OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-28

MINISTRY OF ATTORNEY GENERAL

Celia Francis, Senior Adjudicator

December 9, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 35
Document URL: http://www.oipc.bc.ca/orders/2009/OrderF09-28.pdf

Summary: Applicant requested access to Crown counsel records about contacts between the Criminal Justice Branch of the Ministry and his defence lawyers. The Ministry was authorized to withhold the records under s. 15(1)(g) as they relate to and were used in the exercise of prosecutorial discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(g).

Authorities Considered: **B.C.:** Decision F07-05, [2007] B.C.I.P.C.D. No. 24; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-27, [2000] B.C.I.P.C.D. No. 30; Order 04-13, [2004] B.C.I.P.C.D. No. 13.

1.0 INTRODUCTION

[1] Some years after pleading guilty to two counts under s. 151 of the *Criminal Code* (the offence of touching persons under 16 for a sexual purpose), the applicant filed a notice of appeal of his conviction on two grounds. In support of these grounds in his application for an extension of time to appeal, he added an argument that he had been "ineffectively represented" at his trial. A Court of Appeal judge sitting in Chambers dismissed his application for a time extension and thus "the Applicant's matter was never before the full Court of Appeal for decision".[1]

[1] Para. 4.18, Ministry's initial submission.

[2] The applicant later requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to records of "contacts" between the Criminal Justice Branch ("CJB"), Ministry of Attorney General ("Ministry"), and his defence lawyers. The Ministry responded that it was withholding Crown counsel's notes to file and interoffice memoranda under ss. 14, 15(1)(g), 16(1)(b), 19(1) and 22 of FIPPA. Although the Ministry withdrew its reliance on s. 16(1)(b), the applicant's request for review by this Office ("OIPC") did not settle in mediation. The matter then proceeded to an inquiry under Part 5 of FIPPA. The OIPC invited representations from the applicant, the Ministry and a third party. The third party chose not to participate in this inquiry but the applicant and Ministry both provided submissions.

2.0 ISSUES

[3] The notice for this inquiry stated that the issues were these:

1. Whether the Ministry is required by s. 22 to refuse access to information.

2. Whether the Ministry is authorized by ss. 14, 15(1)(g) and 19(1) to refuse access to information.

[4] In its initial submission, the Ministry said it was no longer relying on s. 14. This exception is therefore no longer in issue. Given my finding on s. 15(1)(g), I need not consider ss. 19(1) and 22(1). Under s. 57(1), the Ministry has the burden of proof regarding s. 15(1)(g).

3.0 DISCUSSION

[5] **3.1 Records in Dispute**—The Ministry said Crown counsel in the CJB have the responsibility to conduct prosecutions in this province under the direction of the Assistant Deputy Attorney General. The Ministry said that the records in dispute in this case, held by the CJB, relate to the applicant's attempts to appeal his conviction, including his argument that he was inadequately represented at the hearing that led to his conviction. It said that the records were created and maintained as a result of the CJB's "mandate to conduct, on behalf of the Crown," the applicant's criminal appeal.[2]

[6] The Ministry described the records as follows:

> 4.09 … correspondence (letters, e-mails, or notes of telephone calls), notes to file, and preliminary drafts of an affidavit, all of which

[2] Paras. 4.03-4.07, Ministry's initial submission.

> relate to Crown Counsel's conduct of a file relating to the Notice of Appeal filed by the Applicant. …

[7] The Ministry said it applied s. 15(1)(g) to all of the records. It also applied ss. 19(1) and 22(1) to some of the same information.[3]

[8] **3.2 Exercise of Prosecutorial Discretion**—The Ministry said that s. 15(1)(g) was designed to protect the independent exercise of prosecutorial discretion, which it said is "an essential aspect of the criminal justice system".

[9] The relevant provisions read as follows:

> **Disclosure harmful to law enforcement**
>
> **15**(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …
>
> (g) reveal any information relating to or used in the exercise of prosecutorial discretion, …
>
> **"exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (a) to approve or not to approve a prosecution,
>
> (b) to stay a proceeding,
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> (c) to prepare for a hearing or trial,
>
> (d) to conduct a hearing or trial,
>
> (e) to take a position on sentence, and
>
> (f) to initiate an appeal.

[10] Several orders have considered the application of s. 15(1)(g). I take the same approach here without repetition.[4]

[11] The Ministry argued that the information it withheld under s. 15(1)(g) relates to the exercise of prosecutorial discretion:

> 4.19 The Records relate to the Appeal, including the Applicant's argument that he was inadequately represented by legal counsel at the hearing that led to the Conviction. Kenneth Madsen, Crown Counsel, has deposed that the information in the Records relate[s] to and was used in the exercise of his duties and power[s] under the *Crown Counsel Act*, including the duty or power to prepare for

[3] Para. 4.08, Ministry's initial submission.
[4] See for example Order 00-02, [2000] B.C.I.P.C.D. No. 2.

> an appeal hearing and to conduct an appeal hearing. The exercise of powers "to conduct a hearing or trial" and "to prepare for a hearing or trial" expressly fall[s] within the definition of "exercise of prosecutorial discretion" under the Act.[5]

[12] The Ministry further argued that it had exercised its discretion appropriately in refusing access and provided affidavit evidence on this point.[6]

[13] The applicant argued that the original trial is over and the appeal was not a "prosecution". He wants release of all information the CJB provided to his former lawyer when that lawyer's affidavit was being prepared for the hearing on the applicant's application for a time extension to appeal his conviction. The applicant contended that Crown counsel "colluded" with his former defence lawyer in the preparation of the lawyer's affidavit, by providing documents to the lawyer without notice to the applicant. He alleged that the lawyer perjured himself in his affidavit and, by "acting in an unconscionable manner", the lawyer "thwarted [the applicant's] ability to make an appeal to withdraw a guilty plea, and have a trial to establish [his] innocence in those charges". The applicant said he needs proof of "collusion" between Crown counsel and his former lawyer in order to get a new trial.[7]

[14] The Ministry argued that the appeal was part of an ongoing criminal prosecution. Although in its view the applicant's allegations of "collusion" are not relevant, it argued that there had been nothing improper in Crown counsel's dealings with the former defence lawyer. It said that Crown counsel had simply offered technical comments on the lawyer's affidavit, for example, on grammar or areas which might require clarification.[8]

[15] The Ministry acknowledged that Crown counsel had provided the former lawyer with copies of materials from files on the applicant's previous criminal matters.[9] However, it said, this was to assist the lawyer in refreshing his memory so he could respond to the applicant's serious and inaccurate allegations against the lawyer as they related to the appeal. The Ministry said that the applicant did not challenge the affidavit at the time of the hearing on his application for a time extension to appeal. The Ministry added that the

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[5] See also paras. 9-10, affidavit of Kenneth Madsen.

[6] Paras. 4.19-4.20, Ministry's initial submission; Gillen affidavit. The Ministry also drew my attention to Decision F07-05, [2007] B.C.I.P.C.D. No. 24, Order 00-02, Order 00-27, [2000] B.C.I.P.C.D. No. 30, and Order 04-13, [2004] B.C.I.P.C.D. No. 13, in support of its arguments.

[7] Applicant's initial submission. The applicant reiterated these arguments in his reply submission.

[8] Paras. 1-4, Ministry's reply submission.

[9] The Ministry said that Crown counsel had provided only those materials the lawyer would have received as defence counsel in the previous matters on which the lawyer had acted for the applicant.

applicant's "bald assertion" that his former lawyer had perjured himself was serious and unsupported by evidence.[10]

Analysis

[16] I agree with the Ministry that the applicant's appeal of his conviction was part of an ongoing criminal prosecution. I have carefully reviewed the records in dispute. Some are typed or handwritten notes, others are correspondence and still others are draft affidavits. I can confirm that the records all relate to Crown counsel's activities in relation to the applicant's appeal, including the applicant's application for a time extension to appeal his conviction.

[17] The Ministry argued that Crown counsel's activities as reflected in the records fit within paras. (c) and (d) of the definition of "prosecutorial discretion". I agree with the Ministry on this point. The information in the records in dispute clearly relates to or was used in Crown counsel's preparation for, and conduct of, the appeal. I therefore find that s. 15(1)(g) applies to the records in dispute. I am also satisfied that the Ministry exercised its discretion in deciding whether or not to refuse access to the records.

4.0 CONCLUSION

[18] For reasons given above, under s. 58 of FIPPA, I confirm that the Ministry is authorized to withhold the information in dispute under s. 15(1)(g). In light of my finding on s. 15(1)(g), no order on ss. 19(1) and 22(1) is necessary.

December 9, 2009

ORIGINAL SIGNED BY

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Celia Francis
Senior Adjudicator

OIPC File No. F08-36425

[10] Paras. 5-19, Ministry's reply submission.