Information and Privacy
Commissioner/Ontario

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

# ORDER P-1551

## Appeal P-9700076

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

The appellants submitted a request to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to "... all police investigation documents, records and statements" in connection with a criminal proceeding in which the appellants were the complainants. This criminal proceeding was a trial arising from a sexual assault on one of the appellants, a young boy. The other appellants are his mother and step-father. The criminal trial in relation to this matter is concluded and the accused (referred to in this order as the "primary affected person") was convicted. The appellants have commenced a civil proceeding against the primary affected person.

The Ministry identified a number of responsive records and granted partial access to some of them. The Ministry denied access to the remaining portions of these records, and to other records in their entirety. The Ministry claimed the following exemptions in the Act as the basis for this denial of access:

- law enforcement - section 14(2)(a)
- solicitor-client privilege - section 19
- invasion of privacy - section 21.

The appellants appealed the Ministry's decision to deny access.

This office sent a Notice of Inquiry to the appellants, the Ministry and several individuals mentioned in the records (the affected persons), including the primary affected person. Because some of the requested records also appeared to contain the personal information of one or more of the appellants, the Notice raised the possible application of sections 49(a) and (b) of the Act.

In response to this Notice, the appellants, the Ministry and one of the affected persons submitted representations. The latter individual asked not to be contacted again regarding this matter and accordingly, no further material has been sent to this individual.

The Ministry indicates that it no longer relies on section 14(2)(a).

During the inquiry, the Ministry issued an amended decision letter and disclosed several additional documents. Parts of these were withheld on the basis of the exemption in section 21 of the Act.

Subsequently, it became apparent that one of the major substantive issues in this appeal, in relation to the scope of the solicitor-client privilege exemption in section 19, was being addressed in another appeal. For this reason, this appeal was placed "on hold" pending the outcome of the other appeal. Eventually, the other appeal was resolved by the issuance of Order P-1342.

Once this had occurred, this office sent a Supplementary Notice of Inquiry to the appellants, the Ministry and the remaining affected persons, enclosing a copy of Order P-1342 and inviting representations on its possible application in the circumstances of this appeal. In response to this Supplementary Notice, the appellants and the Ministry submitted representations. Subsequently, a second Supplementary Notice was sent to the appellants and the Ministry, requesting more

specific representations on the application of section 19. Representations were received from the appellants and the Ministry.

The appellants raised the possible application of the "public interest override" in section 23 of the Act. This issue was not raised in either the original or supplementary Notices of Inquiry and accordingly, the Ministry has not been given an opportunity to make submissions on it. However, because of the way I have resolved this issue (see the discussion under "Public Interest in Disclosure" below), I have concluded that it was not necessary to solicit the Ministry's representations in this regard.

**THE RECORDS**

The records at issue (with the record numbers assigned by the Ministry, which will also be used in this order) are identified in Appendix "A" to this order.

## DISCUSSION:

**PERSONAL INFORMATION/DISCRETION TO DENY ACCESS TO REQUESTER'S OWN INFORMATION**

"Personal information" is defined, in part, in section 2(1) of the Act as "... recorded information about an identifiable individual ...". Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body, subject to the exceptions listed in section 49. On the other hand, where a record does not contain the appellants' personal information but does contain personal information of another individual or individuals, section 21(1) of the Act prohibits disclosure of this information unless one of the exceptions listed in that section is applicable. In this appeal, the only exception which could apply is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Accordingly, I have reviewed all of the records at issue to determine whether they contain personal information and if so, to whom the personal information relates. My findings in this regard are as follows:

**Records which contain the personal information of the appellants**

- Of the records described as "Crown counsel notes" (Records C(b)1 to C(b)35), Records C(b)1 to C(b)29 contain the personal information of one or more of the appellants, as well as other individuals including the primary affected person.

- Of the records described as "Crown counsel notes (Records C(b)1 to C(b)35), Records C(b)30 to C(b)34 contain the personal information of the appellants only.

- The Will Say statement of one of the appellants and the interview transcript of the appellants, comprising Records C(c)1 to C(c)42, contain the personal information of one or more of the appellants as well as other individuals, including the primary affected person.

- Of the additional documents prepared by the investigating police service (the Police) (Records C(c)43 to C(c)119), Records C(c)43 to C(c)46 and C(c)50 to C(c)119 contain the personal information of the appellants, the primary affected person and other individuals.

- Of the correspondence comprising Records C(d)1 to C(d)19, Records C(d)1 to C(d)8 and C(d)16 contain the personal information of the appellants, the primary affected person and other individuals.

- The Supplementary Record of Arrest (Records D-1 to D-4) contains the personal information of two of the appellants, the primary affected person and other individuals.

- Records E-1 to E-5, E-7, E-18 and E-19, and E-26 to E-31 consist of witness lists and criminal subpoenas. These records contain the personal information of the appellants, the primary affected person and several other individuals. The portions of these records which contain the appellants' personal information have been disclosed. The portions which remain at issue contain the personal information of civilian witnesses other than the primary affected person.

**Records which do not contain the personal information of the appellants**

- The letters and fax correspondence comprising Records A-1 to A-8 contain the personal information of the primary affected person only.

- The presentence report (Records B-12 to B-19) contains personal information of the primary affected person and other individuals.

- The file covers (Records C(a)1 to C(a)2) contain the personal information of the primary affected person only.

- Of the additional documents prepared by the Police (Records C(c)43 to C(c)119), Records C(c)47 to C(c)49 consists of the curriculum vitae of a toxicologist, and contains the personal information of this individual only.

- Of the correspondence comprising Records C(d)1 to C(d)19, Records C(d)9 to C(d)15 and C(d)17 to C(d)19 contain the personal information of the primary affected person and other individuals.

- The records comprising Records C(f)1 to C(f)5 contain the personal information of the primary affected person only.

- The Record of Arrest (Record D-5) contains the personal information of the primary affected person and one other individual. The CPIC printout (Records D-6 to D-13) contains the personal information of the primary affected person only.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that

information. This section states as follows:

> 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]

Accordingly, for records which contain the appellants' personal information, and for which the Ministry has claimed section 19, I will consider whether the latter section applies in order to determine whether the records are exempt under section 49(a).

**SOLICITOR-CLIENT PRIVILEGE**

Section 19 of the Act states:

> 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.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**
   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   **OR**

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation. (Order 210)

The Ministry claims this exemption (in combination with section 49(a), for records which contain the appellants' personal information) for all the records at issue except Records B-12 to B-19, Records C(a)1 to C(a)2 and Records E-1 to E-31.

**BRANCH 1**

- **Solicitor-Client Communication Privilege**

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.

Having reviewed the records at issue, I am satisfied that they are not direct communications between a solicitor and client, or their agents or employees. Accordingly, this part of the exemption does not apply.

- **Litigation Privilege**

Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508-511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424-425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must

> turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

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 DeBoo 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.)].

Having reviewed all of the records 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 each record was prepared or obtained with an intention that it be confidential in the course of the litigation, with the exception of Records A-1 to A-8, C(c)48 and C(c)49, and C(b)12 to C(b)15 (see below).

- **Loss of Privilege through Termination of Litigation**

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.

All litigation involving the Crown is now at an end regarding this matter. Therefore, the policy reasons underlying litigation privilege are no longer present. On the basis of the representations, I am not satisfied that disclosure of the records will harm the adversarial process by hindering the investigation and preparation of future cases of this nature. Accordingly, I find that the records do not qualify for exemption under Branch 1 of section 19.

As indicated above, "opinion" work product, which consists of counsel's mental impressions, conclusions, opinions or legal theories, enjoys a heightened protection over ordinary work product. Having reviewed the records at issue, I am satisfied that they do not contain any of this type of information, 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.

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. The sensitivity issue is addressed in section 21(2)(f) of the Act, the applicability of which I will consider below. The sensitivity of witness information is also addressed in the discretionary law enforcement exemption in section 14, which the Ministry no longer claims.

- **No Privilege where Communication between Opposing Parties**

Additionally, I note that Records A-1 and A-2 are letters from the Crown Attorney to the primary affected person's defence counsel, and Records A-3, A-4 and A-5 are fax cover sheets, also from the Crown Attorney to defence counsel.

At common law, communications between opposing parties, even in contemplation of litigation, are not considered privileged unless made with a view to settlement [see, for example, Flack v. Pacific Press Ltd. (1971), 14 D.L.R. (3d) 334 (B.C. C.A.); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 426-427 (Alta. C.A.)]. In Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993), R.D. Manes et al. explain the rationale for not extending privilege to cover this circumstance (at page 148):

> The key to holding that privilege cannot possibly attach to communications between opposing parties is that in the making of such a communication, there cannot have been an intention of confidentiality, and that the production ... cannot violate a confidential relationship between the defendants and their solicitors. Thus, there is no room for privilege to attach. The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the other side, the communicating party could be said to have waived privilege with respect to that communication.

In my view, this common law principle applies to Records A-1 to A-5, and therefore no privilege attaches to these five records.

Similarly, Record A-6 is a Notice of Assignment Court, and Records A-7 and A-8 are Charge Screening forms prepared by or on behalf of the Crown. These three documents were served on the primary affected person. Since this individual was at that time a party adverse to the Crown in the criminal proceedings, the above analysis with respect to Records A-1 to A-5 also applies to Records A-6 to A-8.

- **No privilege where Document Records Communication in Open Court**

Records C(b)12 through C(b)15 are entitled "Summary of Evidence Heard on the Voir Dire". These documents record evidence actually given at trial (albeit in the absence of the jury). At common law, notes of statements made during a proceeding in the presence of the parties cannot be deemed to have been intended to be confidential [Rawstone v. Preston Corp., [1885] 30 Ch. D. 116 at 118; Manes et al., pp.114-115] and, therefore, no privilege attaches to these records.

**BRANCH 2**

In Order P-1342 I considered whether Branch 2 would be available in cases where a record would not qualify for solicitor-client privilege at common law under Branch 1. After reviewing the legislative history of section 19, I concluded (at p. 8):

> In essence, then, the second branch of section 19 was intended 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. In my view, Branch 2 of section 19 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.

In that case, four records were at issue. The Ministry claimed that the Branch 1 litigation privilege applied to two of the four, and that the Branch 2 litigation privilege applied to all four. I found that none of the records qualified for litigation privilege under either branch, since the relevant litigation had terminated and, alternatively, since the Ministry had waived any privilege which might have attached through disclosure to a third party. This order was sustained by the Ontario Court (General Division) Divisional Court on judicial review. In Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.), the court found that the common law principle of waiver applies equally to Branch 1 and Branch 2 of section 19 of the Act. In my view, consistent with this court decision, 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.

Accordingly, where I found above under Branch 1 of the exemption that records were not subject to solicitor-client privilege, I find that these same records are also not exempt under Branch 2 of section 19.

The Ministry cites a number of previous orders of the Commissioner which, the Ministry asserts, contradict the view that the common law principles which define the scope of Branch 1 of the privilege apply equally to Branch 2.

I would first point out that the Commissioner is not bound by the principle of stare decisis, and thus is entitled to depart from earlier interpretations of law [Hopedale Developments Ltd. v. Oakville (Town) (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); Portage la Prairie (City) v. Inter-City Gas Utilities (1970), 12 D.L.R. (3d) 388 (Man. C.A.)].

In addition, all of these cases can be distinguished on their facts. In none of the cases cited by the Ministry was the effect of "termination of litigation" ever raised in argument or considered in the order. Further, in all but two of these orders (P-1279, P-613), the information could be characterized as "opinion" work product, and thus entitled to the higher degree of protection to which R.J. Sharpe refers in his article cited above.

In summary, I find that none of the above-mentioned records qualify for exemption under section

19.

Records C(b)1 to C(b)11, C(b)16 to C(b)29, C(b)35, C(c)1-42 and D-1 to D-4 contain the personal information of the appellants and other identifiable individuals. As the Ministry has exercised its discretion not to claim section 49(b) of the Act and I have found that they do not qualify for exemption under section 19, these records should be disclosed to the appellants.

**INVASION OF PRIVACY**

As previously noted, 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.

Under section 49(b) of the Act, where a record contains the personal information of both the appellants and other individuals and the Ministry determines that the 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.

In addition, where a record does not contain the appellants' personal information but does contain personal information of another individual or individuals, section 21(1) of the Act prohibits disclosure of this information unless one of the exceptions listed in that section is applicable. In this appeal, the only exception which could apply is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

The Ministry has denied access to Records B-12 to B-19, C(c)43 to C(c)119, C(d)1 to C(d)19, C(f)1 to C(f)5 and D-5 to D-13, and the severed portions of Records C(a)1 to C(a)2, E-1 to E- 5, E-7, E-18 and E-19, and E-26 to E-31 on the basis that disclosure would be an unjustified invasion of personal privacy. In addition, I have found that Records A-1 to A-7 contain the personal information of the primary affected person, and Records C(b)12 to C(b)15 contain the personal information of individuals other than the appellants. Therefore, I will also consider whether these records are exempt under sections 21(1) or 49(b).

In considering the possible application of sections 49(b) and 21(1), sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the ruling of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 makes it clear that an institution can disclose the personal information **only** if it falls under section 21(4) or if the "public interest override" in section 23 applies to it.

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

The Ministry submits that disclosure of the information it has exempted under section 21(1) or 49(b) would constitute a presumed unjustified invasion of personal privacy under section

21(3)(b).

The appellants submit that, if section 21(3)(b) is found to apply, the information to which it applies should be disclosed to them pursuant to the "public interest override" in section 23 of the Act, arguing that there is a public interest that criminal offenders be held liable to those they have harmed. The appellants also submit that section 21(3)(b) does not apply to Records B-12 to B-19 and they argue that section 21(2)(d), a factor favouring disclosure, applies to this record. The appellants also submit that the primary affected person's privacy rights are diminished under the Act because of his criminal behaviour.

Sections 21(2)(d) and 21(3)(b) state as follows:

> (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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (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.

**Records which do not contain the personal information of the appellants**

Records C(f)1 to C(f)5 and D-5 to D-13 contain only the personal information of the primary affected person. Most of this information was compiled and is identifiable as part of an investigation into a possible violation of law and I find that the presumption in section 21(3)(b) applies to it. With regard to the remaining information, in my view it is not information to which section 21(2)(d) applies. Given the application of the presumption to part of the record, and the absence of any factor favouring disclosure in relation to the remainder, I find that these records are exempt under section 21(1).

Records C(d)9 to C(d)15, and C(d)17 to C(d)19 contain information that relates to the medical and/or psychiatric conditions of an individual other than the appellants. I find that the presumed unjustified invasion of privacy in section 21(3)(a), which applies to information that "relates to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation", applies. I would have found that the factor favouring disclosure in section 21(2)(d) applies to this information, but as noted previously, a factor in section 21(2) cannot rebut a presumption. This is not information to which section 21(4) applies. Therefore, I find that disclosure of this information would be an unjustified invasion of personal privacy and it is exempt under section 21(1).

Records A-1 to A-8, B-12 to B-19, C(a)1 and C(a)2, and C(c)47 to C(c)49 contain the personal information of the primary affected person and/or other identifiable individuals **only** and do not contain any personal information of the appellants. Therefore the exemption under consideration is section 21(1), which applies **unless** it is established that disclosure would not be an unjustified invasion of personal privacy.

I am not satisfied that there is a sufficient link between the appellants' civil case and the contents of these records to establish the application of section 21(2)(d). In my view, these records have no bearing on the appellants' civil suit, and are therefore not "relevant to a fair determination of rights" for the appellants and section 21(2)(d) does not apply.

As no factors favouring disclosure have been established, I find that these records are exempt under section 21(1).

**Records which contain the personal information of the appellants**

I have found that Records C(b)30 to C(b)34 contain the personal information of the appellants only. As these records do not contain the personal information of another identifiable individual, no unjustified invasion of privacy can result from their disclosure. Accordingly, section 49(b) does not apply, and these records should be disclosed to the appellants.

Records C(b)12 to C(b)15 consist of the evidence given by several police officers during a "voir dire" at the criminal trial of the primary affected person. This record contains the personal information of one of the appellants and the primary affected person and, therefore, the exemption to consider is section 49(b). Similarly, Records C(c)43 to C(c)46 and C(c)50 to C(c)119 are "will say" statements setting out the intended evidence of Crown witnesses. Many of these statements are in the form of extracts from police officers' notebooks. These statements contain the personal information of one or more of the appellants and the primary affected person.

I am satisfied that the information in Records C(b)12 to C(b)15, C(c)43 to C(c)46 and C(c)50 to C(c)119 was compiled and is identifiable as part of an investigation into a possible violation of law, namely the Criminal Code offences for which the primary affected person was ultimately convicted. Therefore the presumed unjustified invasion of personal privacy in section 21(3)(b) applies. This is not information to which section 21(4) applies. Therefore, I find that disclosure of this information would be an unjustified invasion of personal privacy and it is exempt under section 49(b).

Records C(d)1 to C(d)8 and C(d)16 consist of correspondence from a relative of the primary affected person to various parties, including the Crown Attorney responsible for the criminal prosecution. These records primarily contain the personal information of the author and the primary affected person. They also contain passing references to one of the appellants, the young victim of the sexual assault, which constitute this individual's personal information. Therefore, the exemption to consider is section 49(b). In my view, section 21(3)(b) does not apply to these records. 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 addition, I find that the factor favouring disclosure in section 21(2)(d) is also

relevant, as this information could well have a bearing on the appellants' lawsuit against the primary affected person.

In balancing the factors favouring privacy protection against the factors favouring disclosure to the appellants, I have carefully considered the contents of the records themselves, which suggest that the author was in favour of disclosure of the information to the appellants, and the broader context of this appeal, which involves a horrifying sexual assault on a young boy and his family's attempt to recover damages for the injuries suffered as a result of the assault. In the circumstances, I find that the factor favouring disclosure to the appellants is most compelling. Accordingly, I find that disclosure of these records would not be an unjustified invasion of personal privacy and section 49(b) does not apply.

Records E-1 to E-5, E-7, E-18 and E-19, and E-26 to E-31 were withheld in part. These records consist of lists of names and addresses of witnesses and two subpoenas to witnesses. The withheld parts consist of the names and addresses of witnesses. Several of these documents also contain personal information of the appellants which has been previously disclosed. I find that this information was compiled and is identifiable as part of an investigation into a possible violation of law (and later incorporated into these records) and therefore the presumed unjustified invasion of personal privacy in section 21(3)(b) applies. This is not information to which section 21(4) applies and I find that disclosure would be an unjustified invasion of personal privacy. The withheld passages from records which also contain the appellants' personal information are exempt under section 49(b) and the passages from records which do not are exempt under section 21(1).

**PUBLIC INTEREST IN DISCLOSURE**

As noted earlier, the appellants claim that the "public interest override" in section 23 of the Act applies in this case. This section states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 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]

In this appeal, I have applied the exemptions in section 21(1) and 49(b). Section 21(1) is one of the exemptions listed as being subject to section 23. Section 49(b) is not mentioned in this regard, but in Order P-541, former Inquiry Officer Anita Fineberg found that section 49(b) should also be considered as subject to section 23. She stated:

> In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21. Were this not to be the case, an individual could theoretically have a lesser right of access to his or her own personal information than would the "stranger". This would result if section 23 could be used to override the exemption in section 21 of the Act, but not if the institution denied access to the information pursuant to

> section 49(b) as it contained the appellant's personal information, as well as that of other individuals.

I agree. Therefore, I will consider whether the information I have exempted under both sections 21(1) and 49(b) is subject to section 23.

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

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.

The appellants submit that section 23 applies for several reasons. First, the appellants submit that there is a public interest in ensuring that all relevant evidence is placed before the court which decides the appellants' civil case against the primary affected person. In this regard, the appellants cite a comment made by former Inquiry Officer John Higgins in Order M-539 to the effect that there is a public interest in ensuring that a tribunal makes its decisions based on full and fair disclosure. However, in that order, Inquiry Officer Higgins did not find that there was a "compelling public interest" in disclosure within the meaning of section 23; rather, he found that the evidence-gathering methods available to that tribunal were sufficient to satisfy that particular public interest.

Similarly, in the circumstances of this case, I find that the discovery provisions in relation to civil proceedings such as the one which has been initiated by the appellants in this case are sufficient to meet this particular public interest. I find that the appellants have not established a compelling public interest in disclosure under section 23 on the basis of this argument.

The appellants also argue that there is a public interest that criminal offenders be held liable to those they have harmed. In a related submission on section 23, they also argue that the primary affected person's privacy rights are diminished under the Act because of his criminal behaviour.

The Act does not explicitly contemplate a reduction of an individual's privacy rights on such a basis. However, in some cases, such factors could be "relevant circumstances" to consider under section 21(2), which I dealt with in the discussion of "invasion of privacy", above.

In the context of section 23, however, I believe that the public interest in holding criminal offenders liable to their victims is met by the procedures of the civil courts and, in particular, the discovery procedures available to litigants in civil proceedings. Moreover, in my view, the appellants' interest in the disclosure of these records is of a private, rather than a public nature.

I find that there is no compelling public interest in disclosure of the information which I have exempted under sections 21(1) and 49(b), and therefore, section 23 does not apply.

I realize that this decision may be disappointing to the appellants. However, in the context of the Act, I have concluded that some of the information is exempt, and that the public interest override in section 23 has not been established. In this regard, it is important to note that, although the Act is sometimes used for this purpose, it is **not** designed as a vehicle for obtaining disclosure in civil lawsuits. That type of disclosure is provided for in the Rules of Civil Procedure.

## ORDER:

1. I order the Ministry to disclose Records C(b)1 to C(b)11, C(b)16 to C(b)35, C(c)1 to C(c)42, C(d)1 to C(d)8, C(d)16 and D-1 to D-4 to the appellants by sending them a copy by **May 5, 1998** but not earlier than **April 30, 1998**.

2. I uphold the Ministry's decision not to disclose the remaining records or parts of records to the appellants.

3. 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 which are disclosed to the appellant pursuant to Provision 1.

Original signed by: March 31, 1998
Holly Big Canoe
Inquiry Officer

# APPENDIX "A"

## INDEX OF RECORDS AT ISSUE

| RECORD NUMBERS | DESCRIPTION |
|---|---|
| A-1 to A-8 | Letters and fax correspondence between the primary affected person's counsel and Crown counsel |
| B-12 to B-19 | Pre-sentence Report of primary affected person |
| C(a)1 to C(a)2 | Front cover of General Division File with Crown notations |
| C(b)1 to C(b)35 | Crown Counsel notes |
| C(c)1 to C(c)42 | Will say statement and transcription of taped interview |
| C(c)43 to C(c)119 | Documents prepared by police to assist Crown, including additional will say statements, statement of primary affected person, fingerprint identification, curriculum vitae of experts |
| C(d)1 to C(d)19 | Correspondence and psychological material relating to primary affected person provided to Crown counsel |
| C(f)1 to C(f)5 | Show cause file cover, Record of Arrest, photocopied photographs of the primary affected person |
| D-1 to D-4 | Supplementary Record of Arrest ("Synopsis") |
| D-5 to D-13 | CPIC printout relating to primary affected person, Record of Arrest (including information for Show Cause) |
| E-1 to E-5, E-7, E-18 and E-19, and E-26 to E-31 | Witness lists and criminal subpoenas with severance of names and addresses of civilian witnesses |