Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3957-I

Appeal PA16-590

Ministry of the Attorney General

May 27, 2019

Summary: The appellant submitted an access request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* for the Crown brief regarding his murder conviction. The ministry denied access, citing the application of section 49(a) (discretion to refuse requester's own information), in conjunction with the section 19 solicitor-client privilege exemption. In Interim Order PO-3927-I, the adjudicator found the Crown brief exempt under the discretionary section 49(a) exemption but ordered the ministry to re-exercise its discretion concerning the witness statements of the individuals who witnessed the interaction between the appellant and the deceased.

In this interim order, the adjudicator finds that the ministry did not properly exercise its discretion in response to Interim Order PO-3927-I and orders it to re-exercise its discretion again.

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"), 49(a), and 19; *Criminal Code* R.S.C., 1985, c. C-46, sections 696.1, 696.3, and 696.4.

Orders Considered: Interim Order PO-3927-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The appellant submitted an access request to the Ministry of the Attorney

General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). The request was for "all disclosure relevant to the prosecution of second degree murder charge in relation to the death of [name]." The appellant indicated in his request that he had been convicted on the murder charge.

[2] The ministry issued a decision denying access, citing the discretionary personal privacy exemption in section 49(b) and the discretionary solicitor-client exemption in section 19(a) of the *Act.*

[3] The appellant appealed the ministry's access decision.

[4] During the mediation stage, the ministry advised that the requested information forms part of the Crown brief. The ministry also confirmed it is claiming section 49(a) (discretion to refuse requester's own information) in conjunction with the solicitor-client privilege exemption in section 19 of the *Act.* A mediated resolution of the appeal was not possible. Accordingly, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[5] After the exchange of representations, I issued Interim Order PO-3927-I. In that order, I found that the records were exempt from disclosure under section 49(a), in conjunction with section 19.

[6] However, I ordered the ministry to re-exercise its discretion with respect to the witness statements of the individuals who witnessed the appellant's interaction with the deceased in accordance with the reasons in Interim Order PO-3927-I.

[7] The entirety of the ministry's response to Interim Order PO-3927-I, dated March 21, 2019, reads:

> In accordance with the Notice of Interim Order issued by the Office of the Information and Privacy Commissioner of Ontario, dated February 14, 2019, the Ministry was to reconsider its exercise of discretion with respect to specific witness statements as contained in the Crown brief. The Ministry has now had the opportunity to do so and continues to maintain that the statements should be withheld as part of the Crown brief pursuant to ss. 19, 21 and 49 of the Freedom of Information and Protection of Privacy Act.

[8] I then sought and received the appellant's response to this response of the ministry. His response is more particularly described below.

[9] In this interim order, I order the ministry to re-exercise its discretion again.

RECORDS:

[10] At issue in this appeal are the witness statements of the individuals who

witnessed the appellant's interaction with the deceased contained in the Crown brief.[1]

DISCUSSION:

Did the ministry re-exercise its discretion in a proper manner under section 49(a), in conjunction with section 19?

[11] 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.

[12] 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.

[13] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[2] This office may not, however, substitute its own discretion for that of the institution.[3]

[14] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[4]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected

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[1] The contents of the Crown brief is more particularly described below.
[2] Order MO-1573.
[3] Section 54(2).
[4] Orders P-344 and MO-1573.

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[15] In Interim Order PO-3927-I, I set out the appellant's position, which was essentially that he required access to the witness statements of the individuals who witnessed his interaction with the deceased to assist in vindicating him regarding the murder conviction for which he is serving a life sentence. The appellant noted that he was initially acquitted of this charge.

[16] In reply to the appellant's initial representations, the ministry stated that the FOI process is not the proper avenue for accessing the records because they are protected by section 19 solicitor-client privilege in perpetuity, and because no limits or restrictions can be placed on the records disclosed under *FIPPA* in terms of use or sharing with other parties.

[17] The ministry also noted that since the appellant had exhausted his routes of appeal, he could have his criminal convictions reviewed pursuant to a process in place under section 696.1 of the *Criminal Code*. According to the ministry, this process offers a means by which previous criminal disclosure may be accessed. The ministry also pointed out that convicted individuals are free to make a request to the relevant police service for copies of their investigative files.

[18] The appellant then provided sur-reply representations. In sur-reply, the appellant stated that he is in the midst of applying for a section 696.1 *Criminal Code* review and that is the reason he has made this access request. He states that he needs "new and significant" information for his section 696.1 review process, which he submitted would be contained in the witness statements of the individuals who witnessed his interaction with the deceased. He further stated that he had not received anything of significance from his access request to the police.

[19] In Interim Order PO-3927-I, I made the following findings:

> The appellant was initially acquitted, but later convicted of second degree murder, and he is serving a life sentence. He claims that he was wrongfully convicted and requires access to the records to assist him in seeking to overturn his wrongful conviction. In particular, he believes that the witness statements of the individuals who witnessed his interaction with the deceased may be relevant.
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> The records in the Crown brief at issue include those witness statements. As noted above, however, the ministry's evidence is that the records overall consist of the records typically found in a Crown brief: synopses, civilian witness lists, police will-says/statements/notes, supplementary police reports, witness interviews/statements, Centre of Forensic Sciences Reports, expert reports, videos, audio tapes, photographs of the victim's injuries, police diagrams, Crown notes, CPIC checks, Crown correspondence, legal research, appeal materials, and other documents.
>
> The appellant's position is that the witness statements regarding his interaction with the deceased contain significant information that would assist him in his quest for a review of his conviction under section 696.1 of the *Criminal Code*. This section reads:
>
> > (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.
> >
> > (2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.
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> The powers of the Minister of Justice concerning an application under section 696.1 are set out in section 696.3(3), which reads:
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> > On an application under this Part, the Minister of Justice may
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> > > (a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,
> > >
> > > > (i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a

> person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or
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> (ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or
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> (b) dismiss the application.
>
> (4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

The considerations to be taken into account in an application under section 696.1 are set out in section 696.4, which reads:

> In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including
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> (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
>
> (b) the relevance and reliability of information that is presented in connection with the application; and
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> (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy. [Emphasis added by me]

As stated, the appellant seeks access, in particular, to copies of the witness statements of the individuals who witnessed his interaction with the deceased. He states that neither he nor his counsel were provided with copies of these statements. He wishes to utilize these statements in support of his section 696.1 application to obtain a new trial or appeal hearing under section 696.3(3). He submits that he has been wrongfully convicted of murder and that the witness statements of those who witnessed his interaction with the deceased will exonerate him. He claims to have been denied access to these witness statements. The ministry did not respond to the appellant's submission that the appellant has been denied access to these witness statements. In other words, in its

representations, the ministry did not respond to the appellant's representations as to what specific information he is seeking from the records and why he is seeking that information in particular.

Based on the information before me, I find that in exercising its discretion, the ministry considered all of the various records at issue in this appeal as essentially comprising one record and did not consider whether any of the records at issue could be disclosed individually. In particular, in denying access to the undisclosed witness statements sought by the appellant, I find that the ministry did not consider with respect to these statements that:

- the appellant has a sympathetic or compelling need to receive the information, and

- the nature of the information in the witness statements and the extent to which it is significant to the appellant.

Although the ministry submits that the process under section 696.1 of the *Criminal Code* offers a means by which previous criminal disclosure may be accessed, it did not provide particulars in this regard. I note, too, that the appellant states that he never received the witness statements in question as part of his disclosure in the context of the criminal trial. If the appellant's right under the section 696.1 process is limited to access to material he already received, this would not be helpful if the witness statements in question were not provided to him. In any event, I note that the availability of another process for disclosure is not a barrier to obtaining access under the *Act*.[5] Overall, I find that the appellant's sympathetic need to receive the information through the FOI process remains a relevant consideration notwithstanding the ministry's apparent assertion that he has another means of obtaining it.

Accordingly, I will order the ministry to re-exercise its discretion concerning the specific information from the Crown brief that the appellant has identified as significant to his section 696.1 application, namely the witness statements that contain information about the appellant's interaction with the deceased.

In arriving at this decision to order the ministry to re-exercise its discretion regarding the witness statements that contain details about the appellant's interaction with the deceased, I have considered the findings

[5] Order M-1146.

of the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[6]

As stated in the *Criminal Lawyers'* case, the ministry has a residual discretion under section 19 to consider all relevant matters, and it is open to the IPC to review the ministry's exercise of his discretion. Therefore, I am reviewing the ministry's exercise of discretion under section 19.

In this case, I find that the ministry did not consider whether to disclose the witness statements notwithstanding the privilege attached to them in the circumstances. These circumstances include the fact that:

> • the appellant was initially acquitted of the second degree murder for which he is now serving a life sentence,
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> • he needs to present "new matters of significance that were not considered by the courts" to the Minister of Justice in support of his section 696.1 of the Criminal Code application to review his conviction, and
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> • the witness statements he is seeking as to his interactions with the deceased may contain information that qualifies as evidence of "new matters of significance that were not considered by the courts."

It appears that the ministry did not consider these factors in exercising its discretion. In addition, I find that the ministry has fettered its discretion by indicating that:

> … the FOI process is not the proper mechanism for accessing such records given that: (i) they are protected by s. 19 solicitor-client privilege in perpetuity, and; (ii) no limits or restrictions can be placed on the records disclosed under *FIPPA* in terms of its use or to whom it can be shared with subsequent to its disclosure. [Emphasis added by me].

In doing so, the ministry has taken into account an improper consideration and I find that this constitutes an error in the exercise of its discretion in applying section 19.[7] The ministry, by determining that the FOI process

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[6] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, (also referred to in this order as the *Criminal Lawyers'* case). I quoted from paragraphs 66 to 72 of the *Criminal Lawyer's case*.

[7] See Interim Order MO-2552-I.

> was not a means to access the records sought, failed to take into account that section 19 is a discretionary exemption. The ministry stated that it was "required" to withhold the information under section 19. This is not the case.
>
> According to the ministry's representations, there are many documents that comprise the Crown brief. As well, the ministry provided an index of records which lists the types of records at issue in this appeal and categorizes these records by the level of court they were used by the ministry.
>
> I accept that the Crown brief is comprised of many records. By not considering whether any of the records could or should be disclosed to the appellant, in particular the specific information that the appellant seeks, the witness statements that contain information about the appellant's interaction with the deceased, I find that the ministry has not exercised its discretion in a proper manner. Accordingly, I will order the ministry to re-exercise its discretion under section 49(a), in conjunction with section 19, with respect to the witness statements of the individuals who witnessed the appellant's interactions with the deceased.
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> As noted above, the appellant specifically disputed the ministry's exercise of discretion concerning the witness statements that contain information about his interaction with the deceased. He has not explicitly challenged the ministry's exercise of discretion concerning any other specific records in the Crown brief. Based on my review of the parties' representations, I find that the ministry exercised its discretion in a proper manner concerning the remaining information in the Crown brief.

[20] The ministry's entire letter, consisting of one paragraph, in response to Interim Order PO-3927-I is set out above.

[21] The appellant responded to this letter by stating:

> In my view, the ministry[8] is doing whatever possible to prevent me from viewing potential exculpatory information that could be utilized in exonerating me of second degree murder. Instead of allowing justice to continue to run its course, they build road blocks to prevent me from uncovering important evidence. I have been found not guilty of this charge previously, which is a true and tangible testament that there is at a

[8] The ministry is also referred to as the Attorney General or the Ministry of the Attorney General in the appellant's response.

> minimum much plausibility that I may very well be innocent. That being said, one would reasonably think that the ministry would happily turn over all disclosure and other important information…
>
> Obviously, the ministry is vehemently fighting against me because they have information that they are trying to hide. Why else would they be so adamant that I not receive this material? What is more important than someone's liberty that may be innocent, or people's privacy, which this information has already been viewed by many? A rationally minded person would decide liberty to be paramount.
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> …Like I have stated previously, if there needed to be any redacting to highly private information I would be fine with it as long as I could still have an understanding of the material before me.

Analysis/Findings

[22] The ministry's response to Interim Order PO-3927-I was that witness statements at issue should be withheld as part of the Crown brief. This is the same improper consideration that it took into account previously.

[23] I find that by taking the position that the witness statements should be withheld as part of the Crown brief, the ministry has fettered its discretion and, in fact, has failed to exercise it at all. Instead, it appears to me that the ministry has treated all of the information in the Crown brief as being part of one document, as opposed to being comprised of many types of different documents. It appears to me that the ministry has also determined that it has no choice but to withhold everything in the Crown brief.

[24] As set out above, the Crown brief includes:

> …, civilian witness lists, police will-says/statements/notes, supplementary police reports, witness interviews/statements, Centre of Forensic Sciences Reports, expert reports, videos, audio tapes, photographs of the victim's injuries, police diagrams, Crown notes, CPIC checks, Crown correspondence, legal research, appeal materials, and other documents.

[25] By determining that nothing at all can be disclosed from the Crown brief, I find that the ministry has failed to consider the Crown brief's contents, as well as having failed to consider that sections 19(a) and 49(a) are discretionary exemptions, each of which permit the ministry to disclose information from the Crown brief, despite the fact that it could withhold it.

[26] I find that the ministry has not re-exercised its discretion in a proper manner in accordance with the reasons set out in Interim Order PO-3927-I. Specifically, in its response to the order, there is no indication in its letter of March 21, 2019 that it took into account the considerations noted in Interim Order PO-3927-I, including the

following:

- that the appellant was initially acquitted of the second degree murder for which he is now serving a life sentence,

- that he needs to present "new matters of significance that were not considered by the courts" to the Minister of Justice in support of his section 696.1 of the Criminal Code application to review his conviction, and

- that the witness statements he is seeking as to his interactions with the deceased may contain information that qualifies as evidence of "new matters of significance that were not considered by the courts."

[27] I find that the ministry's response to Interim Order PO-3927-I demonstrates that it did not properly re-exercise its discretion as it was required to do. As such, I am ordering the ministry to re-exercise its discretion again and to take into account the considerations set out in this order and in Interim Order PO-3927-I.

ORDER:

1. I order the ministry to re-exercise its discretion again under section 49(a), in conjunction with section 19, with respect to the witness statements that contain information about the appellant's interaction with the deceased, taking into account the considerations set out in this order and in Interim Order PO-3927-I.

2. I order the ministry to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If the ministry continues to withhold the witness statements of the individuals who witnessed the appellant's interaction with the deceased, then I also order it to provide the appellant and this office with an explanation of the basis for re-exercising its discretion in this manner.

3. The ministry is required to send to the appellant and this office the results of its re-exercise of discretion, and its explanation, by no later than **June 26, 2019**.

4. If the appellant wishes to respond to the ministry's re-exercise of discretion, and/or its explanation for re-exercising its discretion to withhold the witness statements, he must do so within 45 days of the date of the ministry's correspondence (or whatever time as I may permit) by providing this office with written representations.

Original Signed by: May 27, 2019

Diane Smith
Adjudicator