COURT FILE NO.: 29/07, 30/07
DATE: 20090306

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

HACKLAND R.S.J., SWINTON and KARAKATSANIS JJ.

B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	*Robert Ratcliffe*, for the Applicant
- and -	
INFORMATION AND PRIVACY COMMISSIONER AND JANE DOE, REQUESTER Respondents	*William S. Challis*, for the Respondent Information and Privacy Commissioner *Vanessa V. Christie*, for the Respondent Jane Doe
AND B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	*Robert Ratcliffe*, for the Applicant *William S. Challis*, for the Respondent Information and Privacy Commissioner
- and -	
INFORMATION AND PRIVACY COMMISSIONER AND JOHN DOE, REQUESTER Respondents	
	HEARD at Toronto: February 20, 2009

SWINTON J.:

[1] The Ministry of the Attorney General ("the applicant") has brought applications for judicial review of two decisions of the Information and Privacy Commissioner ("IPC") ordering the Ministry of Community Safety and Correctional Services to disclose certain documents arising out of criminal

investigations. At issue is the scope of s. 19(b) of the *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31 ("the Act"): does it exempt from disclosure documents in the hands of the police, when copies of those records have been provided to Crown counsel, and they are found in the Crown's brief?

Background

Order PO-2494

[2] On July 18, 2003, the Ontario Provincial Police ("OPP") executed a search warrant at a home shared by Jane Doe and her partner. During the execution of the warrant, the police seized two firearms and then charged Jane Doe and her partner with firearm related charges. These charges were subsequently withdrawn.

[3] In August 2004, Jane Doe filed an access to information request with the Ministry of Community Safety and Correctional Services ("the Ministry") under the Act seeking access to all information relating to her Firearms Possession Licence. The records in issue included both paper and electronic records. The request was denied under various exemptions, and Jane Doe appealed to the IPC.

[4] The IPC upheld the Ministry's decision not to disclose certain of the records in issue, but ordered the Ministry to disclose the balance of the documents, finding that the records in question did not fall within s. 19(b) of the Act. Section 19 of the Act reads, in part:

> 19. 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 ...

[5] The Ministry applied for reconsideration with respect to particular records subject to the order. On further review, the IPC found that portions of certain records were exempt on the basis of solicitor-client privilege pursuant to s. 19(a) of the Act.

[6] However, the IPC upheld the earlier decision to disclose the balance of the records. These include a video of the execution of the search warrant, photographs, e-mail correspondence among police officers and some police officers' notes. The IPC rejected the Ministry's submission that some of these additional records were copies of records contained in the Crown brief prepared for use in the prosecution of Jane Doe and, therefore, exempt from disclosure under s. 19(b).

[7] In finding that s. 19(b) did not apply, the IPC relied on the following considerations:

- The police prepared the records for the purpose of investigating the matter and deciding whether to lay criminal charges.
- This purpose was distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and using records in prosecuting.
- Although some of the 26 documents appeared in the Crown's brief, this did not alter the purpose for which the records were originally prepared and held by the Ministry.
- If privilege under s. 19(b) was to apply in the circumstances, this would undermine the purpose of the Act by extending s. 19 to almost any investigative record created by the police.
- If privilege under s. 19(b) was to apply in the circumstances, Ontario police would no longer have discretion to disclose investigative records out of a perceived obligation to "protect" Crown privilege.

Order PO-2498

[8] This order was made as a result of a request to the Ministry under the Act for 26 records relating to occurrences involving John Doe that were investigated by the Haldimand Detachment of the OPP. The IPC found all of the records to be exempt except for a video statement made by John Doe, as their disclosure would be an unjustified invasion of the personal privacy of persons other than John Doe under s. 21(3)(b) of the Act.

[9] With respect to the video statement, the IPC found that it was not prepared by or for Crown Counsel for use in litigation. Because the video statement was taken by the OPP for the purpose of investigating John Doe, and deciding whether or not to lay charges against another person, s. 19(b) did not apply.

[10] The IPC subsequently rejected the Ministry's request for reconsideration.

Analysis

[11] The only issue in these applications is whether the IPC erred in finding that the records were not exempt from disclosure because of s. 19(b) of the Act. That provision protects records from disclosure that were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

[12] The standard of review respecting the interpretation and application of s. 19 of the Act is correctness *(Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) at para. 6).

[13] The applicant submits that the IPC erred in the interpretation of s. 19(b), having misunderstood the role of the police: they are the investigative arm of the state, with the responsibility for investigating crime and compiling evidence for charges prosecuted by the Attorney

General. Once copies of police records arising from an investigation are found in the Crown brief after criminal or quasi-criminal charges are laid, the records are exempt pursuant to s. 19(b). Such records were "prepared" for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[14] The respondent IPC submits that s. 19(b) applies only where the requester seeks access to the copies of the records contained in the Crown brief. It does not apply to records remaining in the hands of the police. To exempt those records from disclosure, the police must rely on other provisions of the Act, such as s. 14, which specifically deals with law enforcement.

[15] I agree with the submissions of the IPC. The applicant's interpretation of s.19 of the Act is inconsistent with the terms of that provision and fails to take into account other provisions of the Act which provide exemptions that directly address the interests of the police in effective law enforcement.

[16] Section 19 has been held to have two branches, Branch 1 being solicitor-client privilege and Branch 2 (now s. 19(b)) being a statutory form of litigation privilege.

[17] The Court of Appeal, in its 2002 decision in Ontario (Information and Privacy Commission), supra, held that Branch 2 of s. 19 extends a permanent protection to records comprising Crown counsel's work product contained in the Crown brief. It protects material gathered in preparation for litigation (at paras. 11-13). See also *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) and *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div. Ct.). By its terms, Branch 2 of s. 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.

[18] The records sought by the two requesters are held in police files, and they were gathered in the course of criminal investigations. The IPC in Order 2494 properly found that the records were created by police officers for the purpose of criminal investigation. The decision maker correctly understood the different, albeit related roles of the police and Crown prosecutors in the criminal justice system.

[19] Moreover, when one reads the Act as a whole, it is apparent that s. 19 is not meant to cover police records still in police possession. Other exemptions set out in the Act directly address the interests in protecting police records from disclosure. Section 2(1) of the Act defines "law enforcement" to mean

> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b).

[20] Section 14(1) gives an institution the discretion to refuse to disclose a record that could reasonably be expected to harm a wide range of enumerated law enforcement interests, as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[21] Further exemptions are provided for law enforcement records in s. 14(2) and the power to refuse or deny the existence of a record in s. 14(3). As well, s. 20 of the Act allows a head to refuse

disclosure where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. Section 21 exempts from disclosure personal information where its disclosure would constitute an unjustified invasion of personal privacy.

[22] Thus, detailed provisions specifically deal with exemption of police records from disclosure. These provisions seek to strike a balance between competing interests: holding law enforcement agents publicly accountable for their actions and protecting the legitimate need for confidentiality and secrecy of a wide range of law enforcement information, so that law enforcement activities may be carried out effectively.

[23] Initially, the Ministry raised a number of law enforcement exemptions in s. 14 as a reason to refuse to disclosure and later withdrew them.

[24] In my view, the IPC orders to disclose the disputed records in the possession of the Ministry were correct. The fact that copies of the police records were in the possession of Crown counsel does not exempt the records from disclosure by the Ministry of Community Safety and Correctional Services, even though the same documents in the possession of the Ministry of the Attorney General would likely have been protected by Branch 2 of s. 19.

[25] Therefore, both applications for judicial review are dismissed. No party sought costs, and none are awarded.

SWINTON J.
HACKLAND J.
KARAKATSANIS J.

Released: March 6, 2009

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REASONS FOR JUDGMENT

SWINTON J.

Released: March 6, 2009