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

ORDER PO-2788

Appeal PA07-356

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester indicated that she was the victim in a criminal matter and requested a copy of the Crown brief and all records pertaining to the matter, including emails between the Crown, police and the Victim/Witness Assistance Program (the VWAP).

The Ministry located the responsive records and issued an access decision granting partial access to the requested records. In its decision letter, the Ministry indicated that with respect to the VWAP records, it was denying access to parts of the records, based on sections 13 (advice to government), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*. It also indicated that with respect to the Office of the Crown Attorney records, it was denying access to parts of the records, based on sections 19 and 21(1) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision denying access.

During mediation, the Ministry released pages 40-47 (in full) and pages 91-92 and 100-102 in part. Also during the mediation stage, the Ministry provided an index of the records which indicated that sections 49(a) and (b) of the *Act* were being claimed as well.

As mediation did not fully resolve the issues in this appeal, the appeal was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and to one of the persons whose personal information was contained in the records (the affected person). I received representations from the Ministry, and a letter from the affected person's counsel indicating that the affected person did not object to the disclosure of their personal information, provided that notification was first received. I sent a copy of the affected person's letter to the Ministry. In response, the Ministry advised that it would not disclose additional information to the appellant, as the affected person's consent was inadequate to allow such disclosure.

I sent a complete copy of the Ministry's representations along with a Notice of Inquiry, to the appellant seeking her representations. I received representations from the appellant. The appellant did not consent to the sharing of her representations with the Ministry or the affected person, "unless the information [she is] requesting is released".

I then decided to seek representations from the Ministry concerning the application of the principles enunciated in Order PO-2733 to the records at issue. In that order, Senior Adjudicator John Higgins found that the following two principles concerning Crown Briefs have emerged from the Divisional Court case of *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289:

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 section 19 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.

I received representations from the Ministry. I sent a copy of the Ministry representations to the appellant and sought her representations in response. The appellant did not provide surreply representations.

RECORDS:

The records consist of memorandums, notes, emails, correspondence and administrative forms, as follows:

Record #	Ministry Page #'s	Description of Record	Released?	Exemptions Claimed
1	3 to 5	VWAP memo	Partial	49(a) with 13(1) and 19; 49(b) with 21(1)
2	9 to 10	Crown email	Partial	49(b) with 21(1)
3	12	VWAP memo	Partial	49(b) with 21(1)
4	20	Crown email	Partial	49(b) with 21(1)
5	25 to 26	Crown counsel file's copy of a search of the RCMP CPIC database	Withheld	49(a) with 19; 49(b) with 21(1)
6	29	Disclosure Log of the documents to be disclosed by the Crown counsel	Withheld	49(a) with 19; 49(b) with 21(1)
7	31 to 32	Crown counsel file's copy of Promise to Appear form and Undertaking form	Withheld	49(a) with 19; 49(b) with 21(1)
8	33 to 39	"Confidential Instructions for Crown Counsel", "Notice of Trial/Disposition" form and request forms	Withheld	49(a) with 19; 49(b) with 21(1)
9	50 to 61	Correspondence to and from counsel	Withheld	19 and 21(1)

		for the affected person		
10	62 to 63	Correspondence from counsel for the affected person	Withheld	49(a) with 19; 49(b) with 21(1)
11	64 to 67	Court date form, Crown Charge Screening form and video disclosure form	Withheld	49(a) with 19; 49(b) with 21(1)
12	68 to 74, 83 to 90, 93 to 99, 103 to 113	Crown Brief	Withheld	49(a) with 19; 49(b) with 21(1)
12	91, 92, 100 to 102		Partial	49(a) with 19; 49(b) with 21(1)
12	75, 77		Partial	49(b) with 21(1)
13	114	Crown's file index	Withheld	49(a) with 19; 49(b) with 21(1)
14	115 to 116, 119 to 131, 134 to 136, 141 to 144, 147 to 148, 151 to 152	Crown emails from May 14, 2007 to July 17, 2007	Withheld	49(a) with 19; 49(b) with 21(1)
	149		Partial	
15	117 to 118, 132 to 133, 138 to 140, 153 to 154	"Confidential Instructions for Crown Counsel" notes	Withheld	49(a) with 19; 49(b) with 21(1)
16	137	Intake form	Withheld	49(a) with 19; 49(b) with 21(1)
17	145 to 146	Memorandum outlining Crown counsel office's involvement in the file	Withheld	49(a) with 19; 49(b) with 21(1)

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, I will first determine whether the records contain "personal information" as defined in section 2(1) and, if so, to whom it relates. That term 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 and 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 and PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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.)].

Neither the Ministry nor the appellant directly addressed in their representations the issue of whether the records contain personal information.

Analysis/Findings

The records at issue contain recorded information about identifiable individuals, namely, the appellant, the affected person and other identifiable individuals in their personal capacity, and as such constitute their personal information within the meaning of that term in section 2(1) of the *Act*.

The personal information in the records of these identifiable individuals includes their age, sex, marital or family status, medical and employment history, addresses, telephone numbers, views or opinions of another individual about the individuals and the individuals' names where they appear with other personal information relating to these individuals.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

I will now determine whether the discretionary exemption at section 49(a) in conjunction with the sections 13(1) and 19 exemptions apply to the information at issue.

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.

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.

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.

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 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 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. Branch 2 consists of the statutory solicitor-client communication privilege, which applies to a record that was "prepared by or for Crown counsel for use in giving legal advice" and the statutory litigation privilege, which applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation".

The Ministry relies on the branch 2 statutory litigation privilege. It submits that the records were prepared "in contemplation of or for use in litigation" and include records produced as part of the police investigation as well as records produced by and for Crown counsel. It submits that:

> …branch 2 of section 19 is specifically designed to protect information prepared by or for Crown Counsel in connection with proceedings being conducted by Crown counsel on behalf of the government. The plain meaning of the words used in branch 2 was to give Crown counsel permanent exemption. [T]here

> [should] be no public access to Crown counsel's litigation work product even after the termination of the criminal proceedings…
>
> [The section] 19 affords exemption to 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. With respect to the records still in issue, confidential correspondence between Crown counsel and police stays within the "zone of privacy" that branch 2 of the section 19 privilege is intended to protect. As such, any information contained in those records would fall under this sphere of privilege…
>
> …records such as witness statements or other third party communications regarding a criminal charge are primarily prepared in contemplation, or for use in, litigation. Consequently, having them form part of a Crown Brief later on should not be viewed as a secondary purpose simply because they were "copied" and filed into a Crown Brief;…

Concerning Order PO-2733, it submits:

> [This order] actually re-affirms the statutory exemption under branch 2 …by upholding the rationale adopted in the General Division case of *Ontario* (*Attorney General) v. Big Canoe* (2006), 269 D.L.R. 4TH 154, which held that "... 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...". The order goes on to support the position that a Crown Brief need not be accessible to the public "upon simply request" and thus provides a blanket protection for prosecution records in the hands of Crown counsel, including copies of police records...". This, of course, would apply to the originals of the criminal investigation records and as well as copies made for inclusion into the Crown Brief.

Analysis/Findings

The Ministry has claimed that solicitor-client exemption at section 49(a) in conjunction with section 19 applies to all of the information at issue in the records except for some information in Record 1 and the information at issue in Records 2 to 4 and pages 75 and 77 of Record 12. The records for which section 19 is claimed include forms, emails, letters, notes, memorandums and the Crown Brief, which is Record 12. I will discuss the application of the solicitor-client exemption to the Crown Brief separately from the remainder of the records.

Crown Brief

In Order PO-2733, Senior Adjudicator John Higgins discussed the application of the branch 2 statutory privilege to the contents of a Crown Brief, as follows:

> 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* [cited above], 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.

Senior Adjudicator John Higgins in Order PO-2733 concluded that branch 2 of the section 19 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.

Record 12 constitutes the Crown Brief. The Ministry has claimed the application of section 19 to all of the information at issue in this record, except for the information severed from pages 75 and 77. The Ministry has claimed that the section 49(b) personal privacy exemption applies to this severed information, which consists of the name of the affected person. Based on the reasoning of Senior Adjudicator John Higgins in PO-2733, I find that the branch 2 statutory litigation privilege of section 19 applies to the information claimed by the Ministry to be exempt by reason of section 49(a) in conjunction with section 19 in Record 12, except for the severed information at pages 75 and 77 of Record 12. This privilege does not terminate once the litigation ends. The information in the Crown Brief is information related to the fact-finding and investigation process of Crown counsel, resulting from selective copying, research or the exercise of counsel's skill and knowledge.

Records other than the Crown Brief

The appellant's request was not only for a copy of the Crown brief but also for all records pertaining to a specific criminal matter, including emails between the Crown, police and the VWAP.

According to the Ministry, Records 1 to 4 originated from the VWAP office and the remaining records (Records 5 to 17) originated from the Ministry's Crown Law Office - Criminal.

I will now determine whether the branch 2 statutory litigation privilege applies to the remaining records, which consist of forms, emails, letters, notes and memorandums. The statutory litigation privilege applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation".

I will also determine whether the solicitor-client communication privilege in branch 2 also applies to this information. The statutory solicitor-client communication privilege applies to a record that was "prepared by or for Crown counsel for use in giving legal advice." For this privilege, the legal advice in question must be sought from or given by Crown counsel.

Record 1 is a VWAP memo prepared by the VWAP office. On the Ministry's website, the VWAP is described as a program that "provides information, assistance and support to victims and witnesses of crime to increase their understanding of, and participation in, the criminal court process". The severed information for which section 19 is claimed concerns phone calls between the writer of the memo at the VWAP office and Crown counsel. Upon my review of the information at issue in this record, I find that this record is not a record prepared by or for Crown counsel, nor does any of the information at issue concern the giving of legal advice by the Crown Counsel. As this record is not otherwise subject to solicitor-client or litigation privilege and no other exemptions have been claimed for this information, I will order this information disclosed to the appellant.

Records 5 to 8, 11, 13 and 15 to 17, which are described in detail above, consist of forms, notes and other administrative documents located in the Crown counsel's file. Upon my review of the information at issue in these records, I find that they were prepared by or for Crown counsel and that these records were prepared for use by the Crown in giving legal advice. Therefore, I find that the statutory litigation privilege in section 19 applies to all of these records as they were prepared by or for Crown counsel "in contemplation of or for use in litigation".

Records 9 and 10 contain correspondence between Crown counsel and the lawyer for the accused (the affected person). The application of section 19 to letters between defense counsel and Crown counsel was considered by Justice Lane in "*Big Canoe* 2006" (cited above) where he held that such correspondence was outside of the "zone of privacy" and, therefore, not subject to the branch 2 solicitor-client privilege. As the Ministry has also claimed the application of section 49(b) to these letters, I will consider them further in my discussion below.

Record 14 consists of a series of emails to and from Crown counsel. Upon my review of the information at issue in this record, I find that this record was prepared by or for Crown counsel and concerns the giving of legal advice by Crown counsel as solicitor and the police as the client. I find that the statutory solicitor-client communication privilege applies to these email chains.

In conclusion, I find that branch 2 of section 19, which is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of the government, applies to Records 5 to 7, 8, 11, 12 (except for

the severed information on pages 75 and 77) and 13 to 17. These records are exempt from disclosure, subject to my review of the Ministry's exercise of discretion.

ADVICE TO GOVERNMENT

The Ministry relies on section 49(a) in conjunction with section 13(l) in respect of one paragraph of Record 1. It submits that this paragraph's content clearly sets out a course of action. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include,

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Analysis/Findings

As stated above, "advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

Based on my review of the information in the paragraph at issue, I conclude that it does not reveal the "advice or recommendations" of a public servant within the meaning of section 13(1), because it does not set out a recommended course of action. Nor am I able to find that disclosure of this paragraph would permit an individual to accurately infer the advice or recommendations given. Therefore, I find that this paragraph is not subject to section 49(a) in conjunction with 13(1). As no other exemption has been claimed for this paragraph in Record 1, I will order it disclosed.

PERSONAL PRIVACY

I will now determine whether the discretionary exemption at section 49(b) applies to the information at issue in Records 1 to 4, 9 to 10 and pages 75 and 77 of Record 12.

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.

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.

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.

In deciding whether the exemption in section 49(b) applies, sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 49(b). If section 21(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 49(b). In this appeal, the information does not fit within paragraphs (a) to (e) of section 21(1) and section 21(4) does not apply.

If any of 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 49(b).

The Ministry submits that the records were compiled and are identifiable as part of an investigation into a possible violation of law. The Ministry relies on the presumption in section 21(3)(b) of the *Act*, which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]

The appellant does not dispute this claim by the Ministry.

Analysis/Findings

Record 1 is a VWAP memo. Record 2 consists of emails exchanged between the VWAP and Crown Counsel. It can be ascertained from the information that has been disclosed, that the VWAP office is providing background information concerning the appellant's involvement with the VWAP. Record 3 is a memo from the VWAP office. Record 4 is an email chain involving the appellant, the VWAP office and the Crown. Records 9 and 10 consist of correspondence between Crown counsel and counsel for the affected person. Page 75 of Record 12 is a cover sheet sent to the Crown counsel from the Police attaching the appellant's statement. Page 77 is the first page of the synopsis of the appellant's video-taped statement.

Upon my review of the information at issue in these records, I find that section 21(3)(b) does not apply as these records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]. All of these records relate to communications which occurred after the police investigation concluded and during or after the conclusion of the criminal proceedings. Therefore, the presumption at section 21(3)(b) does not 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 [Order P-239]. Section 21(2) reads:

> 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (c) access to the personal information will promote informed choice in the purchase of goods and services;
> >
> > (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;
> >
> > (g) the personal information is unlikely to be accurate or reliable;

> (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.

Although invited to do so in the Notice of Inquiry, neither party provided direct representations concerning the applicability of these or other factors to the information at issue.

The personal information in the records concerns criminal proceedings which were brought against the affected person that were ultimately withdrawn. The Ministry describes the records as being:

> …primarily compiled during the course of a police investigation into criminal matters that resulted in the laying of criminal charges. As part of the investigation into the allegations of criminal misconduct relating to the complainant/[appellant], the police conducted various interviews and prepared statements and summaries with third party civilian witnesses.

I do note, however, that certain factors that weigh in favour of privacy protection are relevant, namely the factor in section 21(2)(f), that the personal information is highly sensitive, as well as the factor in section 21(2)(i), that disclosure of the information at issue may unfairly damage the reputation of the affected person.

Therefore, in the absence of any relevant factors in favour of disclosure of the personal information at issue that outweigh the factors in favour of privacy protection, I find that section 49(b) applies to the personal information at issue. I find that the disclosure of the personal information of individuals other than the appellant in the records will give rise to an unjustified invasion of their personal privacy.

Therefore, I find that the personal privacy exemption in section 49(b) applies to the personal information of the identifiable individuals other than the appellant in Records 1 to 4, 9 to 10 and pages 75 and 77 of Record 12.

EXERCISE OF DISCRETION

I will now determine whether the Ministry exercised its discretion in a proper manner under sections 49(a) and 49(b) concerning all of the records, except the information in Record 1 which I have found not exempt by reason of the application of section 49(a) in conjunction with sections 13(1) or 19.

The sections 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

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

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

The Ministry submits that it exercised its discretion in good faith in deciding not to release the records in question either in full or in part. It states that:

> Factors considered by the Ministry include the following: the requester's legitimate interests in gaining access to the records; the fact that the records were not addressed to or intended for the requester; the creation of the records in contemplation of criminal proceedings; the sensitive nature of the records' contents and the confidential context of their creation; and the public interest in fostering an ongoing relationship of confidence between the Ministry and law enforcement agencies.

Analysis/Findings

I find that the Ministry exercised its discretion under sections 49(a) and 49(b) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. I find that the Ministry applied the claimed exemptions in the *Act* appropriately to the withheld portions of the records that I have found to be subject to either the personal privacy or solicitor-client exemptions. Any additional disclosure of information would constitute an unjustified invasion of the personal privacy of the affected person and the other identifiable individuals in the records or would result in the disclosure of information that is subject to solicitor-client privilege. Accordingly, I find that the severed information in Records 5 to 8, 11, 12 (except the information severed from pages 75 and 77) and Records 13 to 17 is exempt under section 49(a) and the information in Records 1 to 4, 9 to 10 and the severed information at pages 75 and 77 of Record 12 is exempt under section 49(b) of the *Act*.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of Record 1 which I have found not subject to the section 49(a) by **July 16, 2009**, but not before **July 11, 2009**. For ease of reference, I have highlighted the portions of this record that should be disclosed to the appellant on the copy of this record sent to the Ministry with this order.

2. I uphold the Ministry's decision to not disclose the undisclosed information from the remaining records.

3. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with a copy of the portions of Record 1 that it discloses to the appellant.

Original Signed by: June 10, 2009
Diane Smith
Adjudicator