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

Reconsideration Order PO-2532-R

Appeal PA-040327-1

Order PO-2494

Ministry of Community Safety and Correctional Services

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BACKGROUND:

The appellant made a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to information relating to her Firearms Possession Licence. The Ministry denied access to the responsive records on the basis of sections 49(a), 14, 19, 49(b), and 21 of the *Act*. The appellant appealed that decision to this office. The Ministry released some records following its receipt of the Notice of Inquiry and withdrew its claim to certain portions of section 14. Following the exchange of representations, I issued Order PO-2494.

Subsequently, the Ministry requested a reconsideration of Order PO-2494. The Ministry's letter contained its submissions in support of the reconsideration request. In particular, the Ministry seeks a reconsideration of the finding in Order PO-2494 that the following records be released: Records 1-4, 12-13, 15-31, 41-42, 47-48, 56-58, 63-66, parts of Records 53 and 66, and the video tape and photographs. The basis for the Ministry's claim for reconsideration is set out below.

I issued an interim stay of Order PO-2494 as it relates to all the records that fall within the scope of the reconsideration request, pending my review of the issues raised by the request. In my letter granting the stay of the order, I stated:

> In the circumstances, I am granting an interim stay of Provision 2 of Order PO-2494 as it relates to all records that fall within the scope of the reconsideration request until I have had the opportunity to review the issues raised in your reconsideration request, and to determine the next steps in this process. I will be contacting the parties shortly to identify the next steps in this reconsideration process.

Following a careful review of the Ministry's request for a reconsideration, I made some preliminary and final rulings on the request, on a record by record basis, that were communicated to the parties by letter. I then provided the appellant with a copy of my letter and invited her to make representations on the reconsideration request as it related to the two preliminary findings only. As my rulings with respect to the other grounds for the reconsideration request were final, it was not necessary for me to seek representations from the appellant on those issues.

I received representations from the appellant in response to my request. Having reviewed those representations, I have determined that it is not necessary for me to seek representations from the Ministry in reply.

RECORDS AND EXEMPTIONS:

The records at issue in the appeal include both paper and electronic records. As previously mentioned, portions of these records were disclosed to the appellant by the Ministry in response to the first Notice of Inquiry. The table below sets out a description of the records at issue and the exemptions claimed by the Ministry for those records. In addition to the exemptions claimed, the Ministry also took the position that parts of these records are not responsive to the appellant's request.

Record	Type of Record	Exemption(s) Claimed
Pages 1 to 7	OPP incident LP03120166; General occurrence report; Notes, reports and supplementary occurrence reports.	49(a), 19, 49(b), 21(3)(d), unresponsive portions
Pages 8 to 62	Police officers' notes (9 officers)	49(a), 14(1)(l), 19, 49(b), 21(2)(f), 21(3)(b) and 21(3)(d), pages 8-11 released, unresponsive portions
Pages 63 to 66	E-mail correspondence	49(a), 19, unresponsive portions
Pages 67	Firearms Interest Person (FIP) record	Released
Pages 68 to 69	E-mail correspondence	Unresponsive portions
Pages 70 to 74	Canadian Firearms Registration On-line (CFRO) queries	Unresponsive portions
Pages 75 to 78	Fax correspondence	Released
Electronic	One CD, containing 41 photographs taken by the OPP	49(a), 19, 49(b), 21(2)(f), 21(3)(b), unresponsive portions
Electronic	One videotape, containing footage taken by the OPP of the exterior and interior of a property	49(a), 19, 49(b), 21(2)(f), 21(3)(b), unresponsive portions

The Ministry's request for a reconsideration relates to Records 2, 19, 20, 41, 42, 47, 48, 53 and 66.

THE RECONSIDERATION REQUEST:

DISCUSSION:

THE RECONSIDERATION PROCESS

This office's reconsideration process is set out in section 18 of the *Code of Procedure* (the *Code*). In particular, sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The Commissioner may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

SHOULD THE ORDER BE RECONSIDERED?

As previously noted, I have already made both preliminary and final rulings with respect to the reconsideration request. For ease of reference, I will repeat my rulings here:

Record 2

For the reasons set out below, I do not uphold the Ministry's reconsideration request with respect to Record 2.

The Ministry submits that:

> … the second paragraph on page 2 is unresponsive to the request, and contains the personal information of a police officer, consisting of the officer's employment history. The Ministry contends that this part of the record should also not have been ordered disclosed.

The second paragraph of Record 2 does not contain the personal information of the police officer. Applying the test set out in Order PO-2225, by former Assistant Commissioner Tom Mitchinson, and having reviewed the records and the representations of the Ministry, I find that the information relating to the employment of the police officer in Record 2 is professional information that falls outside the scope of the definition of "personal information" in the *Act*. This information appears in the context of a "will say" statement prepared by the police officer in question. The context is an inherently business, professional or official government context that is removed from the personal sphere. I also find that there is nothing in the information that, if disclosed, would reveal something of a personal nature about the police officer in these circumstances.

Record 53

The Ministry submits:

> . . . [P]aragraph 5 in the middle of page 53 is unresponsive to the requester's request for records and contains the personal information of an individual. This paragraph relates to a separate criminal investigation that has no bearing on the requester's Firearms Possession License. The Ministry submits therefore that the paragraph should be exempt from disclosure.

In Order PO-2494 I upheld the Ministry's decision to withhold this information when I stated the following on pages 8 and 9 of Order PO-2494:

> The following records are responsive to this request and have not been released, or ordered to be released, to the appellant . . . 53 (the unshaded portion except the information that refers to an unrelated law enforcement matter on lines 22-24)

Since paragraph 5, in its entirety, appears on lines 22 to 24 of Record 53, Order PO-2494 clearly provides that the information in paragraph 5 is unresponsive to the request and accordingly, should not be disclosed. Therefore, the Ministry's reconsideration request with respect to Record 53 is unnecessary and redundant.

Records 19, 20, 41, 42, 47, 48, 66

The Ministry submits that the above-noted records "are subject to solicitor-client communication privilege" under section 19 of the *Act*.

Specifically, the Ministry states:

> . . . [T]he Assistant Commissioner has ordered the release of records that are subject to solicitor-client communication privilege. The following records reveal communications concerning the request or provision of legal advice between Crown counsel and the police, and based on the reasoning in Order PO-2494, ought not to be disclosed. These records are:
>
> > *Bottom of page 19 and top and middle of page 20*: Records communications between police officer and Crown Attorney, including specific advice provided by the Crown Attorney.

> *All of pages 41, 42 and bottom of page 66*: Records the substance of communications between the police and a Crown Attorney concerning the withdrawal of charges.
>
> *All of pages 47 and 48*: Records the substance of communications between the police and a Crown Attorney on issues including on the subject of disclosure.

I note that in its original representations the Ministry made only vague references to the notes containing solicitor-client communications between police officers and Crown counsel. It is only now, upon reconsideration, that the Ministry chose to be more specific as to which passages it believes contain this type of information. If the burden of proof in section 53 of the *Act* is to have any real meaning, it is incumbent upon institutions to provide specific and detailed representations during the course of the appeal, rather than waiting until the order is issued and providing them in support of a reconsideration request. Proceeding in that way serves only to frustrate the processes of this office, and undermine the purposes of the legislation.

However, having reviewed pages 19 and 20, I agree with the Ministry that they record discussions between the police and Crown counsel in the context of the seeking or giving of legal advice, namely the interpretation and application of a particular section of the *Criminal Code*. Accordingly, I have reached the preliminary conclusion that the following information is exempt under section 49(a) in conjunction with section 19:

> Lines 28-33 (i.e. the last six lines) of Record 19
>
> Lines 1-22 (i.e. all but the last 12 lines) of Record 20

Since I must be correct in the application of section 19 (see *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3rd) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31), an error in this regard constitutes a jurisdictional defect. Accordingly, the basis for reconsideration with respect to pages 19 and 20 would be section 18.01(b) of the *Code*.

I have reached different conclusions with respect to Records 41, 42, 47, 48 and 66. While many of the passages in these records record conversations between police and Crown counsel, there is insufficient evidence either on the face of the records, in the Ministry's initial or reconsideration submissions, or in the surrounding circumstances, to indicate that these specific conversations took place

in the context of the seeking or giving of legal advice within the meaning of the Supreme Court of Canada decision in *R. v. Campbell*. Accordingly, the principles in Order MO-1663-F apply here. Therefore, I am not persuaded that I erred within the meaning of any of the grounds for reconsideration in section 18 of the *Code*.

In summary, I uphold my decision that Records 41, 42, 47, 48 and 66 do not qualify for exemption under section 49(a)/19.

I have made a preliminary decision that the portions of Records 19 and 20 referred to above qualify for exemption under section 49(a)/19, subject to any submissions the appellant may make on this issue.

Records found not to be exempt under section 49(a)/19 on the basis that copies found their way into the Crown brief

In my Order PO-2494, I found that the Ministry could not rely on the portion of section 19 that reads "prepared by or for Crown counsel in contemplation of or for use in litigation" because:

- the police prepared the records for the purpose of investigating the matter and deciding whether to lay criminal charges;
- this purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation;
- the fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry;
- if I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the *Act*;
- if I were to accept that the branch 2 privilege applied in these circumstances, police forces across Ontario arguably would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege;
- this finding is consistent with court and IPC case law, including the 1999 decision of the Court of Appeal for Ontario in *General Accident Assurance Co. v. Chrusz*.

The Ministry submits that I erred in my findings, for the following reasons:

> Order PO-2494 was issued on August 14, 2006. On May 8, 2006, [the] Ontario Divisional Court released [*Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812].
>
> The [*Big*] *Canoe* decision significantly adds to the jurisprudence upholding the confidentiality of the Crown brief. However, the Assistant Commissioner failed to consider or to apply *Canoe* in Order PO-2494.
>
> . . . [I]n [*Big*] *Canoe*, the Court protected a Crown brief from being disclosed. In so doing, the Court made the following findings:
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> - The courts have protected the Crown brief from disclosure for a variety of policy reasons, which have been accepted "*at the highest judicial levels*". These reasons include the need to protect against the disclosure of police methods, as well as the names of persons giving information to the police (paragraphs 22-25).
>
> - Section 19 creates for [*Act*] purposes only, a statutory exemption power allowing the head to withhold documents such as Crown briefs from disclosure. Only the head of the institution can waive this exemption (paragraph 37).
>
> - Where records are sought that fit the description in the second branch of section 19, the test as to whether they ought to be disclosed is based on whether they fit within the definition in the section, and it is not based on any other extraneous considerations (paragraph 46).
>
> . . . [P]arts of Order PO-2494 contradict the findings in [*Big*] *Canoe*. For example:
>
> - The Assistant Commissioner does not adopt or even consider the reasons set out in [*Big*] *Canoe* for protecting the Crown brief from disclosure.

- The Assistant Commissioner held that there may be a legal distinction between records that form part of the Crown brief that are held in one place and those that might be held in another place. This distinction is not recognized in [*Big*] *Canoe*.

- The Assistant Commissioner relies on common law jurisprudence in interpreting the scope of litigation privilege (i.e., *Hodgkinson v. Simms*). [*Big*] *Canoe* makes it clear that the section 19 litigation privilege is created by statute, and has nothing to do with the common law litigation privilege.

- In paragraph 46 of [*Big*] *Canoe,* the court recognizes that the modern rule of statutory interpretation may result in the head of an institution having "*an overly broad discretion*" in deciding to withhold records under section 19. But as the court concludes, "*that is what the statute says*" . . . [T]his type of interpretation of section 19 should have been applied to Order PO-2494.

The Ministry provides the following additional representations:

> . . . [T]he IPC has not considered the harm that could result from its finding that Crown brief records can be privileged in one location and not the other. In effect, it could result in individual requesters being denied access to records that form part of the Crown brief that are held by the Crown Attorney, but not the police. This undermines the confidentiality of the Crown brief, and the privilege upon which it is based.
>
> Page 15 of the Order suggests that the police are changing their disclosure practices by exempting records from disclosure that form part of the Crown brief under section 19. The Ministry submits that it has not changed its practices. It has continued to exercise its statutory discretion under section 19 in respect of this request in the same manner as it has for the other requests to which it responds.
>
> The Ministry has appended a memorandum to these submissions that has been written by counsel at the Ministry of the Attorney General, and that confirms which records that have been ordered out, and that are part of the Crown brief.

I do not accept the Ministry's submissions on the applicability of *Big Canoe* for the following reasons:

- In *Big Canoe*, the requester made a request to the Ministry of the Attorney General for records that were contained in the Crown brief [see paragraph 2]. As I explained in detail in Order PO-2494, different considerations apply to a request to the police for its investigation records;

- In *Big Canoe*, the court did not comment or rule on whether records held by the police, copies of which may have found their way into the Crown brief held, were subject to section 19;

- I relied on the decision in *Hodgkinson v. Simms* only for the limited purpose of supporting the proposition that, in the general context of solicitor-client privilege, different considerations may apply to the same records held by different bodies in different locations for different purposes;

- The proposition that common law considerations are never capable of informing a proper interpretation of the statutory privileges under section 19 is not supported by *Big Canoe*. In fact, the court in *Big Canoe* took the opposite approach. The Court ruled that while "letters from Crown counsel to defence counsel" fall within the words of the branch 2 statutory exemption, they are not exempt under section 19 because they fall "outside of any reasonable 'zone of privacy'" [see paragraph 45]. The "zone of privacy" principal is not contained in the wording of branch 2 of section 19; rather, it is rooted in the common law. Thus, the court clearly considered the common law in interpreting and applying branch 2 of section 19.

- The Ministry states that *Big Canoe* refers to the need to protect the Crown brief in order to protect against disclosure of police methods, as well as the names of persons giving information to the police. The Ministry also states that I did not consider the harm that could result from my findings. As I stated in my Order PO-2494, to the extent that disclosure of police investigation records may affect valid law enforcement, safety or privacy interests, the *Act* contains robust and comprehensive exemptions at sections 14, 20 and 21 to address these concerns. A recent decision of the Supreme Court of Canada is consistent with this view. In *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39, the court held that the solicitor-client privilege exemption in the *Act*'s federal counterpart need not be interpreted so broadly as to permanently protect all material in the

> Crown brief, due to the existence of the law enforcement and safety exemptions at sections 16 and 17 of the federal statute.

Finally, the Ministry states that it has not changed its disclosure practices. In my decision I stated:

> . . . If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario . . .

I then cited a number of decisions in support of the proposition that police forces across Ontario, including the OPP, routinely disclose law enforcement investigation records without claiming section 19 (or its municipal counterpart). My statement was directed at the discrepancy between this routine practice across Ontario, and the Ministry's position in this particular case. Conversely, there was no evidence before me that police forces in the past have routinely claimed section 19 or its municipal counterpart for law enforcement investigation records.

Finally, the Ministry provides additional evidence to support its original submission that copies of the records in question made their way into the Crown brief. For the reasons cited above, whether or not copies found their way into the Crown brief does not impact my decision that section 19 is not applicable in these circumstances.

For these reasons, I conclude that I did not err in rejecting the Ministry's argument that records are exempt under section 49(a)/19 on the basis that copies found their way into the Crown brief. Accordingly, I do not uphold the Ministry's reconsideration request on this basis.

As my final rulings referred to above have disposed of some of the issues in this reconsideration request, the only records that remain at issue are portions of Records 19 and 20. I now turn to consider the Ministry's reconsideration request as it relates to those records and to a review of the appellant's representations.

Appellant's Representations

The appellant did not make any representations that specifically relate to pages 19 and 20 of the records.

More generally, the appellant submitted that the *Big Canoe* decision did not apply as the issues that the court dealt with were different from those that are involved in this appeal. The appellant states:

> Big Canoe vs. the Attorney General involved a requester who had been convicted of a crime. The appeal at hand involves a requester asking for material that found its way into a Crown brief involving criminal charges laid against her that should never have been laid had the police and prosecutors properly applied the provisions of the Criminal Code. The appellant contends the material that has found its way into a Crown brief involved a case that should never have existed and, therefore, should not be protected.
>
> …
>
> The appellant submits that dissemination of information contained in a Crown brief created by a questionable investigation and prosecution could lead to disclosure of undesirable police methods – and that would be a benefit to the citizenry.
>
> …
>
> The appellant suggests that the Crown brief is in danger of becoming a sacred dumping ground for anything the police and the prosecution do not wish to see the light of day, so that no one will ever be able to know the truth about what evolved from an investigation into a wrongful (or shameful, or malicious) prosecution.

Having carefully reviewed these records again and having reviewed the representations of the Ministry and the appellant, I confirm my preliminary findings and conclude that pages 19 and 20 record discussions between the police and the Crown counsel in the context of the giving or seeking of legal advice. Those discussions related to the interpretation and application of a particular section of the *Criminal Code* and are exempt under section 49(a) in conjunction with section 19. Accordingly, I find that the following information is exempt under section 49(a) in conjunction with section 19 of the *Act*:

> Lines 28-33 (i.e. the last six lines) of Record 19
> Lines 1-22 (i.e. all but the last 12 lines) of Record 20

ORDER:

1. I order that the stay issued on September 15, 2006 with respect to Provision 2 of Order PO-2494 be lifted.

2. I order the Ministry to disclose all of the records that were the subject of the stay and are referred to in Provision 2 of Order PO-2494, except for lines 28-33 (i.e. the last six lines) of Record 19 and lines 1-22 (i.e. all but the last 12 lines) of Record 20. The Ministry is ordered to disclose this information by sending a copy to the appellant by **January 19, 2007**.

3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: December 14, 2006
Brian Beamish
Assistant Commissioner