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

ORDER PO-2706

Appeal PA07-126

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 (Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*Act*) for "all records, notes, correspondence, e-mail messages and documents" to and from a named Assistant Crown Attorney (assigned Crown) for a specified time period relating to a *Criminal Code* prosecution matter involving the requester, who is a police officer.

In response to the request, the Ministry located responsive records totaling 126 pages. The Ministry denied the requester access to the records pursuant to sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (invasion of privacy) of the *Act*.

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

During the mediation stage of the appeal, the appellant confirmed that he was only pursuing access to pages 1 to 35, 116 to 121, 125 and 126 of the records.

Also during mediation, the Ministry issued a revised decision to the appellant. The revised decision indicated that the Ministry relied on the exemption at section 49(a) (discretion to refuse requester's own information) in conjunction with section 19 (solicitor-client privilege) of the *Act* to deny access to all of the records now at issue. The Ministry also claimed that disclosure of some of the records would constitute an unjustified invasion of privacy under section 49(b) of the *Act* (personal privacy). The Ministry, however, stated that it no longer relied on the exemption in section 13(1) of the *Act*.

The remaining issues in dispute were transferred to adjudication. The adjudicator previously assigned to this appeal commenced his inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry. The Ministry provided written representations in response. A Notice of Inquiry along with a copy of the Ministry's representations was then sent to the appellant. The appellant was given an opportunity to make written representations, which he did. A copy of the appellant's representations was sent to the Ministry who was given an opportunity to make reply representations. The Ministry did not provide reply representations.

This file was transferred to me for completion.

RECORDS:

The Ministry has withheld the following records pursuant to section 49(a) in conjunction with section 19 (solicitor-client privilege) and section 49(b) (personal privacy) of the *Act*:

1) Records representing communication between the assigned Crown and appellant's counsel

Page Numbers	Description of Records	Exemptions claims
1	Letter from Appellant's Counsel to the assigned Crown	Solicitor-client privilege
2	Letter from the assigned Crown to the Appellant's Counsel	Solicitor-client privilege and personal privacy
3	Fax cover sheet from the assigned Crown to the Appellant's Counsel	Solicitor-client privilege personal privacy
4-6	Fax Transmission Report and Letter from the assigned Crown to the Appellant's Counsel	Solicitor-client privilege and personal privacy
7-12	Duplicates of Letter from the assigned Crown to the Appellant's Counsel and fax transmission reports	Solicitor-client privilege and personal privacy
17	Email from the assigned Crown to Appellant's Counsel	Solicitor-client privilege
18	Email exchange between the assigned Crown and Appellant's Counsel	Solicitor-client privilege
19	Email exchange between the assigned Crown and Appellant's Counsel	Solicitor-client privilege
20	Email from the assigned Crown to Appellant's Counsel	Solicitor-client privilege
21	Email exchange between the assigned Crown and Appellant's Counsel	Solicitor-client privilege

2) Records prepared by third parties or representing communications between the assigned Crown and third parties

Page No.	Description of Records	Exemption
13	Fax from Duty Counsel	Solicitor-client privilege and personal privacy
14-15	Letter from a police agency to the assigned Crown and fax cover sheet	Solicitor-client privilege
16	Fax Cover Sheet from the assigned Crown to a police agency	Solicitor-client privilege
22	Email from a police agency to the assigned Crown	Solicitor-client privilege
23-25	Email exchange between the assigned Crown and police agency	Solicitor-client privilege and personal privacy
26-27	Email exchange between Crown Attorneys and assistants	Solicitor-client privilege
28	Email exchange between the assigned Crown and other Crown Attorneys and assistants	Solicitor-client privilege and personal privacy
29-30	Email exchange between the assigned Crown and Victim Witness Services	Solicitor-client privilege and personal privacy
31-32	Email exchange between Crown Attorneys	Solicitor-client privilege and personal privacy
33	Email from the assigned Crown to other Crown Attorneys	Solicitor-client privilege and personal privacy
34	Email from the assigned Crown to other Crown Attorneys	Solicitor-client privilege
35	Victim Input Form	Solicitor-client privilege and personal privacy

116-121	Crown brief form, pre-trial form, handwritten note, victim witness assistance program form and bail hearing information form.	Solicitor-client privilege and personal privacy
125- 6	Bail Hearing Information Form	Solicitor-client privilege and personal privacy

DISCUSSION:

To determine whether the exemptions at sections 49(a) or 49(b) of the *Act* apply to the records at issue, I must first decide whether the information at issue contains "personal information" and if so, to whom it relates.

PERSONAL INFORMATION

The term "personal information" is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except 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].

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

Representations of the parties

The Ministry's representations identify the following records as containing the "personal information" of both the appellant and other individuals:

- Correspondence between the assigned Crown and the appellant's counsel, pages 2 to 12
- Fax from duty counsel, on behalf of the complainant, page 13
- Email exchange between the assigned Crown and police agency, pages 23 to 25
- Email exchange between the assigned Crown and other Crown Attorneys, pages 28 to 32
- Email from the assigned Crown to other Crown Attorneys, page 33
- Forms and notes, pages 35, 116 to 121 and 125 to 126

The Ministry submits that the above-noted records contain the appellant's personal information as they relate to allegations of criminal wrongdoing by him. The Ministry submits that these records also contain the personal information of the complainant and civilian witnesses, in particular, the complainant's name, address, phone number along with information relating to her involvement in the police investigation and prosecution. With respect to information relating to civilian witnesses, the Ministry submits that their names appear with information explaining their involvement in the case against the appellant.

The appellant submits that the records at issue contain his personal information as defined in section 2(1) of the *Act*. The appellant does not dispute that some portions of the records also contain the "personal information" of the complainant or other civilian witnesses. In particular, the appellant states that he believes that the records may contain the complainant's name along with information relating to her former residential address and place of employment.

Neither of the parties claim that any of the information relating to the investigating police officers, police officer witnesses, appellant's counsel, duty counsel and staff from the Crown Attorney's Office contained in the records constitute "personal information" as defined in section 2(1) of the *Act*.

Finding and Analysis

The records at issue consist of communications between the assigned Crown and the appellant's counsel as well as correspondence between the assigned Crown and polices agencies, Victim Witness Services and duty counsel. Some of the records also capture communications between the assigned Crown and other Crown Attorneys.

Records identified by the Ministry as containing the personal information of the appellant and other individuals, pages 2-12, 13, 23-25, 28-32, 33, 35, 116-121 and 125-126

Having regard to the representations of the parties and the records themselves, I find that pages 2-12, 13, 23-25, 28-32, 33, 35, 116-121 and 125-126 contain the "personal information" of the appellant and other individuals.

In particular, the records contain information about the appellant's address and employment and criminal history. The information reveals something of a personal nature about the appellant and appears along with his name and badge number. In my view, this information constitutes the "personal information" of the appellant as defined in section 2(1)(a), (b), (c), (d) and (h) of the *Act*.

The records also contain the "personal information" of the complainant and civilian witnesses under section 2(1)(a), (b), (d), (e) and (h) of the *Act*. In particular, these portions of the records identify the complainant and civilian witnesses and describe information relating to their sex/gender, family status, employment, address and/or telephone number along with their personal views and/or opinions.

Other records, pages 1, 14-15, 16, 17-22, 26, 27 and 34

The appellant submits that the remaining records contain his "personal information". The Ministry did not specifically address this issue in its representations. The Ministry, however, raised the possible application of the discretionary exemption at section 49(a) in conjunction with section 19 (solicitor-client privilege) to the following records during mediation:

- Letter from appellant's counsel to Crown, page 1
- Letter and fax cover sheet exchanged between the Crown and police agency, pages 14 -15
- Fax transmission report, page 16
- Emails and email exchanges from Crown to appellant's counsel, police agencies, pages 17 – 22
- Emails between Crown Attorneys, pages 26, 27 and 34

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the solicitor-client privilege exemption would apply to the disclosure of that information.

Taking into consideration the Ministry's position that section 49(a) applies to the remaining records at issue, it appears that the Ministry and the appellant agree that pages 1, 14-15, 16, 17-22, 26, 27 and 34 contain information of a personal nature relating to the appellant. I have carefully reviewed these records and note that the appellant is often named in the subject heading or content of the emails and letters. In a few instances, reference is also made to the appellant's employment and/or badge number.

I note that a partial sentence found on page 18 contains information of a personal nature about the appellant's counsel and thus constitutes counsel's "personal information" as defined in section 2(1)(a) of the *Act*. In my view, this information is not responsive to the appellant's request as it does not relate to the Crown's prosecution and, as a result, I will not address it further in this order. For the sake of clarity, I will provide the Ministry with a highlighted copy of page 18 identifying the non-responsive information.

Having regard to the above, I am satisfied that pages 1, 14-15, 16, 17-22, 26, 27 and 34 are responsive to the appellant's request for information relating to his prosecution and thus contain his "personal information" as defined in section 2(1)(b), (c) and (h) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ SOLICITOR-CLIENT

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. It reads:

> 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.

Even if the information at issue falls under one of the listed exemptions, the institution must still exercise its discretion in deciding whether or not to disclose the information to the requester.

The Ministry has denied the appellant access to the records at issue pursuant to the discretionary exemption in section 49(a), in conjunction with section 19 of the *Act*. The relevant portion of section 19 reads:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege
>
> (b) 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. The Ministry submits that the statutory privileges in Branch 2 apply to all of the records at issue.

Branch 2: statutory privileges

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 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."

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.)).

Representations of the parties

The Ministry's representations state:

> The Ministry claims the s.19(b) exemption for all the requested records, as all those records were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." The requested records were clearly prepared in contemplation of or for use in litigation. They include communications between the prosecuting Crown attorney and various other individuals, as well as a "Victim Input Form", "Bail Hearing Information", and so on. The records clearly form part of the Crown's litigation brief.
>
> The need to "protect the Crown brief and its sensitive contents from disclosure … continues long after the litigation for which the contents were created" [*Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2006), 80 O.R. (3d) 761 at para. 37 (Div. Ct.).] … For this reason, the Court of Appeal for Ontario has held that the statutory exemption in s.19(b) does not end at the conclusion of litigation, but rather is a "permanent exemption" with no "temporal limit." [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 at para. 14 (C.A.). While the general principle in civil litigation is that privilege ends with the litigation for which the information was prepared, this general principle has no application when construing s.19(b) of the *Act*. The exemption in s. 19(b), properly interpreted, reflects the general principle that there should be no automatic *public* access to Crown counsel's litigation work product even after the termination of the criminal proceedings.
>
> The records prepared by or for Crown counsel "in contemplation of or for use in litigation" in the criminal law context, by their very nature, deal with sensitive matters, and these matters continue to be sensitive long after a prosecution is completed. To release this information would be contrary to the plain wording and express intent of s. 19(b) to exempt such records from public access.

The appellant makes the following three arguments in his representations:

- the records representing communication between his counsel and the Crown's office are not subject to the statutory solicitor-client privilege exemption under Branch 2;

- any statutory litigation privilege that may have applied to the records at issue is now expired; and

- if the records meet Branch 2 of the test, the Ministry has waived any privilege to records between the Crown's office and his counsel.

Findings and Analysis

The Ministry's position is that the records at issue are exempt under Branch 2 as they were prepared by or for Crown counsel for use in giving legal advice and/or in contemplation of or for use in litigation. In other words, the Ministry submits that both the statutory solicitor-client communication and litigation privileges apply to the information at issue.

The Ministry submits that there is no "temporal limit" to the statutory litigation privilege. The appellant submits that the Ministry can not rely on the statutory litigation privilege by reason that the prosecution matter has concluded. In support of his position, the appellant refers to *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.). The *Blank v. Canada* decision, however, does not support the appellant's position as it holds that the common law litigation privilege, not statutory litigation privilege, may be lost through termination of litigation or the absence of reasonably contemplated litigation.

In fact, the termination of litigation does not affect the application of statutory litigation privilege under Branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) and *Ontario (Attorney General) v. Big Canoe* (2006) O.J. No. 1812 (Div. Ct.)] As the Ministry is correct on this issue, I will go on to determine whether the statutory privileges apply to the records at issue.

First, I will consider whether the statutory litigation privilege and/or statutory client privilege apply to the records representing communications between the assigned Crown and the appellant's counsel.

Then, I will consider whether the statutory litigation privilege and/or statutory client privilege apply to the records prepared by third parties or representing communications between the assigned Crown and third parties.

a) Records representing communications between the assigned Crown and the appellant's counsel, pages 1-12 and 17-21

Statutory Litigation Privilege

The appellant argues that if the statutory litigation privilege is not time-limited, the privilege can not apply to the emails, faxes and correspondence exchanged between the Crown's office and his counsel. In other words, the appellant argues that records representing communications between the assigned Crown and his counsel can not qualify for exemption under the statutory litigation privilege as these records do not constitute privileged communications.

In *Ontario (Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, the Divisional Court recently considered whether records prepared by opposing counsel were exempt under Branch 2. The Divisional Court found that such records are not exempt under Branch 2 and stated:

> I see no basis to conclude that the IPC [Information and Privacy Commissioner of Ontario] erred in holding that the letter from plaintiff's counsel and the list of undertakings … were not exempt from disclosure. These records were prepared by opposing counsel. At common law, communications between opposing parties are not considered privileged (*Flack v. Pacific Press Ltd.* (1971), 14 D.L.R. (3d) 334 (B.C.C.A.) at 358). Nor are these records part of the work product of Crown counsel, prepared by it or for it by third parties, in order to assist Crown counsel in the litigation. Therefore, they are not privileged under Branch 2 of s.19.
>
> This conclusion is consistent with the decision of this Court in *Ontario (Attorney General) v. Big Canoe*, supra, which held that letters from defence counsel to Crown counsel in the course of a prosecution were not "prepared … for Crown counsel … for use in litigation".

The Divisional Court in *Ontario (Attorney General) v. Big Canoe* considered the issue of whether letters between Crown counsel and defence counsel fell within the definition of prepared by or for Crown counsel "in contemplation of or for use in litigation." Like the appellant, the requester in that appeal sought access under the *Act* to records relating to the criminal prosecution against him. The Ministry, in that appeal, claimed that the records were exempt under section 19 of the *Act*. The records at issue in that appeal fell under two categories - letters exchanged between Crown counsel and the requester's defence counsel and documents created for Crown counsel for inclusion in the Crown brief.

The Divisional Court found that all of the records, but for the letters prepared by defence counsel to Crown counsel, clearly fit the definition in Branch 2. The Divisional Court held that a finding that the letters from defence counsel fell within the definition would have been a stretch of the words "prepared … for Crown counsel … for use in the litigation".

In addition, although the Divisional Court found that the letters prepared by the Crown counsel and provided to defence counsel fell within the definition of being "prepared … by Crown counsel … for use in the litigation", it found that disclosure of these letters to the requester was reasonable as they were "outside any reasonable zone of privacy".

Having regard to the appellant's submission, the records themselves and the reasoning in *Ontario (Correctional Services) v. Goodis* and *Ontario (Attorney General) v. Big Canoe*, I find that the statutory litigation privilege in Branch 2 does not apply the emails, faxes and correspondence from the appellant's counsel to the assigned Crown on the basis that communications of this nature are not considered privileged and do not fit the definition of being "prepared … by Crown counsel … for use in the litigation. In addition, the correspondence prepared by the appellant's counsel does not form part of the work product of the assigned Crown as they were not prepared by him in order to assist him in the litigation.

Turning now to the emails, faxes and correspondence that was prepared by the assigned Crown and sent to the appellant's counsel, in my view, these records fall outside the ambit of the statutory litigation privilege in Branch 2. In this regard, I adopt the Divisional Court's reasoning in *Ontario (Attorney General) v. Big Canoe* and find that, though the assigned Crown's emails, faxes and correspondence to the appellant's counsel fit the definition of being "prepared by … Crown counsel … for use in litigation", these records are outside of any reasonable "zone of privacy" as they do not constitute the assigned Crown's work product or reveal information relating to his investigation and/or research in preparation of litigation.

Having regard to the above, I find that none of the records representing communications between the assigned Crown and the appellant's counsel qualify for exemption under the statutory litigation privilege under Branch 2.

I will now go on to consider whether these same records qualify for exemption under the statutory solicitor-client privilege exemption.

Statutory solicitor-client communication privilege

As noted above, the statutory solicitor-client privilege applies to a record that was "prepared by or for Crown counsel for use in giving legal advice." I have carefully reviewed pages 1-12 and 17-21 and am satisfied that these records do not contain legal advice being sought from or given by the assigned Crown, nor were they prepared by or for Crown counsel for use in giving legal advice to a client. Rather, these records represent the type of communications one would expect to be exchanged between a prosecuting Crown Attorney and defence counsel preparing for trial. In particular, the assigned Crown and the appellant's counsel advise one another of developments, make inquiries and provide information about their schedules. In some cases, the assigned Crown copied his communications to the appellant's counsel to police agencies or other Crown Attorneys.

Having regard to the above, I find that the statutory solicitor-client privilege does not apply to pages 1 -12 and 17- 21.

As I have found that the statutory litigation and solicitor-client privilege exemptions do not apply to the records representing communication between the assigned Crown and the appellant's counsel, it is not necessary for me to consider the appellant's submission that, had these records qualified for exemption under Branch 2, any privilege had been waived by the Ministry.

b) Records prepared by third parties or representing communications between the assigned Crown and third parties, pages 13-16, 22-35, 116-121 and 125-126

Statutory Litigation Privilege

These records consist of forms and notes as well as emails, faxes and correspondence between the assigned Crown and police agencies, duty counsel, Victim Witness Services and other Crown Attorneys. In my view, these records were prepared by the assigned Crown or for him by third parties in order to assist him in the litigation. Accordingly, I find that the statutory litigation privilege exemption applies to these records.

In making my decision, I also considered the appellant's submission that the absurd result principle applies to the records at issue. The appellant submits that he already has knowledge of the withheld information by reason of it having been provided to him or him being present when the information was collected.

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]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The appellant submits that the information contained in records prepared by third parties or represent communications between the assigned Crown and third parties are already within his knowledge as a result of the significant number of documents provided to him and his counsel through pre-trial disclosure. The appellant also states that some of the records, such as the bail hearing information form, were created when he was present in court or were read aloud in court.

In support of his position, the appellant attached a copy of a blank form to his representations. The appellant submits that the information sought in the blank form is the same information that is contained on the bail hearing information form. The appellant submits that he already has knowledge of the information to be completed in the blank form, such as the complainant's former residential address and place of employment.

In my view, the appellant's submission falls drastically short of demonstrating that the records I found exempt under the statutory litigation privilege are clearly within his knowledge. In fact, the appellant's submissions suggest the opposite. The only documentary evidence the appellant provides in support of his position that the absurd result principle applies to the information at issue is a blank report which he claims contains the same information contained in the completed bail hearing information form at issue. Not only are the forms different, they do not record the same information.

Even if I accept the appellant's submission that at some time during the Crown's prosecution the information contained in the records was "read aloud" or provided to him, so that he was made aware of the complainant's allegations, I am not satisfied that the records I found exempt under the statutory litigation privilege are clearly within his knowledge. For example, there is no evidence on the face of these documents to suggest that they were copied and shared with the appellant or his counsel during the Crown's prosecution. Even if I had found the information to be within the appellant's knowledge, I would have had to consider the purpose of the exemption before applying the absurd result principle, as noted above. In the case of section 19, I note that solicitor-client privilege is an important value carefully guarded by the Supreme Court of Canada. (*Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209).

For the reasons stated above, I find that the absurd result principle has no application to information found at pages 13-16, 22-35, 116-121 and 125-126.

As this information qualifies for exemption under the statutory litigation privilege, it is not necessary that I also consider whether these records are also exempt under the statutory solicitor-client privilege exemption under Branch 2.

Summary

The Ministry claims that the statutory litigation privilege and statutory solicitor-client communication privilege under section 19 of the *Act* apply to all of the records at issue.

I found that the only records exempt under section 19 are those prepared by third parties or represent communications between the assigned Crown and third parties located at pages 13-16, 22-35, 116-121 and 125-126 under the statutory litigation privilege under Branch 2. As a result of my finding, it is not necessary that I also consider whether the personal privacy provisions of the *Act* apply to this information. I will however consider whether the Ministry properly exercised its discretion to deny the appellant access to his own personal information contained in these records under section 49(a) of the *Act*.

I also found that the records representing communication between the assigned Crown and the appellant's counsel found at pages 1 to 12 and 17 to 21 do not qualify for exemption under the statutory solicitor-client privilege or statutory litigation privilege under Branch 2. The Ministry did not raise the application of any other exemption to the information on pages 1, 17 to 21 and I found that these records, but for the non-responsive portion on page 18, do not contain the "personal information" of other individuals. Accordingly, I will order the Ministry to disclose pages 1, 17, 18 (in part), 19 to 21 to the appellant.

The Ministry, however, submits that disclosure of pages 2 to 12 would constitute an unjustified invasion of privacy as it contains the personal information of both the appellant and another identifiable individual. Accordingly, I must determine whether the information contained in pages 2 to 12 is exempt under section 49(b) of the *Act*.

PERSONAL PRIVACY

The Ministry claims that disclosure of the records containing the "personal information" of the appellant and other individuals would result in an unjustified invasion of personal privacy under section 49(b). The Ministry also claims that these records are exempt under section 49(a) (solicitor-client privilege). I found that all of these records, but for pages 2 to 12, are exempt under section 49(a). Accordingly, I need only consider whether disclosure of pages 2 to 12 would result in an unjustified invasion of personal privacy.

The remaining information at issue found at pages 2 to 12, consists of:

- Letter from the assigned Crown to the appellant's counsel and fax cover sheet, page 2-3

- Fax transmission report and letter from the assigned Crown to the appellant's counsel, page 4-6

- Fax Transmission Report to police agencies copying letter from the assigned Crown to the appellant's counsel, pages 7-12

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.

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

If the information fits within any of paragraphs (a) to (f) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The only exception that could apply in the circumstances of this appeal is 21(1)(f) (disclosure does not constitute an unjustified invasion of personal privacy).

Section 21(4) refers to certain type of information whose disclosure does not constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure of the information is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The appellant has not claimed that any of the exceptions listed in paragraphs (a) to (d) apply in the circumstances of this appeal and I am satisfied that none of the exceptions apply.

Section 21(3) lists the type information whose disclosure is presumed to constitute an unjustified invasion of personal privacy, if any of the 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 21(3). The Ministry has not claimed that any of the presumptions found at paragraphs (a) to (h) apply to pages 2 to 12 and I am satisfied that none of the presumptions apply.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) [Order P-239].

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.

Section 21(2): factors and considerations

The Ministry has claimed that the factors favouring non-disclosure at paragraphs (e), (f), (h) and (i) apply in the circumstances of this appeal. The appellant, in turn, submits that the factor favouring disclosure at paragraph (d) applies to the circumstances of this appeal. The relevant sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

21(2)(d): fair determination of rights

The appellant submits that the information at issue is relevant to fair determination of his rights relating to a pending civil claim. The Ministry claims that section 21(2)(d) does not apply to the information at issue as the criminal proceedings commenced against the appellant were terminated. For section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

I am satisfied with the appellant's evidence that he has filed a civil claim against various police agencies. Presumably, the appellant seeks damages as a result of charges being laid against him by the police which were ultimately withdrawn by the Crown's office. Accordingly, I am satisfied that he is seeking to enforce a legal, as opposed to a moral right. As I have not been presented with any evidence to the contrary, I am also satisfied that the appellant's civil claim remains ongoing.

Pages 2 to 12 consist of two letters the assigned Crown wrote to the appellant's counsel. The first letter is one page and is found on pages 2 and 3 along with its fax cover page. The second letter consists of two pages and is duplicated (along with fax transmission reports) and is found on pages 4 to 12. The information exchanged between the assigned Crown and the appellant's counsel relate to matters arising during the prosecution. In my view, this information relates to the Crown's prosecution, not the police's decision to arrest and charge the appellant. Accordingly, this information has no bearing on the determination of the appellant's civil claim against various police agencies.

Having regard to the above, I find that this factor has no application in the circumstances of this appeal.

21(2)(e): pecuniary or other harm

The appellant submits that he has not commenced any civil actions against the complainant and to his knowledge, the time to do so has expired. The Ministry submits that disclosure of the information at issue would result in the complainant suffering "psychological harm". The Ministry, however, did not provide detailed representations demonstrating how disclosure of the information at issue would result in psychological harm. For the factor at section 21(2)(e) to apply, the Ministry must demonstrate that disclosure of the information at issue would result in the harm contemplated and explain why the harm would be unfair.

In my view, the Ministry has failed to adduce sufficient evidence in support of its position. As a result, I find that the factor at section 21(2)(e) is not relevant in this appeal.

21(2)(f): highly sensitive

To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518].

The Ministry submits that the complainant's personal information is highly sensitive as it relates to an alleged crime the complainant claims was committed by the appellant. Accordingly, the Ministry takes the position that it is reasonable to expect that disclosure of the information at issue would cause the appellant significant personal distress. The appellant, in his representations, questions how the information at issue could be considered highly sensitive when he is already aware of the complainant's former residential address and place of employment. The personal information at issue relating to the complainant, however, does not make reference to her former residential address or place of employment but relates to other matters.

I have carefully reviewed the personal information relating to the complainant contained in pages 2 to 12 and am satisfied that the information is highly sensitive as it describes information the complainant provided to the police during the Crown's prosecution. The information was then communicated to the assigned Crown who shared it with the appellant's counsel while the matter was still before the courts. In my view, it is reasonable to expect that disclosure of this information, years after the Crown terminated its prosecution, would cause significant personal distress to the complainant.

Accordingly, I find that this factor is highly relevant and give it significant weight.

21(2)(h): supplied in confidence

The Ministry also submits that the personal information relating to the complainant contained in the information at issue was supplied by her in confidence. I agree and note that the letters found at pages 2 to 12 contain information the complainant provided to the police who in turn shared the information with the assigned Crown. Again, the appellant, in his representations claim that

he is already aware of the complainant's former residential address and place of employment. This information, however, is not contained in pages 2 to 12.

Having regard to the above, I am satisfied that the information at issue was supplied in confidence and find that this factor is highly relevant and give it significant weight.

21(2)(i): unfair damage to reputation

The Ministry submits that based on the "nature of the information contained in these records, it is clear that their disclosure could unfairly damage the reputation [of] the complainant". The appellant submits that taking into account the wealth of information already in his possession relating to the Crown's case, the Ministry's suggestion that the reputation of any person referred to in the requested records would be harmed is absurd. The appellant, however, goes on to state that "… the complainant stated an unwillingness to participate in the criminal prosecution, essentially damaging her own reputation, in the process."

In my view, the appellant's statement demonstrates the Ministry's point - that disclosure of the specific information the complainant provided to the police during the prosecution, which was subsequently abandoned by the Crown, could result in assumptions and allegations that could result in unfairly damaging the reputation of the complainant.

Having regard to the above, I am satisfied that this factor is relevant and give it significant weight.

Summary

As I have found that the factor in favour of disclosure in section 21(2)(d) raised by the appellant has no application to the information remaining at issue, I find that disclosure of the personal information relating to the complainant would constitute an unjustified invasion of privacy taking into consideration the factors at paragraphs (f), (h) and (i), and thus would constitute an unjustified invasion of personal privacy under section 49(b).

In my view, the complainant's personal information can be reasonably severed from the pages 2 to 12. Accordingly, the exemption at section 49(b) only applies to the portions of pages 2 to 12 which contain the "personal information" of the complainant and the remaining information should be disclosed to the appellant. For the sake of clarity, I will provide the Ministry with a highlighted copy of pages 2 to 12 with this Order.

As previously stated, despite a finding that information falls within the scope of section 49(b) the Ministry may exercise its discretion to disclose the information to the appellant.

Accordingly, I will go on to consider whether the Ministry properly exercised its discretion to deny the appellant access to the portions of pages 2 to 12 I found qualify for exemption under section 49(b) of the *Act*.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even though it may qualify for exemption. Because sections 49(a) and (b) are discretionary exemptions, I must also review the Ministry's exercise of discretion in deciding to deny access to the information. As previously stated, this involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry 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 these cases, I may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the Ministry [section 54(2)].

The Ministry submits that it properly exercised its discretion to deny access to the information I found exempt under section 49(a) and (b) and states that it:

> … took into account several factors, including the highly sensitive and confidential nature of the records requested, which contain the personal information of the appellant and the complainant, as well as several witnesses. The Ministry also considered the chilling effect releasing the documents would have on the Crown's ability to communicate with police and defence counsel.

The appellant did not specifically address this issue in his representations. The appellant's representations, however, suggest that he has a right to access the withheld information as it relates to the Crown's prosecution against him and that the information contained in the records has already been provided to him, albeit in another form.

With respect to the information I found exempt under section 49(b) (personal privacy), I am satisfied that the Ministry has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold this information. In particular, it appears that the Ministry considered the sensitive nature of the information at issue and the circumstances of the appeal. It also appears that the Ministry took into account that one of the purposes of the *Act* is that the privacy of individuals should be protected.

With respect to the information I found exempt under section 49(a) (solicitor-client privilege), I am satisfied that the Ministry has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold this information. In particular, it appears that the Ministry took into account the confidential nature of the information and the extent to which it is significant and sensitive. It also appears that the Ministry took into consideration that the records contained sensitive "personal information" relating to the complainant and civilian witnesses.

Accordingly, I conclude that the Ministry properly exercised its discretion in deciding to withhold the information I have not ordered to be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose those portions of the records that I have found are not exempt under sections 49(a) and 49(b) of the *Act* by **September 5, 2008**.

2. I uphold the Ministry's decision to withhold the remaining portions of the records at issue. For the sake of clarity, I have highlighted the portions of these records that should **not** be disclosed in the copy of the records enclosed with this Order.

3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original Signed by: July 31, 2008
Jennifer James
Adjudicator