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

ORDER PO-2446

Appeal PA-040218-1

Ministry of the Attorney General

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 related to the appellant held by the Ministry concerning any communication between the Ministry and the Ontario College of Teachers (the College). The request specifically stated:

> I am seeking all files and references regarding my personal information that is held by, and has been communicated between the Ministry of the Attorney General, and copies of letters, court records and documents that have been forwarded to "The Ontario College of Teachers", "[named individual]", "[named individual]" and any others associated with Ontario College of Teachers including, but not limited to, "[named individual]".
>
> This will include letters and copies of faxes between [named individual], [named individual] some one at the Ontario Court of Justice Provincial Division only identified as "[named individual]" who was at fax #[specific fax number], and [named individual] which are known to exist.

In response, the Ministry granted partial access to the responsive records. Access to 8 pages of records was denied pursuant to section 49(a) and (b) in conjunction with sections 14(1)(a), 14(1)(b), 19 and 21(1). In addition, the Ministry denied access to 7 pages under section 22(a) as records currently available to the public.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant stated he expected the records would contain more than 15 pages. As a result, reasonable search was added to the issues under appeal.

No other issues were resolved through mediation and the file was moved to adjudication.

I initially sent a Notice of Inquiry to the Ministry which summarized the facts and issues under appeal. The Ministry provided representations. In the portion of its representations dealing with section 22(a), the Ministry argued that the pages 16–22, which consist of records from a Court file, are not within its custody or under its control, and that, as a consequence, are not accessible under the *Act*.

I then provided the Notice of Inquiry to the appellant along with a copy of the non-confidential portions of the Ministry's representations. The non-confidential portions given to the appellant included the Ministry's argument that pages 16-22 are not within the Ministry's custody or control. The appellant responded with representations. Subsequently, the appellant also provided this office with further information.

The Ministry also issued a revised decision with respect to two records and disclosed these records to the appellant. As a result, these two records (comprising pages 9, 10, 12, 13 and 14) and sections 14(1)(a) and (b) are no longer at issue in this appeal.

RECORDS/ISSUES:

The following pages of record remain at issue:

> Page 5 – Memorandum from Court Services Division to Director of Criminal Policy and Program (withheld in full, section 49(a) and 19)
>
> Page 11 – Letter from Ontario Court of Justice, Criminal Court Office to the College (withheld in full, section 49(b) and 21)
>
> Page 15 – Letter from Ontario Court of Justice, Criminal Court Office to the College (withheld in full, section 49(b) and 21)
>
> Pages 16 – 17 – Information relating to the appellant (withheld in full, custody or control)
>
> Pages 18 – 20 – Appearances and Adjournments Form relating to the appellant (withheld in full, custody or control)
>
> Page 21 – Court form with file number relating to the appellant (withheld in full, custody or control)
>
> Page 22 – Recognizance of Bail relating to appellant (withheld in full, custody or control)

The Ministry identifies pages 16 – 22 of the record as "Informations" relating to the appellant in its representations. After reviewing the records, I note that only pages 16 - 17 are the "Informations" relating to the appellant and pages 18 – 22 are as described above.

DISCUSSION:

CUSTODY OR CONTROL

As noted above, in its section 22(a) argument, the Ministry also argues that it does not have custody and control over pages 16 – 22 of the records. This argument relates to section 10(1) of the *Act*, which states that "[e]very person has a right of access to a record or a part of a record in the custody or under the control of an institution unless …" the record is subject to an exemption or the request is frivolous or vexatious.

The Ministry states:

> It is submitted that Pages 16 – 22 is a copy of an Ontario Court of Justice Information. Informations from the court file are not responsive records subject to the *Act*.

> Section 10(1) of the *Act* provides that in order to be subject to the *Act*, the record must be under the care [sic] and control of the institution.
>
> Order P-994 found that the courts are not institutions under the *Act*. Order P-994 also found that the Ministry of the Attorney General "does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the *Act* and accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the *Act*."
>
> This finding was adopted and relied upon in Order P-995 and in Order P-1397.
>
> In Order P-1397, the adjudicator stated that:
>
> > (5) records of the type at issue in Order P-994 (an "information") found within a court file are in the possession of the Ministry, but it is only bare possession, and they are not under the Ministry's control;
> >
> > (6) based on Order P-239, "bare possession" does not amount to custody for the purposes of the *Act*; rather, there must be "some right to deal with the records…",
> >
> > (7) as a result of points (5) and (6), neither custody nor control were established for "informations" found in court files, and they fall outside the scope of the *Act*;…
>
> The Ministry respectfully submits that, as in Order P-994, the information in the present case is not under the custody or control of the Ministry in the meaning of the Act as authority over the record's use is subject to the supervision of the courts.
>
> The Ministry submits that it is the Court that has custody or control of this record. Every court has supervisory and protecting power over its own records. (*Attorney General of Nova Scotia* v. *MacIntyre* (1982), 132 D.L.R. (3d) 385 1 S.C.R. 175 (at 405) see also Orders P-994 and 1397.) Accordingly, the Ministry submits that, it is the Court rather than the Ministry that is in the appropriate position to determine access to the record.

In response, the appellant submits:

> The records sought in part form the legal basis for the decision of the Ministry "Policy Branch" to release the personal records of the appellant, without appropriate application for their disclosure, to a person or persons, authorized or unauthorized, at the Ontario College of Teachers, while at the same time denying the appellant access to the same personal records.

> …
>
> The Ministry demonstrated by its letters or memos with the Ontario College of Teachers, and subsequent decision to release the records at issue to the Ontario College of Teachers that the Ministry assumed the "right to deal with the records".

The appellant then quotes from two letters between the Ministry and the College and states:

> The letter indicates that far from "bare possession" these records, all of which are responsive, were analyzed, "reviewed" and the subject of consultations with the Criminal Policy and Program Branch of the Ministry of the Attorney General.
>
> …
>
> [T]he records of the personal information of the applicant in the file were obtained by, reviewed by, and commented on, by competent authority at the Ministry Policy Branch, [and] the copies of the responsive records become part of the Ministry file regarding the subsequent decision of the Criminal Policy and Program Branch which subsequently led to the release of the personal records of the appellant to the Ontario College of Teachers.
>
> …
>
> Accordingly, the appellant respectfully submits that the Ministry cannot rely on a concept of "bare possession" since the records became the basis of a significant Ministry decision and policy regarding personal records that indicated there was action exercised using "some right to deal with the records".

The second part of the Ministry's argument focused on the application of section 22(a) to pages 16 - 22. I will not be referring to these representations because of my finding below.

Finding

The Ministry is correct that in Order P-994, former Inquiry Officer Laurel Cropley found that the Ministry does not have custody or control over records relating to a court action in a court file. I also agree that in the present case the Ministry does not have custody and control over pages 16 – 22 of the records.

While it appears from pages 16 - 22 and the Ministry's representations that counsel at the Ministry may have reviewed these records, the Ministry in its representations regarding reasonableness of search states the following:

> Page 5 and some of the records were already in the possession of counsel at the Criminal Programs and Policy Branch.
>
> [Named court employee] was contacted to conduct a search to ensure that all relevant records were located. She provided a copy of the court Information and copies of all correspondence relating to the appellant that she located in her correspondence file…
>
> However, in some cases where a specific issue arises a correspondence file is maintained by the Manager. In this case, a file of correspondence with the Ontario Teachers College was maintained. Included in that file were letters requesting copies of court records regarding [the appellant] and as of 2004 copies of correspondence with [the appellant]. Other items not related to [the appellant] were also in this file. [Named court employee] advises that the correspondence regarding [the appellant] had been maintained as of June 23, 2003. These materials were forwarded by [named court employee] to [named lawyer], Criminal Programs and Policy Branch, Court Services Division.

From my review of the records and the Ministry's representations I find that the Ministry lawyer did not review the actual Informations and other court documents that are the subject of pages 16 – 22 of the record. I do not agree with the appellant's submission that these specific pages of record were "obtained by, reviewed by, and commented on" by Ministry staff at the Policy Branch. As stated in the Ministry's representations, the letters of correspondence between the court office and the College and then letters from the appellant were included in the file that was provided to the Criminal Programs and Policy Branch, not the actual records in the court file i.e. Informations and other documents. Even though the Ministry's representations mistakenly refer to these pages as Informations, I find that these records in fact did properly form part of the Court file and, like the court records in Order P-994, are not in the custody or under the control of the Ministry.

I conclude, therefore, that pages 16 – 22 of the record are not under the custody or control of the Ministry for the purposes of section 10(1) of the *Act*. Accordingly, there is no right of access to pages 16 - 22 under the *Act*. That being said, I urge the appellant to contact the Ontario Court of Justice regarding these pages.

In view of this finding, I will not rule on the application of section 22(a), as it is only claimed for pages 16 - 22.

PERSONAL INFORMATION

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,
>
> …
>
> (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;

All of the records relate to the appellant and contain information about the appellant that meets the definition of "personal information in sections 2(1)(a) (sex), (b) (criminal history), (c) (file number), (h) (the appellant's name along with other personal information relating to him).

In addition, the records contain the personal information of other individuals. This information qualifies as the personal information of these individuals as it includes information about their sex (section 2(1)(a)) and their names along with other personal information relating to them (section 2(1)(h)).

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

General principles

Section 47(1) 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(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with section 19. I will consider whether the records qualify for exemption under section 19 as a preliminary step in determining whether they are exempt under section 49(a).

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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

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.)].

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.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Waiver

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

Representations

The Ministry submitted the following in support of its position that section 19 applies to pages 5, 11 and 15 of the records.

> The Ministry respectfully submits that the record at page 5 is subject to both common law and statutory solicitor-client privilege. This record is a memorandum from the client seeking advice from Ministry counsel. The Ministry submits that this communication clearly lies within the common law solicitor-client communications privilege, as it is a request for legal advice from Ministry staff to Ministry counsel. The Ministry respectfully submits that this record must remain confidential in order to ensure that Ministry staff may continue to seek legal advice without reservation.
>
> In addition to the common-law solicitor-client privilege, the Ministry relies on the statutory solicitor-client privilege, as this record relates to the seeking of advice from Crown counsel.
>
> The Ministry also relies on both the common law and statutory litigation privileges. The litigation privilege covers records produced for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I]. The Ministry submits that this document was produced in response to correspondence that at the time could reasonably be expected to result in litigation pursuant to the *Act*.

The appellant submits the following in response.

> In already having reached a decision to disclose the personal information of the appellant to a wide variety of various individuals at the Ontario College of Teachers, an outside party, and an Institution having no jurisdiction over the appellant, as he is not a member of the Ontario College of Teachers, by way of letters, phone calls, faxes and discussions beginning in September 2001, the appellant submits that Ministry has waived privilege…

Finding

The Ministry claims that section 19 applies to exempt pages 5, 11 and 15.

Page 5 is a memorandum from individuals at the Ministry to the Director of the Criminal Policy and Program Branch seeking legal advice relating to the College's request for information. I agree with the Ministry that this record qualifies as a confidential solicitor-client communication for the purpose of seeking legal advice. I find that this record qualifies for common law solicitor-client communication privilege and is therefore exempt under that aspect of branch 1.

Pages 11 and 15 on the other hand are letters from the Ministry to an individual at the College. These records indeed reveal the advice given to Ministry staff from counsel regarding the issue raised in the letters.

In *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.), the Court upheld a finding of waiver in Order P-1342 where records had been sent voluntarily by the Ministry to the Law Society and were accordingly found not to qualify for the solicitor-client communication privilege aspect of either branch 1 or 2.

Similarly, in this case, I am satisfied that the Ministry has effectively waived its privilege, and cannot rely on the solicitor-client communication privilege aspect of either branch 1 or 2. In addition, the disclosure to the College effectively removes any possible claim that the communications were confidential as between solicitor and client, thus negating any possible application of solicitor-client communication privilege under branch 1. And since the records were prepared as communications with the College, not any client of Ministry counsel, they were not prepared "for use in giving legal advice" and therefore do not qualify for exemption under the solicitor-client communication privilege aspect of branch 2.

As regards litigation privilege, the records were prepared for the purpose of communications with the College. Although the College may have been considering litigation with the appellant, no litigation existed or was contemplated between the Ministry and the College or appellant. On this basis, in the absence of evidence that the records were actually prepared for the purpose of litigation, I find that they could not be said to have been prepared for the dominant purpose of existing or contemplated litigation (branch 1), nor were they prepared by or for Crown counsel in contemplation of or for use in litigation (branch 2). Accordingly, I find that pages 11 and 15 do not qualify for exemption under section 19.

In summary, I find that section 49(a) in conjunction with section 19 applies to exempt page 5 of the record from disclosure.

INVASION OF PRIVACY

As the Ministry also claimed section 49(b) for pages 11 and 15, I will proceed to analyze whether this exemption applies to those pages in the following discussion.

General principles

As stated above, 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.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations

The Ministry submits that the presumptions at sections 21(3)(b) and 21(3)(d) apply to pages 11 and 15. The Ministry states:

> Subsection 21(3) sets out circumstances that would constitute a presumed invasion of privacy. Subsection 21(3)(b) applies 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. Section 21(3)(d) applies where the information relates to employment history.

The Ministry also provided confidential representations on how sections 21(3)(b) and (d) applied to the personal information of the other individual. These representations were not shared with the appellant.

While the appellant did not make representations directly on this issue he does quote from both pages 11 and 15. Apparently the appellant has copies of both of these letters, which he received outside the *Act*, missing only the dates. The appellant received this information from the College as part of a hearing that was to be conducted by the College. Still, in the appellant's

representations he correctly identifies the dates of both of the records which are the correct dates for pages 11 and 15.

Finding

I agree with the Ministry that disclosure of the personal information in pages 11 and 15 relate to the employment history of another individual. As a result, I find that the presumed unjustified invasion of personal privacy at section 21(3)(d) does apply to the information at issue in pages 11 and 15. Section 21(4) does not apply to this information and the public interest override at section 23 does not apply in this appeal. Accordingly, the personal information on pages 11 and 15 qualifies for exemption under section 49(b) because disclosure would constitute an unjustified invasion of personal privacy, subject to the "absurd result" discussion below.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

As stated above, in this case, the appellant already has copies of some of the records at issue. Apparently, the appellant received these records from the College as part of the hearing process. In fact, he provided this office with a copy of the records and then the records were sent from this office to the Ministry during mediation. The Ministry confirms in its representations that page 11 is identical to the record sent in by the appellant. I can confirm that page 15 is also identical to the record provided by the appellant. The appellant refers to these records in his representations and specifically quotes the section that refers to the personal information of the other individual.

While it would appear that pages 11 and 15 may qualify for disclosure under the absurd result principle as the personal information in these records is within the knowledge of the appellant, it is unknown to me as to whether any restrictions or conditions were placed upon the appellant regarding the disclosure of these records to him by the College. In any event, as the appellant already has a copy of these records, no useful purpose would be served by my applying the absurd result principle to them, and I decline to do so. Accordingly, I will not order them disclosed.

EXERCISE OF DISCRETION

The section 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In this case, I have upheld the application of section 49(a) in conjunction with section 19 of the *Act* to some of the records, and have not upheld the application of section 49(b). I will therefore review the Ministry's exercise of discretion with respect to section 49(a) in conjunction with section 19.

The Ministry submits that it considered the highly sensitive nature of the information requested and the interests that the exemptions seek to protect in applying the exemption at section 19.

I find that considering the record and exemption applied, the Ministry's exercise of discretion was not in bad faith and the Ministry did take into account relevant considerations.

As such I find that the Ministry properly exercised its discretion under section 49(a).

REASONABLE SEARCH

General principles

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

The Ministry submitted that the following steps were taken in order to respond to the appellant's request:

> On June 21, 2004 the Letter of Request pursuant to the *Freedom of Information and Protection of Privacy Act* was forwarded to [named court employee], Manager of Intake and Facilities at the Ontario Court of Justice, 444 Yonge Street, Toronto. A search was conducted.
>
> Page 5 and some of the records were already in the possession of counsel at the Criminal Programs and Policy Branch.
>
> [Named court employee] was contacted to conduct a search to ensure that all relevant records were located. She provided a copy of the court Information and copies of all correspondence relating to the appellant that she located in her correspondence file.
>
> [Named court employee] advises that in the usual course of business, correspondence to the Ontario Court of Justice court office requesting court records is not maintained but is returned to the requester with the records or, if the records are not provided, with a letter of explanation.
>
> However, in some cases where a specific issue arises a correspondence file is maintained by the Manager. In this case, a file of correspondence with the Ontario Teachers College was maintained. Included in that file were letters requesting copies of court records regarding [the appellant] and as of 2004 copies of correspondence with [the appellant]. Other items not related to [the appellant] were also in this file. [Named court employee] advises that the correspondence regarding [the appellant] had been maintained as of June 23, 2003. These materials were forwarded from [named court employee] to [named lawyer], counsel, Criminal Programs and Policy Branch, Court Services Division.
>
> In January 2005 further materials provided by the appellant were reviewed. Those materials include:
>
> - An Ontario Teacher's College Memo to File (date appears to have been removed) by [named College employee] regarding a conversation with a [named] Crown Attorney. It is submitted that Court Services Division has no knowledge or possession of any such record. This record was created by the Ontario Teacher's

> College and refers to a conversation with a Crown Attorney, not a Court Services Division employee. This has no connection to anything that would be in a court file.
>
> - A letter from [named court employee], Ontario Court of Justice, identical to Page 11 of these proceedings but the date appears to have been removed and there appears to be a receipt stamp from the Ontario College of Teachers. The Ontario Court of Justice' copy of this letter has been provided to the IPC as Page 11.
>
> - A letter from the Ontario College of Teachers identical to Pages 12, 13, and 14 of these proceedings but the date appears to have been removed and COPY appears in the signature line. The Ontario Court of Justice court office has already provided its copy of this letter to the IPC as Pages 12, 13 and 14.
>
> - A letter from the Ontario Teachers College to [named individual] at the Ontario Court of Justice.
>
> In January 2005, [named court employee] was requested to conduct a further search for a letter addressed to [named individual] at the Ontario Court of Justice and any other relevant records. [Named court employee] indicates that no such letter was in her file and, as mentioned above, there were no other correspondence files to search. [Named court employee] advises that there is no one known as [named individual] at the College Park court office at 444 Yonge Street. As noted above, the Court office does not normally retain copies of correspondence, except in specific circumstances.
>
> The Ministry therefore respectfully submits that the search it conducted was reasonable.

As evidence that further records should exist, the appellant submitted an extensive chronology of events and the following:

> The Chronological summary provided to the Commissioner outlines a time frame in which responsive records will be or are likely to be found.
>
> In addition, now included in the file from the Ontario Court of Justice should be letters from the appellant written in response to the advice given by the Ministry in procedures for applying for "publicly available records" since the application was first made by the appellant…

The appellant also refers to the records and additional records, which he provided to this office as evidence of prior correspondence between the Ontario College of Teachers and the Ministry which the Ministry claims do not exist.

Finding

As stated above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. The institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

I am satisfied that the search undertaken by the Manager of Intake and Facilities at the Ontario Court of Justice, the named court employee in the appellant's request, was reasonable. This individual appears to have been the contact point between the Ministry and the College and is the individual who would have the type of information requested by the appellant.

It appears that the appellant's concern, which I discern from his chronology of events, is that his relationship with the Ministry and the courts has been extensive beginning from August 2001 and continuing up until recently. I note that in the appellant's original request to the Ministry, he states:

> A response to my request will also include a copy of "the file" and discussions of the case with the Criminal Policy and Program Branch referred to in a 14 July 2003 letter of [named court employee] when she discusses this file [I would expect my personal file] with a [named individual] of the Ontario College of Teachers.

The appellant's reference to his "personal file" leads me to conclude that the appellant believes there to be an extensive file regarding himself in the hands of the Ministry which was not located in the Ministry's search for responsive records.

I note too that the appellant, in his representations, makes reference to recent letters exchanged between himself, the College and the Ontario Court of Justice. The appellant obviously feels that recent records are also responsive to his request.

I conclude from the appellant's representations that he views his request as broader than his actual request to the Ministry. He appears to take the view that he requested all records relating to himself held by the Ministry and not just those records that were exchanged between the Ministry and the Ontario College of Teachers.

In my view, in assessing the Ministry's search, it is significant that the appellant's request was very specific and detailed, setting out specific names, file numbers, positions, locations and dates. I do not find that the Ministry took a narrow interpretation of the appellant's request. I agree with the Ministry's interpretation.

I assume that the appellant's belief that further records should exist arises from his broader interpretation of his request. Even if I am incorrect in my assumption, there is nothing precluding the appellant from making a new and more broadly phrased request for his "personal file" or information relating to him which is held at the Ministry.

And finally, I wish to comment on the fact that I have evidence that the appellant has contacted the Superior Court of Justice and received a response regarding information related to him. In addition to the possibility of making a further request under the *Act*, the appellant might wish to consider contacting the Ontario Court of Justice.

ORDER:

I uphold the Ministry's decision.

Original signed by: February 2, 2006
Stephanie Haly
Adjudicator