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

INTERIM ORDER PO-2022-I

Appeal PA-010349-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any information held by the Crown Attorney's office in Toronto pertaining to the requester and six named individuals.

The request was subsequently clarified to be for records relating to a specified criminal matter from the 1980s. In particular, the requester wanted to know why this matter did not proceed to trial. She also identified in her request that the office of the Assistant Deputy Attorney General had more recent dealings with this matter, and she wanted access to a report that was prepared by a Ministry legal counsel in this context.

The Ministry issued a decision dated September 4, 2001, in which it stated the following:

> This is to advise that a search of [sic] the crown brief was conducted at the Office of the Crown Attorney in Toronto. However, no record was located. Accordingly, the Ministry is not in possession of the crown brief.
>
> With respect to the report, this is to advise that access to the record is denied under section 19 of the *Act* as the record was prepared by Crown Counsel for use in giving legal advice.

The requester (now the appellant) appealed the Ministry's decision to deny access.

During mediation, the appellant indicated that additional records should exist in the office of a named Ministry employee, because she met with this employee in 1999 on issues stemming from the prior criminal charges. The Ministry agreed to conduct an additional search for records in this employee's office, but subsequently advised the mediator that no additional records were located. The appellant did not accept the Ministry's position, and the reasonableness of the Ministry's search remains an issue in this appeal.

In a follow-up letter to the appellant, the Ministry advised her that, because the one identified record contained her personal information, it was relying on section 49(a) of the *Act* as the basis for denying access.

Further mediation was not successful, and the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry to the Ministry initially, which set out the facts and issue in the appeal. The Ministry submitted representations in response, which were provided to the appellant along with a copy of the Notice of Inquiry. The appellant also submitted representations.

RECORD:

The record is a 2-page memorandum dated January 10, 2001 from a Ministry legal counsel to the Assistant Deputy Attorney General.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual". Having reviewed the record, it is clear from its face that it contains the appellant's personal information as defined in section 2(1). Specifically, the record contains details regarding the appellant's complaint to the Law Society of Upper Canada. It is also clear that any other individual identified in the record is referred to in a professional capacity as legal counsel, and not in any personal capacity.

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

Introduction

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access. Under section 49(a) of the *Act*, the Board has the discretion to deny the appellant access to his 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 information.

Section 19 of the *Act* reads:

> 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 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.

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].

The Supreme Court of Canada has described this privilege 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 ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The Ministry submits:

> The Ministry claims exemption of the entire document under the solicitor-client communication and "legal advice" components of section 19. The document at issue consists of a communication between Crown counsel and the Ministry (as represented by the Assistant Deputy Attorney General) and was prepared for use in giving legal advice. The document recommends a particular course of action based on legal considerations arising from a complaint made to the Law Society of Upper Canada. Therefore, as outlined above, the record falls squarely within the scope of section 19.
>
> As part of its legal advice, Crown counsel drafted a letter to counsel to the Law Society of Upper Canada. This letter was ultimately copied to the Appellant. At no time, however, did the Ministry waive or purport to waive its claim of privilege in respect of the legal memorandum at issue. The memorandum was always intended to be confidential legal advice to the Assistant Deputy Attorney General. The Ministry still does not waive privilege in respect of this protected communication.

The appellant's representations do not address the requirements of solicitor-client communication privilege.

Having reviewed the record, I accept the Ministry's position. The document is accurately described as a written communication prepared by counsel and submitted to her internal client (the Assistant Deputy Attorney General), and consists of legal advice, specifically a recommended course of action in the context of the Law Society complaint referred to by the Ministry in its representations. Given the nature of the information contained in the record and the context in which it was prepared, I accept the Ministry's submission that it was a confidential communication. Accordingly, the requirements of solicitor-client communication privilege have been established, and I find that the record falls within the scope of the section 19 exemption claim.

EXERCISE OF DISCRETION

Section 49(a) of the *Act* requires the Ministry to properly exercise discretion in deciding whether to provide the appellant with access to the record, despite the fact that the requirements of the section 19 exemption claim are present.

The Ministry's only representations on the exercise of discretion are as follows:

> The right of a requestor to access his or her personal information is not absolute. Section 49(a) grants institutions the discretion to deny an individual access to their own personal information in instances where, among others, the exemption in section 19 applies. It is the Ministry's position that the report falls within a

> class of information contemplated by subsection 49(a) and [the appellant] does not have a general right of access to this information.

In Order MO-1277-I, I outlined in some detail the steps required by an institution in properly exercising discretion. I stated:

> In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.
>
> In Order P-344, I considered the question of the proper exercise of discretion as follows:
>
> > ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.
> >
> > In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

In considering the representations provided by the institution in Order MO-1277-I, I found that all relevant circumstances had not been considered, and I returned the matter to the institution for a proper exercise of discretion. [See also Orders MO-1287-I and MO-1318-I]

Similarly in this appeal, the representations of the Ministry clearly do not constitute a proper exercise of discretion. There is no indication that the particular circumstances of the appellant's request or the contents of the record itself were taken into account by the Ministry in reaching its section 49(a) decision. The *Act* recognizes a higher right of access to records containing a requester's personal information, and it is not acceptable for an institution, such as the Ministry in this case, to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for exemption.

Accordingly, I will include a provision in this interim order returning the matter to the Ministry for a proper exercise of discretion under section 49(a) of the *Act*.

ADEQUACY OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records that he/she 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 that 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 exist.

The appellant's request letter asked for access to any records about the appellant "held by the Crown Attorney's office in Toronto on University Ave.". She identified certain individuals who had been involved in the criminal matter from the 1980s, and also indicated that the Assistant Deputy Attorney General had made reference to the matter in a 2001 letter sent to the Law Society.

During the course of responding to the appellant's request and in the context of the subsequent mediation of her appeal, it became clear that the appellant wanted access to three categories of records: (1) the Crown brief prepared in the early 1980s; (2) a report prepared in the context of the appellant's subsequent complaint to the Law Society (which is the record identified by the Ministry in this appeal); and (3) any records created in the context of the appellant's dealings with a named Ministry employee in 1999.

Crown brief

The Ministry submits that it made reasonable efforts to identify and locate any responsive records contained in the Crown brief. The criminal matter that forms the basis of the appellant's request occurred 20 years ago. The Ministry states that any records would have been returned to the relevant police service, and that the Toronto Police Service in this instance advised the Ministry that "documents dating back to a 1982 investigation would have been destroyed".

The appellant's representations do not address this aspect of the search issue.

I find that the Ministry has conducted an adequate search for records relating to the Crown brief. In my view, it is reasonable to assume that any records gathered in the context of a criminal matter that did not proceed to trial would be returned to the appropriate police service, as suggested by the Ministry, and also that inactive records from the early 1980s would have been destroyed.

The report

The appellant appears to have had the impression that a particular employee in the office of the Assistant Deputy Attorney General prepared the report that is the subject of her request. The report, in fact, was prepared by another legal counsel. However, the record that has been identified by the Ministry appears to be one and the same document, and the appellant accepts this.

Records relating to the 1999 meeting

The appellant points out that she and her counsel met with a named employee of the Ministry in 1999 to discuss matters relating to the criminal matter from the 1980s, and that it is reasonable to expect that records were generated in this context, and that they would be responsive to her request.

According to the appellant, the 1999 meeting dealt with the subject matter of her request. In my view, any records relating to this meeting between the appellant and this employee would be responsive to the appellant's request. The Ministry agreed to conduct a search for any such records during mediation, but did not locate any responsive records. However, the Ministry's representations on this issue do not appear to address any search activities relating to records of this nature and, absent adequate representations, I am unable to conclude that the Ministry has discharged its responsibilities under section 24 of the *Act* to conduct a reasonable search for all responsive records.

Accordingly, I find that the Ministry's search for records created in the context of the appellant's 1999 meeting with the named Ministry employee is not reasonable, and I will include a provision in this interim order requiring additional search activities in this regard.

ORDER:

1. I order the Ministry to consider the exercise of discretion under section 49(a) of the *Act* with respect to the record at issue in this appeal, and to provide me with representations as to the factors considered in doing so by J**une 20, 2002**. The representations concerning the exercise of discretion should be forward to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor St., West, Suite 1700, Toronto, Ontario, M5S 2V1.

2. I order the Ministry to conduct a further search for records created in the context of the appellant's 1999 meeting with the named Ministry employee and, if no records are

located, to provide the appellant with a decision letter outlining the results of this search by **June 20, 2002**. A copy of this decision letter should be provided to me at the address noted in Provision 1.

3. If additional responsive records are located, I order the Ministry to provide the appellant with a decision letter regarding access to these records in accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension. A copy of any such decision letter should be provided to me at the address noted in Provision 1.

4. I remain seized of this appeal in order to deal with the exercise of discretion, search issues, and any other issues that remain outstanding.

Original signed by: June 6, 2002
Tom Mitchinson
Assistant Commissioner