



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2824

Appeal PA08-107-2

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 a specific Crown brief identified in the request.

The requesters are the family of a victim of a fatal motor vehicle accident. Through their legal counsel, they requested the Crown brief relating to the criminal prosecution of a named individual who was involved in the motor vehicle accident.

The Ministry denied access to the responsive records pursuant to the discretionary exemptions in sections 19(a) and 19(b) (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

Through their counsel, the requesters, now the appellants, appealed the Ministry's decision.

During the course of mediation of the appeal, the Ministry provided the appellants' representative with an index of records containing a description of the responsive records and exemptions claimed.

Also during mediation, the appellants' counsel submitted a letter to the Ministry specifying the names of the individuals that he is representing in this appeal. The Ministry subsequently disclosed the typed and handwritten versions of the witness statement given by one of the appellants. Consequently, these records are no longer at issue in this appeal. The appellants' representative also confirmed that his clients do not seek access to an additional page, which is blank. However, the appellants' representative confirmed that he is pursuing access to the remaining records listed in the index of records.

As noted, the Ministry's initial decision letter had identified that, amongst other exemptions, access to the records was being denied under section 19(b). During mediation, the Ministry clarified that, contrary to what appears in the index of records, it is withholding all of the remaining records pursuant to section 19(b) of the *Act*. The Ministry also clarified that it is no longer relying on section 19(a). Consequently, section 19(a) of the *Act* is no longer at issue in this appeal.

Mediation was not able to resolve any further issues and the appeal was transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

Initially, I sent a Notice of Inquiry to the Ministry, outlining the facts and issues in the inquiry and inviting the Ministry to provide representations, which it subsequently did. I then provided the appellants' representative with a complete copy of the Ministry's submissions, along with the Notice of Inquiry. The appellants' representative provided brief representations in response.

RECORDS REMAINING AT ISSUE:

The remaining records at issue in this appeal comprise the contents of the Crown brief referred to in the request, other than the records already disclosed to the appellants, and include witness

statements, occurrence reports, health records, police officers' notes and will say statements, photographs, Crown's notes, court documents and other related materials.

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.

Section 19(c) has no application in the circumstances of this appeal and the Ministry has withdrawn its reliance on section 19(a).

The Ministry continues to rely on section 19(b), which forms part of what is commonly referred to as "branch 2" of the section 19 exemption.

Section 19(b)

Branch 2, as reflected in section 19(b), is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and the common law privileges reflected in section 19(a), although not necessarily identical, exist for similar reasons. The Ministry states that it:

... claims the [section] 19(b) privilege over all of the records requested in this matter as the records constitute the entire Crown brief which was prepared for and used by the Crown in a criminal prosecution of a third party....

In my view, it is clear that this is an accurate description of records that would be responsive to the request, since the request itself expressly seeks access to the "Crown brief." In his representations, the appellants' counsel confirms that "[w]e have requested production of the Crown brief."

The Ministry states:

The records at issue pertain to matters involving Crown witnesses and potential Crown witnesses in respect of this litigation conducted by Crown counsel. The Ministry claims privilege for any and all records relating in any matter to Crown witnesses in respect of contemplated or actual litigation. The Ministry submits that branch 2 of s. 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 and that this claim has no temporal limit. The Ministry submits that s. 19 affords exemption to a wide range of materials obtained and prepared for litigation, including not only work product but materials such as witness statements and lists, photographs and reports such as those at issue in this case.

In my recent Order PO-2733, referred to by the Ministry in its representations, I referred to the protection provided under branch 2 for the Crown brief. I stated:

A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. These decisions spell out the special status that a Crown brief is given in the legal process. 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]

...

... 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]

...

... 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. ...

Later in Order PO-2733, I summarized the impact of the previous case law as follows:

... 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 appellants’ representative’s representations do not expressly address the application of section 19(b), or the impact of Order PO-2733, in relation to the records at issue in this appeal, although expressly invited to do so.

The appellants’ representative refers to the fact that the litigation against the accused is terminated. However, as noted in *Ontario (Ministry of the Attorney General) v. Big Canoe* (2002), 67 O.R. (3d) 167 (quoted in the extract from order PO-2733, above), it is clear the Ontario Court of Appeal has found that the protection provided to materials exempt under branch 2 is permanent and does not terminate because litigation has come to an end.

The appellants’ representative also submits that because there is an issue regarding an unidentified vehicle, the contents of the Crown brief, including information about witnesses and vehicles, is required by his clients.

Having reviewed the records and the representations provided to me, I conclude that the records at issue in this appeal, like those under consideration in Order PO-2733, are also a Crown brief in the hands of the prosecuting agency, the Ministry of the Attorney General. I therefore find, for the same reasons given in my Order PO-2733, as quoted above, that section 19(b) applies to exempt the Crown brief from disclosure. While I appreciate the representations of the appellants’ representative about his client’s need for this information, the exemption in section 19(b) applies to the Crown brief in its entirety, except for the portions no longer at issue, and that is the exact record he has requested.

Since the records at issue are fully exempt from disclosure under section 19(b) of the *Act*, it is not necessary for me to consider whether the personal privacy exemption found at section 21(1) of the *Act* applies.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
John Higgins
Senior Adjudicator

_____ September 10, 2009