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

ORDER PO-1715

Appeal PA-980330-1

Niagara Parks Commission

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

During a visit by a family to the Niagara Gorge, the 17 year old son fell into the Niagara River and drowned. The man's body was recovered by the United States Coast Guard. The Office of the New York State Niagara County Coroner pronounced the man dead and communicated its findings to the Niagara Parks Commission (the NPC), the public body with jurisdiction over the Niagara Gorge property.

The NPC conducted an investigation into the circumstances surrounding the death. Statements were taken from family members and other witnesses as part of the investigation. A Sudden Death Report and Supplementary Report were also prepared.

NATURE OF THE APPEAL:

The NPC received a request under the Freedom of Information and Protection of Privacy Act (the Act) from counsel representing the family of the deceased man for a copy of all records pertaining to the investigation. The request encompassed all file documentation, investigating officer notes, witness statements and reports of other emergency services, such as ambulance, coast guard and fire department.

The NPC identified 12 responsive records. It granted access in full to one record (a Niagara Parks Police Bulletin) and denied access to the other 11 pursuant to section 21(1) of the Act (invasion of privacy). The response letter provided to the requester included the following statements:

> ... I have taken into consideration the fact that many of the records are personal to a deceased individual, but, according to the Act, the individual's privacy must be protected for a period of thirty years [Section 2(2)]; that despite the fact that you have stated you are acting for the deceased's family, I cannot accept their authority as he was over the age of sixteen [Section 66(c)]; and that the information contained in these records would not appear to be beneficial to the administration of this individual's estate [Section 66(a)].

An index describing the records was attached to the NPC's response letter.

The requester appealed this decision. Because the requester represents all members of the deceased individual's immediate family, I will refer to him and these family members collectively as "the appellant" in the remainder of this order.

Mediation was not successful and I sent a Notice of Inquiry to the appellant, the NPC and two individuals named in the records who were witnesses to the incident (the affected persons). Because it appeared that some records contained the personal information of certain family members, section 49(b) was added as an exemption claim in the Notice.

Because of the particular facts and circumstances of this appeal, I determined that the outcome could have implications beyond the interests of the parties. For this reason, I added issues in the Notice of Inquiry which relate to the law of presumptions as it applies to section 21(3)(b) of the Act, the doctrine of *stare*

decisis, and the applicability of the Divisional Court's ruling in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (the John Doe case) to the present appeal. I provided copies of the Notice to the following institutions and/or organizations, allowing them the opportunity to submit representations regarding these issues: Management Board Secretariat, the Ministry of the Attorney General, the Ministry of the Solicitor General and Correctional Services, the Society of Ontario Adjudicators and Regulators, the Association of Chiefs of Police for Ontario, and Bereaved Families of Ontario.

Representations were received from the appellant, the NPC and the two affected persons. I also received representations from the Ministry of the Attorney General (the Attorney General). Unfortunately, none of the other notified institutions or organizations responded to the Notice of Inquiry.

RECORDS:

The records total 33 pages and consist of a Sudden Death Report and Supplementary Report prepared by the NPC, a Supplementary Report prepared by the Niagara Regional Police Service, a checklist, a dispatcher chronology, witness information and statements, a CPIC incident history, correspondence to witnesses, and a memorandum received from the New York State Niagara County Coroner's office.

PRELIMINARY MATTERS:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

As noted earlier, in its original response to the appellant, the NPC outlined its reasons for concluding that sections 66(a) and (c) were not applicable. The draft Report of Mediator issued to the parties at the conclusion of mediation also stated:

> The appellant confirmed that the records are not relevant to the administration of the victim's estate.

This statement was not disputed by the appellant during the time period allowed for revisions to the draft Report.

However, in the representations provided in response to the Notice of Inquiry, the appellant submits that he is entitled to access to the deceased's personal information as the personal representative and guardian, pursuant to sections 66(a) and (b) of the Act. These sections state:

> Any right or power conferred on an individual by this Act may be exercised,

> (a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;
>
> (b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property;

The appellant states that if the deceased were alive he would be entitled to access to his own personal information under section 47(1) and:

> ...[a]s [the son] is deceased, s. 66 empowers his parents with the same s. 47(1) rights to access his personal information ... as their son's guardians and personal representatives of [the son's] estate.

I disagree with the appellant.

Section 66(b) only has potential application when the individual in question is alive, which is clearly not the case in the present circumstances.

As far as section 66(a) is concerned, I made the following statements in Order M-1075 which are also relevant in this appeal:

> The rights of a personal representative under section 54(a) [the equivalent provision to section 66(a) in the Municipal Freedom of Information and Protection of Privacy Act] are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.
>
> In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

In the present appeal, the appellant has provided no evidence to demonstrate that he is the "personal representative" of the deceased's estate, as the term is used in section 66(a), nor that the records are required in order to wind up the deceased's estate.

Therefore, I find that sections 66(a) and 66(b) of the Act have no application in the circumstances of this appeal.

AWARDING OF COSTS

The appellant also submits:

> As with any legal submission, the appellants have incurred significant expenses of time and disbursements in their battle for access to requested [NPC] records.
>
> One way or another, somebody has to bear the costs of this appeal. Should the [Commissioner's Office] determine that the NPC wrongly withheld public information from the [appellant] family - then the NPC must account for its mistaken decision and reimburse innocent [appellant] family members for reasonable expenses incurred. Such would be the case in any other judicial proceeding.

The issue of whether the Commissioner's Office has legal authority to award costs to a party to an appeal has been considered in a number of previous orders. In Order P-1312, former Assistant Commissioner Irwin Glasberg made the following comments on this issue:

> In Orders P-604 and P-724, I considered the issue of whether the Commissioner's office has the legal authority to award costs to a party to an appeal. I observed that, as a general principle, an administrative tribunal possesses only those powers which it has been granted by its enabling statute, by necessary implication or through some statute of general application.
>
> I then reviewed the relevant provisions of the Act and concluded that they do not provide the Commissioner or his delegate with either the express or implied authority to award costs to a party in an appeal. I also found that there is no statute of general application, to which the Act is subject, which provides the Commissioner with this power. I went on to conclude that the Commissioner's office does not possess the requisite authority to make an award of costs.
>
> For the same reasons that I expressed in the previous two orders, I find that the Commissioner's office lacks the authority to award costs in the present appeal.

I concur and, for the same reasons, I find that I do not have authority to award costs in this appeal.

PUBLIC INTEREST OVERRIDE

For the first time in his representations, the appellant also raises the possible application of the public interest override contained in section 23 of the Act. I will address this issue in the "Discussion" portion of this order.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The NPC submits that "... the entire file falls squarely within the definition of personal information as contemplated by the Act". The NPC goes on to state:

> The issue of determining whether or not this information constitutes personal information may be clouded somewhat by two factors:
>
> (i) The first is that the person to whom the report relates is deceased. We recognize that privacy interests associated with an individual may diminish in some circumstances after the person's death [Order M-50 ...]. However, the factor plays no part in whether or not the information constitutes personal information. It is only relevant if the Section 21(2) factors are being considered in a particular matter. As we will submit later in this report ... the Section 21(2) criteria are irrelevant based on the John Doe decision which is cited below. On the issue of whether all of the stated information (circumstances of the accident, rescue attempts, etc.) constitutes personal information, it would, in our view, clearly constitute personal information if the deceased had survived the ordeal. The circumstances surrounding the trauma are exactly the type of information which ought to receive the statutory protections afforded by the Act. The fact that the young man died in this instance does not change the nature of the information.
>
> (ii) The second factor clouding the issue is that it is the deceased's family requesting the information. If the reports were being requested by, for example, a newspaper, the issue would seem much clearer, and the information would certainly be considered to be personal information within the meaning of the Act. Given the provisions of section 66 relating both to the age of the deceased and to the use of information for administration of estate purposes, the family in this case stands in no better position than a newspaper.
>
> ...
>
> The fact that the individual is deceased, and the fact that sympathies may lie with the family are not relevant to the issue of whether or not this information constitutes personal information.

The appellant states that any personal information pertaining to the deceased son is already known by other family members, and that it should not be withheld. Alternatively, the appellant submits that information such as blood type, medical history, etc., of the deceased could be severed and the remaining information disclosed.

All of the records at issue in this appeal were created in the context of the investigation into the death of the son. As such, I find that they are clearly "about" the son and, therefore, contain his personal information. Section 2(2) of the Act makes it clear that an individual must be dead for more than thirty years before information about that individual is deemed to no longer qualify as "personal information". The fact that certain of the deceased's personal information may be known by other family members is not relevant to the issue of whether it qualifies as "personal information". I also find that the severability arguments put forward by the appellant are not applicable in these circumstances, since the records in their entirety contain the deceased son's personal information.

Information contained in certain records consists of statements made by the deceased's sister, his cousin, and the two affected persons. I find that those portions of records contain the personal information of these individuals, as well as the deceased son.

INVASION OF PRIVACY

Under section 49(b) of the Act, where a record contains the personal information of both an appellant and other individuals, and an institution determines that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has discretion to deny the requester access to that information. However, where a record contains only personal information of individuals other than an appellant, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits an institution from disclosing this information.

In both these situations, sections 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. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

Section 21(3)(b) states:

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

The NPC submits that the personal information contained in the records was compiled and is identifiable as part of an investigation by the Niagara Parks Police Service into a death and, as such, relates to the investigation into a possible violation of law. The NPC states that the Niagara Parks Police Service is a police service operating under the auspices of the Niagara Regional Police pursuant to a contract between

the Niagara Regional Police Services Board and the NPC. The NPC adds that the Niagara Parks Police Service has the authority to investigate incidents on NPC property and its members are special constables appointed pursuant to the Police Services Act, with arrest and investigative powers in respect of all matters occurring on NPC property. The NPC concludes:

> As the file constitutes the report on the police investigation into the incident, it falls squarely within the presumption contained in Section 21(3)(b) and the exception found in Section 21(1) does not apply.
>
> The inquiry ends when the presumption is raised under Section 21(3), and the Commission then ought not to perform any balancing test using the Section 21(2) factors ...
>
> As with the issues relating to the definition of personal information, the Commission ought not to let a natural desire to accommodate the family's request for information influence its interpretation of Section 21(3) and determine, wrongly, that the Section 21(2) factors can be taken into account.

In his submissions in relation to section 21(3)(b), the appellant points out that the deceased son did not violate any laws, and that if NPC staff are under investigation for action relating to the death, then the NPC "... should not be allowed to escape civil liability for the legal violations of its staff".

The affected persons both submit that disclosure of their personal information would be an unjustified invasion of their personal privacy.

I am satisfied that the records were created as part of a police investigation into the circumstances surrounding the sudden death of the son, with a view to determining whether criminal charges should be laid against any individual under the Criminal Code of Canada (Order PO-1654). Therefore, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b). This presumption still applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

I also find that none of the circumstances outlined in section 21(4) which would rebut a section 21(3) presumption are present in this appeal.

As mentioned previously, some of the information contained in the records was provided to the NPC by certain members of the deceased man's family during the course of the investigation. The deceased's sister is a member of the family represented by the counsel in this appeal and is an "appellant" for the purposes of this inquiry.

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of

the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied in a number of subsequent similar orders of this Office (eg. M-451, M-613 and P-1457) and, in my view, it is equally applicable to certain records at issue in the present appeal. I find that applying the section 21(3)(b) presumption to deny access to information which the deceased's sister originally provided to the NPC would, according to the rules of statutory interpretation, lead to an "absurd result". On this basis, I find that the presumption in section 21(3)(b) does not apply to those portions of Records 3 and 8 which contain this information.

THE JOHN DOE DECISION

In certain circumstances, the presence of listed and/or unlisted factors under section 21(2) might indicate that disclosure of a record would not constitute an unjustified invasion of personal privacy. However, the Divisional Court's decision in the John Doe case (see page 2 of this order for a complete citation) states that factors under section 21(2) cannot rebut a presumption under section 21(3) once its application has been established.

By way of background, the John Doe decision was issued in a judicial review application that arose from an order made by this Office in 1991 (Order P-237). The appeal that led to Order P-237 concerned a request for access to records relating to an investigation undertaken by the Ontario Provincial Police into certain criminal activity. After considering representations from the Ministry of the Solicitor General, the requester and certain affected parties, former Commissioner Tom Wright made the following findings:

> Considering the circumstances under which this record was created, the steps taken during the course of the investigation and the materials reviewed by the OPP officers, it is my view that the subsection 21(3)(b) presumption applies. The record describes an investigation into allegations of certain criminal offences having been committed by the individuals whose personal information is at issue.
>
> In my view, the fact that no criminal proceedings were commenced against these individuals does not negate the applicability of subsection 21(3)(b). The presumption in subsection 21(3)(b) only requires that there be an investigation into a possible violation of law. Thus, there is a presumption raised that disclosure of the personal information would result in an unjustified invasion of the personal privacy of the four affected parties who have not given their consent to the disclosure of their personal information.

After discussing the particular and unusual fact situation surrounding the records and the appeal, the former Commissioner went on to consider the possible relevance of factors which might favour disclosure, including section 21(2)(a) (subjecting the activities of an institution to public scrutiny). He then concluded:

> Having carefully considered all of the circumstances of this appeal I find that the presumption contained in subsection 21(3)(b) has been rebutted. In my view, any invasion

> of the privacy of the four affected parties is outweighed by the desirability of subjecting the institution to public scrutiny and ensuring public confidence in the integrity of the institution. Although the disclosure of the information is, to a degree, an invasion of the four affected parties' privacy, in the unusual circumstances of this case I find that it is a justified, rather than an unjustified invasion. It is always a difficult task to balance the right of access with the right to privacy. In the circumstances of this appeal, I believe that the appropriate balance is in favour of access.

The affected parties applied for a judicial review of this decision to the Divisional Court.

In its decision on this judicial review, the majority of the Divisional Court overturned Commissioner Wright's order. One aspect of the decision concerned the relationship between sections 21(3) and 21(2), and the impact of a finding that one of the presumptions in section 21(3) was present. On this point, the court stated:

> Having found an unjustified invasion of personal privacy pursuant to s. 21(3)(b), and having concluded that none of the circumstances set out in s. 21(4) existed so as to rebut that presumption, the Commissioner considered both enumerated and unenumerated factors under s. 21(2) in order to rebut the presumption created by s. 21(3).
>
> The words of the statute are clear. There is nothing in the section to confuse the presumption in s.21(3) with the balancing process in s. 21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s. 21. Once the presumption has been established pursuant to s. 21(3), it may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation. The Commissioner fundamentally misconstrued the scheme of the Act. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

Mr. Justice Southey, who issued dissenting reasons in John Doe on this issue, commented as follows at page 795:

> In my opinion, it is not clear whether the presumption raised under section 21(3) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"), is rebuttable, or whether it can be overridden by the application of s. 21(4) or some other express provision of the Act. I am satisfied that the interpretation given to s. 21 by the Information and Privacy Commissioner (the "commissioner") in the order under review is one that the words of the section can reasonably bear, although I am not certain that it is the correct interpretation. The order should not be interfered with because of that interpretation.

The decision of the Divisional Court was not appealed.

STARE DECISIS AND ITS APPLICATION TO JOHN DOE

The majority position in the John Doe decision has been followed in many appeals and orders of this Office since 1993. During this period, strong views have been expressed by many appellants that the Act should permit the consideration of factors which favour disclosure under section 21(2), even when the requirements of the section 21(3)(b) presumption have been established. To date, this Office has followed the approach that, because of the findings of the Divisional Court in John Doe, it is precluded from considering listed or unlisted factors favouring disclosure under section 21(2) in order to rebut a section 21(3) presumption.

In an effort to provide clarity on this controversial issue, I decided to seek representations in this appeal from a wide range of parties who have been impacted by the John Doe decision and the approach taken by this Office since it was issued by the Divisional Court in 1993. Unfortunately, none of these parties chose to submit representations, other than the Attorney General, who provided extensive representations.

The parties were asked to provide representations on the question of whether the doctrine of *stare decisis* applies to administrative tribunals so as to require them to follow court decisions on point, and whether I am required to follow the Divisional Court's decision in John Doe.

The appellant submits that "administrative tribunals are not bound by court precedents - or even by their own precedents". In support of this proposition, the appellant cites the reasons of Mr. Justice Iacobucci in Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 (S.C.C.):

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate. In labour arbitration, the arbitrator is not bound to follow the decisions of other arbitrators, even when similar circumstances arise.

The context for these remarks is an analysis of whether a labour arbitrator is a "court" for the purposes of granting a remedy under section 24(1) of the Canadian Charter of Rights and Freedoms, and this quotation forms part of Mr. Justice Iacobucci's dissent on this issue. It was not a case in which the application of *stare decisis* was actually being argued. One possible interpretation of the second and third sentences of the passage I have quoted is that *stare decisis* never applies to tribunals, even when the decision sought to be applied was issued by a supervising court. However, one might also argue that these comments do no more than confirm the well recognized principle of law that administrative tribunals are not bound by their own previous decisions. Given the example provided by Mr. Justice Iacobucci, and the context of his remarks within the Weber decision, I have concluded that the quoted passage is equivocal on the question of whether higher court decisions can bind a tribunal under *stare decisis*. I am therefore not persuaded, solely on the basis of this quotation from Weber, that *stare decisis* can never apply in that way.

The appellant also cites Tremblay v. Quebec (Commission des affaires sociales) (1992), 90 D.L.R. (4th) 609 (S.C.C.), in which Mr. Justice Gonthier comments:

> Ordinarily, precedent is developed by the actual decision-makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This, of course, is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it particularly important for the persons responsible for hearing a case to be the ones to decide it.

The Tremblay decision deals with the decision-making process within an administrative tribunal. In my view, the quotation referred to by the appellant does not go beyond the proposition that tribunals are not bound by their own previous decisions. It does not assist in deciding if, and under what circumstances, the doctrine of *stare decisis* applies to tribunals so as to require them to follow an interpretation established by a higher court.

The NPC agrees that tribunals are not bound by the doctrine of *stare decisis* as regarding their own decisions. However, with respect to court decisions, the NPC submits that tribunals are "... bound by certain court decisions, including those in which a court interprets the tribunal's governing legislation." The NPC points out that in John Doe, the Divisional Court found that the Commissioner had fundamentally misconstrued the provisions of the Act relating to the relationship between sections 21(2) and 21(3), thereby committing a jurisdictional error which was reviewable by the court and in effect found to be patently unreasonable. The NPC submits, therefore, that the Commissioner is bound by the John Doe decision and:

> ... while deference will be extended to decisions of the Commissioner, that deference will not be extended in a situation where the Commissioner clearly misconstrues the governing statute contrary to a ruling of the court made on judicial review of a prior decision of the Commissioner.

In my view, the issue of deference is not relevant to the basic question of **whether** *stare decisis* can ever apply to require a tribunal to follow a higher court's decision. The answer to that question depends on the fundamental nature of the relationship between these two levels of decision-making bodies, in a hierarchical sense, and not on the particular standards that may be applied on judicial review.

However, the Attorney General's submissions indicate that, if *stare decisis* does apply in the context of this relationship (the Attorney General submits that it does), then the standard of review may be relevant in determining **when** a higher court decision should be considered binding. The Attorney General states:

> ... the doctrine of *stare decisis* applies to tribunals where a section 96 judge makes a definitive statement on the interpretation of a statute. A definitive statement results where a

> court: (1) employs the "correctness" standard of review, or (2) employs the "patently unreasonable" standard of review and finds that a particular interpretation is patently unreasonable.

The section 96 issue (a reference to section 96 of the Constitution Act, 1867) is also referred to in Macaulay, Practice and Procedure Before Administrative Tribunals, (Toronto: Carswell, 1998) (looseleaf), where the authors state:

> In determining which judicial decisions are authoritative for administrative agencies one can use as a general rule of thumb that decisions of the courts of the same jurisdiction as the agency will be authoritative if the judges of that court are appointed by the federal government (i.e. courts known as s. 96 courts – referring to the appointment power set out in s. 96 of the Constitution).

Interestingly, the Macaulay text provides no case or other authority for this proposition.

The Attorney General also points to statements made by Sara Blake in Administrative Law in Canada, 2nd ed. (Toronto: Butterworths 1997) at 113:

> If a court has interpreted a statutory provision under consideration by a tribunal, the tribunal must adopt the court's interpretation. However, if a court has merely upheld an earlier tribunal's interpretation of the provision as reasonable, the tribunal is not obliged to follow that interpretation if it prefers another interpretation of the provision that is also reasonable.
> ...

In other words, the Attorney General draws a distinction between: (1) decisions where a court has made a definitive statement on the interpretation of a statute, and *stare decisis* applies; and (2) decisions where a court has merely upheld an earlier tribunal's interpretation of a statute as being reasonable, where a tribunal is free to make other equally "reasonable" interpretations of the statute. Further, the Attorney General says that in order to be definitive, the reviewing court must be composed of "section 96" judges and, according to Macaulay, the court must be of the same jurisdiction as the tribunal.

In support of its position, the Attorney General cites the case of Frontenac (Catholic School Board) v. Ont. English Catholic School Teachers' Assn. (1978), 21 O.R. (2d) 364 (Div. Ct.), which is also the only case cited in the analysis quoted above from the Blake text. In Frontenac, the Court found that an arbitrator had made a conclusion of law that was contrary to a Federal Court of Appeal decision on the same point. The Court stated:

> In our opinion, the decision of the Federal Court of Appeal ruling on a federal statute was binding and ought to have been recognized by the board of arbitration.

The Court in Frontenac indicates (at page 366) that "[t]he board of arbitration operated under the authority of the School Boards and Teachers Collective Agreement Act, 1975 (Ont.), c.72", clearly an Ontario statute. (It still exists today as the School Boards and Teachers Collective Negotiations Act, R.S.O. 1990, c. S-2.) Applying the statement made by Macaulay and the approach suggested by the Attorney General, in order for *stare decisis* to apply, the court must be of the same jurisdiction as the tribunal, and the judge hearing the case must be appointed pursuant to the power in section 96 of the Constitution Act, 1867. Neither of these conditions is present in Frontenac. The Federal Court of Appeal is not "of the same jurisdiction" as the board of arbitration, nor are its judges appointed pursuant to section 96. It appears that this decision may well be an incorrect application of the doctrine of *stare decisis* and, in my view, this significantly undermines its value and authority as a precedent.

The Attorney General also cites Partagec Inc. c. Syndicat des travailleurs de Partagec [1993] J.Q. No. 1110, in which the Quebec Superior Court held:

> This is a jurisdictional error and the (Appeal) Commission ignored the decision of the Court of Appeal in the matter Théberge v. Habitat Ste-Foy and others, [1991] R.J.Q. No. 1616, which interpreted sections 227 and 228 of the Health and Employment Security Act ... The tribunal cannot ignore this decision and must apply the principle of *stare decisis*. (unofficial translation)

Although this decision suggests that *stare decisis* applies to bind tribunals to follow higher court decisions in the appropriate circumstances, it is a decision from another jurisdiction and does not appear to be a ruling where the Court had the benefit of extensive argument on the issue.

Finally, the Attorney General discusses the case of Dairy Producers Cooperative Ltd. v. Teamsters, Dairy and Produce Workers, Local 834 (1992), 102 Sask. R. 202, 5 Admin L.R. (2d) 212, [1992] S.J. No. 248 (Sask. Q.B.), reversed on other grounds by the Court of Appeal at [1993] S.J. No. 364), which I referred to in the Notice of Inquiry. In that case the Saskatchewan Court of Queen's Bench commented as follows:

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the labour relations board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.
>
> I am asked to hold that the Board's interpretation of s. 11(1)(m) of the [Trade Union Act] is patently unreasonable because it did not adopt the view of Mr. Justice Hrabinsky [in the prior case of S.E.I.U. Local 333 v. Bethany Pioneer Village Inc. (1990), 85 Sask. Q. B. 120 (Q.B.)]. However, I am unable to find any doctrine of precedent stating that when a

> court and a specialist tribunal share jurisdiction to interpret a statute, a prior judicial determination is to be regarded as binding upon the tribunal.

In the Attorney General's view, the statements made by the Court in Dairy Producers are not in conflict with its position on the issue of *stare decisis*. The Attorney General points out that:

> The Court of Appeal [in Dairy Producers] held that: (1) the interpretation of the statute [in that case] was within the jurisdiction of the Saskatchewan Labour Relations Board; (2) the standard of review was whether the interpretation of the legislation was patently unreasonable; and (3) in this particular case, the determination of the board was not patently unreasonable.
> ...
>
> ... As previously stated, where a court has merely upheld an earlier tribunal's interpretation of the provision as reasonable, the tribunal is not obliged to follow that interpretation if it prefers another interpretation of the provision that is also reasonable.

In my view, the Attorney General's interpretation of the Dairy Producers case does not accurately reflects its fact situation. The decision in S.E.I.U. Local 333 was made in a case where the reviewing court applied a correctness standard. The labour relations board in Dairy Producers was being reviewed on a standard of patent unreasonableness. The Court in Dairy Producers ruled that, in that situation, if the divergent interpretation was not patently unreasonable, it would not be overturned on judicial review. This is inconsistent with the Attorney General's analysis of this case reflected in the final paragraph quoted above. The Attorney General's argument suggests that the standard being applied in S.E.I.U. Local 333 was "reasonableness", which was not the case.

Moreover, the court in Dairy Producers, chose not to apply the decision in S.E.I.U. Local 333, despite the fact that the standard of review in the S.E.I.U. Local 333 case was "correctness". In my view, this would appear to be inconsistent with the Attorney General's position outlined on page 11 of this order, which characterizes situations where a court employs a correctness standard as a "definitive statement" that willbe binding on a tribunal in the future.

That being said, I agree with the Attorney General's view that the case does not stand for the proposition that *stare decisis* can never apply so as to bind a tribunal to follow a higher court's interpretation.

The case law dealing with whether or when the doctrine of *stare decisis* applies to render higher court decisions binding on administrative tribunals is surprisingly limited. I would have expected that, given the overwhelming view that tribunals are not bound by their own decisions because of the importance of retaining unfettered discretion, this issue might have been considered more explicitly and in more detail. However, the Dairy Producers and Partagec cases cited by me in the Notice of Inquiry, and the Frontenac case referred to by the Attorney General, appear to be the three cases most directly on point. It is striking

that none of the decisions appears to have involved any extensive review of the law on this point, and none of them provides clear authority for tribunals to follow.

The Attorney General puts forward an interesting theory for determining when the doctrine of *stare decisis* should apply to render higher court decisions binding on administrative tribunals. As stated earlier, in the Attorney General's view:

> ... the doctrine of *stare decisis* applies to tribunals where a section 96 judge makes a definitive statement on the interpretation of a statute. A definitive statement results where a court: (1) employs the "correctness" standard of review, or (2) employs the "patently unreasonable" standard of review and finds that a particular interpretation is patently unreasonable.

However, no authority is cited to support this theory, and the only case referred to by the Attorney General in support of its position (the Frontenac case) is more than 20 years old, has never been applied in subsequent decisions so far as I can determine, and may well be flawed in its reasoning. In addition, the Dairy Producers case appears to provide an example of a case where a previous decision meeting the requirements of the first type of "definitive" statement in the Attorney General's theory was found **not** to be binding.

Based on the authorities and arguments put forward in the context of this appeal, the only conclusion that would appear to be supportable is that there is no definitive answer to the question of whether and when administrative tribunals are bound by the doctrine of *stare decisis* to follow decisions of supervisory courts. It may be necessary for this Office in future to make a determination on this issue in the absence of clarity but, given my findings relating to the weighing of various factors under section 21(2) which follows, it is not necessary for me to do so in this appeal.

Section 21(2)

The appellant argues that disclosure of personal information would not be an unjustified invasion of personal privacy based on the factors favouring disclosure outlined in sections 21(2)(a), (b) and (d). These sections state:

> 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

The appellant submits that "Ontario civil justice holds negligent parties accountable where reasonable care and safety precautions are not exercised", and the disclosure of the records would subject the activities of the NPC to public scrutiny through the appellant's court action against the NPC (section 21(2)(a)). The appellant also submits that the evidence contained in the records should be made available to the public to prevent future accidents from happening and that this would have the effect of promoting public health and safety (section 21(2)(b)). Finally, the appellant submits that disclosure is relevant to a fair determination of his clients' rights in advancing the civil action against the NPC, and that his clients cannot advance their civil claim without the requested records (section 21(2)(d)).

Section 21(2)(a)

The appellant's submissions in relation to section 21(2)(a) all relate to his law suit filed on behalf of the family in connection with the son's death. The appellant's interest and the interest of his clients in this matter is private in nature.

In my view, the appellant has failed to make a connection between the information contained in the records and the desirability of any public scrutiny of the NPC or of the Ontario government at large which might result from disclosure. I accept that the appellant holds the view that disclosure of the records is relevant to his law suit, but he points to nothing outside the context of the law suit to establish any broader relevance. There is nothing apparent on the face of the records which would point to a need for public scrutiny and, in the absence of any such evidence or argument from the appellant on this issue, I find that section 21(2)(a) is not a relevant factor in the context of this appeal.

Section 21(2)(b)

The appellant submits that:

> In their lawsuit, the appellants claim that thousands of Niagara Park tourists are routinely and unknowingly lured to hazardous banks of the Niagara River.
>
> The appellants submit that evidence and recommendations contained within the requested records must be made available to the public in order to prevent future accidents/deaths in the Niagara Glen Nature Area.
>
> Judgement proclaiming even some degree of Niagara Park liability for [the deceased's] death would push the NPC into mounting warning signs, initiating park safety campaigns, and improving rescue facilities so essential for the avoidance of future tragedy.

Once again, the appellant has not provided sufficient argument to establish that disclosure of the records may promote public health or safety. While the result of the appellant's lawsuit, or any lawsuit for that matter, may have an impact on future changes that would benefit health and safety, I am not persuaded that access to the specific information contained in these records may promote public health and safety. Therefore, I find that section 21(2)(b) is also not a relevant factor in the circumstances of this appeal.

Section 21(2)(d)

The appellant claims that without access to the records, he cannot properly advance the family's civil action and that the personal information contained in the records is "crucial to a fair determination of the appellants' rights to [the deceased's] rights, and to the rights of future victims of Niagara Park Commission negligence."

I stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

> In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant has commenced a civil action against the NPC on behalf of the deceased's family, and the personal information contained in the records may be characterized as relevant to the determination of rights affecting the family in that context. However, in my view, the existence of disclosure processes available to parties in the court context reduces the weight accorded the section 21(2)(d) factor in these circumstances.

Unlisted factors

The factors listed in section 21(2) of the Act are not exhaustive. Unlisted factors may also be relevant, depending on the particular circumstances of an appeal. One such factor that has been recognized in past orders is a diminished privacy interest after death (Order M-50). The appellant identifies this as a factor favouring disclosure in the present appeal.

I agree with the statement made by former Commissioner Tom Wright in Order M-50, that:

> The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of person privacy if the person is deceased.

A decision to consider this factor, and the assessment of the weight to be given to it in a particular appeal, must be made in the context of section 2(2). In that section, the legislature makes it clear that information about an individual remains his or her personal information until thirty years after death, signalling a broad and strong intention to protect the privacy rights of deceased persons.

The deceased son in this case has been dead for a relatively short period of time. The information contained in the records is almost exclusively related to the son, and much of it is sensitive in nature. Had the son survived the accident, it is highly unlikely that his personal information would have been accessible under the Act by others, including his family members, without consent. In these circumstances, although relevant, I would give little weight to this factor.

The NPC's representations quoted earlier in this order express the view that "the family in this case stands in no better position than a newspaper". I agree that this is an accurate statement in the context of determining whose personal information is contained in the records. However, in my view, the fact that the appellant represents the family members of the deceased son, and not a newspaper, is a relevant unlisted factor when considering whether disclosure would constitute an unjustified invasion of privacy. The weight accorded to this factor varies according to circumstances, and in the circumstances of the present appeal I would give it moderate weight.

There are some listed and unlisted section 21(2) factors favouring disclosure of the son's personal information to his family members. The question I am addressing in this discussion is not whether these factors are sufficient to outweigh other factors favouring privacy protection under section 21(2). Rather, assuming for the moment that presumptions in section 21(3) are rebuttable, the question is whether the section 21(2) factors present in this appeal could outweigh the presumption in section 21(3)(b).

Former Commissioner Sidney B. Linden discussed the weight given to presumptions in Order 20, one of the early orders of the Office issued in 1988:

> Subsection 21(3) of the Act sets out a list of the types of personal information, the disclosure of which is to be presumed to constitute an unjustified invasion of personal privacy. Clearly subsection 21(3) is very important in terms of the privacy protection

> portion of the Act. It specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason.
> ...
>
> It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual.

The approach of the former Commissioner is consistent with the discussion of the personal privacy exemption found in Volume 2 of the Report of the Commission on Freedom of Information and Individual Privacy/1980 (the Williams Commission report). This report formed the foundation for Ontario's freedom of information and privacy legislation. The Williams Commission recognized the need for an exemption to cover personal privacy, and discussed various models for implementing it. The report concluded that a "balancing" test should be embodied in this exemption, described as follows at page 326:

> In order to provide clearer guidance than is afforded in the [U.S.] 'unwarranted invasion of privacy' test, we propose that the test adopted in the statute meet these requirements:
>
> - the statute should, to the greatest extent possible, identify clearly situations in which there is an undeniably compelling interest in access;
>
> - for those cases not resolved by such explicit provisions, a general balancing test should be stated with some indication of the factors to be weighed in an application of the test to a particular document;
>
> - as part of the criteria set forth for the application of the balancing test, personal information which is generally regarded as **particularly sensitive** should be identified in the statute and made the subject of a presumption of confidentiality. [emphasis added]

In my view, whether presumptions created by section 21(3) are conclusive or rebuttable, the fact that the legislature chose to clothe the kinds of information listed in this section in the language of presumptions indicates that it considers these types of information to be in need of particular protection, though of course the individual circumstances of each case must be taken into account. In the present appeal, I have given moderate weight to the unlisted factor relating to the fact that the appellant represents the family of the deceased son, and limited weight to the factor in section 21(2)(d) and the unlisted factor relating to diminished privacy interest after death. I have also concluded that the son's information is sensitive in

nature. Balancing all of these considerations, I have concluded that the presumption has more weight than the factors favouring disclosure. Therefore, even if I were to conclude that the John Doe case was not binding, or was inapplicable for some other reason, I would not find that factors under section 21(2) favouring disclosure were sufficient to rebut the established presumption in section 21(3)(b) in the particular circumstances of this appeal.

Accordingly, with the exception of those portions of Records 3 and 8 covered by my "absurd result" finding, I find that disclosure of all other records or parts of records would be an unjustified invasion of personal privacy. Because they do not contain personal information of any immediate family members, section 49(b) does not apply, and I find that these records and partial records are exempt under section 21(1) of the Act.

COMPELLING PUBLIC INTEREST

Section 23 of the Act 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.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

The appellant points to the three factors he raised under section 21(2) as the basis for his position that there is a compelling public interest in disclosure.

In my view, the primary purpose of the appellant's request for access is to further the family's civil action against the NPC, which is essentially a private rather than a public interest. Based on the my review of the records, and having considered representations provided by the appellant and all other related circumstances in this appeal, I am not persuaded that there is compelling **public** interest in disclosure of the records, nor that any public interest that is present is sufficient to outweigh the purpose of the mandatory personal information exemption claim.

Therefore, I find that the requirements of section 23 are not present in this appeal.

ORDER:

1. I order the NPC to disclose those parts of Records 3 and 8 which I have found do not qualify for exemption pursuant to section 21(1) of the Act to the appellant by **October 22, 1999** but not

before **October 18, 1999**. I have attached a highlighted copy of these records with the copy of this order sent to the NPC's Freedom of Information and Privacy Co-ordinator which identifies those portions which **should** be disclosed.

2. I uphold the NPC's decision not to disclose the remainder of the records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the NPC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: September 17, 1999
Tom Mitchinson
Assistant Commissioner