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

ORDER PO-2502

Appeal PA-050009-1

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 copies of records relating to identified charges laid against the requester. In particular, the requester asked for copies of the "entire disclosure" made to his counsel with respect to the charges.

The Ministry responded to the request by denying access to all of the responsive records on the basis of the exemption found in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(a) and (b) (law enforcement), 14(1)(f) (right to a fair trial), 14(2)(a) (law enforcement report), and section 19 (solicitor-client privilege).

In addition, the Ministry denied access on the basis of sections 49(b) and 21(1) (invasion of privacy) with reference to the presumption in section 21(3)(b) (information compiled as part of an investigation).

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

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. In its representations, the Ministry indicated that it was no longer relying on any of the exemptions found in section 14 of the *Act*. As a result, that section is no longer at issue in this appeal. In addition, the Ministry reconsidered its position with respect to two pages of the records (pages 48 and 49), and disclosed them to the appellant. Finally, the Ministry indicated that it was also taking the position that the request is frivolous and vexatious.

I then sent the Notice of Inquiry, together with a copy of the Ministry's representations, to the appellant, who also provided representations in response.

One of the issues raised in this appeal concerns a requester's right of access to documents that have been disclosed to his or her counsel through the Crown disclosure process. At the time that this file was in the inquiry stage of the process, the Ontario Divisional Court issued a decision in a judicial review application of an appeal involving records that are similar to those under consideration in this appeal (*Attorney General v. Big Canoe* [2006] O.J. No. 1812). The records at issue in that appeal also concern the application of the section 19 solicitor-client exemption to the contents of a Crown's file. I accordingly sent a copy of that decision to the parties and invited them to provide representations on what impact, if any, the decision of the Divisional Court has on the issues raised in this appeal. I received representations from both the appellant and the Ministry.

RECORDS:

The records at issue in this appeal consist of 49 pages of reports, lists, correspondence, notes, and photographs.

DISCUSSION:

PRELIMINARY ISSUES

Scope of the appeal

As a preliminary matter, I note that the appellant makes references in his representations to a videotape. The request resulting in this appeal was for photocopies of the entire disclosure of documents, and the records at issue have, throughout the course of this appeal, been identified as 51 pages of records (two of which were subsequently disclosed to the appellant). It is unclear to me how the videotape referred to by the appellant relates to this appeal, as it was not identified throughout this appeal as a responsive record. Therefore, I will not address it further in this appeal.

Frivolous or vexatious

As a second preliminary matter, the Ministry takes the position that it is entitled to refuse to process the request on the basis that it is frivolous or vexatious. The Ministry identifies this position for the first time in its representations, and presumably relies on section 10(1)(b) of the *Act* which reads:

> Every 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 head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

The Ministry also states that it is taking the position that it refuses the request as an abuse of the right of access. It then refers to section 5.1 of Regulation 460 which reads:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

In its representations, the Ministry begins by confirming that, as a result of the criminal charges laid against the appellant, the appellant has a constitutional right to disclosure of the Crown's case. The Ministry then takes the position that the appellant, through his lawyers, has received

disclosure in the criminal proceedings, and that the Crown has fully complied with its disclosure obligations. The Ministry states that the appellant was represented by a lawyer who received disclosure on behalf of the appellant from the Ministry. The Ministry also states that the appellant subsequently retained a new lawyer to act on his behalf, and that this lawyer was also provided with disclosure.

The Ministry submits that allowing an access request under the *Act* for disclosure of documents relating to a criminal matter would bypass the rules and procedural protections afforded to parties and affected parties in criminal proceedings, and that such a request amounts to an abuse of the right of access. The Ministry refers to portions of certain court decisions which identify the purpose and intent of the *Act* and appears to rely on these decisions in support of its position that the request is frivolous or vexatious.

Previous orders have confirmed that section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests, and that this discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850]. In addition, an institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious [Order M-850].

Furthermore, previous orders have determined that the following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- the number of requests - whether the number is excessive by reasonable standards;
- the nature and scope of the requests – whether they are excessively broad and varied in scope or unusually detailed, or whether they are identical to or similar to previous requests;
- the purpose of the requests - whether they are intended to accomplish some objective other than to gain access. For example, whether they made for "nuisance" value, or to harass government or to break or burden the system;
- the timing of the requests – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings.

[See Orders M-618, M-850, MO-1782]

In the circumstances of this appeal, I am not satisfied that the request is frivolous or vexatious. The Ministry has not satisfied me that the request is part of a pattern of conduct that amounts to an abuse of the right of access for the purpose of the *Act*, as established by the previous orders referred to above. Furthermore, the court decisions referred to by the Ministry address the issue of the application of the solicitor-client exemption to records contained in a Crown's file. In my view, the decisions by the courts do not support the position that requests for this type of information are frivolous or vexatious. Though the courts refer to the fact that access is not granted to the requested documents in those cases, the courts do so on the basis of the exemption in section 19, and not by finding that the requests are frivolous or vexatious.

In the circumstances, I am not satisfied that the request is frivolous or vexatious, and I will review the application of the identified exemptions to the records at issue.

PERSONAL INFORMATION

In order to determine whether the exemption at section 49(a) 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). The definition reads 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 if 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].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The Ministry submits that the information is "personal information primarily related to the appellant." I agree. The request is for records relating to charges laid against the appellant, and I find that the records contain his personal information for the purpose of paragraphs (a), (b), (c), (d), (g) and (h) of the definition of that term in section 2(1).

The Ministry also takes the position that page 45 of the records includes the name, date of birth, address, phone number and information about the involvement of another individual in the incident that is the subject of the records. I agree that page 45 contains the personal information of another identifiable individual within the meaning of paragraphs (a), (c) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Under section 49(a), the Ministry has the discretion to deny the appellant access to his 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 appeal, the Ministry relies on section 49(a) in conjunction with section 19 of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

General principles

When the request in this matter was filed, section 19 stated as follows:

> 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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches, the common law privilege and the statutory privileges. The institution must establish that one or the other (or both) branches apply. In this appeal, the Ministry claims that the statutory litigation privilege under Branch 2 of the section 19 exemption applies to all of the records remaining at issue.

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory litigation privilege

General Principles

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

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

The Ministry's representations

In support of its position that the records qualify for exemption under the statutory litigation privilege in Branch 2 of section 19, the Ministry states:

> The Ministry claims privilege as the records were prepared for Crown counsel for use in 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 government.

As identified above, the Ministry takes the position that the appellant, through his lawyers, has received disclosure in the criminal proceedings, and that the Crown has fully complied with its disclosure obligations.

The Ministry also states that it is not aware of any actions by any party, including the Ministry, which would constitute waiver with respect to the documents at issue.

The Ministry also confirms that records which contained correspondence between Crown counsel and counsel for the appellant in the criminal proceedings have now been disclosed to the appellant, and are no longer at issue in this appeal.

The Appellant's representations

The appellant's representations focus on the circumstances surrounding his criminal trial and his dissatisfaction with the disclosure process. He identifies that certain portions of the records at issue were disclosed to his lawyer, and that he himself reviewed them through the Crown disclosure process. He identifies that his interest in obtaining his own copies of all of the records disclosed to his lawyer is one of the primary reasons why he launched this appeal.

The appellant also identifies concerns he has about the disclosure process, in particular, the timing of the disclosure of certain records to his lawyer, and whether full disclosure was in fact provided to his lawyer. He also identifies concerns he has regarding the actions of his lawyer, including whether his lawyer provided him with full access to the disclosure documents. The appellant accordingly takes issue with the statements in the Ministry's representations which state that complete disclosure was provided to him.

The Divisional Court decision

In the Divisional Court decision referred to above, the court reviewed the impact of disclosure that was made by the Crown in accordance with the obligations set out by the Supreme Court of Canada in *R v. Stinchcombe* [1991] 3 S.C.R. 326 on the application of the section 19 exemption in the *Act*. Portions of the Divisional Court decision read as follows:

> The principal issue in this judicial review is whether records disclosed by the Crown to the defence, and correspondence passing between Crown and defence counsel in the course of the prosecution, fall within the section 19, second branch, exemption. …
>
> The Ministry submitted that there was no reason why a *Stinchcombe* disclosure should affect the second branch of section 19 exemption, which rests upon an entirely different basis than litigation privilege. Its language contains no reference to the material being privileged at common law as the basis for the exemption. On the contrary, the conditions for the exemption are explicitly related to the purpose for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the

> language of section 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. There should be no generalized public access to the Crown's work product even after the case has ended.
>
> For the reasons already set out, I agree with this position, for there is a clear need to protect the information in the Crown brief from dissemination to the public as a matter of course upon "simple request", which could lead to undesirable disclosure of police methods and the like. The limited waiver of the Crown's litigation privilege by a *Stinchcombe* disclosure cannot be turned into a waiver of the section 19 exemption so as to entitle any person to insist upon access to the records. Crown counsel has no authority to waive the FIPPA exemption.

Both of the parties provided representations on the impact of the Divisional Court decision to the circumstances in this appeal.

The Ministry simply refers to the decision in support of its position that section 19 applies to the records remaining at issue. The Ministry also refers to the decision to support its view that, when the Crown released the records to the appellant's lawyer in the course of providing disclosure under the *Stinchcombe* obligations, this did not constitute a voluntary waiver of the statutory litigation privilege.

The appellant provided lengthy representations in support of his position that he ought to have access to the records. In his representations, he states that he is entitled to disclosure of all of the records in order to allow him the opportunity to defend himself. He argues that the circumstances of his case are distinct from the ones addressed by the Divisional Court, in that there are "gross injustices" in his case which support the position that he should be provided directly with the disclosure in its entirety, as opposed to its being provided through a lawyer.

In addition, the appellant requests that I not consider any statements in the reasons set out in the Divisional Court decision which "negatively impacts" his position, in light of the alleged partiality shown by the Ministry in this appeal.

Findings

As a preliminary matter, I note that a number of the issues raised by the appellant relate to either his complaints and concerns about the actions of his lawyers, or his concerns about the disclosure process followed by the Crown, including the timing and extent of the disclosure that was made to his lawyers. The issue in this appeal is whether the records at issue qualify for exemption under section 19 of the *Act*, as that section has been applied by this office and the courts. Although I discuss below what impact, if any, the Crown disclosure process has on the application of the section 19 exemption, issues concerning the nature and extent of the Crown's actions and obligations under *Stinchcombe*, or the actions of the appellant's lawyers, are not

issues that fall within the jurisdiction of this office and, therefore, these issues are not before me, unless they impact the application of the section 19 exemption.

In the circumstances, I find that the records remaining at issue in this appeal qualify for exemption under the statutory litigation privilege found in Branch 2 of section 19, as they were prepared by or for Crown counsel "in contemplation of or for use in litigation". The records requested in this appeal reside with the Crown and formed part of the Crown counsel's file with respect to the criminal litigation involving the appellant. Indeed, the request specifically states that it is for copies of the "entire disclosure" held by the Crown relating to the charges involving the appellant.

I make this finding based on the representations provided by the parties, as well as the Divisional Court decision in the *Big Canoe* case set out above, in which the Court found that similar records in the possession of the Crown qualified for exemption under Branch 2 of section 19 of the *Act*.

In addition, I find that the statutory litigation privilege which applies to the records has not been lost through waiver. As established in the *Big Canoe* decision, the limited waiver of the Crown's litigation privilege by a *Stinchcombe* disclosure does not constitute a waiver of the application of the section 19 exemption. Furthermore, I find that the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation in this case only applies to the correspondence between Crown counsel and counsel for the appellant that the Ministry has decided to disclose.

Finally, the Ontario Court of Appeal has determined that termination of litigation does not negate the application of the Branch 2 statutory litigation privilege [*Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)]. Accordingly, the fact that the criminal prosecution of the appellant is no longer ongoing does not negate the application of the statutory litigation privilege in Branch 2 of section 19.

In the circumstances, I find that the records remaining at issue qualify for exemption under section 19, and are exempt under section 49(a) of the *Act*.

EXERCISE OF DISCRETION

General principles

The section 19 and 49(a) 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, this office may determine whether the institution failed to do so. In addition, this office 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

If any of these circumstances are present, the matter may be sent 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.

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry identifies the factors it considered in deciding to exercise its discretion not to disclose the records in this appeal. The Ministry's representations on this issue were shared with the appellant.

Having reviewed the reasons and rationale provided by the Ministry for exercising discretion under section 49(a) in conjunction with section 19 of the *Act*, I find nothing improper in the manner in which the Ministry exercised its discretion.

Accordingly, I uphold the Ministry's decision to withhold the records under section 49(a) of the *Act*.

Having found the records to be exempt from disclosure under section 49(a), it is not necessary for me to review the possible application of section 49(b).

ORDER:

I uphold the decision of the Ministry.

Original signed by: September 13, 2006
Frank DeVries
Adjudicator