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

# ORDER PO-2317

## Appeal PA-030392-1

## 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 records relating to the prosecution of the requester. Specifically, the requester sought access to "internal documents regarding communications and records held by" several named individuals in the office of the Crown Attorney in Toronto.

The Ministry responded by denying access to the responsive records as they "concern a matter that is currently before the courts". The requester's trial is scheduled to begin later this month. The Ministry also claimed the application of the following exemptions contained in the *Act* as the basis for its denial of access:

- sections 14(1)(a) and (b) – law enforcement
- section 14(1)(f) – right to a fair trial
- section 19 – solicitor-client privilege
- section 21(1) – invasion of privacy, in conjunction with the presumption in section 21(3)(b) (information compiled as part of an investigation into a possible violation of law)

The requester, now the appellant, appealed the Ministry's decision. The Ministry indicated that it declined to participate in the mediation of the appeal and this office moved the appeal directly to the inquiry stage of the process.

I decided to seek the representations of the Ministry initially. Because the records appeared to include the personal information of the appellant, I sought the representations of the Ministry on the application of the discretionary exemption in section 49(b) to the records. I received the Ministry's submissions and shared them, in their entirety, with the appellant. The Ministry did not address the application of sections 14(1)(a), (b) and (f) in its representations. Due to the manner in which I have addressed the application of the other exemptions claimed to the records, it is not necessary for me to determine whether they apply to the records in this decision. The appellant also submitted representations in response to the Notice of Inquiry that I provided to him.

## RECORDS:

The records at issue in this appeal consist of various audio and video witness statements and transcripts, a videotape of a television program, the Appellant's personnel file, newspaper articles addressing the matters which gave rise to the criminal charges against the appellant, case law and research notes prepared by the trial Crown Attorney, correspondence between the Crown and the appellant's counsel and various Court documents relating to the prosecution of the appellant.

# DISCUSSION:

## PERSONAL INFORMATION

### General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

**The meaning of "identifiable"**

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

**Findings**

The records at issue relate to the investigation, arrest and subsequent prosecution of the appellant on a number of serious criminal charges. The appellant's trial on these charges is expected to begin later this month. In my view, the majority of the records relating to the Police investigation contain the personal information of both the appellant and other identifiable individuals. Because these records pertain to the allegations of criminal wrongdoing by the appellant, I find that they contain his personal information for the purposes of section 2(1). In addition, the records relating to the investigation also contain a great deal of personal information relating to other individuals, particularly the appellant's alleged victims and other witnesses to the allegations. This information includes descriptions of their age, sex, sexual orientation and family status (section 2(1)(a)), their education, medical, psychiatric or employment history (section 2(1)(b)), their addresses and telephone numbers (section 2(1)(d)), their personal views or opinions (section 2(1)(e)), correspondence of a private nature sent to an institution (section 2(1)(f)), the views or opinions of others about these individuals (section 2(1)(g)) and the individual's name appearing with other personal information about that individual (section 2(1)(h)).

I find that the majority of the records relating to the prosecution of the appellant contain his personal information along with that of the individuals bringing the allegations of criminal wrongdoing against him (sections 2(1)(g) and (h)). Some of the records, including the appellant's personnel file, relate only to him.

Some of the records, particularly those involving contact between the investigators and the victims and witnesses to the investigation contain only the personal information of those individuals within the meaning of section 2(1), and not the appellant.

In addition, I find that some of the records relating to the prosecution or found in the Crown Brief, including various notes, the products of legal research and case law compiled by the Crown Attorneys and their staff do not contain any personal information within the meaning of section 2(1).

**INVASION OF PRIVACY**

The Ministry takes the position that those records compiled during the investigation containing only the personal information of individuals other than the appellant are exempt from disclosure under the mandatory exemption in section 21(1) of the *Act*. It also submits that the records containing the personal information of both the appellant and other identifiable individuals is exempt from disclosure under the discretionary exemption in section 49(b). In both situations, the factors and presumptions in sections 14(2), (3) and (4) provide guidance in determining whether the exemptions apply.

Those records that contain only the personal information of the appellant, however, cannot qualify for exemption under sections 21(1) or 49(b). I will, therefore, address them in the context of my discussion of section 19 below.

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In the circumstances, it appears that the only exception that could apply is paragraph (f), which applies where disclosure would not constitute an unjustified invasion of personal privacy.

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 exemptions from this right. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

The Ministry argues that the investigation records that comprise much of the records at issue were compiled as part of an investigation into a possible violation of law. It submits that this applies to the investigation records containing only the personal information of individuals other than the appellant as well as those which contain a combination of the personal information of the appellant and other identifiable individuals. As a result, the Ministry is of the view that the records fall within the ambit of the presumption in section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > 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;

I have reviewed the contents of all of the records relating to the investigation of the allegations made against the appellant and conclude that they were compiled and are identifiable as part of an investigation into a possible violation of law, in this case the criminal code prohibitions against sexual assault.

The Ministry also submits that the information contained in the investigation records falls within the ambit of the considerations listed in sections 21(2)(f), (h) and (i) as it is "highly sensitive", was supplied in confidence and its disclosure would unfairly damage the reputation of various persons referred to therein. It argues that because the records are concerned with the "personal knowledge of events and circumstances relating to alleged sexual misconduct", it is highly sensitive in nature. I agree that, in the circumstances, the information in the investigation records can properly be characterized as "highly sensitive" within the meaning of section 21(2)(f). I also find that, when taken in the context of an investigation into a possible violation of law, the information provided to the investigators by the alleged victims and witnesses was provided with an expectation of confidentiality. Therefore, I find that the consideration in section 21(2)(h) is also applicable. Because of the nature of the information contained in these records, I also find that their disclosure may unfairly damage the reputation of the individuals described in them and that section 21(2)(i) is, therefore, a relevant consideration, as well.

The appellant has made extensive and detailed representations in this appeal which fail to address the application of the exemptions in sections 21(1) and 49(b) to the records. Much of his submission focuses on the premise that the disclosure of the information in the investigation and prosecution records will assist him in his defence of the criminal charges that are pending. This gives rise to the possible application of the factor listed in section 21(2)(d) which refers to a situation where the disclosure of the personal information in a record is "relevant to a fair determination of rights affecting the person who made the request." However, I note that I have found that the presumption in section 21(3)(b) applies to the investigation record and that Divisional Court held in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 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).

To conclude my discussion of the application of the invasion of privacy exemptions in section 21(1) and 49(b), I find that because of the application of the presumption in section 21(3)(b), all of the records relating to the investigation stage of the appellant's prosecution, with the exception of those records containing exclusively the personal information of the appellant, are exempt from disclosure.

I will next address the application of the exemptions in sections 49(a) and 19 to those records that do not form part of the investigation of the appellant.

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

The Ministry takes the position that those records relating to the prosecution (including the Crown Brief) and the investigation records containing only the personal information of the appellant are exempt from disclosure under the discretionary exemption in section 49(a), taken in conjunction with the exemption in section 19 of the *Act*. In order to determine whether the records are exempt under section 49(a), I must first determine whether they qualify for exemption under section 19.

The Ministry also relies exclusively on the discretionary exemption in section 19 to deny access to those remaining records that contain either no personal information whatsoever or only the personal information of individuals other than the appellant.

**Solicitor-client privilege**

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 contains two branches. The Ministry argues that Branch 2 of the exemption applies.

**Branch 2: statutory privileges**

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies. The Ministry relies on the litigation privilege component of Branch 2 to support its position that the records are exempt from disclosure under section 19. In this context, Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

***Litigation privilege***

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The Ministry submits that:

> [T]hese records came into existence as a result of litigation, namely the on-going prosecution of the sexual abuse related charges against the Appellant. The records at issue pertain to matters involving Crown witnesses/complainants in respect of this litigation conducted by Crown counsel. The Ministry claims privilege for any all records relating in any manner to Crown witnesses/complainants in respect of contemplated or actual litigation. The Ministry submits that Branch 2 of section 19 is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of the government and that this claim has no temporal limit. The Ministry submits that section 19 affords exemption to a wide range of materials obtained and prepared for litigation, including not only work product but materials such as the statements of witnesses/complainants that are the subject of this proceeding.

The Ministry goes on to describe the considerations taken into account in exercising its discretion not to disclose the records to the appellant under section 49(a). It notes that the records contain information that is highly sensitive and that much of it was provided on a confidential basis. It also stresses the fact that the information relates to an investigation and prosecution of a serious criminal matter.

The appellant's lengthy representations do not directly address the issue of the application of the exemptions claimed to the records at issue. Rather, the appellant focuses his submissions on the nature and alleged shortfalls of the disclosure made to his counsel in the criminal litigation now underway.

In Order PO-1999, I considered the application of the litigation privilege component of section 19 to certain records prepared prior to the commencement of litigation and then compiled by Crown counsel acting on behalf of the Province of Ontario against a civil action alleging involvement in and liability for the sexual abuse of a number of young men in Cornwall. In that decision, I addressed the application of this part of the section 19 exemption to these records as follows:

> During the progress of the Ministry's defence of the actions, its solicitors, both in-house and external, requested and were provided with a number of documents generated by the Ministry which may bear some relation to the facts alleged in the plaintiffs' Statements of Claim. As a result, Ministry staff made a number of inquiries and finally located a large number of records, some dating back many years, which pertain to the events which gave rise to the litigation. These records were not prepared in contemplation of litigation and do not, accordingly, qualify under the "dominant purpose" test for litigation privilege. Rather, I am obliged to determine whether they qualify under the test enunciated in *Nickmar* and Order MO-1337-I, which are referred to in my discussion above. The question to be answered is whether these records qualify as "others which were not created with the litigation in mind" within the meaning of Assistant Commissioner Mitchinson's discussion in MO-1337-I.
>
> I find that Records 3-4, 7, 8, 9-10, 11-12, 14-19 (which is duplicated at 37-42 and 265-270 of Record Group C), 20-27 (which is duplicated at 43-50), 28-35 (which is duplicated at 366-373 of Record Group C) and 36 of Record Group A, Records 21 and 22-28 of Record Group B and Records 70-80, 124-125, 135-147 (which is duplicated at 202-214), 328 and 329-338 of Record Group C are documents which were not created with litigation in mind but which were gathered by the solicitor for inclusion in the litigation brief. These records relate to the fact-finding and investigation process undertaken by counsel in formulating the Ministry's response to the actions brought against it. The inclusion of these records in the litigation brief served to inform the solicitor of the Ministry's evidence in order to assist in the preparation of its defence. Accordingly, I find that these records qualify under the litigation privilege component of section 19

> using the criteria described in *Nickmar* and reiterated in Assistant Commissioner Mitchinson's reasoning in Order MO-1337-I.
>
> Further records at issue in the appeal were created directly in response to the litigation as part of the Ministry's attempts to gather information for the preparation of a defence and in order to meet its obligations with respect to undertakings which it entered into in the course of Examinations for Discovery. These records must be examined with a view to determining whether the "dominant purpose" for their creation was to assist the Ministry in its defence of the legal proceedings brought against it.
>
> I find that Record 13 of Record Group A and Records 24, 69, 91-94, 96, 97, 98-99, 114-116 (which is duplicated at 350-352), 123, 126-133, 177, 182-184, 185, 218 and 229 were created for the dominant purpose of assisting the Ministry in its defence of the litigation then underway. The records primarily describe the Ministry's efforts to locate in its record-holdings any information which would assist the Ministry in its defence or to respond to its undertakings entered into at the Examinations for discovery stage of the litigation. As such, I find that they qualify for exemption under the litigation privilege component of section 19.

In the present situation the Ministry is conducting a prosecution, rather than a defence. However, I find that the principles set out in the decision in Order PO-1999 are equally applicable to the information contained in those records to which the Ministry has applied section 19 in the present case and adopt the reasoning which I relied upon in that decision for the purposes of this appeal.

In my view, the records remaining at issue (those not subject to exemption under section 21(1)) fall within three broad categories. First, there are records containing information gathered by or provided to the Crown Attorney to assist in the prosecution of the appellant that were created prior to his arrest, and therefore prior to the commencement of the litigation involving the appellant. These records, including the investigation records that contain only the personal information of the appellant, are analogous to those referred to above in my discussion of Order PO-1999 as relating to the "fact-finding and investigation process undertaken by counsel" in preparing the Crown's case. As was the case in my discussion in PO-1999, I also find that these records qualify under the litigation privilege component of section 19 using the criteria described in *Nickmar* and reiterated in Assistant Commissioner Mitchinson's reasoning in Order MO-1337-I.

Second, a number of additional records were compiled as a result of the application of counsel's expertise and skill in building the Crown's case. These records consist of compilations of the media reports on the case and other information obtained from sources outside the Crown Attorney's office. Despite the fact that the dominant purpose for their original creation was not litigation, I find that they are also subject to litigation privilege, based on the principles referred to above in Order MO-1337-I; *General Accident Assurance Co.* and *Nickmar*.

The third category of records consist of those documenting the Crown/Police post-arrest contacts with the complainants and witnesses, as well as the Crown Attorney's own research. I find that these records were clearly created for the dominant purpose of litigation, to assist Crown counsel in the still-pending criminal litigation involving the appellant. Accordingly, I find that these records clearly qualify under the litigation privilege aspect of Branch 2 of section 19.

In my view, all of the remaining records that are not subject to exemption under section 21(1) that comprise the Crown brief fall within the ambit of the litigation privilege component of Branch 2 of section 19. Those records which contain the personal information of the appellant are, therefore, exempt under section 49(a), taken in conjunction with section 19. Those records which do not contain the personal information of the appellant are exempt under section 19 alone.

## ORDER:

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

Original signed by: September 3, 2004
Donald Hale
Adjudicator