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

ORDER PO-2801

Appeal PA08-95

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's file relating to an alleged incident involving the requester and a subsequent peace bond application initiated by a private individual under section 810 of the *Criminal Code*.

The Ministry denied access to the responsive records, citing the application of the exemptions in sections 21(1) (personal privacy), 14(2)(a) (law enforcement report) and 19(a) and (b) (solicitor-client privilege) of the *Act*. In support of its section 21(1) exemption claim, the Ministry cited the application of the presumption in section 21(3)(b) (investigation into violation of law).

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

During the course of the mediation stage of the appeal process, the Ministry also raised the application of the exemptions in sections 49(a) and (b) of the *Act* on the basis that the records at issue contain information relating to the requester, as well as other individuals. The Ministry also prepared an Index of Records and provided the appellant with a copy of it. The Ministry advised that it would continue to rely on all of the exemptions listed in the Index of Records to withhold all of the records at issue in this appeal.

Following discussions with the Ministry during the mediation stage, the appellant advised that he did not wish to pursue access to the following records: pages 1 to 12, 19 to 29, 35 and 50 to 52. The Ministry subsequently confirmed that pages 38 to 49 are already in the appellant's possession and that pages 31 to 34 are duplicates of pages 40 to 43. Accordingly, the aforementioned pages of records are no longer at issue in this appeal. The appellant confirmed that he is pursuing access to the balance of the records.

The parties were unable to resolve the appeal during mediation and the file was transferred to the adjudication stage for an inquiry. I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Ministry. The Ministry submitted representations in response and agreed to share the non-confidential portions with the appellant. I next sought representations from the appellant and enclosed with a Notice of Inquiry a complete copy of the Ministry's representations. I then shared the appellant's representations in their entirety with the Ministry and invited the Ministry to provide reply representations. The Ministry submitted reply representations.

RECORDS:

There are four records at issue, identified in the Index of Records as pages 13-16, 17, 18, and 36. The records and the exemptions claimed are described in the following table:

Record #	**Description**	**Exemptions Claimed**
Pages 13-16	Occurrence report	49(a)/14(2)(a) 49(a)/19 49(b)/21(1)

Pages 17, 18 and 36	Fax cover sheet (page 17), fax transmission page (page 18) and letter from Ministry counsel to counsel for identifiable individuals (page 36)	49(a)/19 49(b)/21(1)

DISCUSSION:

PERSONAL INFORMATION

Section 47(1) of the *Act* 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. In circumstances where a record contains both the personal information of the appellant and other individuals, the request falls under Part III of the *Act*.

In this case, the Ministry has claimed the application of section 49(a), read with section 14(2)(a), for pages 13-16 and section 49(a), read with section 19, and 49(b), read with section 21(1), for all records at issue. In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

The definition of personal information is found in section 2(1) of the *Act* and states:

> "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 where 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 if 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. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Ministry submits that the occurrence report (pages 13-16) contains personal information about the appellant and other identifiable individuals who were not acting in any official or professional capacity. The Ministry states that the information contained in the report about the other identifiable individuals concerns their interaction with police with regard to an investigation into potentially criminal conduct.

The Ministry states that the letter (page 36) and associated fax cover sheet (page 17) and the fax confirmation sheet (page 18) were created by Crown counsel and contain communications in relation to section 810 peace bond proceedings. The Ministry submits that these documents contain personal information about other identifiable individuals regarding their interactions with the criminal justice system.

The appellant acknowledges that the records at issue may contain the personal information of both the appellant and other identifiable individuals. However, the appellant argues that both the fax cover and confirmation sheets do not, on their own, contain any personal information.

On my review of the records at issue, I find that they all contain information pertaining to the appellant that qualifies as his personal information within the meaning of the definition in section 2(1) of the *Act*, including paragraphs (a), (c), (g) and (h). In addition, I find that the records contain personal information relating to identifiable individuals other than the appellant that satisfies the definition of personal information under paragraphs (a), (c), (d), (e), (f) and (h) of section 2(1). While it is arguable that the fax cover sheet and the fax confirmation sheet could be viewed as separate records, it is clear that they are associated directly with the letter. Accordingly, I find that the letter should be viewed together with the fax cover and confirmation sheets as one record. On that basis, I am satisfied that this single record contains both the appellant's personal information and that of other identifiable individuals.

Having determined that the records contain the mixed personal information of the appellant and other identifiable individuals, I will now consider whether the records are exempt under section 49(a) of the *Act*, read in conjunction with section 19.

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

As noted, the Ministry relies on section 49(a), read in conjunction with section 19, to deny access to all of the records. I will consider whether the records qualify for exemption under section 19 as a preliminary step in determining whether they are exempt under section 49(a).

General Principles

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.

Representations

The Ministry submits that the records at issue form part of the "Crown brief" and are exempt under the branch 2 litigation privilege aspect of section 19(b). In support of its position, the Ministry states:

> The branch two privilege is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted on behalf of government. It is a permanent privilege, existing for the narrow purpose of freedom of information requests, and is not subject to the limitations of any of the common law privileges. The branch 2 privilege covers a wide range of materials obtained and prepared in anticipation of existing or contemplated litigation, including communications to and from third parties and documents compiled in connection with litigation.

In support of its view, the Ministry cites the Divisional Court's reasoning in *Ontario (A.G.) v. Big Canoe* (2006), 269 D.L.R. (4th) 154 (Ont. Div Ct.) at paragraphs 37 and 43-44:

> …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 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…**There should be no generalized public access to the Crown's work product even after the case has ended**. [emphasis added]

The Ministry submits that both the occurrence report and the letter with its associated fax cover and confirmation sheets form part of the Crown brief, and are exempt from disclosure under branch 2. The Ministry states that the occurrence report was gathered in preparation for litigation and the letter is a communication between Crown counsel and counsel for identifiable individuals that was prepared in relation to the same litigation.

The Ministry acknowledges that the protection provided to the Crown brief under branch 2 is "potentially subject to the Crown's *Stinchcombe* disclosure obligations, and to a *subpoena duces tecum* or civil production under the *Wagg* [*D.P. v. Wagg*, [2004] O.J. No. 2053 (C.A.)] procedure." The Ministry asserts that "[n]one of these potential routes of access to the Crown's brief are in play in the present context…", but that "*if* the ends of justice genuinely require that the appellant have access to the Crown brief documents, there are recognized routes to fairly adjudicating the issue."

The Ministry states that there has been no waiver of privilege over the records at issue in this case. The Ministry asserts that the relevant "head" in this case, the Assistant Deputy Attorney General – Criminal Law Division, is the only person with authority to waive branch 2 privilege. The Ministry submits that the head has not waived privilege over the records at issue.

The Ministry also states that there has been no "implicit waiver on account of documents at issue going outside the protected 'zone of privacy' in which privilege is sustained." With regard to the letter, the Ministry submits that it is "significantly different from letters written between *opposing parties* in litigation, which would *not* ordinarily be privileged." Similarly, the Ministry asserts that communications between police and Crown counsel, such as the occurrence report at issue, remain within the protected zone of privacy. The Ministry states that no waiver occurs when police provide the Crown with a confidential document.

With regard to the Crown brief argument asserted by the Ministry, the appellant submits that "any privilege did not start to apply to any record in the Ministry's possession […] until the Crown took carriage of the [prosecution], which did not occur until June 4, 2007." The appellant states that prior to that date "no Crown brief existed." The appellant submits that if the statutory exemption is designed to protect information prepared by or for the Crown in connection with proceedings being conducted on behalf of government, there were "no proceedings being conducted on behalf of the government in the instant case until June 4, 2007." The appellant does not make any representations on waiver.

In reply, the Ministry responds that simply because the Crown had not yet taken carriage of the peace bond proceeding at the time some of the records were created, the statutory privilege still applies. The Ministry asserts that the privilege "applies to materials 'prepared by or for Crown counsel…**in contemplation of** or **for use in** litigation.'" [emphasis added] The Ministry adds that "[o]nce the private information was sworn and laid before a justice, litigation was clearly underway, not just contemplated." In the Ministry's view, it does not matter that the Crown had not yet intervened. The Ministry states that under section 11 of the *Crown Attorneys Act*, Crown Attorneys have a "statutory obligation to monitor private proceedings" and that to this end the Crown may create "watching briefs" to monitor private proceedings. The Ministry submits that watching briefs are no less privileged than briefs used directly in litigation. Furthermore, the Ministry states that it is obvious that the occurrence report, the earliest dated document at issue, was created "in contemplation" of criminal litigation, since all criminal investigations contemplate possible criminal or quasi-criminal charges. The Ministry submits that the Legislature has created a privilege that protects the Crown brief "both before and after, as well as during, litigation." The Ministry adds that if the appellant's submission is accepted, then any police reports created before charges were laid, which commonly occurs, would not be protected by section 19(b) privilege.

Analysis and findings

I concur with the Ministry's position that the records for which it claims exemption under section 49(a), together with section 19, are Crown brief materials.

Order PO-2733, issued by Senior Adjudicator John Higgins, contains a detailed analysis of the section 19 solicitor-client privilege exemption. The notable exception to his review of the jurisprudence is the Divisional Court's decision in the judicial review application of Orders PO-2494 and PO-2498 which has now been issued (upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952 (Div. Ct.), leave to appeal dismissed, Doc. M37397 (C.A.)), and post-dates Order PO-2733 by four months. I would note, however, that the relevant issue in Orders PO-2494 and PO-2498 was whether copies of the Crown brief materials *in the hands of the police* was exempt under section 19. In my view, Order PO-2733 continues to reflect the current approach of this office to branch 2 of section 19 where a request for a Crown brief has been submitted under the *Act* to the Ministry. This is evidenced by the fact that the reasoning in Order PO-2733 with regard to Crown brief records was recently adopted and applied in Order PO-2769. As the facts of, and principles discussed in, Order PO-2733 are relevant to the appeal before me, I will quote extensively from the Senior Adjudicator's decision.

Senior Adjudicator Higgins begins his discussion of the application of the branch 2 statutory privilege to the contents of a Crown brief in Order PO-2733 as follows (at page 4):

> 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 [of] 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 [of] 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 [emphasis added].

I concur with the reasoning of the Senior Adjudicator in Order PO-2733, and adopt his reasoning for the purposes of this appeal. The appeal here concerns the Ministry's decision to deny access to the Crown brief under branch 2 litigation privilege in section 19. This appeal does not deal with a request for copies of the original records which are maintained by the police.

In my view, the records at issue fall squarely within the branch 2 litigation privilege exemption in section 19(b) for the reasons stated above in Order PO-2733. I am satisfied that the records at issue comprise part of the Crown brief with respect to a section 810 peace bond application proceeding. I concur with the Ministry that the fact that the Crown had not yet taken carriage of the proceeding at the time some of the records were created is irrelevant. The fact remains that the records at issue were prepared for or by Crown counsel in contemplation of or for use in litigation.

On the issue of waiver, I am satisfied on the evidence before me that there has been no waiver, either express or implied, of the records at issue.

As stated in *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.):

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.

However, waiver may be found not to apply where the record is disclosed to another party that has a common interest with the disclosing party.

Parties that are involved in or anticipate litigation against a common adversary on the same issue or issues, particularly when they are co-parties in the litigation, can be regarded as having a "common interest". As stated by Mr. Justice Carthy in *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300):

> ... The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.
>
> [Order MO-2006-F]

I agree with the Ministry that no waiver occurred as a result of the police providing the Crown with a copy of the occurrence report. The occurrence report remains within the zone of privacy. With respect to the letter, I find that this communication was exchanged between parties with a common interest in the potential prosecution or other disposition of a criminal matter involving the appellant. I am, therefore, satisfied that no waiver has occurred with regard to the letter and the associated fax cover and confirmation sheets.

Accordingly, I find that the section 49(a) exemption, read with section 19(b), applies to the records at issue.

In view of my findings, it is not necessary for me to review the possible application of section 49(a), read with section 14(2)(a), or section 49(b), read with section 21(1).

EXERCISE OF DISCRETION

After deciding that a record falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 49(a) exemption is discretionary, which means that the Ministry could choose to disclose information, despite the fact that it could withhold it. At the very least, however, the Ministry was required to exercise its discretion under this exemption.

On appeal, the Commissioner or her delegated decision-maker (the adjudicator) may determine whether the Ministry failed to do so. In addition, the Commissioner or her delegate may find that the Ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the Ministry 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 maintains that it properly exercised its discretion in deciding to apply section 49(a), together with section 19, to the records at issue. The Ministry submits that it considered several important factors, including the following:

- the fact that the records contain both the personal information of the appellant and other individuals
- the appellant's interests in gaining access to records that contain information about him
- the fact that the letter was not addressed to, or intended for, the appellant and was a private communication between legal counsel
- the fact that police occurrence reports are, in general, not publicly available
- the availability of other legal avenues for pursuing access to the records at issue
- the public interest in fostering an ongoing relationship of confidence and trust between the Ministry and law enforcement agencies, and between Crown counsel and private legal counsel
- the strong public policy reasons for protecting the Crown brief, and especially the private information of potential witnesses and victims of crime who voluntarily participate in criminal investigations

The appellant made submissions in response to those put forward by the Ministry. The appellant submits that the Ministry has not exercised its discretion under section 49(a), but has "simply responded in a manner designed to protect the sanctity of the "Crown brief" in the face of all challenge." In the appellant's view, the letter was not a private communication between legal counsel. The appellant asserts that counsel for the complainants was trying to convince the Crown to take carriage of the peace bond application. The appellant submits that Crown counsel was acting in his or her capacity as an employee of the Crown and had no private interest in the matter.

I have considered the parties' submissions and I am satisfied that the Ministry exercised its discretion within appropriate parameters, and that it considered relevant factors in doing so. I acknowledge the appellant's concerns regarding the nature of the letter and would agree that the Ministry's description of it as a "private" communication may be misleading. The letter may be better described as a "confidential" piece of correspondence. However, in my view, this discrepancy does not, in any meaningful way, negatively impact upon the Ministry's exercise of discretion. In all the circumstances, I am satisfied that the Ministry properly exercised its discretion in this appeal, and I uphold it.

ORDER:

I uphold the Ministry's decision to deny access to the records at issue pursuant to the exemption at section 49(a), read in conjunction with section 19.

Original signed by: June 30, 2009
Bernard Morrow
Adjudicator