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

# RECONSIDERATION ORDER MO-1968-R

## Appeals MA-040045-1 and MA-040094-1 to MA-040105-1

## Toronto Police Services Board

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 RECONSIDERATION:

The appellant in this matter has made a large number of requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) and the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) with both the Toronto Police Services Board (the Police) and the Ministry of the Attorney General (the Ministry), respectively. The requests were for access to records relating to a Police investigation into his activities and his subsequent prosecution pursuant to certain charges brought against him under the *Criminal Code*. On September 4, 2004, I issued Order PO-2317 in which I upheld the Ministry's decision to deny access to those records which comprised the "Crown Brief". On March 3, 2005, I issued Interim Order MO-1908-I in which I upheld the decision of the Police to deny access to many of the records responsive to a total of 13 requests filed by the appellant. In that decision, however, I also ordered a large number of records to be disclosed as they did not qualify under the exemptions claimed by the Police.

On May 11, 2005, following the final date set for compliance with Order MO-1908-I, I received a request from the Police that I reconsider my decision in Order MO-1908-I on the basis that many of the records ordered disclosed in that decision were also the subject of my decision in Order PO-2317, involving an appeal from a decision of the Ministry. The Police also asked that I solicit the representations of the Ministry, as it was a party with an interest in the information contained in the records which I ordered disclosed in Order MO-1908-I. I contacted the Ministry and obtained representations from it respecting whether I ought to reconsider my decision in Order MO-1908-I.

In its submissions to me, the Ministry raised another ground for reconsideration, arguing that the Police ought to have applied the discretionary exemption in section 12 of the *Act* as well as the mandatory exemption in section 9(1)(d) of the *Act* to some or all of the records. It submitted that some or all of the records responsive to these requests formed part of the Crown brief prepared in the course of the prosecution of the appellant, or were records that had been received by the Police from the Ministry in confidence.

In a letter to the parties dated July 28, 2005, addressing each of the grounds for reconsideration, I found that the fact that the records which are the subject of these requests may have also been addressed in the earlier appeal involving the Ministry is not determinative of whether they are therefore automatically exempt from disclosure in the hands of the Police. These requests were made to a different institution from the Ministry and different exemptions were claimed to apply to the responsive records. In my view, the records that are the subject of the requests to the Police are not automatically exempt from disclosure solely because they were found to be exempt when in the hands of another institution, in this case the Ministry.

In addition, I found that because section 12 is a discretionary exemption and the Police decided not to apply it to the records, it was not appropriate for me to allow a third party, in this case the Ministry, to require the institution in these appeals, the Police, to apply a discretionary exemption to records which are in the custody or control of the Police. I specifically found that these records belong to the Police and they (and only they) are entitled to make the determination about whether to apply a discretionary exemption to them. (Order P-257)

However, I advised all of the parties that I decided to reconsider my decision in Order MO-1908-I on a single, relatively narrow basis. The exemption in section 9(1)(d) is a mandatory one and was not considered by me in my analysis of the issues in Order MO-1908-I. Because of the mandatory nature of section 9(1)(d), I am required to consider its possible application. Accordingly, I sought the representations of the appellant, the Ministry and the Police, on whether some or all of the records at issue in these appeals are subject to the section 9(1)(d) exemption. I received representations from all of the parties.

As an additional matter, the Police submit that, in the unique circumstances of this appeal, I ought to allow them to apply the discretionary exemption in section 12 to certain records which it claims may be exempt under the solicitor-client privilege exemption. I addressed whether the Ministry ought to be entitled to raise the section 12 exemption in my letter to the parties dated July 28, 2005. In my view, the Police cannot raise its application at this late date either. The requests and the subsequent appeals respecting these records have been ongoing for some time and, in my view, the appellant would suffer prejudice if I were to allow the Police to apply a discretionary exemption to some of the records at this point in time. In my letter to the parties of July, 28, 2005, I advised that I would only be reconsidering my decision in Order MO-1908-I with respect to the possible application of the mandatory exemption in section 9(1)(d). I have not been convinced by the representations of the Police that I ought to do otherwise.

I now address the possible application of section 9(1)(d) to the records, which is the sole issue to be determined in this reconsideration.

## DISCUSSION:

### RELATIONS WITH OTHER GOVERNMENTS

Both the Police and the Ministry take the position that some of the records ordered disclosed in Order MO-1908-I fall within the ambit of the mandatory exemption in section 9(1)(d).

### Section 9(1)(d): agency of another government

#### *General principles*

Section 9 states:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;

> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

In Order MO-1581, Adjudicator Sherry Liang reviewed the manner in which the section 9(1)(d) exemption has been applied by this office in previous orders and provided some useful guidance as to how it might be applied in the future. She wrote that:

> The section 9(1) exemption has been applied in a variety of circumstances, including information provided to a police service from other police services (Order M-202), information provided to a municipality by the Ontario Realty Corporation (an agency of the provincial government) (Order M-1131), information provided to a police service by a ministry of the provincial government (Order MO-1569-F), and information provided to a police service by Crown Attorneys (see discussion below).
>
> In these cases, it has been said that in order for section 9(1) to apply, the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence.

In addition, in the specific case of information provided to a police service by Crown Attorneys, certain orders have linked the application of the section 9(1) exemption under the municipal *Act* to the application of an exemption under the provincial *Act*. In Order MO-1202, for example, former Adjudicator Holly Big Canoe discussed the requirements for the application of the section 9(1) exemption, in very similar circumstances to the ones before me. The record consisted of a Confidential Crown Envelope bearing entries made by a Crown Attorney. In that order, former Adjudicator Big Canoe considered whether the information would be exempt under the provincial *Act*, in the hands of the Ministry. She found that the information would fall under section 19 (solicitor-client privilege) of the provincial *Act*, and that the requirements for section 9(1) under the municipal *Act* were accordingly met.

This approach has been followed subsequently, in Orders MO-1292, MO-1313, and MO-1327 (the "Toronto Police Service cases").

I find the analysis in the Toronto Police Service cases sound, to the extent that a consideration of whether the information would have been exempt under the provincial *Act*, had it remained in the hands of the provincial institution, may be a significant factor in determining whether the same information was "received in confidence" and therefore exempt under section 9(1) of the municipal *Act*.

However, to the extent that there is also a suggestion in these cases that there is a direct link between the application of an exemption under the provincial *Act*, and the application of section 9(1) under the municipal *Act*, I have some reservations about such an approach. In my view, the applicability of an exemption under the provincial *Act* is not necessary and may not even be sufficient to the application of section 9(1)(d) of the municipal *Act*. As expressed in Order M-128 originally, and applied in other cases subsequently, the requirements for the application of section 9(1) (that disclosure of the record could reasonably be expected to reveal information received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by the institution in confidence) are essentially questions of fact. Whether or not the information might have been exempt under the provisions of the provincial *Act* is a factor which may assist in applying section 9(1), but may not be determinative of the issue. A finding that the information would have been exempt had it remained in the hands of the provincial institution does not necessarily lead directly to a finding that the same information is exempt in the hands of a municipal institution. Likewise, a finding that certain information would *not* have been exempt in the hands of the provincial institution does not dictate a conclusion that the information is not exempt in the hands of the municipal institution.

It should be noted that section 15(b) of the provincial *Act*, which is the provincial equivalent to section 9(1), also exempts information "received in confidence from another government or its agencies by an institution". Orders of this office

applying section 15(b) of the provincial *Act* have adopted a fact-based approach to the issue more in keeping with Orders M-202, M-1131 and MO-1569-F than the approach in the Toronto Police Service cases, and have essentially looked for evidence as to the nature of the confidentiality understanding surrounding the provision of the information. In Order P-1629, for example, Assistant Commissioner Tom Mitchinson accepted the submission of the Ministry of Economic Development, Trade and Tourism that certain information in the records was received from the federal government in confidence, but did not accept that other information at issue was provided on a confidential basis. In Order PO-1915-F, Senior Adjudicator David Goodis found that the Ministry and the City had not provided the "necessary detailed and convincing evidence" to establish that disclosure of these records would reveal information the Ministry of the Attorney General received "in confidence" from the City of Toronto, either expressly or by implication.

In my view, the approach taken in the above orders, in essentially seeking to determine the basis on which information was shared between governments, is in keeping with the rationale for the section 9(1)/15(b) exemption, as discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission), at pages 306-7:

> ... It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information that would be of assistance to the government of Ontario in the conduct of public affairs. An illustration may be useful. It is possible to conceive of a situation in which environmental studies (conducted by a neighbouring province) would be of significant interest to the government of Ontario. If the government of the neighbouring province had, for reasons of its own, determined that it would not release the information to the public, it might be unwilling to share this information with the Ontario government unless it could be assured that access to the document could not be secured under the provisions of Ontario's freedom of information law. A study of this kind would not be protected under any of the other exemptions ... and accordingly, could only be protected on the basis of *an exemption permitting the government of Ontario to honour such understandings of confidentiality*. ... [emphasis added]

In conclusion, I prefer the approach to this issue taken in Orders M-202, M-1131, MO-1569-F and the provincial orders cited above, over the approach taken in the Toronto Police Service cases. Accordingly, although it may be helpful to

> determine whether information would have been exempt in the hands of the sending institution (such as through the application of the solicitor-client privilege), it is not a necessary path to take in order to reach a conclusion on the applicability of section 9(1) of the *Act*.

I too prefer the approach suggested by Adjudicator Liang to that adopted in the earlier Toronto Police cases. I will, accordingly, apply this reasoning to the records at issue in this reconsideration decision.

***Representations of the parties***

In their representations, the Police concede that the section 9(1)(d) exemption can only apply to a portion of the records comprising the contents of a folder entitled "Crown Notes". The Police state that:

> The majority of the records at issue are investigation materials that were created or produced by the Police in contemplation of or for use in a prosecution. The Police adopt the Ministry's submissions with respect to the unique relationship between the Police who investigate crimes and the Crowns who prosecute them. There is a mutual expectation of confidentiality between the Police and the Crown with respect to materials in the Crown brief. However, with the exception of documents created by the Crown and included in a folder labelled "Crown Notes", the records were not received by the Police from the Crown. *Therefore, the mandatory exemption in section 9(1)(d) would not apply to the majority of the records.* [my emphasis]

Addressing the application of the section 9(1)(d) exemption to the records in the folder entitled "Crown Notes", the Police argue that these documents were:

> . . . included in the Crown brief by the Crown with the expectation that the records would remain confidential. This expectation of confidentiality continues to date. The documents are included in a file named 'Confidential Crown Brief' which underscores the expectation of confidentiality. The records are protected by various storage measures and procedures to restrict access and maintain secrecy. They are not available from any sources to which the public has access. The disclosure of these records could reasonably be expected to reveal information the Police (who are responsible for the storage and maintenance of the Crown brief) have received in confidence from the Crown. Accordingly, section 9(1)(d) must be applied [MO-1581, MO-1606, MO-1896].

The Ministry also addressed the application of section 9(1)(d) to the "Crown Notes", submitting:

> . . . this information would have been received by the police in confidence from the Crown Counsel. Of course, it is important that the Ministry and the Police be able to work together to ensure the proper administration of justice and to ensure a

> fair judicial proceeding. Communications between the Crown and the Police, like that found in the material referred to, should be protected through the expectation of privacy. Therefore, release of this information clearly would meet the test under section 9 – the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations (the Ministry) **and** that the information was received by the institution in confidence. This determination is a question of fact (as per IPC-MO-1581) and it is respectfully submitted that the test, on these facts, is met.

The Ministry also takes the position that the other materials contained in the "Crown Brief" also fall within the ambit of section 9(1)(d) because:

> [T]he Crown Brief is, in essence, simply a lawyer's brief for litigation: P-1064; see also PO-2364. Due to the fact that the investigation and prosecution functions are carried out by two different entities, the police have in their file copies of the investigation materials they prepared in contemplation of or for use in the criminal prosecution. Similarly, the Crown prosecutor has copies of the very same documents received from the police and entitled the 'Crown Brief'. As you know, the Crown brief and its content[s] belong to the Crown – not the Police (MO-1663-F and MO-1633-I).

***Findings with respect to the application of section 9(1)(d) to the records***

In my view, as recognized by the Police, section 9(1)(d) can only apply to records which were received by the Police from the Ministry. Other records, including the majority of the contents of the Crown Brief, originated with the Police and were shared with the Ministry, rather than vice versa, as is required under section 9(1)(d). Accordingly, I will examine the application of the exemption only to the "Crown Notes" portions of the records, described in the Ministry's representations as:

> Crown Notes: internal police correspondence; crown forms, handwritten notes of the Crown, a list of audiotapes with accompanying witness names, correspondence between the crown and police.

In the case before me, I am satisfied that those portions of the records entitled "Crown Notes" which originated with the Ministry and not with the Police contain information supplied to the Police by Crown counsel, and that the information was received by the Police in circumstances of confidentiality. In this respect, I accept the representations of the Police and of the Ministry as to the confidentiality surrounding the receipt of this kind of information, in the context of the roles of these two institutions in criminal court proceedings, as was the case in Order MO-1581. Accordingly, I find that those portions of the "Crown Notes" which originated with the Ministry and were shared with the Police, and only those portions of the records, are exempt from disclosure under section 9(1)(d). The remaining records ordered disclosed in Order MO-1908-I are to be disclosed in accordance with the order provisions cited below.

## ORDER:

1. I reiterate the disclosure requirements set out in Order Provision 2 of Order MO-1908-I with the following amendments:

   (a) the Police are not required to disclose those portions of the Crown Brief records described as 'Crown Notes', which originated with the Ministry, rather than the Police;

   (b) the date for compliance with the order is amended to **October 24, 2005,** but not before **October 28, 2005**.

2. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Police to provide me with a copy of the records that are disclosed to the appellant.

September 22, 2005

Donald Hale
Adjudicator