

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-2993

Appeal PA10-112

Ministry of the Attorney General

September 16, 2011

Summary: The appellant made a request to the ministry for Crown brief materials about her relating to a theft charge. The ministry granted access to some records in the Crown brief but denied access to the remaining records under section 49(a) with reference to section 19(b) and 49(b) with reference to the presumption in section 21(3)(b). Section 19(b) was found to apply to all records contained in the Crown brief. Section 49(a) was found to apply and the ministry's decision to withhold access was upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1)(definition of "personal information"), 19(b), 49(a).

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the ministry) for access to:

...all material the Crown has in regards to [myself]. In particular, I'm looking for material supplied to the Crown in regards to a charge of theft laid on a [specified date] and all material supplied by [named persons] as it regards myself. (interviews, etc.)

As well as the material [a named person] collected re: myself as it regards the attempt to remove the bond placed on me, 2009 film, etc.

[2] The ministry located responsive records consisting of the Crown brief relating to the charges against the appellant and denied access to them pursuant to the discretionary exemptions in section 49(a), with reference to the solicitor-client privilege in section 19(b) and section 49(b) (personal privacy) with reference to the presumption in section 21(3)(b).¹

[3] During mediation, the ministry provided the appellant with a supplemental decision and index of records. After obtaining the appropriate consent, the ministry released additional information including several records that were part of the Crown Brief to the appellant. These records consisted of communications initiated by, or sent to the appellant's husband. The information that was released, in full or in part, was contained in pages 42 to 45, 49, 62, 63, 80 – 87, 100 – 116. This information is no longer at issue in this appeal.

[4] At the end of mediation, the appellant advised the mediator that portions of the Crown Brief not released during mediation remain at issue. The appellant had received some pages of the Crown Brief through another process and argued that it was absurd that she did not receive these records under the *Act*. The appellant raised the issue of the application of the absurd result principle to these pages of the record.

[5] During the inquiry into this appeal, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, I uphold the ministry's decision to withhold the records.

RECORDS:

| PAGE | EXEMPTION | RECORD DESCRIPTION |
|-------------|---------------------|--|
| 1 | 49(a), 19(b), 49(b) | Charge Screening Form |
| 2 | 49(a), 19(b), 49(b) | Case Management Worksheet |
| 3 | 49(a), 19(b), 49(b) | Pre-trial notes |
| 4 | 49(a), 19(b), 49(b) | Information |
| 5-6 | 49(a), 19(b), 49(b) | Cover – Crown Counsel Brief |
| 7 | 49(a), 19(b), 49(b) | Witness/Victim List |
| 8 | 49(a), 19(b), 49(b) | Property List |
| 9-10 | 49(a), 19(b), 49(b) | Statement |
| 11-13 | 49(a), 19(b), 49(b) | General Occurrence Report |
| 14-21 | 49(a), 19(b), 49(b) | Notes of the Ontario Provincial Police |

¹ The ministry also provided information to the appellant about where she could locate other responsive records, including making a separate request to the Ministry of Community Safety and Correctional Services.

| | | |
|-------|---------------------|---|
| 22-32 | 49(a), 19(b), 49(b) | Email, correspondence, administrative forms, fax, Crown counsel notes |
| 33-35 | 49(a), 19(b), 49(b) | Correspondence |
| 36-41 | 49(a), 19(b), 49(b) | Email, correspondence, Crown counsel notes |
| 45 | 49(a), 19(b), 49(b) | Email |
| 46-48 | 49(a), 19(b), 49(b) | Correspondence |
| 49 | 49(a), 19(b), 49(b) | Email |
| 50-61 | 49(a), 19(b), 49(b) | Email, correspondence, Crown counsel notes |
| 64-79 | 49(a), 19(b), 49(b) | Email, correspondence, administrative forms, fax, Crown counsel notes |
| 86-99 | 49(a), 19(b), 49(b) | Email, correspondence, administrative forms, fax, Crown counsel notes |

ISSUES:

- A. Do the records contain personal information?
- B. Does the discretionary exemption at section 49(a) in conjunction with the section 19(b) exemption apply to the information at issue?
- C. Was the ministry's exercise of discretion proper?
- D. Was the ministry's search for records reasonable?

DISCUSSION:

A. DO THE RECORDS CONTAIN PERSONAL INFORMATION?

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Section 2(1) defines "personal information" as "recorded information about an identifiable individual". Paragraphs (a) to (h) of the definition of section 2(1) describe various types of information that qualify as personal information under the definition. The following paragraphs of the definition are specifically relevant:

"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,
- (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;

[8] The ministry submits that the information at issue relates to an incident involving the appellant that led to a criminal charge being laid against her. As such, the ministry submits that the records contain the personal information of the appellant and other identifiable individuals, specifically their names, contact information and statements taken from other involved individual(s) that were made about the incident and the appellant's actions. I find that the records contain recorded information about identifiable individuals, including the appellant. In conclusion, I find that the records at issue contain the personal information of both the appellant and other identifiable individuals within the meaning of that term in section 2(1).

[9] I will now proceed to consider whether the personal information is exempt under section 49(a).

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 49(A) IN CONJUNCTION WITH THE SECTION 19(B) EXEMPTION APPLY TO THE INFORMATION AT ISSUE?

[10] 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 and reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

[11] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[12] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[13] In this case, the institution relies on section 49(a) in conjunction with section 19(b).

SOLICITOR-CLIENT PRIVILEGE

[14] Section 19 of the *Act* states, in part:

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

[15] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

Statutory litigation privilege

[16] Section 19(b) applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

[17] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2 [Order PO-2733]. However, "branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief." [Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952]

[18] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

[19] Termination of litigation does not affect the application of statutory litigation privilege under branch 2 [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above)].

[20] In the present appeal, the ministry submits that the records at issue were prepared by or for Crown counsel in contemplation of litigation and are, therefore, protected by statutory litigation privilege aspect of Branch 2 of section 19(b). Further, the ministry states that it did not take any steps that would constitute waiver in respect of the records.

[21] The appellants submit the following in support of their position that section 19 does not apply.

- They are requesting their own personal information and the ministry should not apply the section 19 exemption in the same manner as if a third party were requesting the same information.
- Section 19 is not a "blanket exemption" for the ministry's files.
- The charge against the female appellant was withdrawn and no litigation ensued.
- The information in the records is generally inaccurate and "in some cases" incomplete.

[22] The appellants' request was for information contained in the Crown's materials about the appellant. Based on my review of the records at issue, I find that the records form part of the Crown brief and are, accordingly, subject to section 19(b), as the Crown brief and the records are in the hands of the prosecuting agency, the ministry. I have set out the description of records above, and I accept the ministry's representations that these records were either prepared by or for Crown counsel in contemplation of the litigation that was to ensue with respect to the charge against the appellant.

[23] As stated above, even though the charge was later withdrawn and no litigation occurred, the statutory litigation privilege in section 19(b) still applies as the records were prepared in anticipation of contemplated litigation. Further, I find that the ministry has not waived its privilege in these documents. Accordingly, I find that

section 19(b) applies to the records at issue. As a result, I find the records at issue exempt under section 49(a), subject to my finding on the ministry's exercise of discretion.

[24] The appellants' position that I must take into consideration the fact that they are requesting their own personal information is set out in my discussion below on the ministry's exercise of discretion.

[25] As I have found the records exempt under section 49(a), I do not need to consider the application of section 49(b).

[26] Finally, I wish to address the appellant's argument that the absurd result principle should apply to the records as she has received some of the records in another process. The absurd result principle may apply in circumstances where the requester is otherwise aware of the information and it would be absurd and inconsistent with the purposes of the exemption to withhold the information. I find that, in the circumstances of this appeal, the appellant has not established that it would be absurd or inconsistent with the purposes of section 49(a) to withhold the information at issue. I find that the absurd result principle does not apply to the information at issue in this appeal.

C. WAS THE MINISTRY'S EXERCISE OF DISCRETION PROPER?

[27] The section 49(a) exemption is discretionary, and permits 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.

[28] 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.

[29] 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)].

[30] The ministry submits that it took the following considerations into account in exercising its discretion to withhold the records:

- Individuals should have access to their own personal information, except when the head is required to withhold under the *Act*, or when withholding, is permitted under the limited exceptions provided by the *Act* and it is in the public interest to deny access.
- Appellant's legitimate interest in gaining access to the records.
- Records were not addressed or intended for the appellant.
- Creation of records was in contemplation of criminal proceedings.
- The confidential context of the creation of the records.
- Public interest in fostering an ongoing relationship of confidence between the ministry and law enforcement agencies.

[31] The appellants submit that the ministry did not consider the following factors when it exercised its discretion:

- Individuals should have a right of access to their own personal information.
- The ministry has applied the section 19(b) in a manner that is not limited or specific.
- The appellant is only requesting her personal information.
- The appellant has a compelling need to review the information and correct any misinformation about the appellant.

[32] Having considered the ministry's representations on the factors it considered in its exercise of discretion, I find that the ministry properly exercised its discretion to withhold the records. The ministry properly considered the section 49(a) exemption, the appellant's right of access to her own personal information and the interests protected by the section 19(b) exemption. Further, in my view, the ministry also considered those factors raised by the appellant. I find that the ministry has considered only relevant factors and I uphold its exercise of discretion in withholding the records from the appellants.

D. WAS THE MINISTRY'S SEARCH FOR RECORDS REASONABLE?

[33] In her representations, the appellant argued that additional responsive records may exist which were not listed in the ministry's index of records. The ministry was asked to comment on the appellant's representations and did so.

[34] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[35] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[36] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[37] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[38] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

[39] The appellant submitted that the following additional records should exist:

- Notes from a meeting between the male appellant and an officer.
- Discussions between officer, named individual of the Town of Huntsville Building Department, Ministry of Natural Resources and second named individual.
- Occurrence report with specified date.
- Correspondence between named individual and a lawyer representing the female appellant.

- Video containing images of female appellant, the appellants' son an officer and individual from Town of Huntsville Building Department.
- Letter sent from appellants' son to a named individual.

[40] The ministry submits that it conducted a "tertiary" review of the Crown brief "for completeness" once it received the appellant's representations regarding the additional records that should be in the brief. The ministry notes that after mediation, the appellant advised that only the portions of the Crown brief remain at issue. With the exception of the video and the correspondence between the Crown's office and the lawyer representing the appellant, all of the records claimed to be missing were in fact referred to in the ministry's index of records as follows:

| Documents Alleged to be missing | Reference of Records in the Index | Exemption(s) claimed |
|--|--|--------------------------------------|
| Notes from August 4, 2009 meeting between male appellant, officer and crown office | Pages 60 – 61 | 19(b), 21(1), 21(3)(b), 49(a), 49(b) |
| Discussions between officer, Building Department official, MNR and crown office | Pages 49 – 59 | 19(b), 21(1), 21(3)(b), 49(a), 49(b) |
| General Occurrence Report by officer | Pages 11 - 13 | 19(b), 21(1), 21(3)(b), 49(a), 49(b) |
| Letter from appellants' son to crown office | Pages 46-48 | 19(b), 21(1), 21(3)(b), 49(a), 49(b) |
| Series of communications between male appellant and crown office | Pages 42 – 44, 102 – 115 | All Documents Released |

[41] The ministry submits that the Crown brief does not contain any records that contain any specific reference to the lawyer referred to by the appellant. The ministry's position on the video is:

Although the Appellant claims that the Crown is in possession of a video depicting the Appellant, [the appellant's son], [named officer] and [named building department official], no such video is contained in the Crown file. The Crown is therefore not in possession of the specific video requested by the Appellant.

[42] Finally, the ministry submits that it has either disclosed or withheld the records mentioned by the appellant (with the exception of the video and correspondence

mentioning the lawyer) and concludes that it has conducted a reasonable search for responsive records.

[43] Based on my review of the parties' representations, I find the ministry's search for responsive records to be reasonable. The Crown brief contains material either created or provided to the Crown by the police. I accept that the ministry's search for responsive records would be in the Crown brief and that any records not found in the brief would not be held elsewhere in the ministry.

[44] I uphold the ministry's search for responsive records.

ORDER:

1. I uphold the ministry's decision to withhold the records and dismiss the appeal.

Original Signed:
Stephanie Haly
Adjudicator

September 16, 2011