Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1931

Appeal PA-990399-1

Ministry of the Attorney General

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BACKGROUND:

In Order PO-1882, Adjudicator Donald Hale provided some background information relating to the appellant and her husband and the various freedom of information requests and appeals that have been filed by these individuals, which I feel would be helpful to reproduce for the purposes of this order. Adjudicator Hale explained the following:

> The appellant and her husband were the owners of a vacation property in eastern Ontario. Over the past ten years, they were involved in a number of disputes with their neighbours which resulted in a series of complaints to the local Ontario Provincial Police (OPP) detachment and charges being laid against the appellant's husband. As a result of these complaints and counter-complaints to the OPP, a number of investigations were undertaken, which resulted in the creation by the OPP of a large number of records such as occurrence reports, witness statements and notebook entries.
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> The appellant initiated several requests with the Ministry of the Solicitor General (the Ministry) and the Ministry of the Attorney General seeking access to a wide range of records relating to various investigations and prosecutions undertaken by the OPP, the local Crown Attorney's office and the office of the Public Complaints Commission, for example. These requests have also given rise to several appeals to the Commissioner's office which have resulted in the issuance of Orders PO-1708, P-1618, P-1472, P-1457 and P-585, as well as other pending decisions. ...

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

(1) "the complete Crown Brief(s) and Crown Attorney files in the matter(s) of R. v. [name of appellant's husband]";

(2) the "complete Provincial Court file for a trial held in May, August and September of 1997", including "the judge's notes";

(3) "the affidavit of Service and Court documents showing the disposition of a Summons served on [the appellant's husband] in 1991", including "the complete information, both sides, related to that Summons"; and

(4) copies of two specific Informations, both sides, laid in 1992.

The appellant's request, which was outlined in two separate letters to the Ministry, also included additional details in order to assist the Ministry in locating the responsive records. With her request, the appellant provided the Ministry with a letter from her husband consenting to the disclosure of his personal information.

Subsequently, the Ministry wrote to the appellant advising that, in accordance with section 27 of the *Act*, the Ministry was extending the time to respond to the request by an additional 14 days.

The Ministry did not, however, issue its decision by the specified date and the requester later appealed the Ministry's deemed refusal. Appeal File PA-990287-1 was opened by this Office to deal with that matter.

Subsequently, the Ministry issued a decision letter to the appellant granting partial access to the responsive records. The Ministry relied on sections 49(a) and (b) of the *Act*, with specific reference to sections 19 (solicitor-client privilege), 21 (invasion of privacy) and/or 22(a) (information published or available) of the *Act*, to deny access to the remainder of the records.

With respect to the records which were denied by the Ministry pursuant to section 22(a), the Ministry advised the appellant as follows:

> Lastly, access to another part of the record (approximately 38 pages) is denied under subsection 49(a) in conjunction with subsection 22(a) of the *Act* as the record is currently available to the public. The exempt records consist of court transcripts including the Pre-Trial dated September 20, 1996, and the Reasons for Judgement dated September 22, 1997, and the Information.

I note that although the Ministry indicated that approximately 38 pages were withheld pursuant to section 22(a), according to the Ministry's index of records and based on my review of the records at issue, only 29 pages are withheld by the Ministry pursuant to this exemption.

The Ministry also advised the appellant that should she wish to obtain a copy of the court transcripts, she should contact the Court Reporter's Office. Similarly, the Ministry indicated that if the appellant wishes to obtain a copy of the Information, she should contact the Criminal Court Office. The Ministry provided the appellant with the relevant information in this regard.

Also in its decision, the Ministry advised the appellant that the requested "Provincial Court file" and the "judge's notes" are not in the custody or under the control of the Ministry.

In turn, the appellant advised that the Ministry's decision did not address all of the information which was being sought by the appellant. As a result, the Ministry conducted a further search and located additional records responsive to the appellant's request. The Ministry then issued a supplementary decision to the appellant and granted partial access to these records. The Ministry denied access to the remainder of the records, pursuant to sections 49(a) and 49(b), with specific reference to sections 13 (advice or recommendations), 19, 21 and 22(a) of the *Act*.

In view of the above, the appellant's deemed refusal appeal was resolved and Appeal File PA-990287-1 was closed. The appellant appealed the Ministry's two decisions regarding access to the responsive records and, in turn, the current appeal (PA-990399-1) was opened. During the mediation stage of the appeal, the appellant informed the Mediator that she is no longer pursuing access to the Reasons for Judgment (record 112), judge's notes or the court transcripts from the first day of the trail (May 26, 1997) (record pages B170 - B267). Accordingly, these records are no longer at issue in this appeal. Also during mediation, the Ministry disclosed records 1, 2, 42, 61 and 235 - 237 to the appellant.

A Notice of Inquiry was sent by this office to the Ministry, initially. The Ministry submitted representations in response to the Notice. The Ministry also disclosed one additional record [page 101(a)] in total to the appellant. Accordingly, this record is no longer at issue in this appeal.

Subsequently, I sent a modified Notice of Inquiry, reflecting matters arising from the Ministry's representations, to the appellant along with the non-confidential portions of the representations. The appellant also provided representations, which were forwarded, in part, to the Ministry for reply. Reply submissions were made by the Ministry.

In her representations, the appellant indicated that she is not pursuing access to the severed potions of Records B71, B82 and B84. Accordingly, these records are no longer at issue in this appeal. The appellant also indicated that she was not seeking access to any medical reports or medical information concerning any individuals other than herself or her husband. The records that consist of such information are Records: 165-171. Accordingly, these records are also no longer at issue in this appeal.

Also in her representations, the appellant indicated that after reviewing the Notice of Inquiry with respect to the issue of custody and control, the appellant agrees that records maintained by the Provincial Court are not subject to the *Act*. Accordingly, I will not consider this issue further.

Finally, the appellant raised the possible application of the public interest override contained section 23, which I will address below.

RECORDS:

The records remaining at issue in this appeal include correspondence, memoranda, interview reports, occurrence and supplementary reports, witness lists, handwritten notes, an Information, copies of photographs, witness statements, police officers' notes, photocopies of reported court decisions, transcript of a pre-trial, and other related documents.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

All of the records at issue in this appeal pertain to the criminal charges which had been brought against the appellant's husband and the prosecution of that matter. As such, I find that they contain the appellant's husband's personal information. Most of these records also contain the personal information of the appellant.

A large number of records also contain information pertaining to other identifiable individuals, including witnesses. This information consists of the names and addresses of various named individuals, information about the nature of their complaints against the appellant and her husband, as well as the evidence that was provided during the appellant's husband's trial.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

The Ministry is relying on section 49(a) to exempt the remaining records at issue from disclosure on the basis of the exemptions contained in sections 13, 19 and 22(a).

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

I will consider whether the records qualify for exemption under sections 13, 19 and 22(a) as a preliminary step in determining if section 49(a) applies.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for 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.

Representations

The appellant submits that any communication between the Crown Attorneys and the appellant or her solicitor is not protected by solicitor-client privilege. Similarly, the appellant argues that any communication between the Crown Attorneys and witnesses is also not covered under this exemption. The appellant also submits that the privilege with respect to certain records may have been waived if the records were disclosed by an OPP officer to an individual outside the OPP or the Crown Attorney's office. The appellant further argues that solicitor-client privilege cannot

apply to information which has been tendered in evidence in a proceeding. Finally, the appellant submits that litigation privilege in the records has terminated and that any further litigation involving the Ministry before the Ontario Court of Appeal or the Ontario Civilian Commission on Police Services (OCCPS) is not related to the prosecution of her husband.

The Ministry relies on "branch 2" of section 19 with respect to all of the records which remain at issue in this appeal, with the exception of Records 113 and 213-214, for which an exemption under section 22(a) has been claimed. The Ministry submits that all of the records in the Crown files were created and prepared by or for Crown counsel in contemplation of or for use in litigation at the stage of trial, at the stage of appeal and at the stage of consideration of a new trial after the Court of Appeal allowed the appellant's husband's appeal. The Ministry submits that it is not aware of any further litigation continuing in this matter, but that section 19 privilege should apply to the records at issue, even though litigation has terminated.

The Ministry takes the position that previous decisions of this office (Orders P-1342, P-1551 and P-1561) relating to the termination of litigation and the limits placed on "branch 2" of the exemption were in error and should not be applied to the case at hand. To a large extent, the Ministry bases its arguments on the findings in orders pre-dating these newer orders.

The Ministry also submits the following:

> There is nothing in the plain wording of branch 2 of section 19 that indicates that this exemption ends when the litigation ends. If the Legislature had intended for the branch 2 exemption to end when the litigation ended they could have written so in the section. Branch 2 does not incorporate the rules that govern the solicitor-client privilege. The rules governing the solicitor-client privilege apply to branch 1.
>
> ...
>
> There are strong policy justifications for privilege under branch 2 of section 19 not to end with the termination of litigation. The release of records from Crown files could have a negative effect on the adversarial system of justice, in that there would be a chilling effect on the creation of written records by Crowns. Crown counsel prosecute highly sensitive criminal matters, and in order to prosecute effectively, crown counsel should have the assurance that the legal advice that they provide and the correspondence that they engage in will remain confidential even after the prosecution is completed.
>
> The Ministry also submits that the release of documents such as witness statements and interview reports from Crown files after the termination of litigation could also discourage prospective witnesses in future cases from cooperating with the police and the Crown.

Discussion of previous orders

In Order PO-1879, the Assistant Commissioner Tom Mitchinson dealt with an appeal involving the Ministry where the records at issue pertained to a dangerous offender application made by the Attorney General regarding a certain individual. In that appeal, the Ministry's submissions relating to the application of the section 19 exemption were similar to the Ministry's representations in the current appeal. In addressing the section 19 exemption and the Ministry's arguments, the Assistant Commissioner stated as follows:

> Many previous orders of this Office, beginning with Order P-52, have indicated that this section consists of two "branches". The first "branch" has been found to incorporate the common law concepts of solicitor-client communication privilege and litigation privilege; while the second "branch" relates to the closing words of the section (ie "... prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation").
>
> The wording of section 19 raises the issue of whether the second "branch" is intended to create a privilege that is broader or more durable than that which is available at common law. This issue was considered in detail by Adjudicator Holly Big Canoe in Order P-1342. In that case, she concluded that waiver of privilege had occurred because of a disclosure by Crown counsel to the Law Society of Upper Canada, resulting in the loss of privilege at common law. She then went on to consider whether the closing words of the section allow the exemption to apply despite the loss of common law privilege through waiver.
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> To assist in making this determination in Order P-1342, Adjudicator Big Canoe reviewed the legislative history of section 19 in order to ascertain the legislature's intent. As she notes in that order, the closing words of the section were added to the *Act* while it was being considered by the Standing Committee of the Legislative Assembly. The following quotation from the Hansard record of the committee's proceedings explains the purpose of this change:
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> > **Hon. Mr. Scott:** As I said the other day, this is just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.
> > ...
> >
> > To be fair, Mr. Chairman, I do not think it really extends section 19; it clarifies it. The use of the words, "for use in giving legal advice or in contemplation of or for use in litigation" really adds nothing because they would be within our understanding of what a solicitor-client privilege is anyway.

> The key words, and the words that clarify, are "crown counsel" because the case is made that crown counsel may not, in a highly theoretical sense, have a client. Because crown counsel has a kind of independent role that a normal lawyer does not have, a crown counsel may be thought, in a technical sense, not to have a client. The policeman is not the crown counsel's client, but as a matter of clarification it was recognized that opinions given by crown counsel should be producible or not in the same way as opinions given by any other crown lawyer.
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> (Monday, March 30, 1987, Morning Sitting, pages M-1, M-3)

Adjudicator Big Canoe determined that the closing words of the section were added:

> ... to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation.

She went on to conclude that this part of the section "is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships." Because waiver had occurred, she found that the exemption did not apply. In *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.), the Divisional Court upheld Order P-1342.

Adjudicator Big Canoe subsequently considered the same issue in Order P-1551. In that case, she found that where litigation had terminated, litigation privilege was no longer available at common law, and for this reason privilege could no longer be claimed under any part of the section 19 exemption. She stated:

> In my view, consistent with [*Ontario (Attorney General) v. Big Canoe*], other common law principles which define the scope of solicitor-client and litigation privilege should apply equally to both branches. This preserves for government institutions the full scope of the privilege extended to private litigants.

In essence, former Adjudicator Big Canoe in her two orders was rejecting the "branch 1/branch 2" distinction made by this Office in previous cases. In her view, which I share, the Crown has the right to claim the equivalent protection of solicitor-client privilege available at common law, but the additional words added to the end of section 19 during legislative debate do not add to this right. In other words, if records in the custody or control of an institution which would have been

protected by solicitor-client privilege at common law lose this protection through waiver or termination of litigation, then the fact that these records were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation has no bearing on the application of the doctrine of solicitor-client privilege. If privilege is lost or terminates at common law, then it is also lost or terminates in the context of a solicitor-client relationship involving Crown counsel.

In the present appeal, the Ministry claims that all the records are exempt under "branch 2" and states that "... the limitations of solicitor-client privilege do not apply to Branch 2 of s. 19". In effect, the Ministry is arguing that Orders P-1342 and P-1551 were wrongly decided.

The Ministry submits that it was implicit in the Court's ruling on the judicial review of Order P-1342 that the section 19 privilege did not end when the litigation in that case came to an end, or the court would not have considered waiver. I disagree with this position, which is not supported by anything in the decision. It was open to the Court, and to Adjudicator Big Canoe, to rely on waiver instead of termination of litigation as a basis for concluding that privilege no longer existed. The opening words of the endorsement are a succinct summary of the view taken by the Court:

> In our view any obligation that counsel for the Crown had to the Law Society did not obligate him to report anything that would entail a breach of solicitor-client privilege. Accordingly by reporting to the Law Society what was privileged, the Crown voluntarily waived privilege and that information is no longer shielded from disclosure under the *Freedom of Information and Protection of Privacy Act.*

The Ministry also submits that the statement in Order P-1342 that section 19 is not intended to create a privilege more durable than that which is available to "other solicitor-client relationships" fails to take account of the fact that private solicitors are not subject to requests under the *Act*. This submission implies that solicitors acting for institutions are entitled to a higher form of privilege than private sector counsel. This is in conflict with the legislative intent, as already canvassed, and unsupported by anything in the law of privilege itself. The Ministry also argues that "there is nothing in the plain meaning of the section that indicates that this exemption ends when litigation ends". Given the incorporation of common law concepts of privilege into section 19, I do not accept this argument.

Moreover, the approach taken by Adjudicator Big Canoe in Orders P-1348 and P-1551, relying on legislative history as a guide to legislative intent, is consistent with the modern rule of statutory interpretation. *In 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool*) (1996), 140 D.L.R. (4th) 577 at 640 (S.C.C.), Madam Justice L'Heureux-Dubé adopted the following passage from Professor R. Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

Adjudicator Big Canoe's conclusion that common law principles limit the availability of section 19 is plausible given that this is a privilege-based exemption. It is also efficacious because it promotes the purposes of access under the *Act* identified at section 1, that "information should be available to the public" and that "necessary exemptions from the right of access should be limited and specific." Moreover, its outcome is reasonable and just because it achieves a result that is consistent with the availability of privilege at common law, and this important public policy goal is therefore protected and promoted.

The Ministry also argues that Orders P-1342 and P-1551 contradict past decisions of the Commissioner's Office. It is well known that the doctrine of stare decisis does not apply to administrative tribunals so as to make their own past decisions binding on them. This allows them to develop their interpretation over time, as has happened with the section 19 exemption. As stated by Justice Gonthier in *Tremblay v. Quebec (Commission des affaires sociales*) (1992), 90 D.L.R. (4th) 609 (S.C.C.):

> Ordinarily, precedent is developed by the actual decision-makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This, of course, is a longer process; but there is no indication that the legislature intended it to be otherwise.

The type of approach described by Justice Gonthier is especially appropriate where the Commissioner is required to interpret and apply an external body of law, such as solicitor-client privilege, which is itself subject to change. In fact, the law of privilege has changed considerably over time. For example, in *Solosky v. R.* (1979), 105 D.L.R. (3rd) 745 (S.C.C.) and *Descoteaux v. Mierwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.), the Supreme Court of Canada clarified that solicitor-client privilege, formerly viewed as a rule of evidence, is also a substantive rule that could apply even in the absence of court proceedings. More recently, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), the Ontario Court of Appeal altered

> the scope of litigation privilege to require that, in order for a document produced with litigation in mind to qualify for litigation privilege, the dominant purpose for its preparation must be reasonably contemplated litigation, to bring litigation privilege in line with the modern trend of complete discovery. I applied this change in the law in Order MO-1337-I.
>
> The recent evolution of the Commissioner's approach to the solicitor-client privilege exemption is primarily reflected in Orders P-1342 and P-1551. As indicated in those orders, the application of section 19 depends on the availability of common law solicitor-client privilege. It encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue. The "branch 1/branch 2" approach described in previous order of this Office, to the extent that it may be interpreted as being inconsistent with the scope of solicitor-client privilege described above, is not a useful analytical tool and should no longer be applied.

I agree with the findings made by the Assistant Commissioner and Adjudicator Big-Canoe and adopt them for the purposes of this appeal.

As far as the Ministry's concerns regarding the legal advice provided by Crown counsel and the correspondence that they engage in during the course of the litigation, it is possible that such records will be covered by the section 19 exemption notwithstanding the termination of litigation, as such records may be subject to the solicitor-client communication privilege, which I will address below.

Solicitor-Client Communication Privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> … all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship …
>
> (*Descôteaux v. Mierzwinski*, supra, at 618, cited in Order P-1409)

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> … the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
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> (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P1409)

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729).

Internal correspondence between Crown counsel

Although the Ministry did not make any specific submissions with respect to solicitor-client communication privilege, from my review of the records, I find that Records 5, 216, 223, 232, 244, 271, 272, B92, B99 and B100, meet the solicitor-client communication privilege test as set out above. These records consist of internal communications between Crown counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the various stages of the appellant's husband's prosecution. Based on the nature of these records and the context in which they were created, I am satisfied that this information was treated as confidential as between the Crowns. Accordingly, I find that Records 5, 216, 223, 232, 244, 271, 272, B92, B99 and B100 qualify for exemption under the solicitor-client communications privilege component of section 19 of the *Act* and are, therefore, exempt from disclosure under section 49(a).

In addition, I find that records 25, 26, 30 - 33, 215, 231, 238, 240, 246, 248, 250, 254, B87 and B88, which also consist of internal communications between Crown counsel, as well as their handwritten notes, are also subject to the solicitor-client communication privilege. These records were created in the course of responding to various letters from the appellant to the Crown Attorney's office and were made for the purpose of seeking, formulating and/or giving legal advice regarding certain issues and concerns which were raised by the appellant with respect to her husband's prosecution. I am satisfied that these records also qualify for exemption under the

solicitor-client communication privilege component of section 19 of the *Act* and are, therefore, exempt from disclosure under section 49(a).

Because I have found that records 5 and B92 are exempt under section 19, it is not necessary for me to address section 13(1) of the *Act*, as these are the only two records for which the Ministry claimed this exemption. It is also not necessary for me to address the late raising of this exemption to record 5.

Correspondence between Crown counsel and the OPP

In Order PO-1779, Assistant Commissioner Mitchinson commented on the question of whether the relationship between Crown Attorney and the OPP can be that of a solicitor and client. He stated:

> ... In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

I adopt the approach articulated by Assistant Commissioner Mitchinson for the purposes of the present appeal. It is clear on the face of Record 226 that this record represents confidential communications passing between the OPP and Crown counsel involving the giving and seeking of legal advice with respect to the prosecution of the appellant's husband. I have not been provided with any evidence to indicate that the privilege in this document has been waived. Accordingly, I find that Record 5 qualifies for exemption under section 19 and is, therefore, exempt from disclosure under section 49(a).

Although there are other records which represent communications between the OPP and Crown counsel within the records at issue, I find that none of them were made for the purpose of seeking, formulating and/or giving legal advice. Although these records document various requests by Crown counsel for certain records and/or information relating to the OPP investigation, as well as the OPP's response, in my view, these communications were not made for the purpose of giving or seeking of legal advice. Therefore these records do not qualify for solicitor-client communication privilege.

The remaining records and parts of records to which the Ministry has applied the section 19 exemption do not represent confidential communications between a solicitor and his or her client and these records do not qualify for exemption under the solicitor-client communications portion of section 19.

Litigation privilege

Introduction

In Order PO-1855, Assistant Commissioner Mitchinson reviewed the current state of the law with respect to the concept of litigation privilege. He found that:

> As far as the litigation privilege component of section 19 is concerned, the Ontario Court of Appeal recently issued a judgement interpreting the doctrine of litigation privilege (*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321). I considered this case in Order MO-1337-I, and its application to the scope of the litigation privilege component of section 19. In that order, I stated:
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> > In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege ...
> >
> > ...
> >
> > In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, 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.
> >
> > 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.

> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
>
> Thus, there must be more than a vague or general apprehension of litigation.
>
> Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:
>
> 1. The record must have been created with existing or contemplated litigation in mind.
>
> 2. The record must have been created for the dominant purpose of existing or contemplated litigation.
>
> 3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.
>
> In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

Having reviewed all of the records that remain at issue for which the section 19 exemption is claimed, I am satisfied that each was prepared or obtained for the dominant purpose of existing or reasonably contemplated litigation. I am also satisfied that the majority of the records were prepared or obtained with an intention that they be confidential in the course of the litigation. In view of my findings below, it is not necessary for me to undertake a detailed analysis in this regard.

Termination of litigation

Litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation. In Order P-1551, Adjudicator Big Canoe stated:

> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [*Boulianne v. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [*Carleton Condominium Corp. v. Shenkman Corp*. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

In the same order, Adjudicator Big Canoe also commented on the distinction between "ordinary" work product and "opinion" work product and the impact of this distinction in circumstances where the litigation has ended:

> Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process," *Law Society of Upper Canada Special Lectures,* 1984 (Richard De Boo publishers, 1984), pp. 175-177; *In re Sealed Case*, 676 F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); *Mancao v. Casino* (1977), 17 O.R. (2d) 458 (H.C.)].

As stated earlier, all litigation involving the Crown is now at an end regarding this matter. Therefore, the rationale for litigation privilege is no longer present. Accordingly, sections 19 and 49(a) do not apply to exempt the records from disclosure. Also, having reviewed the records at issue, I am satisfied that they do not contain any information that would qualify as "opinion" work product, as defined above, and thus it is not necessary for me to consider whether some of the information in the records is entitled to a "heightened" degree of protection.

As outlined above, the Ministry argues that the records deal with very sensitive matters, and that their disclosure would inhibit future witnesses from coming forward and cooperating with the Police and the Crown Attorney's office. In Order P-1840, Adjudicator Laurel Cropley considered similar submissions made by the Ministry, wherein she stated:

> I do not accept the Ministry's concern about the disclosure of personal information as a basis for finding that section 19 should apply to records notwithstanding the termination of litigation. The protection of personal privacy is clearly addressed in sections 21(1) and 49(b) of the *Act*. While this may be a policy consideration in the dissemination of information as part of the Crown

> disclosure process, it would be redundant to apply the same considerations under both sections 19 and 21(1)/49(b) of the *Act*, particularly when the latter two sections are specifically designed to address the very concerns raised by the Ministry.

I agree with Adjudicator Cropley's comments and adopt them for the purposes of this appeal. I will address the protection of personal privacy of individuals other than the appellant as part of my discussion of sections 21 and 49(b) below.

INFORMATION PUBLISHED OR AVAILABLE

The only records that remain at issue in this appeal, which were withheld by the Ministry pursuant to section 22(a) of the *Act*, are the transcript of the pre-trial of September 20, 1996 (record 113, consisting of 13 pages) and an Information (record pages 213-214). In her representations, the appellant confirmed that she has in fact already obtained copies of both of these records from the court reporter and the court respectively. The appellant questions, however, whether the transcript that was provided to her by the court reporter is identical to the one obtained by the Crown Attorney's office from the court reporter. Similarly, the appellant believes that the copy of the Information that exists within the Ministry's records is different from the certified copy that she received from the court.

I note, however, that the appellant is also already in possession of copies of both the pre-trial transcript and the Information that exist within the Ministry's records as a result of an access request to the Ministry of the Solicitor General (Appeal PA-990402-1, Order P0-1882). In Order PO-1882, Adjudicator Hale found that section 22(a) did not apply to the pre-trial transcript and ordered that it be disclosed, given the difficulties that the appellant was encountering in obtaining copies of this document from the court reporter. The appellant has also provided this office with a copy of the Information that she is seeking from the Ministry. I have compared these two records with the ones at issue in the current appeal and find that they are identical in content.

Previous orders of this office have commented on the usefulness of continuing an appeal in circumstances where the appellant had obtained a copy of the record at issue through other legitimate means. In Order M-271, the former Assistant Commissioner Irwin Glasberg made the following general comments regarding this issue:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.

I agree with these comments. Given that the appellant is already in possession of both the pre-trial transcript and the Information that she is seeking, in the circumstances of this case, I find that no useful purpose would be served by proceeding to determine the issue of access to these records.

INVASION OF PRIVACY/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION - SECTIONS 21/49(b)

The following records/portions of records remaining at issue contain the personal information of the appellant and/or her husband only: 28, 38, 44, 45, 81, 84, 85, 91, 94, 98, 99, 114, 117-120, 140, 141, 144, 146, 148, 151-153, 159, 160, 172, 173, 192-194, 203, 217-225, 227-230, 239, 241-243, 245, 247, 249, 251-253, 255, 266, 300, 302, 309, 318, 319, 321, 323, 326-397, B18, B27, B75, B89, B90, B91, B93-B98, B101, B102 and B103-B169. Accordingly, sections 21 and 49(b) which are intended to protect the personal information of other individuals cannot apply to these records. As the Ministry has not claimed any other exemptions for these records, I will order that they be disclosed to the appellant.

The records remaining at issue, in whole or in part, contain the personal information of the appellant and/or her husband, along with a number of other identifiable individuals.

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the *Act* or where a finding is made under section 23 of the *Act* that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 23 exemption.

In this case the Ministry has cited the presumption in section 21(3)(b) and the consideration in section 21(2)(f), in conjunction with section 49(b). These section read:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> 21. (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

> (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry submits that the section 21(3)(b) presumption applies to certain records, as they were compiled and are identifiable as part of the police investigation of the appellant's husband. This investigation ultimately resulted in the appellant's husband being charged with Mischief, pursuant to section 430(1)(d) of the *Criminal Code*. These records include witness lists, interview reports, incident reports, witness statements, police notes, occurrence reports, synopses and correspondence.

With respect to the records to which section 21(3) presumption does not apply, the Ministry's position is that the release of these records would still constitute an unjustified invasion of the personal privacy of other individuals, as they concern the involvement of these individuals in a criminal case and as such contain sensitive information within the meaning of section 21(2)(f).

The appellant submits that the disclosure of the records at issue is relevant to a fair determination of her rights in proceedings which she is contemplating before the OCCPS and the Ontario Court of Appeal concerning the "'unusual circumstances' of the investigation and prosecution". This submission refers to the consideration listed in section 21(2)(d) of the *Act*, which reads as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> the personal information is relevant to a fair determination of rights affecting the person who made the request;

Based on my review of the records remaining at issue, I am satisfied that the information in Records 82, 83, 116 (pages 5, 6, 16-23), 121-139, 142, 143, 145, 147, 149, 150, 154-158, 162-164, 174-191, 195-202, 204-212, 233 and B62 was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. Therefore, the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies to these records and/or portions of records containing the personal information of the appellant and/or her husband combined with the personal information of other individuals. I also find that section 14(4) is not applicable in the circumstances of this appeal. Accordingly, I find that disclosure of this information would be an unjustified invasion of personal privacy and it is exempt under section 49(b). I have highlighted in yellow those records and portions of the records which are subject to the presumption in section 21(3)(b) and which are exempt from disclosure under section 49(b).

Records 115, 116 (pages 1-4, 7-15), 161, 234, 256-265, 267-270, 273-299, 301, 303-308, 310-317, 320, 322, 324 and 325, however, were compiled by the OPP or the Crown Attorney's office following the completion of the investigation. It cannot be said that these records were compiled or form part of the investigation and as such, cannot be subject to the presumption in section 21(3)(b). However, given the nature of the information in these records, in my view, the factor favouring privacy protection in section 21(2)(f) (the information is highly sensitive) is relevant.

In Order PO-1882, wherein some of the records dealt with the same subject matter as the records at issue in the current appeal, Adjudicator Hale considered the events described in the records and the relationships between the appellant, her husband and the other identifiable individuals. Adjudicator Hale concluded that the disclosure of the information contained in the records which were created following the conclusion of the OPP investigations could reasonably be expected to cause the identifiable individuals excessive personal distress. Similar to the findings made by Adjudicator Hale, I find that the factor favoring privacy protection weighs heavily in favour of non-disclosure of the records at issue in the current appeal.

As indicated above, the appellant submits that the disclosure of the records at issue is relevant to a fair determination of her rights in proceedings which she is contemplating before the OCCPS and the Ontario Court of Appeal. I am not persuaded, however, that there is a sufficient link between these contemplated proceedings and the contents of the records which remain at issue to establish the application of section 21(2)(d). In my view, the disclosure of the information contained in these post-investigation records would be of little or no assistance to the appellant in pursuing her remedies in the forum described above as these records relate primarily to the nature of the complaints made by various individuals against the appellant and her husband. Therefore, I find that section 21(2)(d) does not apply in the circumstances of this appeal.

I find, therefore, that the only relevant consideration in the balancing of the appellant's access rights against the privacy interests of the other identifiable individuals contained in these records favour the protection of privacy. Accordingly, records and/or portions of Records115, 116 (pages 1-4, 7-15), 161, 234, 256-265, 267-270, 273-299, 301, 303-308, 310-317, 320, 322, 324 and 325, are also exempt from disclosure under section 49(b). I have highlighted in blue those portions of the records which are exempt from disclosure.

A number of previous orders (Orders M-384, M-444, M-1093, M-1109, P-1457 and P-1618, for example) have held that the withholding of personal information relating to an individual other than the requester, in circumstances where the person requesting the information originally supplied the information, would lead to an absurd result, and disclosure of this information would not result in an unjustified invasion of personal privacy. I find that the rationale for this conclusion is applicable to certain portions of the withheld information in the records which describe information received by the OPP and the Crown Attorney's office directly from the appellant. Accordingly, I find that this information is not exempt under section 49(b).

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the *Act* reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 20.1 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

The solicitor-client privilege exemption provided by section 19 of the *Act* is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption. Section 23 can, however, apply to override section 49(b) in conjunction with section 21 [Order P-541] and I will consider this below.

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a compelling public interest in disclosure; and (ii) this compelling public interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question [Order 24].

The appellant indicates that she believes that a compelling public interest exists in the disclosure of the records at issue in this appeal. The appellant's representations with respect to section 23, however, do not relate specifically to the records at issue in this appeal, but rather deal with the public's "ongoing and compelling concern with [the] criminal justice system". With her submissions, the appellant included various news articles to show that there is "an ongoing and compelling interest in problems in the criminal justice system" and "in identifying and correcting these problems".

Although in my view, there clearly is a public interest in issues relating to criminal justice, I am not persuaded that there is a compelling public interest in disclosure of the records/portions of records which I have found to qualify for exemption under section 49(b) in conjunction with section 21. Nor am I satisfied that any public interest that may exist would clearly outweigh the purpose of this exemption. Therefore, I find that section 23 does not apply in the circumstances of this appeal.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as

required by section 24 of the *Act*. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, the Ministry must establish that it has made a **reasonable** effort to identify and locate records responsive to the request (Order PO-1837). Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The appellant believes that records exist, in addition to those identified by the Ministry as responsive to her request. The appellant has also identified a number of records/parts of records as either missing or containing illegible information. The appellant also requested that the Ministry identify and/or confirm the existence of certain records within the records that remain at issue in this appeal.

The Ministry provided detailed representations concerning the searches that were undertaken in response to the appellant's request. The Ministry explained that the senior administrative secretary of the Crown Attorney's office, as well as a case management officer conducted a search for responsive records, which included searching the office of the Crown Attorney as well as the courthouse vault, as the file had been "closed" by the time the appellant had filed her request. The Ministry also searched the file storage area for the Crown Law Office - Criminal in Toronto relating to the appellant's husband's appeal.

The Ministry also provided detailed explanations in response to the appellant's various concerns, which I will outline below.

Missing 1998 records

The appellant believes that certain records relating to a charge that was relaid against her husband on June 7, 1988 are missing, and questions whether the Ministry has undertaken a search for these records. With her representations the appellant attached an Information that was sworn on June 7, 1998. The appellant also attached a letter from her lawyer in which he documents various conversations with the Crown's office. Finally, the appellant believes that the Ministry should have records that document a communication from the OPP to the Crown concerning the appellants selling their home.

In response to the appellant's submissions on this issue, the Ministry states that the "missing 1998 records", described by the appellant are not missing, but rather the Ministry is claiming exemptions in respect of these records.

Having reviewed the records at issue in this appeal, I am satisfied that the Ministry has in fact identified a number of records relating to the June 7, 1988 charge against the appellant's husband, as described by the appellant. Based on the information provided by the Ministry, I am also satisfied that it has conducted a reasonable search for these records.

Other Missing Records

The appellant believes that certain pictures and an OPP public complaints file were used in connection with the appellant's husband's prosecution, but were never disclosed to him during those proceedings. The appellant feels that such records may have been "removed from the file and returned to the supplier". The appellant requests that the Ministry question the Crown Attorneys involved in this case to determine if such items were used by the Crown, but not retained in the file.

In response to the appellant's representations, the Ministry submits that the appellant is seeking answers to questions that would require the creation of a record, rather than seeking access to records, and that it is under no obligation under the *Act* to create records. As far as the OPP Public Complaint File is concerned, the Ministry explains that these records were addressed as part of a previous request filed by the appellant, wherein her request was redirected to the OPP.

It is evident from the appellant's submissions, that she has a number of concerns regarding her husband's prosecution and feels that the Crown did not provide her husband with complete disclosure during those proceedings. In my view, however, the appellant is clearly seeking answers from the Ministry in this regard, which may require the creation of a record. I agree that the Ministry is under no obligation, pursuant to the *Act*, to create records in these circumstances. Based on the information provided by the Ministry, I am also satisfied that, in the circumstances of this appeal, the Ministry's search for records responsive to this part of the appellant's request was reasonable.

Additional matters

Record 109

The appellant indicated that Record 109 has not been released and is not listed by the Ministry as an unreleased record. The Ministry explained that it understands that this record has been previously disclosed, but is agreeable to providing the appellant with another copy. Since it does not appear that the Ministry has done this yet, I will include an order provision requiring the Ministry to provide the appellant with a copy of this record.

Records 42 and 61; B31 and B80

The appellant indicated that the information contained in records 42 and 61, as well as B31 and B80, is either incomplete or illegible. The Ministry confirms that some illegible information appears in Record 42. With its representations, the Ministry produced another photocopy of this record on 8 ½" by 14" paper, as requested by the appellant. The Ministry explains that this is the best possible copy. The Ministry also produced a more legible copy of Records 61, B31 and B80 and advised that the handwritten notation at the top of record B31 reads "R v. [name of appellant's husband] and that the handwritten notation contained inside two rectangular boxes on Record B80 appears to read "Apr 15/98" and "deadline" respectively. Once again, I will order the Ministry to disclose these copies of the records to the appellant.

Records 3 - 13

The appellant submits that the Ministry has not provided certain fax information located at the top of pages 3-13. The Ministry explained that it is agreeable to releasing further copies of Records 3 - 4 and 6-13 that include the severed information relating to the fax transmittal. Accordingly, I will order the Ministry to do so. Record 5, however, was withheld by the Ministry pursuant to sections 49(a) and (b), in conjunction with sections 13, 19 and 21, and was addressed above.

Fingerprints or "mug shots"

In her representations, the appellant requested that if her husband's fingerprints or "mug shots" are present in the records maintained by the Ministry that she be so informed so that she can take action to have them destroyed. In its reply submissions, the Ministry confirmed that no records respecting the appellant's fingerprints or "mug shots" are present in the records.

Probation records

Also in her representations, the appellant asked that if any probation records relating to her husband exist within the records remaining at issue in this appeal, that such records be identified, so that the appellant may notify Probation Services. In response, the Ministry confirmed that records relating to the appellant's husband's probation order are located in the records (Records B63 - B65) and advised these records were disclosed to the appellant with the Ministry's original decision letter.

Police investigation and witness interviews after August 1996

Finally, the appellant requested that if there are records relating to a police investigation and witness interviews conducted after August 1996 that these be identified. The appellant explained that she is not requesting that the contents of these records be disclosed, but that "the existence of investigation records collected after August 1996 be confirmed or denied". The appellant further states that she has "long believed that witness statements were taken by OPP [named senior constable] and not disclosed to us". The Ministry provided the following response:

> The appellant claims that the Crown did not provide full disclosure and asks for the identification of records relating to a police investigation and witness interviews conducted after August, 1996. The Ministry confirms that such records exist. This information can be found in the records disclosed to the Appellant in the Ministry's original decision letter dated September 10, 1999. The records that identify this information are as follows:
>
> > Records 76 to 77
> > A letter written by [a named Crown Attorney] to [appellant's husband], dated January 8, 1997, referring to further enclosed disclosure. In paragraph 8 of that letter [a named Crown Attorney] states that [a named individual's] statement was prepared on **October 7, 1996** [original emphasis].

> Records 78 to 80
> A letter written by [a named Crown Attorney] to [appellant's husband], dated February 21, 1997, addressing disclosure concerns and referring to further enclosed disclosure. In paragraph 14 of that letter [a named Crown Attorney] states "I am providing you with a copy of the interview with [a named individual], dated **September 19th, 1996**" [original emphasis]. In paragraph 16 of that letter, [a named Crown Attorney] states "Also please find attached the incident report of **September 23rd, 1996** [original emphasis]. [A named Crown Attorney] further advises, in paragraph 19 of the letter, that "There is no further additional material in the possession of the Crown that is being held back. You have complete disclosure of the Crown witnesses and their statements".

> Records 110 to 111
> A letter written by [a named Crown Attorney] to [appellant's husband], dated April 28, 1997. In paragraph 3 of that letter, [a named Crown Attorney] reiterates that all relevant information in the possession of the Crown has been disclosed.

> Records 95 to 96
> A letter written by [a named Crown Attorney] to [appellant's husband] and the Appellant, dated July 4, 1997. In paragraph 1 of that letter, [a named Crown Attorney] states that "... I am assured and have in fact instructed the prosecution attorney to disclose all relevant information to you. [A named Crown Attorney] assures me that this has been done".

Based on the Ministry's submissions and the detailed responses to the appellant's various concerns, I am satisfied that the Ministry has made a reasonable effort to identify and locate the records responsive to the request and I dismiss this portion of the appellant's appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 5, 25, 26, 30-33, 82, 83, 113, 121-139, 156, 174-187, 213-216, 223, 226, 231, 232, 238, 240, 244, 246, 248, 250, 254, 256-259, 261-265, 267-269, 271, 272, 286-298, 303-308, 310-317, 322, 324, B87, B88, B92, B99, B100, in total, as well as the highlighted portions of the Records 115, 116, 142, 143, 145, 147, 149, 150, 154, 155, 157-158, 161-164, 188-191, 195-202, 204-212, 233, 234, 260, 270, 273-285, 299, 301, 320, 325 and B62, which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose to the appellant Records 3, 4, 16-13, 28, 38, 42, 44, 45, 61, 81, 84, 85, 91, 94, 98, 99, 109, 114, 117-120, 140, 141, 144, 146, 148, 151-153, 159, 160, 172, 173, 192-194, 203, 217-222, 224, 225, 227-230, 239, 241-245, 247, 249, 251-253, 255, 266, 300, 302, 309, 318, 319, 321, 323, 326-397, B18, B27, B31, B75, B80, B89, B90, B91, B93-B98, B101-B169, as well as those portions of Records 115, 116, 142-143, 145, 147, 149-150, 154-155, 157-158, 161-164, 188-191, 195-202, 204-212, 233, 234, 260, 270, 273-285, 299, 301, 320, 325 and B62, which are **not** highlighted by delivering a copy to her by August 28, 2001 but no later than September 5, 2001.

3. The search for responsive records conducted by the Ministry was reasonable and I dismiss this part of the appeal.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original Signed By:
Irena Pascoe
Adjudicator

July 27, 2001