Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3348

Appeal PA13-37

Ministry of the Attorney General

May 30, 2014

Summary: The requester made an access request to the ministry for records contained in a Crown prosecutor's file relating to a motor vehicle accident that occurred between a driver and a cyclist. The ministry denied access, in full, claiming the application of the mandatory exemption in section 21(1) (personal privacy) and the discretionary exemptions in sections 14 (law enforcement), 15 (relations with other governments) and 19 (solicitor-client privilege). During the mediation of the appeal, the appellant narrowed the scope of his request. The ministry issued a revised decision letter to the appellant, again denying access in full, claiming the application of the exemptions in sections 21(1) and 19. In this order, the adjudicator finds that the records at issue form part of the Crown brief and are exempt under branch 2 of the solicitor-client privilege exemption in section 19 of the *Act*. The ministry's exercise of discretion is upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

Orders and Investigation Reports Considered: PO-2733, PO-2769 and PO-2801.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of access request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records from the Crown Prosecutor's file

relating to a motor vehicle accident that occurred between a driver and a cyclist. The driver of the car was initially charged by the police. However, subsequently the Crown dropped the charges on the basis that there was no reasonable prospect of a conviction given the facts of the case.

[2] In particular, the request was for:

- discussions and correspondence between the special prosecutor, his Ontario representative and their offices, and the defence [counsel for the driver];
- analyses of evidence and witness statements;
- analysis of the accident reconstruction report and other [police] documents, including officers' memo books;
- expert analysis of security videos by [the police] and independent experts;
- forensic examination and analysis of the car involved in the incident; and
- photographs and documents as presented in court.

[3] The ministry located approximately 14,000 pages of records and issued a decision to the requester denying access in full, explaining that the records form part of the Crown brief. The ministry claimed the application of the discretionary exemptions in sections 14(1)(l), 15(b), 19(a), (b) and (c), and the mandatory exemption in 21(1), in conjunction with the presumptions in 21(3)(a) and (b) and the factor in section 21(2)(f). The ministry also advised the requester that he may wish to contact the court to request copies of the photographs and documents that were presented in court.

[4] The requester (now the appellant) subsequently appealed the ministry's decision to this office.

[5] During the mediation of the appeal, the appellant advised the mediator that he had already obtained two witness statements, which could be removed from the scope of the appeal. He also revised and narrowed the scope of his request as follows:

- all witness statements, including those from witnesses on the scene except those of [two named individuals];
- the video recordings from four specified locations;
- the analysis of the video evidence;
- the forensic analysis of the car involved in the incident; and
- the full legal analysis conducted by the special prosecutor.

[6] The mediator shared this revised request with the ministry, which in turn issued a revised decision, in which it advised the appellant that the records at issue still formed part of the Crown brief. The ministry denied access to these records, in full, claiming the same exemptions as set out above.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the ministry advised that it was no longer claiming the application of the exemptions in sections 14 and 15. Consequently, these exemptions are no longer at issue. The ministry also clarified that it is relying on the discretionary exemption in sections 19(a) and (b), as well as the mandatory exemption in section 21(1).

[8] For the reasons that follow, I uphold the ministry's decision and its exercise of discretion, and I dismiss the appeal.

RECORDS:

[9] The records include all witness statements, including those from witnesses on the scene except those of [two named individuals], video recordings, the analysis of the video evidence, the forensic analysis of the car involved in the incident, and the full legal analysis conducted by the special prosecutor.

ISSUES:

A: Does the discretionary exemption at section 19 apply to the records?

B: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 apply to the records?

[10] The ministry is claiming the application of the discretionary exemption in section 19(a) and (b) of the *Act*, which states:

> 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

[11] Section 19 contains two branches as described below. 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.

[12] 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.[1]

[13] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[2] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[3] the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
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> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

. . . . .

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[1] 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).
[2] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).
[3] (Butterworth's: Toronto, 1993), pages 93-94.

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[14] 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 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."

[15] 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.[4] 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.[5] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[6]

[16] 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*;[7] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[8]

Representations

[17] The ministry submits that the records at issue are exempt under branches 1 and 2 of section 19, as they represent part of a confidential Crown brief prepared for and/or by Crown counsel in contemplation of, or for use in, litigation. The ministry goes on to state that the records came into existence as a result of potential litigation and include:

- confidential witness statements
- evidence and reports prepared specifically for Crown counsel;
- forensic analysis;
- legal analyses; and
- the Crown Attorney's own work product.

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[4] Order PO-2733.
[5] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[6] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).
[7] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) (*Big Canoe*).
[8] *Ibid*.

[18] The ministry argues that numerous orders of this office and judgments, including *Big Canoe,*[9] have held that prosecution files such as Crown briefs are exempt from disclosure under section 19 of the *Act*. The ministry quotes from the *Big Canoe* decision where the Superior Court of Justice took the following position with respect to Crown brief records:

> . . . [T]he conditions for the exemption are explicitly related to the purpose for which it 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.

[19] The appellant submits that he should be granted access to the Crown brief, with the exception of any records that reveal communications between the defendant and his/her legal counsel. While not addressing the exemption in section 19 directly, the appellant appears to raise the issue of a public interest in the disclosure of the records. The appellant advises that he is concerned that the Crown not only dropped the charges against the defendant but, based on comments made by the Crown in court,[10] essentially exonerated him/her.

[20] The appellant also argues that there is no point in the Crown providing a detailed and apparently reasoned justification for dropping serious criminal charges without allowing for public discussion, analysis and evaluation of the decision. The appellant goes on to state:

> Just as there can be no point in giving explanations of decisions without public discussion, there can be no point in seeming to invite public discussion without the full, unvarnished facts.

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[9] See note 7.

[10] The appellant indicated that he has a copy of the transcript of the court proceeding in which the Crown dropped the charges against the defendant.

[21] In addition, the appellant is of the view that the Crown engaged in "cherry picking" evidence and testimony to arrive at a result that amounted to a special pleading for the defendant. The disclosure of the Crown brief, the appellant argues, would provide all of the factual information required to assess the Crown's decision.

Finding and analysis

[22] At the outset, I agree with the ministry's position that the records for which it claims the exemption in section 19 are Crown brief materials.

[23] In Order PO-2733, issued by former Senior Adjudicator John Higgins, he conducted a detailed analysis of the section 19 solicitor-client privilege exemption. The notable exception to his review of the jurisprudence is the Divisional Court's decision in the judicial reviews of Orders PO-2494 and PO-2498.[11] However, the relevant issue in Orders PO-2494 and PO-2498 was whether copies of the Crown brief materials *in the hands of the police* was exempt under section 19. In my view, Order PO-2733 continues to reflect the current approach of this office to branch 2 of section 19 where a request for a Crown brief has been submitted under the *Act* to the ministry rather than the police who may have conducted an investigation. This is evidenced by the fact that the reasoning in Order PO-2733 with regard to Crown brief records was adopted and applied in Orders PO-2769 and PO-2801.

[24] In Order PO-2733, former Senior Adjudicator Higgins found that many of the records in the Crown brief consisted of materials provided by the police to assist with the prosecution. He also found that the records, being the "foundation" of the Crown brief, qualified as records "prepared . . . for Crown counsel . . . in contemplation of or for use in litigation," and were, accordingly, exempt under branch 2 of section 19.

[25] In addition he also found that 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 also qualified for exemption under branch 2 on that basis.

[26] In making this finding, former Senior Adjudicator Higgins stated:

> 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

[11] Upheld in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952 (Div. Ct.), leave to appeal dismissed, Doc. M37397 (C.A.).

> particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context [emphasis added].

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

[28] In my view, the records at issue fall squarely within the branch 2 litigation privilege exemption in section 19(b) for the reasons stated above in Order PO-2733. I am satisfied that the records at issue comprise part of the Crown brief with respect to a criminal charge that was subsequently dropped by the Crown. Consequently, I find that the records at issue are exempt from disclosure under section 19 of the *Act*, subject to my review of the ministry's exercise of discretion. On the issue of waiver, I am satisfied on the evidence before me that there has been no waiver, either express or implied, of the records at issue.

[29] I also note that in his representations, the appellant raises the possible public interest that exists in the disclosure of the contents of the records at issue, thereby giving rise to the possible application of the "public interest override" provision in section 23 of the *Act*, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[30] Records which are exempt under section 19 are not, accordingly, subject to the application of section 23. As a result, I am unable to consider whether the "public interest override" provision applies to the records at issue in this appeal.

[31] Having found the records to be exempt from disclosure under section 19, it is not necessary for me to consider the application of the mandatory exemption in section 21(1).

Issue B: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[32] The section 19 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.

[33] 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; or
- it fails to take into account relevant considerations.

[34] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution.[13]

[35] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[14]

- the purposes of the *Act*, including the principles that: information should be available to the public; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;

[12] Order MO-1573.
[13] Section 54(2) of the *Act*.
[14] Orders P-344, MO-1573.

- 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; and

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

[36] The ministry submits that when exercising his or her discretion, a head must consider whether the requester's rights and interests in access are outweighed by the interests protected by the exemptions found in section 19 of the *Act*. The ministry also states that it recognizes that access to information should be granted except when the ministry is required to withhold such information under the *Act* or where it remains in the public interest not to release the records.

[37] With respect to this request, the ministry submits that it exercised its discretion not to disclose the records under section 19 in good faith, with full appreciation of the relevant facts on appeal and on a proper application of the relevant principles of law. In particular, the ministry states that it took into consideration the following relevant factors:

- the solicitor-client privilege interests inherent within the exemption in section 19;
- the appellant's interest in gaining access to the records;
- that Crown brief materials are only to be used for the purposes of criminal proceedings for which they were collected/created;
- the sensitive nature of the records' contents and the confidential context behind their creation;
- the creation of the records in contemplation of criminal proceedings;
- the ability of a prosecutor to obtain relevant file materials and administer justice in a fair, equitable and effective manner; and
- the law and principles as stated by the Supreme Court of Canada regarding records clearly protected by solicitor-client privilege.

[38] The appellant's representations did not address the issue of the ministry's exercise of discretion.

[39] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[15] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[16]

[15] Order MO-1287-I.
[16] Order 58.

[40] I have carefully reviewed the representations of the ministry and the appellant I am satisfied that the ministry exercised its discretion under section 19 in a proper manner. I am satisfied the ministry considered relevant factors, including the nature of the withheld information, the importance of solicitor-client and litigation privilege, and the purposes of the *Act*, including the appellant's right of access, in exercising its discretion. I am also satisfied the ministry did not consider irrelevant factors.

[41] Consequently, I uphold the ministry's exercise of discretion under section 19.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: May 30, 2014
Cathy Hamilton
Adjudicator