Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3950

Appeal PA14-501

Ministry of the Attorney General

April 30, 2019

Summary: The Ministry of the Attorney General (the ministry) received a request from the appellant under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to him. At mediation, the appellant narrowed his request to be only for the notes of an identified police officer relating to a police matter involving him and challenged the reasonableness of the ministry's search for them. As a result of mediation, the reasonableness of the ministry's search for responsive records and the application of section 49(a) (discretion to refuse requester's own information), in conjunction with sections 19(a) and (b) (solicitor-client privilege) of the *Act*, became the sole issues in the appeal. In this order, the adjudicator finds that the ministry conducted a reasonable search for responsive records and that the records identified by the ministry as responsive to the narrowed request qualify for exemption under section 49(a), in conjunction with section 19(b) of the *Act*. The appeal is dismissed.

Statute 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(b) and 49(a).

Cases Considered: *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, [2002] O.J. No. 4596; *Ontario (Attorney General) v. Big Canoe*, 2006 CanLII 14965, [2006] O.J. No. 1812; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

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

the following information:

> Appeal Package - Crown Disclosure Package Prisoners Appeal R. v. [appellant] July 1978. Kingston Ontario Court of Appeal Archives. (On appeal from Magistrates Court Brant County Conviction May 1978) Brant County Crown's Office had carriage of the matter.

[2] The ministry identified records that it considered responsive to the request, and disclosed a portion, but denied access to the remainder under sections 15(b) (relations with other governments), 19(a) and 19(b) (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*. Some information was also severed from the records as not responsive to the request. Finally, the ministry advised the requester that court records can be obtained from the Registrar of the Superior Court of Justice and provided him with contact information.

[3] The appellant appealed the ministry's decision. During mediation, the appellant advised that he was only interested in obtaining the notes of an identified Brantford Police Constable relating to the 1977-1978 police matter. He contended that the ministry has access to the notes. These concerns were relayed to the ministry and the ministry reviewed a Crown Brief. It identified several additional responsive records prepared by the identified police officer and issued a supplementary decision letter relying on section 49(a) (discretion to refuse access to a requester's own information), in conjunction with section 19(b), as well as section 49(b) (personal privacy) to deny access to them.

[4] Further discussions with the appellant did not resolve the appeal. The appellant continued to challenge the ministry's exemption claims and the reasonableness of the ministry's search for the notes of the identified Brantford Police Constable relating to the 1977-1978 police matter. Since a mediated resolution could not be reached, the appeal was moved to the adjudication stage of the appeals process.

[5] The originally assigned adjudicator began her inquiry by sending a Notice of Inquiry to the ministry, initially, seeking representations. The ministry provided responding representations. She then sent a Notice of Inquiry to the appellant along with a copy of the ministry's representations. The appellant provided responding representations.

[6] The file was then reassigned to me to complete the inquiry. I decided to send a copy of the appellant's representations to the ministry for reply along with a Notice of Inquiry seeking its representations on the issue of the reasonableness of its search for responsive records. The ministry provided representations, which were then shared with appellant. The appellant provided responding representations.

[7] In this order, I find that the ministry conducted a reasonable search for responsive records and that the records identified by the ministry as responsive to the narrowed request qualify for exemption under section 49(a), in conjunction with section

19(b) of the *Act*. The appeal is dismissed.

RECORDS:

[8] At issue in this appeal are the records prepared by the identified police officer relating to the 1977-1978 police matter involving the appellant.

ISSUES:

A. Did the institution conduct a reasonable search for records?

B. Does section 49(a), in conjunction with section 19 (solicitor-client privilege), apply to the records?

DISCUSSION:

Issue A: Did the institution conduct a reasonable search for records?

[9] 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.[1] 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.

[10] 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.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[11] 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.[4]

[12] 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

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[5]

[13] 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.[6]

The appellant's representations

[14] In his initial representations, the appellant addresses his request for a copy of the notes of the identified police officer dated a specified date. He had provided this office with a redacted copy of these notes during mediation. It would appear that he obtained the redacted copy of these notes in the course of a proceeding before the Ontario Superior Court of Justice. He writes in his representations:

> At the time of the origin of my application, the police note document that I had applied for copies of was stored in a "Disclosure Box" with [named individual] the [envelope shows] #78 and "Notes of Officer [identified police officer]" in assistant crown attorney's [named individual's] handwriting. A photocopy of the envelope [with handwritten notations] was sent to [named mediator], along with a copy of the court transcript pertaining to Ontario Superior Court of Justice case [identified case], a criminal matter that was before […] Justice [named Justice], from [date range], with the file number(s) Court File No.: [identified court file number] […].

[15] He adds:

> They are not in […] [named mediator's] "Revised Mediator's Report" dated [specified date] which redirected my application and search of records to the Kingston, Ontario Superior Court of Justice appeal court archives, as [demonstrated by] this excerpt [of the Revised Mediator's Report]:
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> > Appeal Package - Crown Disclosure Package Prisoners Appeal R. v. [appellant] July 1978. Kingston Ontario Court of Appeal Archives. (On appeal from Magistrates Court Brant County Conviction May 1978. Brant County Crown's Office had carriage of the matter.

The ministry's representations

[16] The ministry submits that it conducted a reasonable search for responsive records and adds:

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[5] Order MO-2185.
[6] Order MO-2246.

> It is significant to note that the searches in relation to the 1970's [specified type] charge were hindered by the fact that almost forty years had passed from the time of that prosecution. As the appellant is aware from an earlier FOI request, Brant County (the jurisdiction with carriage of the original trial) no longer has any records. It is not unreasonable for records to have been purged given how dated this matter is. The Criminal Law Division (CLD) can only respond to the present request based upon the records that are in CLD's possession – meaning that the ministry cannot speak to what the police or courts [footnote omitted] may or may not have in their possession.

[17] The ministry provided an affidavit of a lawyer at the Crown Law Office Criminal Law Division (the lawyer) in support of its position.

[18] In the affidavit the lawyer states that after the CLD Senior Division Coordinator received the request, as she was already aware that an earlier request had determined that no trial records existed in Brant County, the CLD Senior Division Coordinator believed that responsive records might reside with the appeals section of the Crown Law Office - Criminal (CLO-C). She then forwarded the request to a Crown counsel within CLO-C, who located appeal records from the appellant's 1978 conviction. She states that a review of the file was conducted.

[19] The lawyer states that the appellant then submitted a second access request for records relating to his conviction, which he asserted he received in 2005 as part of disclosure during another criminal proceeding. When inquiring into this matter, the Crown counsel within CLO-C learned that the appellant had a conviction in Toronto for other charges. The lawyer then determined that it was therefore necessary to search the Crown brief for the other conviction to see if it contained any of the records sought by the appellant.

[20] The lawyer states that she then contacted counsel to the Director of Crown Operations for the Toronto region, to assist in locating any records that may have formed part of the Crown brief for those charges. She also sought records from CLO-C regarding the appellant's appeal of those charges to the Court of Appeal. She then conducted a review of the files.

[21] The lawyer states that to be as comprehensive as possible, she also sought any responsive records that might be held by CLO-C regarding the other criminal proceeding and subsequently reviewed that file.

[22] She states that the ministry then provided a decision letter to the appellant with respect to his original request denying access to the records relating to his 1978 conviction, which he appealed.

[23] With respect to the notes of the identified police officer, the lawyer states that:

> All materials prepared by [identified police officer] had already been collected and, in April 2015, the appellant was provided with another decision letter from the ministry, denying access to all materials prepared by [the identified police officer]. In July 2015, copies of those documents were provided by the ministry to the IPC, upon request.

[24] The notes provided by the appellant to the mediator were not among the records that were the subject of the ministry's April 2015 supplementary decision letter.

The appellant's reply representations

[25] In his reply representations, the appellant challenges the truth of the statements made by the lawyer in the affidavit and provides his view of the conduct of the ministry as well as individuals involved in the underlying matter and this appeal. He maintains that the ministry misconstrued his request and failed to conduct a reasonable search for responsive records. He seeks, amongst other things, relief under the *Canadian Charter of Rights and Freedoms* (the *Charter*).[7]

Analysis and finding

[26] The appellant has not met the procedural requirements of raising a *Charter* issue in this office. He did not comply with section 12 of this office's *Code of Procedure*, and serve notice to the Attorney Generals of Canada and Ontario. Accordingly, I will not address that aspect of the appellant's argument any further.

[27] Although the appellant takes issue with the reasonableness of the ministry's search for responsive records, in my view he has failed to provide sufficient evidence to challenge the evidence or submissions they provided in support of the reasonableness of their search. The ministry conducted a broad search for records, which included any materials prepared by the identified police officer relating to the 1977-1978 police matter involving the appellant.

[28] In all the circumstances, I am satisfied that the ministry's representations and the affidavit it filed in support of its position demonstrate that its search for responsive records is in compliance with its obligations under the *Act*. Accordingly, I conclude that the ministry conducted a reasonable search for responsive records.

Issue B: Does section 49(a), in conjunction with section 19 (solicitor-client privilege), apply to the records?

[29] Section 2(1) of the *Act* defines "personal information" as being recorded

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[7] The *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982* (UK), 1982, c 11.

information about an identifiable individual. Given the nature of the information requested, which relates to information pertaining to him, and the content of the records, I find that they all contain the personal information of the appellant as defined in section 2(1) of the *Act*. I also find that some of the records contain the personal information of other identifiable individuals.

[30] The legislative scheme established by the *Act* contains different entitlements to information, depending on whether the request is for an individual's own personal information, or for general records. In the former situation, requests would be processed under Part III of the *Act*. In the latter case, requests would be treated under Part II of the *Act*.[8] Section 49(a) applies if a record contains the requester's own personal information. If it does, the analysis is conducted under Part III of the *Act*.

[31] 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.

[32] 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[33] 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.[9]

[34] In this appeal, the ministry takes the position that because they are sourced from a Crown brief, the materials prepared by the identified police officer are subject to solicitor-client privilege, thereby falling within the scope of section 19 of the *Act*.

[35] 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; …

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[8] M-352.
[9] Order M-352.

[36] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 2: statutory privileges

[37] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Statutory litigation privilege

[38] This privilege applies to records prepared by or for Crown counsel "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[10]

[39] 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.[11] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[12] However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[13]

[40] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[14]

The ministry's representations

[41] The ministry submits that all the records at issue represent part of a confidential Crown brief prepared for, and/or by, Crown counsel in contemplation of, or for use in, litigation and qualify for exemption under both Branches of section 19.

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[10] See *Ontario (Attorney General) v. Big Canoe*, 2006 CanLII 14965, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[11] Order PO-2733.
[12] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[13] 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.
[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

[42] Referencing in particular the Ontario Court of Appeal decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*[15] and the Ontario Divisional Court decision in *Ontario (A.G.) v. Big Canoe*[16] the ministry submits that access to confidential prosecution files such as Crown Briefs have been found by this office and Ontario courts to qualify for exemption under section 19 of the *Act*.

[43] The ministry submits that the records in this matter form part of the Crown brief and that the records themselves came into existence as a result of litigation, and subsequent appeals, and generally include synopses, evidence and reports prepared/collected specifically for Crown counsel and the court, legal analyses of the evidence, as well as the prosecutor's own work product.

[44] The ministry submits that previous orders of this office have held that Branch 2 of section 19 has no temporal limit and affords exemption to a wide range of materials obtained and prepared for actual or potential litigation. The ministry submits that the plain meaning of the words used in Branch 2 indicate that the exemption "is permanent".

The appellant's representations

[45] The appellant's representations do not specifically address whether section 19 applies to the records at issue in this appeal. In his representations, the appellant challenges the conduct of the ministry as well as individuals involved in the underlying matter and this appeal. He seeks, amongst other things, relief under section 7 of the *Charter*.

Analysis and finding

[46] As I set out above, the appellant has not met the procedural requirements of raising a *Charter* issue in this office. Accordingly, I will not address that aspect of the appellant's argument any further.

[47] I am satisfied that the records, which are sourced from a Crown brief, are solicitor-client privileged information and are subject to the statutory litigation privilege in section 19(b) of the *Act*.

[48] On the facts before me, I am satisfied that no waiver of privilege has occurred

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[15] [2002] O.J. No. 4596 at paragraph 14.
[16] 2006 CanLII 14965, [2006] O.J. No. 1812 at paragraphs 36, 43 and 44.

with respect to the information at issue in this appeal[17]. Accordingly, I find that this information qualifies for exemption under section 49(a), in conjunction with section 19(b).

[49] Finally, I have considered the representations provided by the ministry on its exercise of discretion, which I have not reproduced in this order. I have also considered the arguments of the appellant challenging the ministry's exercise of discretion, which I have also not reproduced in this order. I am satisfied that in all the circumstances, the ministry properly exercised its discretion under section 49(a). It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[18]

[50] Therefore, I find that the withheld information is solicitor-client privileged information and qualifies for exemption under section 49(a) in conjunction with section 19(b).

[51] As I have found that the records at issue qualify for exemption under section 49(a), in conjunction with section 19(b), it is not necessary for me to also consider whether the other exemptions claimed by the ministry may apply.

ORDER:

1. The ministry conducted a reasonable search for responsive records.
2. The records at issue qualify for exemption under section 49(a), in conjunction with section 19(b) of the *Act*.
3. The appeal is dismissed.

Original Signed by: April 30, 2019
Steven Faughnan
Adjudicator

[17] The Crown's common law privilege is not waived by the delivery of the Crown brief disclosure to an accused: *Ontario (Attorney General) v. Big Canoe*, 2006 CanLII 14965, [2006] O.J. No. 1812 at paragraphs 43 and 44.
[18] 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.