Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3095

Appeal PA10-48-2

Ministry of the Attorney General

July 4, 2012

Summary: The appellant submitted a request for records relating to an incident involving the Guelph Police Service and the office of the local Crown Attorney. The ministry denied access to the requested records on the basis of section 49(a), in conjunction with section 19 (discretion to refuse requester's own personal information/solicitor-client privilege) and section 49(b) (personal privacy). The records at issue contain the appellant's personal information. With the exception of one page, the records are exempt under sections 49(a) and 19. The ministry is ordered to disclose page 113 of the records to the appellant.

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

OVERVIEW:

[1] The appellant submitted a detailed request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to an incident involving the Guelph Police Service and the subsequent involvement of the local Crown Attorney's office.

[2] Prior to issuing an access decision, the ministry advised the appellant that he may seek access to some of the records directly through the Superior Court of Justice, Guelph Courthouse; the court transcript through the Office of the Court Reporter; and the indictment at the Trial Office. The ministry provided contact information for each of these offices.

[3] The ministry then issued an access decision for the records in its possession. The ministry indicated that it located responsive records, but access to those records was denied in their entirety pursuant to the discretionary exemptions found at section 49(a) (refusal to disclose requester's own information), in conjunction with section 19 (solicitor-client privilege), and 49(b) in conjunction with section 21(1), with particular reference to the presumption in section 21(3)(b) (personal privacy) of the *Act.*

[4] The appellant appealed the ministry's decision.

[5] During mediation, the appellant confirmed that public court records and the court transcripts were not at issue in this appeal as he had obtained this information through the alternate access methods provided by the ministry. Accordingly, the only records at issue in this appeal are those identified by the ministry as records held by the local Crown Attorney.

[6] Further mediation could not be effected and this file was forwarded to the adjudication stage of the appeal process. I sought, and received, representations from the ministry and the appellant, which were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I find that the records all contain the appellant's personal information and, except for page 113, the appellant's personal information is interspersed with the personal information of other identifiable individuals. I find further that, with the exception of page 113, the records are exempt under sections 19 and 49(a). I find that page 113 is not exempt under sections 19 and 49(a) and, as no other exemptions have been claimed for it, I order the ministry to disclose this page to the appellant.

RECORDS:

[8] There are 315 pages of records, plus two CDs and one DVD at issue in this appeal. The records at issue include police reports, witness statements and other records prepared by the Crown Attorney. As well, there is a one-page memorandum to file prepared by an administrative staff member in the Crown Attorney's office. The ministry has withheld these records in their entirety. The records are described in an index of records, which was provided to the appellant.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

C. Did the institution exercise its discretion under sections 19 and 49(a)?

DISCUSSION:

A. Do the records contain personal information?

[9] 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. 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;

[10] 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.[1]

[11] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] 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.[2]

[13] 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.[3]

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[15] The ministry submits that the records concern criminal charges laid against the appellant, and as such, contain his personal information. The ministry indicates further that, with one exception, the appellant's personal information is interspersed with the personal information of other identifiable individuals, including the victim and other

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

witnesses. As well, the records include a copy of medical files relating solely to the victim.

[16] The ministry notes that one record is a one-page memorandum to file written by a staff member in the Crown Attorney's office about a telephone call she received from the appellant. The ministry submits that this record contains only the appellant's personal information.

[17] The ministry indicates that the records also contain information about other persons in their official or business capacities, but is silent on whether it takes the position that this constitutes their personal information.

[18] The appellant did not specifically address this issue in his representations.

[19] Based on my review of the records at issue and the submissions made by the ministry, I find that, except for page 113, the records contain the appellant's personal information as well as that of other identifiable individuals. I find that page 113 contains only the appellant's personal information.

[20] The ministry does not argue that the records pertaining to individuals identified in their official or business capacities contain their personal information. After reviewing the records, I find that this information falls outside the definition of "personal information," as the information does not reveal anything of a personal nature about these individuals and is, therefore, not "about" them.

B. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[21] 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.

[22] Section 49(a) 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.

[23] 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.[5] 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.

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

Solicitor-Client Privilege

[25] Section 19(b) of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[26] 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), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies. As I indicated above, the ministry has claimed the application of Branch 2 as found in section 19(b) for all of the records at issue.

Branch 2: statutory privileges

[27] 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.

Statutory solicitor-client communication privilege

[28] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Statutory litigation privilege

[29] Branch 2 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."

[30] 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.[6] However, "branch 2 of

[5] [Order M-352].
[6] [Order PO-2733].

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."[7]

[31] 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.[8]

[32] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[9]

[33] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[10]

Loss of Privilege

[34] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the head of an institution[11] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[12]

[35] In making its representations on this issue, the ministry refers to the case law cited above and 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 the government. It is a permanent privilege, existing specifically for Freedom of Information requests, and is not subject to the limitations of any of the related common law privileges. The branch two 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.

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[7] 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.
[8] Ontario (Ministry of Correctional Services) v. Goodis (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[9] Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (cited above).
[10] Liquor Control Board of Ontario v. Magnotta Winery Corporation, 2010 ONCA 681.
[11] see Ontario (Attorney General) v. Big Canoe, [2006] O.J. No. 1812 (Div. Ct.).
[12] see Ontario (Attorney General) v. Big Canoe, [2006] O.J. No. 1812 (Div. Ct.).

[36] The ministry submits that branch 2 protects materials in the Crown brief even though they may be available from other sources, which includes materials in the defence counsel's file.

[37] The ministry confirms that all of the records at issue in this appeal were generated or gathered by the Crown Attorney's Office in relation to the litigation involving the appellant. The ministry submits that it is irrelevant that the criminal litigation is concluded.

[38] Moreover, the ministry states that the only person with authority to waive the branch two privilege in this case is the Assistant Deputy Attorney General – Criminal Law Division. The ministry asserts that he has not waived privilege over the records at issue, even though large portions of the records found in the Crown brief have been disclosed to the appellant in accordance with the Crown's *Stinchcombe* disclosure obligations.[13]

[39] With respect to the memorandum to file at page 113 of the records, the ministry states:

> It is addressed to "File" and records the nature of the conversation with the appellant, and the position taken on behalf of the Crown. Although not explicit on the face of the document, it can reasonably be inferred that this memo was created in relation to an anticipated dispute about access to the Crown's file [referring to this appeal]. In the Ministry's submission, although this document relates a communication between the Crown's office and the appellant himself, the memo exists within the Ministry's "zone of privacy" and therefore no waiver applies.[14]

[40] The appellant's representations focus on his own particular circumstances and experiences throughout the criminal matters in which he was involved. In them, the appellant asserts his innocence and the improper use of the criminal justice system in family disputes. He takes issue with the actions of all levels of government involved in these matters, including the police and the Crown Attorney. Although the appellant acknowledges that he received Crown disclosure, he believes that he was not provided "full" disclosure. The appellant states:

> [The Crown brief] in its entirety will be presented in the Superior Court of Justice in the future and will illustrate what many Justices in the Canadian Justice System have been stating for years; the Criminal Court System is being manipulated by one spouse using it to gain power over the other in a Family Court matter.

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[13] *Ontario (A.G.) v. Big Canoe* (2006), at para. 35, para 44
[14] Ibid, at para 45

[41] With respect to the memorandum to file (page 113), the appellant expresses a desire to know more about what it contains and when it was created. He believes that it relates to a request he made to the Crown Attorney's office about filing a complaint.

[42] Finally, he refers to an access request he made to the Guelph police and notes that it appears some of the records he received from them were not included in the records listed in the index provided by the ministry.

Analysis and findings

[43] 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:

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

temporal limit." Thus, if branch 2 applies to a record, that record remains exempt even after the litigation concludes.

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

> The scheme of the Act clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth. … [para. 23]
>
> The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37]
>
> The Ministry submitted that there was no reason why a Stinchcombe disclosure should affect the second branch of section 19 exemption, which rests upon an entirely different basis than litigation privilege. Its language contains no reference to the material being privileged at common law as the basis for the exemption. On the contrary, the conditions for the exemption are explicitly related to the purpose for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the language of section 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest

> that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. There should be no generalized public access to the Crown's work product even after the case has ended.
>
> For the reasons already set out, I agree with this position, for there is a clear need to protect the information in the Crown brief from dissemination to the public as a matter of course upon "simple request", which could lead to undesirable disclosure of police methods and the like. [paras. 44, 45]

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

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

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

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

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

> *I need not determine whether the Ministry is correct in the submission that branch 2 protects any document simply copied for inclusion in the Crown brief*. The Adjudicator appropriately applied the test in *Nickmar* and concluded that *the records related to the fact-finding and investigation process of counsel in defending the Ministry in civil actions*. I see no basis to interfere with his conclusions.
>
> The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. *The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief*. [Emphasis added]

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

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

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

1. records related to the fact-finding and investigation process of counsel and resulting from selective copying, research or the exercise counsel's skill and

knowledge *would* fall within branch 2 of the exemption; and

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

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

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

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

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

With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.

The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.

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

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

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

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

If I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the Act. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

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

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

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario [see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

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

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as

> copies satisfies the same test . . . as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not. [emphasis added]
>
> …
>
> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

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

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

[44] The appellant's request for the Crown brief stems from his belief that he has been unfairly dealt with and that the police and Crown Attorney acted inappropriately in the gathering and disclosure of the evidence relating to the criminal charges laid against him. He seeks redress for these perceived contraventions of his rights in order to "give me my life back."

[45] In my view, the law relating to Crown briefs is clear, as succinctly described above by Senior Adjudicator Higgins. In this appeal, the request was submitted to the Ministry of the Attorney General, and the responsive record is the Crown brief. I am not dealing with a request for original records in the hands of the police. For the

reasons stated above, I find that branch 2 of section 19 applies to all of the records for which the ministry claims it, with the exception of page 113.

[46] In my examination of page 113, I have kept in mind the comments made above by Senior Adjudicator Higgins and the courts regarding the extent of the privilege and to whether a record meets "the description in the second branch of section 19."

[47] As the ministry acknowledges, page 113 is of a very different character from the rest of the documents at issue. It is a memorandum to file prepared by an administrative staff member in the Crown Attorney's office documenting a telephone call this person received from the appellant. The memorandum sets out a general query that was received from the appellant and the response given to him.

[48] Prepared by a non-lawyer after the appellant's trial had concluded, the memorandum was to file, and not directed to Crown counsel. There is no evidence that this particular memorandum was prepared, copied or included in a lawyer's brief for the purpose of giving legal advice or in contemplation of or for use in litigation. As a result, I find that the record was not "…prepared by or for Crown counsel…" under branch 2 of the section 19 exemption.

[49] Nor can it reasonably be found that this memorandum was prepared "in contemplation of or for use in litigation" under branch 2 of the section 19 exemption. In order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.[15]

[50] The ministry submits that "[a]lthough not explicit on the face of the document, it can reasonably be inferred that this memo was created in relation to an anticipated dispute about access to the Crown's file [referring to this appeal]." I disagree. The memorandum appears to have simply been placed in the file relating to the criminal prosecution as a record of the call. Moreover, at the time the memorandum was created, an access request had not been made by the appellant. The fact that the appellant subsequently made a request for information and later, after receiving the ministry's decision which he disagreed with, decided to appeal that decision to our office does not automatically and retroactively transform a simple memorandum documenting a conversation that an administrator in the Crown Attorney's office had with the appellant into a document that was prepared "in contemplation of or for use in litigation."

[51] Accordingly, I find that page 113 does not "meet the description in the second branch of section 19" and section 19(b) does not apply to this page. As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

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[15] See: for example, Order PO-3059-R.

C. Did the institution exercise its discretion under sections 19 and 49(a)? If so, should this office uphold the exercise of discretion?

[52] The section 19 and 49(a) 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.

[53] 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.

[54] The ministry indicates that, while recognizing that individuals should have access to their own personal information, it took a number of factors into account in exercising its discretion in favour of non-disclosure, including:

- the highly personal nature of the information in the records pertaining to third parties;
- the relationship between the appellant and one of the third parties;
- the fact that the appellant has already received most of the documents sought through Crown disclosure, and although documents provided through *Stinchcombe* disclosure are subject to limitations on their use, the appellant may apply through civil court process to have them made available for other purposes;
- police records are available from the police service;
- the Crown brief is generally viewed as confidential and contains sensitive materials which are not available to the public at large; and
- no sympathetic need on the part of the appellant or compelling public interest in release of the materials has been put forward.

[55] As I indicated above, the appellant is of the view that he has not been treated fairly throughout his arrest, charging and trial. He believes the information contained in the Crown brief that was not disclosed to him during his trial contains information that will assist him in proving his "mistreatment" by the criminal justice system.

[56] Having considered the representations of both parties and all of the circumstances in this appeal, I am satisfied that the ministry has properly exercised its discretion to refuse disclosure to the appellant, taking into account only relevant considerations and not considering irrelevant ones.

[57] Accordingly, I uphold the ministry's decision to withhold the Crown brief from the appellant, with the exception of page 113.

[58] Because of the decisions I have made in this order, it is not necessary for me to consider the application of section 49(b) to the records, as they are all exempt under sections 19 and 49(a).

ORDER:

1. I order the ministry to disclose page 113 of the records by providing him with a copy of this page on or before **July 25, 2012**.

2. I uphold the ministry's decision to withhold the remaining records.

3. In order to verify compliance with the terms of this order, I reserve the right to require a copy of the record that is provided to the appellant pursuant to order provision 1.

Original signed by: July 4, 2012
Laurel Cropley
Adjudicator