.

The Ministry acknowledged that the appellant's request encompassed the London and Kitchener offices, as well as the Office of the Assistant Deputy Attorney General, Criminal in Toronto. The Ministry stated that it had contacted the individuals mentioned by the appellant in her request, with a view to locating additional responsive records. On June 2, 1999, the Ministry stated that it had heard back from all of these individuals with the exception of two of them, and that additional records had been found. The Ministry issued a new decision letter regarding the additional records to the appellant on July 20, 1999. The appellant agreed to

have any issues relating to the new decision dealt with in a separate appeal. The newly located records, therefore, are not at issue in this appeal, and this appeal deals only with records from the Guelph office.

Finally, the Ministry apparently withdrew its application of section 21(3)(b) with respect to Records 1 to 7. However, it continues to rely on sections 21(1)/49(b) for these records.

I sent a Notice of Inquiry to the Ministry, the appellant and one individual whose interests might be affected by disclosure of the records (the affected person). The issues and records remaining in dispute are:

- sections 21/49(b) (invasion of privacy) for Records 1 to 7, and 43 to 59;
- sections 19/49(a) (solicitor-client privilege/discretion to refuse requester's own information for Records 1 to 7, and 43 to 59; and
- reasonableness of search.

Representations were received from the Ministry and the affected person. The appellant contacted this office on several occasions to request extensions for the receipt of her representations. In the circumstances of her request I granted two extensions but in the end advised her that if her representations were not received by January 7, 2000, I would issue a decision in their absence. The appellant did not submit representations.

On December 30, 1999 (subsequent to the submission of the Ministry's representations), I received a copy of a decision letter which had been sent to the appellant on December 23, 1999 in which the Ministry indicates that following a further search for records, additional records were located in the Guelph office. The Ministry indicated that full access was granted to these records. The records included in this decision consist of a videotape and six telephone slips.

RECORDS:

The records which the Ministry identified as being at issue in this appeal consist of:

- Crown Counsel's notes and correspondence (consisting of two memoranda dated November 19, 1997 and December 7, 1998 from a secretary in the Crown Attorney's office; a fax transmittal sheet containing a message; and a hand-written note) (Records 1 to 6),
- letter to a Crown Attorney from a police constable (Record 7),
- police occurrence reports, and police officers' notes (Records 43 to 59).

DISCUSSION:

REASONABLENESS OF SEARCH

As I indicated above, the issues relating to the search conducted by the Ministry pertain only to that conducted at the Guelph Crown Attorney's office.

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

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

In the Notice of Inquiry which was sent to the Ministry and the appellant, I set out the information provided by the appellant regarding those records which she believes should exist in the Guelph office as follows:

1. The appellant stated that on November 16, 1997, [a named police constable] took a video recording of her statement to the OPP. The appellant stated that she understands that the OPP had provided a copy of this video to the Crown Office in Guelph. The appellant also stated that during a meeting with [a named Assistant Crown Attorney] in February 1998, she had provided [the Assistant Crown Attorney] with some bankruptcy papers. The appellant stated that [the Assistant Crown Attorney] had placed these papers in a file which contained a video cassette. Thus, the appellant believes the video should form part of the responsive records.

2. The appellant believes that there should exist in the records from the Guelph Office a note that [a named Crown Attorney] had redirected the matter of her private complaint from -- as best as she can remember -- Courtroom 2 to the "Duty Courtroom," which was apparently [the Crown Attorney's] courtroom. The complainant stated that she bases her belief in this regard on the conversation she had had with [the named Assistant Crown Attorney] in February 1998.

3. "Checklist" of "diversions" (i.e., the record that shows the Crown's rationale in diverting the alleged offender from being charged).

4. Records of telephone calls the appellant made to the Guelph Office in December 1997, February 1998, and March 1998. The appellant stated that most of these calls were with a [named secretary].

5. Notes further to the appellant's meeting with [the named Crown Attorney] in December 1997.

6. Notes further to the appellant's meeting with [the named Assistant Crown Attorney] in February 1998.

7. Record of a telephone call between the appellant and [the named Crown Attorney] on February 19, 1998.

8. The appellant stated that during a meeting with [another named] Assistant Crown Attorney on March 17, 1999, [the Assistant Crown Attorney] said that he had sent a memo to [the named Crown Attorney] in November 1997, in regard to this matter.

9. While the appellant is unsure of the correct term (i.e., "synopsis" or "crown brief" or "crown package"), she stated she wants access to any and all information the police provided to the Crown. The appellant stated that this would include notes recorded by [ten named] police officers. While the withheld records include police officers' notes, it is not clear who authored them, and, therefore, whether they include notes from all of the above-named officers.

10. An "Information" dated November 16, 1997 which the police originally provided to the Justice of the Peace, who subsequently provided it to the Crown.

During mediation, the mediator noted that Record 7 (a letter to a Crown Attorney from a police constable) refers to the appellant's medical records which were not included with the responsive records.

The Ministry attached an affidavit sworn by an Assistant Crown Attorney at the Guelph Crown Attorney's office to its representations. The Assistant Crown Attorney commented on her general approach to dealing with this request and then addressed each of the items referred to above.

She indicates that initially, she retrieved the file pertaining to the affected person from the filing cabinet that holds their completed files. She indicates that she was subsequently contacted by the Ministry's Freedom of Information office to determine whether there were any notes of conversations made by herself or another individual. She confirmed that she did not make any notes. She contacted the other individual who indicated that she also did not make any notes except for one document which was forwarded to the Freedom of Information office as a result of the initial search.

The Assistant Crown Attorney indicates that she then conducted another search of the file and located additional records which were not in the file as of the date she originally searched it (January 25, 1999). I should note that the appellant submitted her request to the Ministry on January 8, 1999. The Assistant Crown Attorney indicates that the records which she located were all dated post January 25. It is not clear from the Assistant Crown Attorney's affidavit whether a decision was made on these records. However, in my view, they post date the request and should not, therefore, fall within the scope of this appeal.

With respect to a videotape, the Assistant Crown Attorney indicates that she has no recollection of a videotape being in the Crown file at any time. She indicates, however, that she conducted a specific search for the videotape to ensure that it is not now in the file. She suggests that if the tape exists, it is likely to be in the possession of the OPP. As I indicated above, however, this record was subsequently located and disclosed to the appellant. It appears that the videotape was contained in another file and was missed as an

oversight. Since the appellant already has this record, the reasonableness of the Ministry's search for it is no longer at issue.

The Assistant Crown Attorney states that there is no note in the file directing that the criminal matter be traversed from Courtroom 2 to the duty court, nor does she have any recollection of telling the appellant that such a note was on the file. She notes that in her experience, this information would not typically be indicated on the file. She states further, however, that in reviewing the court records (which are not at issue in this appeal), there is an endorsement for February 29, 1998 which refers to this matter. I accept the Ministry's representations in this regard and find that its search for this record was reasonable.

The Assistant Crown Attorney states that there is no document in use called a "Checklist of Diversions". I also accept the Ministry's position regarding this document.

The Assistant Crown Attorney indicates that she requested a search be conducted of the telephone record books for 1997, 1998 and 1999. Six slips of calls made to the office were located. She notes that telephone slips are not typically placed in the Crown brief and were not contained in the file. She states that the appellant did not originally request records of telephone calls, however, these records were forwarded on. I do not agree that the appellant did not request records of telephone calls. Although her request was simply stated "access to the Crown Attorney's file", she went on in her request to describe the various types of documents she was seeking, which clearly include telephone records. In any event, the Ministry has confirmed that these six telephone slips were located and disclosed to the appellant in its December 23 letter.

The Assistant Crown Attorney confirms that she did not make any notes to file with respect to this matter. She contacted the Crown Attorney who indicated that he also did not make notes. I accept this evidence and find that the search for these records was reasonable.

The Assistant Crown Attorney indicates that the only record of a telephone message left for the Crown Attorney by the appellant was on February 19, 1999. She states, however, that there is no record of any telephone conversation that he may have had with her. I accept this evidence and find that the search for this record was reasonable.

With respect to police notes, the Assistant Crown Attorney confirmed that the only notes in the file are those of one named police officer and that these were forwarded to the Freedom of Information office following the original search. She states that if any other notes exist, they are not within the Ministry's control.

The Assistant Crown Attorney states that the Crown's file does not contain an "Information" dated November 16, 1997. She suggests that if it does exist, it would be located in the court file. I accept this evidence.

Finally, the Assistant Crown Attorney confirms that there is no memo from the other Assistant Crown Attorney in the file and that all of the appellant's medical records were included in the original response to her request.

Based on the Assistant Crown Attorney's affidavit, I find that the search conducted by the Ministry was reasonable in the circumstances of this appeal.

PERSONAL INFORMATION

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

All of the records pertain to the criminal matter involving the appellant and the affected person. As such, they all contain the personal information of these two individuals. In addition, some of the records also contain the personal information of other identifiable individuals.

INVASION OF 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.

For the purpose of a determination under section 49(b), 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. Section 21(4) refers to certain types of information whose disclosure 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 section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the Act or if 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 23 exemption.

In this case, the only exception to the section 21(1) exemption which could apply is section 21(1)(f). The Ministry has cited the presumptions in sections 21(3)(a) and (b) to support its position that section 21(1)(f) does not apply. These sections state:

> 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;

As I indicated above, the Ministry apparently withdrew its reliance on section 21(3)(b) to records 1 - 7 during mediation. However, its representations are somewhat vague on those records to which the exemptions have been claimed. In particular, although section 21(1) and 49(b) apparently continue to be at issue for Records 1 - 7, the Ministry has not distinguished between any of the records in its representations. For this reason, I have considered the application of the presumptions referred to above to all of the records at issue.

The Ministry states that the records at issue were compiled during the course of a criminal investigation that resulted in the affected person entering into a peace bond in relation to criminal charges that were brought. The Ministry indicates that as part of that investigation, the police received medical and psychiatric information pertaining to the affected person.

The affected person indicates that, given the circumstances, he does not wish any of his personal information to be disclosed to the appellant.

The records fall into two categories. With respect to the first category, there are records which relate to the Crown's involvement in the matter. Records 1 to 7 contain communications among individuals in the Crown's office or between the police and the Crown, primarily concerning the appellant, but with references to the affected person. These records pertain to the actions taken or to be taken by the Crown.

In Order P-849, I commented on the application of the presumption in section 21(3)(b) to records which are contained in a Crown file as follows:

> The presumption in section 21(3)(b) does not apply to the remaining records at issue. Section 1(a)(ii) of the Act states that exemptions from the right of access should be limited and specific. In my view, section 21(3)(b) is limited to records which are compiled and identifiable as part of an **investigation** into a possible violation of law. To expand the scope of section 21(3)(b) to encompass any information which finds its way into the Crown

> file once the charges have already been laid would enlarge the scope of the section beyond what was intended.

I applied this reasoning in Order P-1622 as follows:

> I find that all of the remaining records were either created or obtained by the Crown in order to prepare for and use in the teacher's criminal trial, or contain communications between the Crown and various parties, including the police and the teacher's lawyer regarding this matter. In my view, these records were not compiled nor are they identifiable as part of the investigation into the possible violation of law, but rather, relate to the prosecution of that violation. As such, they do not fall within the presumption in section 21(3)(b) (Order P-849).

In my view, the reasoning in the above two orders is equally applicable to the information in Records 1 - 7 and on this basis I find that none of these records was compiled nor are any identifiable as **part of an investigation** into a possible violation of law.

Moreover, I find that none of these records contains any information pertaining to the medical or psychiatric condition of the affected person.

Accordingly, I find that neither of the presumptions in sections 21(3)(a) or (b) applies to this information.

Although the Ministry has not made any representations on the factors in section 21(2) or any other considerations in this matter, I have considered them. In particular, I have considered whether section 21(2)(f) is relevant in the circumstances of this appeal. This section 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;

As far as Records 1 to 7 are concerned, the references to the affected person are minimal, appearing primarily as a reference to the interplay between the Crown's office and the appellant. The information about the affected person in these records is certainly within the knowledge of the appellant. In these circumstances, I find that there is nothing inherently "personal" about any of the references to the appellant, the disclosure of which would cause him "excessive personal distress" (Order P-434). Therefore, I find that the information pertaining to him in these records is not highly sensitive. I find that there are no other relevant factors or considerations in favour of privacy protection. The rest of the information in these records pertains to the appellant only. As there are no factors weighing in favour of privacy protection, I find that the exemption in section 38(b) does not apply to these records.

The second category of records includes occurrence reports (Records 43 to 50) and police officer's notebook entries (Records 51 to 59). The information in these records was clearly compiled and is identifiable as part of an investigation conducted by the police into the circumstances of a domestic dispute between the appellant and the affected person which resulted in an alleged assault among other allegations. I am satisfied that this investigation was conducted for the purpose of determining whether there was a possible violation of law under the Criminal Code. Therefore, I find that the presumption in section 21(3)(b) applies to Records 43 to 59 in their entirety.

Further, there are portions of these records which make reference to the medical or psychiatric condition of the affected person. I find that this information falls squarely within the scope of the presumption in section 21(3)(a).

Although not claimed by the Ministry, I have also considered the factor in section 21(2)(f) to the information in these records. I find, based on the totality of the Ministry's submissions combined with the information contained in the appeal file and the records themselves, that the factor in section 21(2)(f) is relevant to the information pertaining to the affected person and any other individuals referred to in the records.

Although the appellant was involved, as the complainant, the criminal matter concerns the affected person and the information in these records pertains more directly to him. In reviewing the records overall which describe to some extent the circumstances between the parties, and the representations of the affected person, I am satisfied that disclosure of this information would cause him "excessive personal distress". I find that there are no factors weighing in favour of disclosure of this information.

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders (Orders M-451, M-613 and P-1457, among others). In my view, the reasoning in this line of orders is equally applicable to certain records at issue in the present appeal. Much of the information in the occurrence reports and police officer's notes is simply a reiteration of what the appellant told the police officer or details a conversation between the officer and the appellant. I find that applying the section 21(3)(b) presumption to deny access to information which the appellant provided to the police would, according to the rules of statutory interpretation, lead to an "absurd result". On this basis, I find that the presumption in section 21(3)(b) does not apply to these portions of the records.

That being said, however, I find that some of the information about the affected person relating to his medical condition is highly sensitive particularly since a number of years have passed since this matter occurred and the affected person appears to have moved on with his life. Although the appellant may have provided some of this information to the police, I find, in the circumstances, that it would not result in an absurdity to withhold it from her.

Accordingly, I find that disclosure of the portions of the occurrence reports and police officer's notes, which I have highlighted in yellow on the copy of these records which I have sent to the Ministry's Freedom of Information and Privacy Co-ordinator, would not constitute an unjustified invasion of personal privacy and section 38(b) does not apply to them.

I find that section 21(4) does not apply to the records in the circumstances of this appeal. The appellant has not raised the public interest override in section 23 and considering the facts of this case, I find that it does not apply. Accordingly, on the basis of the above discussion, I find that the remaining portions of Records 43 to 59 are exempt under section 38(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR CLIENT PRIVILEGE

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 certain exemptions, including section 19, would apply to that personal information. Section 19 provides:

> 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 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 all of the records are exempt under Branch 2 of section 19 in that they were created by or for Crown counsel to assist in the prosecution of the accused.

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.)]

In my analysis I will apply common law principles of solicitor-client privilege, without differentiating between the two branches, for the reasons set out above.

Litigation privilege

The scope of this privilege was described in Order P-1551 as follows:

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), 35 O.R. (3d) 727 (Gen. Div.)]. 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.)].

The Ministry indicates that the records at issue contain statements of civilians and police officers and include the police officer's notes all of which formed the "Crown Brief" (Records 43 - 59). Record 7 is a communication between the police and the Crown relating to the prosecution of the matter. Records 3 - 6 contain discussions between staff of the Crown's office of the criminal matter which was then in existence.

The Ministry states that all of this material was prepared for the prosecution of the criminal matter. The criminal matter was disposed of in February 1998. The Ministry states that it is not aware of any litigation involving the Attorney General in respect of the appellant and the affected person.

The Ministry acknowledges that the litigation has terminated but takes the position that the previous decisions of this office (Orders P-1342, P-1551 and P-1561) relating to the termination of litigation and the limits placed on Branch 2 of the exemption were in error and should not be applied to the case at hand. To a large extent, the Ministry bases its arguments on the findings in orders pre-dating these newer orders.

I do not accept the Ministry's arguments in this regard. In Orders P-1342 and P-1551, Adjudicator Holly Big Canoe undertook a new look at the issues relating to solicitor client privilege in the context of the Act. Following extensive review and consideration of the case law, she arrived at the conclusions referred to above. The Ministry has not persuaded me that Adjudicator Big Canoe misinterpreted or misapplied the common law principles of solicitor-client privilege. I find that the reasoning in these orders is equally applicable to the circumstances of this appeal.

I accept that Records 3 to 7 and 43 to 59 were either generated internally by the solicitor and/or his staff, or were compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained was then existing litigation. However, that litigation was terminated in early 1998 and the Ministry has acknowledged that no further litigation exists or is contemplated.

Having reviewed the records at issue, I am satisfied that Records 3 to 6 reflect the Crown's mental impressions or opinions related to the litigation and the manner in which it was progressing and this constitutes "opinion" work product. I am satisfied that the rationale for litigation privilege is present with respect to these four records notwithstanding the termination of litigation. Accordingly, I find that these records qualify for exemption under section 19 of the Act.

Records 7 and 43 - 59, however, fall under the category of "ordinary" work product because they are documents gathered from third parties, they contain factual information relating to the matter and the dominant intention for their use was in respect of the then existing litigation. I find that there is no value added component to these records by counsel which could elevate them into the category of "opinion" work product. Pursuant to the reasoning in Order P-1551, I find that this information is no longer privileged. Consequently, section 19 does not apply to exempt these records from disclosure.

Records 1 and 2 were created following the conclusion of the litigation and relate to the appellant's dissatisfaction with the manner in which she had been dealt with. I find that neither of these two records was prepared for use in or in contemplation of litigation, but rather, they concern a public relations aspect of

the matter. Accordingly, I find that they do not fall within the litigation component of the solicitor client privilege exemption.

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].
This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
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> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729).

The Ministry states that Records 1 - 6 contain correspondence that resulted from the criminal prosecution and that they contain legal advice of the Crown. Because I found above that Records 3 to 6 are exempt under the litigation privilege component of section 19, I will not consider them further in this discussion. Therefore, this discussion will only consider whether Records 1 and 2 are subject to solicitor-client communication privilege.

As I indicated above, the criminal matter involving the appellant and the affected party was disposed of in February 1998. Records 1 and 2 detail discussions between staff in the Crown's office relating to the appellant's dissatisfaction with the manner in which the matter was dealt with.

I find that the information in these records relates to a complaint about the manner in which the Crown handled the criminal matter. In my view, there is nothing in the records directly related to seeking, formulating or giving legal advice. Nor do they pertain to a continuum of communications related to the seeking, formulating or giving of legal advice.

On this basis, I find that neither of these records are confidential communications between a client (or agent) and a legal advisor made for the purpose of providing or obtaining professional legal advice on a matter. Therefore, they do not fall within the solicitor-client communication privilege part of the section 19 exemption.

ORDER:

1. I find the Ministry's search for responsive records was reasonable and this part of the appeal is dismissed.

2. I order the Ministry to provide the appellant with access to Records 1, 2 and 7 and the highlighted portions of Records 43 to 59 which I have attached to the copy of this order which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator by April 4, 2000 but not before March 28,2000.

3. I uphold the Ministry's decision to withhold the remaining records and portions of records from disclosure.

4. 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 and portion of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: February 29, 2000
Laurel Cropley
Adjudicator