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

ORDER PO-2757

Appeal PA07-46-2

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the Crown Brief, an Agreed Statement of Facts and a List of Exhibits relating to a specified trial. The requester represents the sister of a murder victim and the records pertain to the trial of the individual charged in his murder. A similar request was made to the Hamilton Police Services Board, the police service that conducted the murder investigation, which resulted in the issuance of Order MO-1901 on January 26, 2005. In that decision, I upheld the Police decision to deny access to the vast majority of the records at issue on the basis that their disclosure would result in an unjustified invasion of the personal privacy of a number of identifiable individuals, including the requester's deceased brother.

On June 22, 2006, the *Act* was amended to broaden the right of access by close personal relatives to the personal information of deceased persons in situations where compassionate grounds exist. Following the enactment of this provision, the requester submitted the present request to the Ministry of the Attorney General. She also submitted a further request to the Hamilton Police Service, which resulted in an appeal to this office that led to Order MO-2306.

The Ministry located a number of responsive records and denied access to them on the basis that, in the case of the Crown brief material, it is exempt under section 19 of the *Act* (solicitor-client privilege) and section 21(1) of the *Act* (invasion of privacy), with reference to the presumption in section 21(3)(b). Access to the Agreed Statement of Facts and Exhibit List was denied under section 22(a) on the basis that they are publicly-available in the Court file relating to this prosecution. The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the Ministry created an index of records, which was shared with this office and the appellant. The Ministry also clarified that it is relying on section 19(b) of the *Act* to deny access to the records in the Crown brief.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I initially solicited the representations of the Ministry through the issuance of a Notice of Inquiry. The Ministry provided submissions which were shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. The appellant also provided me with representations, which were also shared in their entirety with the Ministry.

On December 13, 2007, the appeal file was then put on hold by this office pending the outcome of an application for judicial review of the decisions in Orders PO-2494 and PO-2532-R. These decisions addressed the application of the solicitor-client privilege exemption in section 19 to records comprising a Crown Brief in a criminal proceeding. Because the records at issue in that application for judicial review are similar in nature to those at issue in this appeal, I determined that it was necessary for me to put this appeal file on hold, pending the Divisional Court's consideration of the application.

In Order PO-2733, Senior Adjudicator John Higgins addressed in detail the application of section 19 to records contained in a Crown Brief. Because the records in that appeal were similar in nature to those in the present appeal, I invited the parties to comment on the application of Order PO-2733 to the issues before me. I have now received submissions from both parties. As a

result, I will proceed to adjudicate the issues extant in Appeal PA07-46-2, despite not having the benefit of the reasoning of the Divisional Court in the pending application for judicial review.

RECORDS:

The records at issue in this appeal consist of 1168 pages comprising a 3-page narrative, a large number of occurrence reports, witness summaries, photographs, transcripts, statements taken from the accused, various police officers and civilians, police officer notebook entries, related occurrence reports, continuity registers, audio and video tape lists, photographic line-ups and various other notes and press information relating to the murder trial.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* states as follows:

> 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; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Subsection (c) has no application in the circumstances of this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2: statutory privileges

Branch 2 of section 19 arises from sections 19(b) and (c). Under section 19(b), it 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.

The Ministry argues that the documents at issue, with the exception of the statement of facts and list of exhibits, comprise the Crown Brief in this matter and that it falls within the ambit of Branch 2 litigation privilege aspect of the section 19 exemption. It goes on to submit that the privilege which exists in documents found to be exempt under Branch 2 is permanent in nature and remains in force notwithstanding the conclusion of the criminal matter. I agree with the Ministry that the majority of the documents at issue constitute the Crown Brief.

As indicated above, in Order PO-2733 Senior Adjudicator Higgins reviewed in great detail the most recent judicial consideration of the section 19 solicitor-client privilege exemption and how it applies to various types of records, including the contents of the Crown Brief. I will quote extensively from his decision because the issues addressed and the principles referred to are equally applicable to the present case, which also involves an appeal from a decision of the Ministry to deny access to the contents of a Crown Brief. At page 4 of his decision, the Senior Adjudicator begins his discussion of the application of the Branch 2 statutory privilege to the contents of a Crown Brief as follows:

> A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. In *Ontario (Ministry of the Attorney General) v. Big Canoe* (2002), 67 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.), ("*Big Canoe* 2002") Justice Carthy applied branch 2 of section 19 to Crown brief materials. In doing so, he observed as follows:
>
> > In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the Freedom of Information Act and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request. [para. 14]

Earlier in the judgment, Justice Carthy rejected an interpretation of branch 2 that would end its application upon the termination of litigation, as would occur under common law litigation privilege. He found that "the intent was to give Crown counsel permanent exemption. … The error made by the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit." Thus, if branch 2 applies to a record, that record remains exempt even after the litigation concludes.

Subsequently, in *Ontario (Attorney General) v. Holly Big Canoe* (2006), 80 O.R. (3d) 761, [2006] O.J. No. 1812 (Div. Ct.), ("*Big Canoe* 2006") Justice Lane considered the application of section 19 to the Crown brief. He stated:

> The scheme of the Act clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth. … [para. 23]
>
> The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37]
>
> 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. [paras. 44, 45]

Justice Lane also found that branch 2 did not apply to letters between the Crown and defence counsel, for which there was no "zone of privacy" (see para. 45 of the judgment). He rejected the view that branch 2 did not apply to records which were not originally privileged, stating that "in my view this is irrelevant. The issue is not common law privilege, but whether the records meet the description in the second branch of section 19."

P(D.) v. Wagg sets out a screening process where a party seeks to use the Crown brief in a subsequent civil proceeding. In *Big Canoe* 2006 (cited above), Justice Lane expressly comments on *Wagg* and alternative access:

> The test is the definition in the section. It may be thought that this gives the head an overly broad discretion, but in my view that is what the statute says. Nor does the exercise of that discretion to withhold end the requester's opportunity to obtain the documents he seeks. An application under FIPPA is not the only route to obtain the Crown brief. Where relevant, the Crown brief will be available to parties to litigation via the court, subject only to the *Wagg* screening and without reference to FIPPA.

From these two judgments, it appears that the contents of the Crown brief are, generally speaking, exempt under branch 2. Based on a third judgment of the Divisional Court, *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289, however, it appears that there may be an exception to this view for some records copied for inclusion in the Crown brief.

At paragraphs 65 and 66 of the *Goodis* judgment, Swinton J. (writing for the Court) stated:

> *I need not determine whether the Ministry is correct in the submission that branch 2 protects any document simply copied for inclusion in the Crown brief*. The Adjudicator appropriately

> applied the test in *Nickmar* and concluded that *the records related to the fact-finding and investigation process of counsel in defending the Ministry in civil actions*. I see no basis to interfere with his conclusions.
>
> The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. *The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief*. [Emphasis added]

The Divisional Court's case reference in the above-quoted passage is to *Nickmar Pty Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) holding that *copies* of non-privileged documents might become privileged if they were the result of *selective* copying or the result of research or *the exercise of skill and knowledge on the part of the solicitor*. As Swinton J. observed, the Supreme Court of Canada suggested a preference for this approach in *Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39, where it stated:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that *assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect*. (at para. 64) [Emphasis added]

Two principles emerge from the Divisional Court's judgment in *Goodis* and the authorities to which it refers, as follows:

1. records related to the fact-finding and investigation process of counsel and resulting from selective copying, research or the exercise counsel's skill and knowledge *would* fall within branch 2 of the exemption; and

2. branch 2 does *not* reach back to original records in the hands of other parties solely on the basis that they have been copied for inclusion in the Crown brief.

In my view, the import of the two *Big Canoe* decisions I have cited, and the *Goodis* decision, is clear. The contents of the Crown brief in this case are exempt under branch 2 of section 19 as having been prepared by or for Crown counsel in contemplation of, or for use in, litigation. I find that branch 2 of the section 19 exemption applies to the records for which the Ministry has claimed it, all of which are properly viewed as part of the Crown brief. The following further two points are essential to explain this finding.

First, much of the Crown brief in this case consists of copied materials provided by the Police to assist with the prosecution. It is important to note that these copies of original Police records, selected and forwarded by the Police to assist the Crown, are the foundation of the Crown brief. On this basis, they qualify as records "prepared … for Crown counsel … in contemplation of or for use in litigation", and are exempt under branch 2. In this regard, they differ from records simply copied for inclusion in the Crown brief, and do not need to qualify as "resulting from selective copying, research or the exercise counsel's skill and knowledge" under the rule in *Nickmar* in order to be exempt under branch 2.

Second, other than the copies of records provided by the Police, the remaining records at issue were clearly prepared "by or for Crown counsel … for use in litigation" and qualify for exemption under branch 2 on that basis. Accordingly, it is not necessary to establish that they were copied using counsel's "skill and knowledge." My decision that the records at issue are exempt under branch 2 does not affect the exempt or non-exempt status of any original records in the hands of the Police.

In that regard, it is important to distinguish the records at issue here from those at issue in two other orders, both of which are the subject of pending applications for judicial review. In Order PO-2494 (reconsidered in Order PO-2532-R but unchanged on this point), Assistant Commissioner Brian Beamish found that section 19 did not apply to police records on the basis that copies might be found in the Crown brief. He stated:

> With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.
>
> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. 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.

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

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.

There is no question that the *Act* contains provisions that protect the process where the police investigate potential violations of law and decide whether to lay criminal charges. This protection is found primarily in section 14 of the *Act*, the comprehensive "law enforcement" exemption.

However, in this case, the Ministry does not rely on section 14 of the *Act*.

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. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The broad rationale of public accountability underlying freedom of information schemes . . . requires some degree of openness with respect to the conduct of law enforcement activity . . . (p. 294)

Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege.

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions).

Accordingly, the police have used their discretion to disclose records where appropriate. 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 [see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (i.e., the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (i.e., investigation files held by the police). However, courts have made findings of this nature with respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), the majority of the court stated:

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not. [emphasis added]
>
> …
>
> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

This approach was also applied in Order PO-2498, which is, like Order PO-2494, subject to an application for judicial review. As noted above, it appears to be consistent with the approach taken by Swinton J. in *Goodis*.

> Accordingly, based on the approach taken in *Big Canoe* 2002, *Big Canoe* 2006 and *Goodis*, I conclude that among other records capable of falling within its terms, branch 2 of the exemption exists to protect the Crown brief from being accessible to the public "upon simple request" and thus provides a form of blanket protection for prosecution records in the hands of Crown counsel, including copies of police records, without the need for showing interference with a particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context.

The appellant's representations focus mainly on the appropriateness of disclosing the information in the Crown Brief to the appellant on compassionate grounds in order to enable her to have "closure" and to "move on" through a better understanding of the circumstances surrounding the death of her brother and the conviction of those responsible. I addressed these arguments at they relate to the application of section 14(4)(c) in an earlier appeal involving the appellant and the Hamilton Police in which she sought access to the Police investigation records relating to her brother's murder.

In the appeal before me, as I have noted previously, the request was submitted to the Ministry of the Attorney General and the responsive record is the Crown brief. I am not dealing with a request for original records in the hands of the Police. For the reasons stated above, I find that branch 2 of section 19 applies to the records for which the Ministry claims it.

I will now consider whether section 22(a) applies to the records for which the Ministry does not claim section 19.

INFORMATION PUBLISHED OR AVAILABLE

Section 22(a) of the *Act* states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

The Ministry claims this exemption for the exhibit list, arguing that it forms part of the Court file in this matter which can be accessed, upon payment of the required fees, in the local Court office where the murder trial in question took place. It also indicates that the agreed statement of facts was read into the record in open court during the murder trial. The Ministry submits that a transcript of the trial is available to any member of the public upon payment of the required fees and that the transcript would include a complete version of the agreed statement of facts, as it was read into the record of the proceedings.

The appellant indicates that she "has made an effort to seek the Statement of Facts and the Exhibit List from the courthouse, since they are publicly available and only 3 pages in length." On this basis, it would appear that the appellant acknowledges that these documents are available from the local Court office upon payment of a fee.

I find that the Ministry has established that the Statement of Facts and the Exhibit List are available to the public generally, through a regularized system of access, as is required under section 22(a). In this case, upon payment of a fee, both documents can be accessed at the local Court office where the murder trial took place, a fact that appears to be acknowledged by the appellant. This system of access is available to anyone and a pricing structure exists for any

member of the public who wishes to obtain access to these documents. As a result, I find that they qualify for exemption under section 22(a).

ORDER:

I uphold the Ministry's decision to deny access to the responsive records and dismiss the appeal.

Original signed By: January 27, 2009
Donald Hale
Adjudicator