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

ORDER P-1006

Appeal P-9400783

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of the Solicitor General and Correctional Services (the Ministry) received the following seven-part request for information concerning the investigation and prosecution of two named individuals for the years 1992 - 1994:

1. Summary records on costs associated with these two cases, including investigation and trial preparation;
2. Personnel list, with title and salary range, including consultants and their pay;
3. Cost saving achieved by not going to preliminary hearing in one of the cases;
4. Costs associated with the publication ban issue;
5. Estimated future costs with respect to one of the cases;
6. All issue sheets and briefing notes;
7. Costs for local police forces involved with these two cases.

The Ministry located records responsive to Parts 1, 2, 5, 6 and 7 of the request and relies on the following exemptions to deny access to these records in full:

- advice or recommendations - section 13(1)
- law enforcement - sections 14(1)(a) and (b)
- right to fair trial - section 14(1)(f)
- security - section 14(1)(k)
- facilitate commission of unlawful act - section 14(1)(l)
- correctional record - section 14(2)(d)

In addition, the Ministry indicated that no records exist pertaining to Parts 3 and 4 of the request.

The requester appealed the denial of access to information responsive to Parts 1, 2, 5, 6 and 7 of his request. In his letter of appeal, the appellant also indicated that he seeks an order requiring the Ministry to provide a chart of the exempt records by title, record type and number of pages.

During the mediation stage of this appeal, the Ministry notified the Commissioner's office that the Ministryof the Attorney General would be representing its interests in this appeal. As the Ministry of the Attorney General is acting as agent for the Ministry in this appeal, I will make reference to all actions and representations as those of the Ministry.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were submitted on behalf of the Ministry only. The appellant did not make representations.

In its representations, the Ministry indicates that it is no longer relying on the exemptions in sections 14(1)(b), (k) or (l) to deny access to the records. Accordingly, these sections will not be considered further in this order. The Ministry also states that pages 4, 8 and 9 - 11 are not responsive to the request.

It appeared to the Commissioner's office that some records responsive to this request might also contain personal information, thereby raising the possible application of the mandatory exemption provided in section 21 of the Act (invasion of privacy).
Subsequent to the receipt of representations, and in part as a result of the Ministry's claim that some records are not responsive, the Commissioner's office determined that further representations were required. A supplemental Notice of Inquiry was sent to the parties. Representations were received from the Ministry only.

PRELIMINARY MATTERS:

NON-RESPONSIVE RECORDS

As I indicated above, the Ministry claims that pages 4, 8 and 9 - 11 are not responsive to the request and are, therefore, outside the scope of this appeal.

Page 4 is the third page of a three-page Ministry Issue Note. It contains information relating to the detention centre at which one of the named individuals was housed. Page 8 is a photocopy of a page taken from the Policing Standards Manual which has been attached to a Ministry House Note. The Ministry argues that the information in these two pages is not reasonably related to the appellant's request.

Part 6 of the appellant's request specifically asked for "Issue sheets, briefing notes for 1993, 1994 on these cases, including on the preliminary hearing issue and publication ban issue". In my view, this part of the request was worded broadly enough to encompass the information contained in page 4. Furthermore, I find that page 8 was intended to be used to expand on the information provided in the House Note and has been, therefore, incorporated into that record. Accordingly, I find that both pages 4 and 8 are responsive to the request.

Pages 9 - 11 consist of two memoranda to the Freedom of Information Unit from the Joint Forces Funding Co-ordinator regarding the results of his search for records responsive to the appellant's request. The Ministry states that they were erroneously identified as responsive. I also agree that they do not contain information which is responsive to the request. Accordingly, I will not consider these three pages further in this order.

RECORDS

The records at issue consist of four Ministry Issue Notes (pages 1 - 6), one Ministry House Note (pages 7 - 8), and four pages which contain funding figures (pages 12 - 15).

DISCUSSION:

INVASION OF PRIVACY

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.

I have reviewed the records at issue and I find that, with the exception of pages 12 - 14, the records contain the personal information of either one or both of the two individuals referred to in the request. Page 7 contains the personal information of two deceased individuals. Pages 12 - 14 do not contain personal information. None of the records contain the personal information of the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Section 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Ministry's representations refer only to sections 13 and 14, and do not address the application of section 21. However, because this is a mandatory exemption, I have conducted an independent review of the records to determine whether section 21(1) should apply to exempt them from disclosure.

I have reviewed section 21(3), and I find that none of the presumptions against disclosure apply to the personal information at issue. The appellant has not submitted representations outlining any factors in section 21(2) which favour the disclosure of the personal information in the circumstances of this appeal.

In reviewing the records, however, I note that the investigation and prosecution of the two individuals referred to in the request has received wide media attention. I find that because of the public nature of the events which have transpired concerning this matter, both the individuals referred to in the request, and the two deceased individuals must have a lesser expectation of personal privacy with respect to these events. Accordingly, I find that, in the circumstances of this appeal, disclosure of the information contained in the records would not constitute an unjustified invasion of personal privacy, and the section 21(1) exemption does not apply to it.

ADVICE OR RECOMMENDATIONS

The Ministry claims that pages 1 - 7 are exempt pursuant to section 13(1) of the Act. As I have found that page 8 (which is an attachment to page 7) is responsive to the request, I will consider the possible application of section 13(1) to this page as well. Section 13(1) states that:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It was established in Order 118, and followed in many subsequent orders, that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1) of the Act. He stated that "this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

Three of the Ministry Issue Notes (pages 1, 2 and 3 - 5) contain four sections: Issue; Position; Summary; and Background. The fourth Issue Note (page 6) contains the first three sections only. The Ministry House Note (pages 7 - 8) contains the following four sections: Issue; Response; Background; and Ministry Position.

The Ministry submits that the "Ministry Response" sections are recommendations of Ministry employees to the Minister as to how he should respond to possible questions in the House or by the media. In using this term, the Ministry is referring to the sections titled "Position" or "Response" in these records.

The Ministry submits further that the "Background" sections, which includes the "Summary" sections, constitute advice to the Minister to assist him in determining whether to accept the "Ministry Response" suggestions, and to assist him in responding to questions about the cases in a manner that would not be prejudicial to the fairness of the trial of one of the individuals. The Ministry also argues that the manner in which particular issues were framed in these pages constitutes advice.

I have carefully reviewed these pages. I find that they contain factual information rather than advice or recommendations. It is possible that the response portions of issue sheets may qualify for protection under section 13(1) in some circumstances. However, previous orders of the Commissioner's office have determined that where the contents of the response sections of the issue sheets are purely factual in nature and do not contain information relating to a suggested course of action which might be accepted or rejected as part of the deliberative process, they will not qualify for protection (Orders P-771, P-920 and P-952).

I agree with the approach taken in these orders. I find that pages 1 - 8 do not contain any information which relates to a course of action which the Minister might either accept or reject as part of the deliberative process in this case. As I indicated above, I also find that the response sections, like the rest of these pages, are purely factual in nature. Therefore, pages 1 - 8 do not qualify for exemption under section 13(1) of the Act.

LAW ENFORCEMENT/RIGHT TO FAIR TRIAL

The Ministry claims that sections 14(1)(a) and (f) of the Act apply to exempt all of the information contained in the records at issue from disclosure.

These sections state 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;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication.

The Ministry's arguments under both section 14(1)(a) and 14(1)(f) relate to concerns about one of the individuals referred to in the request being able to have fair and impartial trials. With respect to section 14(1)(a), the Ministry submits that "... prejudice to the fairness of a trial clearly constitutes interference with a law enforcement matter". Although this appears to relate primarily to section 14(1)(f), I will also consider whether the Ministry has established the application of section 14(1)(a).

The Ministry has raised a number of arguments in its discussion of sections 14(1)(a) and (f) concerning its interpretation of these sections. Inquiry Officer John Higgins recently dealt with very similar arguments presented by the Ministry in Order P-948, which concerns a request for records pertaining to the overall cost of a police "joint-forces" team to investigate child pornography and exploitation in Ontario. Because of the similarity of the arguments presented in Order P-948 to the current appeal, I have set out these arguments and Inquiry Officer Higgins approach in dealing with them below.

The Meaning of "Could Reasonably Be Expected To"

The Ministry has made extensive submissions on the meaning of the phrase "could reasonably be expected to" in the preamble to this section. The Ministry disagrees with several previous interpretations of this phrase, as set out in past orders of this agency. This phrase modifies both exemptions at issue here, namely sections 14(1)(a) and (f).

For instance, rather than interpreting "could reasonably be expected to" as requiring a reasonable expectation of probable harm, the Ministry argues that a reasonable expectation of **possible** harm will be sufficient.

The Ministry also submits that the common law "sub judice" rule means that courts are concerned to avoid the premature disclosure of information which **could** affect the fairness of a trial.

The Ministry refers to a passage in Order 188, where then Assistant Commissioner Tom Wright interpreted "could reasonably be expected to" as requiring that the expectation of harm not be "... fanciful, imaginary or contrived, but one that is based on reason". The Ministry states that this passage in Order 188 is "... a more

faithful interpretation of 'could reasonably be expected to'". As in this appeal, Order 188 considered the meaning of these words in the context of the preamble to section 14(1).

With respect to these arguments, Inquiry Officer Higgins states:

> Without accepting the Ministry's submissions concerning other interpretations of the phrase "could reasonably be expected to", I am prepared to decide this case based upon the interpretation just cited from Order 188. In my view, the requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying the exemption.

The Canadian Charter of Rights and Freedoms

The Ministry submits that the overriding factor supporting its decision to exercise its discretion to refuse access to the responsive records is its concern about safeguarding one individual's right to a fair trial, as well as society's interest in conducting a fair trial. The Ministry bases its position on the Canadian Charter of Rights and Freedoms and on the common law.

The Ministry states that as the accused's right to a fair trial is guaranteed by sections 7 and 11(d) of the Charter, section 14(1)(f) must be interpreted so as to ensure that the accused's Charter right is protected from any reasonable possibility of harm. The Ministry argues further that where there is a conflict between the right of public access to information pertaining to a criminal matter and the right of an accused to a fair trial, the right to a fair trial must be paramount.

With respect to these arguments, Inquiry Officer Higgins states:

> I am prepared to accept that section 14(1)(f) of the Act should be interpreted in a way that affords no less protection to the right of an accused to a fair trial than do sections 7 and 11(d) of the Charter. In light of the similarity of the Ministry's submissions on the application of sections 14(1)(a) and (f), I will also take this approach to section 14(1)(a).
>
> In my view, however, whether the standard being applied is found in the Act or the Charter, sufficient information and reasoning are required to support the application of the provisions relied upon to justify non-publication or non-disclosure.

He then went on to consider the standards to be applied in deciding whether the Ministry provided sufficient evidence of the harms mentioned in sections 14(1)(a) and (f).

Harms in Sections 14(1)(a) and (f)

As I indicated above, the Ministry's arguments concerning both subsections deal with the right of one of the named individuals to a fair trial. Using the Supreme Court of Canada's decision in Dagenais v. Canadian

Broadcasting Corp., 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.), which relates to a publication ban, as guidance, Inquiry Officer Higgins states:

> The main issue addressed is whether the infringement of the Charter right to freedom of expression was justified in order to ensure that the accused individuals receive fair and impartial adjudication as contemplated in section 11(d) of the Charter. Speaking for the majority, Lamer C.J.C. said:
>
> > The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a **real and substantial risk** of interference with the right to a fair trial (emphasis added) (page 875)
> >
> > [P]ublication bans are not available as protections against remote and speculative dangers. (page 880)
>
> In separate reasons, McLachlin J. said:
>
> > What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.
> > ...
> >
> > Rational connection between a broadcast ban and the requirement of a fair and impartial trial require demonstration of the following ... [I]t must be shown that publication might confuse or predispose potential jurors ... (page 950).

In the circumstances of that appeal, Inquiry Officer Higgins found that the Ministry had provided insufficient evidence to support a conclusion that disclosure of the financial information at issue could reasonably be expected to result in any prejudice to the ongoing investigation, or to the trial of any individual. As this was the basis for the Ministry's claim under both sections 14(1)(a) and (f), he found that a reasonable expectation of harm had not been established for either of these exemptions.

I agree with the approaches taken by Inquiry Officer Higgins in Order P-948 regarding the Ministry's arguments discussed above, and I adopt them for the purposes of this appeal. In the circumstances of the current appeal, I will now decide whether the information and reasoning provided by the Ministry are sufficient to substantiate the application of the exemptions provided by sections 14(1)(a) and/or (f).

In its representations, the Ministry expresses concern that these cases have received an unprecedented amount of pre-trial media coverage. It indicates that the courts have been particulary concerned about the nature and extent of this coverage, as evidenced by the Courts decision to issue a Publication Deferral Order. In this respect, the Ministry also refers to a special "Media Package" which was prepared by the Communications and Courts Administration Branches of the Ministry under the direct supervision and

control of the Executive Legal Officer for the Chief Justice of the Ontario Court (General Division), and argues that this demonstrates the Court's desire to prevent the publication of information which could prejudice the outcome of the proceedings and result in a mistrial.

The Ministry indicates that jury selection for the trial of one of the individuals began in May, 1995. At the time the Ministry submitted its representations, the trial had not yet begun. I note that the trial of this individual has recently concluded. The Ministry indicates, however, that this individual remains before the courts on three other indictments.

The Ministry submits that disclosure of pages 1 - 8 could result in the publication of inadmissible and extraneous information about the case. Moreover, the Ministry asserts that some of the information onpage 2 is not in the public domain. The Ministry claims that publication of this information could prejudice jurors' consideration of the admissible evidence which could distract the jury from rendering a verdict based solely on the evidence admitted during the course of the trial.

With respect to the cost figures in pages 12 - 15, the Ministry submits, in addition to the above, that release of information about the amount of money spent on the investigations could cause jurors to draw an adverse inference as to the guilt of one of the individuals. Moreover, disclosure of these amounts could stir up anger and resentment against one of the individuals which could prejudice the fairness of the trial.

In this regard, the Ministry argues that jurors are fallible human beings who can be influenced by logically irrelevant considerations, and who do commonly draw unreasonable inferences. The Ministry submits that publication of this information could lead the jurors to draw unreasonable inferences not based on the evidence.

The Ministry contends that consequences that could flow from disclosure of the requested information are serious and potentially irreparable, whereas, the only prejudice suffered by the requester is that disclosure may be delayed until the criminal proceedings are concluded. The Ministry states that the "conclusion of criminal proceedings" refers to the date at which all pending prosecutions on the other three indictments presently before the courts, and all avenues of appeal have been exhausted.

Finally, the Ministry submits that in the context of an ongoing trial, by requiring the requester to wait until the conclusion of the criminal proceedings to obtain access to records related to the case, section 14(1)(f) provides a limited and specific exception to the public's general right of access to government records. In this context, the Ministry has indicated in its representations that the information contained in pages 12 - 15 can be released once the criminal proceedings are complete without risk of causing harm.

I have reviewed the records at issue. I am mindful of the degree of media attention these cases have attracted, and I appreciate the Ministry's concerns that the current and future trials of one of the named individuals proceed with as little outside interference as possible. The Ministry's arguments, however, are unsupported by any evidence.

In my view, the Ministry has failed to provide sufficient information and reasoning to support a conclusion that disclosure of the information at issue could reasonably be expected to result in any interference with a

law enforcement matter, or to deprive a person of the right to a fair trial or adjudication. In particular, I do not find that the information contained in these records could or would, if made known, impinge on the production and/or testing of evidence in such a way as to undermine the trial process.

Returning to my discussion of the meaning of the words "could reasonably be expected to", above, the Ministry has not demonstrated any logical connection between disclosure of the information at issue and the harms mentioned in section 14(1)(a) or (f). Moreover, even if I were persuaded that the proper interpretation of these words is that a "reasonable expectation of **possible** harm will be sufficient" to establish the application of these exemptions, or that they would apply if disclosure of the information at issue "**could** affect the fairness of a trial", I would find that I have not been provided with sufficient information and reasoning to meet those standards.

Accordingly, I find that the Ministry has failed to meet the burden of proof imposed on it by section 53 of the Act, and I am not satisfied that a reasonable expectation of the harm contemplated in either section 14(1)(a) or (f) has been established. Therefore, I find that these exemptions do not apply to the information in the records at issue.

With the exception of pages 3 - 6, I have disposed of all the issues concerning the records at issue in this appeal. As I have found that pages 1, 2, 7, 8 and 12 - 15 do not qualify for exemption, they should be disclosed to the appellant.

CORRECTIONAL RECORD

The Ministry claims that section 14(2)(d) applies to exempt pages 3 - 6 from disclosure as these pages contain information about the jail facilities and accommodation arrangements relating to the individuals named in the request. This section provides that:

> A head may refuse to disclose a record,
>
> > that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

I have reviewed these pages, and I find that pages 3 - 5 contain detailed information relating to the steps taken by correctional authorities regarding the supervision of one of the named individuals while in their custody. Accordingly, I find that these pages qualify for exemption under section 14(2)(d) of the Act. In reviewing page 6, however, I find that only the first three sentences of the "Summary" section of this Issue Note contain information relating to the supervision of one of the named individuals, and accordingly, section 14(2)(d) applies to this information. As I have found that no other exemptions apply to the remaining portions of page 6, they should be disclosed to the appellant.

DESCRIPTION OF RECORDS

As I indicated above, the appellant also seeks an order requiring the Ministry to provide a chart of the exempt records by title, record type and number of pages.

When an institution denies access to a record, in whole or in part, pursuant to section 26 of the Act, it is required to issue a notice of refusal to the requester setting out the elements enumerated in section 29(1)(b) of the Act. This provision states that:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The Ministry's decision letter indicates that "access is denied to all briefing notes and costs associated with this matter" and sets out the exemptions, as worded in the Act, that have been relied on as "the reason" for their application.

I find that this decision letter does not meet the requirements of section 29(1)(b)(ii) of the Act. While the decision letter indicates, in a general way, why the records will not be released, it does not contain any description whatsoever of these records either in narrative form or in the form of an index.

The purpose of an adequate decision letter is to put a requester in a position to make a reasonably informed decision on whether to seek a review of an institution's decision. In this case, the requester has already decided to appeal the substantive aspects of this appeal.

I have provided a summary description of the records at issue in this appeal. Moreover, as I have disposed of all issues relating to the records in this order, there would be no useful purpose served by requiring the Ministry to provide a revised decision letter at this time.

Accordingly, I will not order the Ministry to provide a chart of the exempt records.

ORDER:

1. I uphold the Ministry's decision to deny access to pages 3 - 5 in their entirety and to the first three sentences of the "Summary" section on page 6.

2. I order the Ministry to disclose pages 1, 2, 7, 8 and 12 - 15, and the remaining portions of page 6 to the appellant within fifteen (15) days after the date of this order.

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

Original signed by: September 25, 1995
Laurel Cropley
Inquiry Officer