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

# ORDER PO-2101

## Appeal PA-020078-1

## 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 the following:

> all information about [the requester] from victim/witness including the notes of [a named staff person];
>
> all information about [the requester] including notes of [a named counsel with victim/witness];
>
> all information from the office of the Crown Attorney in the matter of R. vs. [a named individual]. This matter was heard at College Park Court House during June 2001.

The requester sought access to those records maintained by the Victim/Witness Assistance Program (the VWAP) involving himself and a named accused person.

The Ministry located responsive records and denied access to them pursuant to the following exemptions contained in the *Act:*

- Solicitor-client privilege - section 19;
- Danger to safety or health - section 20;
- Invasion of privacy – sections 21(1) and 49(b); and
- Discretion to refuse requester's own information – section 49(a).

In its decision, the Ministry advised the appellant to make a request to the Toronto Police Service for the information sought from the Office of the Crown Attorney. The appellant submitted a separate request to the Toronto Police Service for access to this information.

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

During the mediation of the appeal, the Ministry provided the appellant with an index of records containing a description of the records at issue in this appeal and the exemptions relied on to deny access. The Ministry also clarified that some of the records contain information which is not relevant to the request. At the request of the appellant, the issue of responsiveness of all of the information contained in the records has been added as an issue in dispute in this appeal.

The appellant advised the mediator that he is of the view that additional records exist including, but not limited to, a victim impact statement, a statement provided to the Crown Attorney, and communications between himself and counsel at the VWAP. Accordingly, the issue of reasonableness of search remains outstanding as well.

Further mediation was not possible and the matter was referred to the adjudication stage of the appeal process. I decided to seek the representations of the Ministry, initially, as it bears the onus of establishing the application of the exemptions claimed for the records at issue. The Ministry made its submissions, the non-confidential portions of which were shared with the

appellant, along with a copy of the Notice of Inquiry. The appellant also submitted representations in response to the Notice.

## RECORDS:

There are eleven pages of records at issue in this appeal. Records 1 to 7 consist of hand written notes taken by counsel to the VWAP. Records 8 to 11 consist of VWAP client contact records compiled by the Coordinator of the VWAP's College Park office.

## PRELIMINARY ISSUE:

### Do Counsel's Notes Contain Information Which is Not Responsive to the Request?

The Ministry takes the position that certain portions of Records 1 to 7 contain information which is unrelated to the appellant's case. It submits that Records 1 to 7 are handwritten notes taken by VWAP counsel which are recorded in her daily notebook. The Ministry indicates that much of what is recorded on these pages relates to other matters with which counsel was involved at the time of her dealings with the matter concerning the appellant. As a result, she took notes relating to the appellant's case and a number of other files in which she was engaged at that time.

Based on my review of the contents of Records 1 to 7, I find that only certain discrete portions of them relate to the appellant and his involvement with the VWAP's College Park office. The remaining information relates to other matters in which counsel was involved on or around the same dates. Accordingly, I have no difficulty in finding that the majority of the information contained in Records 1 to 7 is not responsive to the appellant's request as it does not relate to the appellant's case with the VWAP office. Rather, the matters reflected in these notes are concerned with other individuals and other incidents not involving the appellant. I find specifically that only the information at the top of Record 1, the bottom of Record 3, the top line and bottom half of Record 4, all of Record 5 except the middle portion, all of Record 6 and two excerpts from Record 7 contain information which is responsive to the appellant's request.

## DISCUSSION:

### REASONABLENESS OF SEARCH

At the mediation stage of the appeal, the appellant indicated that he is also seeking access to a victim impact statement and witness statement which he provided to the Crown Attorney and to records of communications between himself and counsel to the VWAP.

In response, the Ministry submits that the request as originally framed was limited to records maintained by the Coordinator and counsel of the VWAP's College Park office. In responding to the request, searches were conducted of the files located at that office and the notes of VWAP counsel reflecting her communications with and about the appellant. Records 8 to 11 in this appeal represent the entire contents of the VWAP file relating to the appellant and Records 1 to 7 are the notes taken by counsel. The Ministry submits that these are the only responsive documents in its custody or control which are responsive to the request. It indicates that the

victim impact statement and witness statement provided to the Crown Attorney are included in the Crown brief which was returned to the investigating police service, in this case the Toronto Police, at the conclusion of the criminal trial. The Ministry notes that it directed the appellant to file another request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Service for access to these records and that he has done so.

Based on the submissions of the Ministry and my review of the records, I am satisfied that the searches conducted for records responsive to the request were reasonable and that all of the records maintained by the VWAP regarding its involvement with the appellant have been identified and constitute the records at issue in this appeal. As a result, I dismiss this part of the appeal.

**PERSONAL INFORMATION**

The section 49(b) personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry submits that the records contain the personal information of both the appellant and another identifiable individual, including information as to this person's race, age, sex and ethnic origin (paragraph (a) of the definition), criminal history (paragraph (b) of the definition) and the individual's name appearing with other personal information (paragraph (h) of the definition).

Based on my review of the contents of the records, I find that the records contain the personal information of both the appellant and another identifiable individual within the meaning of that term in section 2(1).

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

The Ministry claims the application of section 49(a), taken in conjunction with section 19, to exempt the contents of Records 1 to 7. This section states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 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 Ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.

**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 [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 ... [*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 argues that Records 1 to 7 are notes taken by Crown counsel who provided legal advice to the Ministry, including VWAP staff. It takes the position that the notes were prepared by Crown counsel for use in giving legal advice to the Ministry and that portions of them include notes taken while in direct communication with the Ministry. As a result, it submits that the notes fall within the ambit of the common law solicitor-client communication privilege. The

Ministry also indicates that the notes represent part of a "continuum of communications" between counsel and Ministry staff compiled in the course of giving legal advice.

The appellant does not address this issue in his representations.

In my view, based on the contents of Records 1 to 7 and the representations of the Ministry, I am satisfied that the notes represent confidential communications between a solicitor, the VWAP's counsel, and a client, the staff of the VWAP's College Park office. I find that the notes which comprise Records 1 to 7 constitute part of the "continuum of communications" which took place between counsel and her client in the context of a solicitor-client relationship. The notes include information provided to counsel by VWAP staff about the criminal case in which the appellant was to appear as a witness and the involvement of the VWAP in that proceeding. In my view, this information was provided to the solicitor for the purpose of informing her as to the factual circumstances surrounding the matter and to ensure that the legal advice provided was in accordance with those facts.

As a result, I find that Records 1 to 7 qualify for exemption under section 19 and are, accordingly, exempt from disclosure under section 49(a).

**DANGER TO SAFETY OR HEALTH**

The Ministry relies on the discretionary exemption in section 20, taken in conjunction with section 49(a), to withhold access to Records 8 to 11. This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words "could reasonably be expected to" appear in the preamble of section 20, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated

> expectation of endangerment to safety. Similarly [section] 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.
>
> [D]espite this distinction, the party with the burden of proof under section 20 still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated. [Orders MO-1262 and PO-1747]

Because of the confidential nature of much of the representations provided to me by the Ministry in support of its argument that section 20 applies to exempt the information in Records 8 to 11, I am unable to refer to them in this order.

The Ministry has provided me with evidence outlining the involvement of the VWAP's College Park office with the appellant. Records 8 to 11 also describe the contacts which took place between staff of the VWAP and the appellant from January to May 2001. The appellant became involved with the VWAP office as he was the victim of an assault and was to provide testimony against his assailant in a criminal trial. It is clear from both the contents of Records 8 to 11 and the submissions of the Ministry that the appellant was a difficult and demanding client. It is equally apparent from the records and the Ministry's representations that the appellant is fixated on what he perceives to be the shortcomings of the manner in which the criminal justice system, including the VWAP, dealt with him.

Based on the evidence provided to me by the Ministry, I am satisfied that there exists a reasonable basis for believing that the disclosure of the information contained in Records 8 to 11 could reasonably be expected to seriously threaten the health or safety of an individual. I find that the evidence provided by the Ministry in support of this contention is sufficiently "detailed and convincing" and demonstrates that the threat to health or safety is not "groundless or exaggerated", in accordance with the guidance provided by the Ontario Court of Appeal in the *Ontario (Ministry of Labour)* decision referred to above. As a result, I find that the information contained in Records 8 to 11 qualify for exemption under section 20.

## EXERCISE OF DISCRETION UNDER SECTION 49(a)

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. This reflects one of the primary purposes of the *Act* as

set out in section 1, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure.

Under section 49(a) of the *Act*, the Ministry has the discretion to deny an individual access to their own personal information in instances where certain exemptions, including sections 19 and 20, would apply to the disclosure of that information. In addition, sections 19 and 20 are, in and of themselves, discretionary exemptions.

In Order P-344, Assistant Commissioner Tom Mitchinson considered the question of the proper exercise of discretion under sections 14 (law enforcement) and 49(a) of the *Act*, which I find to be applicable in the circumstances of the current appeal:

> ... 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.

The Ministry's representations specifically refer to the considerations which it took into account when determining whether to exercise its discretion to withhold the information in Records 1 to 7 and 8 to 11 from disclosure. Because of the nature of these submissions, I am unable to refer to them in this order. I am, however, satisfied that the Ministry has taken appropriate considerations into account in exercising its discretion not to disclose the records to the appellant under sections 19, 20 and 49(a) and that the Ministry's decision should not be disturbed.

Because of the manner in which I have addressed the application of sections 19, 20 and 49(a) to the records, it is not necessary for me to consider whether they are also exempt under section 49(b).

## ORDER:

I uphold the Ministry's decision to deny access to the records.

Original signed by: January 17, 2003
Donald Hale
Adjudicator