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

ORDER PO-2215

Appeal PA-030024-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

Three individuals died in a traffic accident while being pursued by members of the Toronto Police Service. In accordance with established practice, the Ministry of the Attorney General's Special Investigations Unit (the SIU) conducted an investigation into the circumstances leading to the accident and prepared a report to the Attorney General and the Chief of Police.

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a lawyer representing the brother of one of the deceased individuals. The request asked for "…a copy of the Director's Special Investigations Unit Report along with any and all notes and records pertaining to the SIU investigation."

The Ministry identified 79 responsive records. It granted access to Records 64 and 65 in full and partial access to Record 26. The Ministry denied access to the rest of the records and the undisclosed portions of Record 26 pursuant to the following exemptions in the *Act*:

- section 14(2)(a) - law enforcement report
- section 21 - invasion of privacy

The Ministry identified the presumption in section 21(3)(b) in support of the section 21 claim.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the Ministry provided the appellant with an index describing the records.

Also during mediation, the appellant raised the possible application of section 66 of the *Act*, claiming that he is the administrator of his brother's estate and that the information being sought relates to the administration of the estate. However, the appellant did not provide evidence of his appointment as estate administrator.

Mediation was not successful, so the file was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the Ministry, outlining the facts and issues in the appeal and seeking representations. The Ministry provided representations, which were in turn shared with the appellant. The appellant also submitted representations. In his representations the appellant provided additional details regarding section 66, and also raised the possible application of the public interest override in section 23 of the *Act*. I then gave the Ministry an opportunity to respond to these two issues, and received additional representations in reply.

RECORDS:

The 77 records at issue in this appeal are described in the index provided to the appellant by the Ministry during mediation. They consist of all documentary materials gathered during the course

of the SIU investigation into the motor vehicle accident that resulted in the death of the appellant's brother. The records include internal administrative documents and reports, correspondence, police officers' statements, witness statements, police officers' notes, CPIC information, police communication tapes, audio and video recordings of witness statements, a CD of photographs, and the SIU Director's Report that summarizes the results of the investigation.

Both exemptions are claimed for all records.

DISCUSSION:

PERSONAL REPRESENTATIVE

General Principles

Section 66(a) reads:

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

Under this section, the appellant is able to exercise the deceased's right to request and be granted access to the deceased's personal information if he can demonstrate:

1. that he is the "personal representative" of the deceased; and

2. that his request for access "relates to the administration of the deceased's estate".

(Orders M-1075 and MO-1241)

If both requirements of section 66(a) are established, the appellant is entitled to stand in the place of the deceased for the purposes of making a request for access to the deceased's personal information under section 47(1) of the *Act* (Orders M-927, MO-1315, MO-1365).

Personal Representative

For section 66(a) to apply, the appellant must first establish evidence of his authority to deal with the estate of the deceased. In Order M-919, Adjudicator Anita Fineberg reviewed the law with respect to section 66(a) and came to the following conclusions:

> The meaning of the term "personal representative" as it appears in section 66(a) of the *Freedom of Information and Protection of Privacy Act* ... was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In

Adams v. *Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:

> Although there is no definition of "personal representative" in the *Act*, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1.
>
> > 1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.
>
> … I am of the view that a person, in this case the appellant, would qualify as a "personal representative" … if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate

I agree with this analysis. In order for the appellant to establish that he is the deceased's personal representative for the purposes of section 66(a), he must provide evidence of his authority to deal with the deceased's estate. The appellant's production of a Certificate of Appointment as Estate Trustee under the seal of the proper court is necessary to establish the requisite authority.

The appellant's brother died intestate. The appellant states that he qualifies as the administrator of the estate and provides an uncommissioned Certificate of Appointment of Estate Trustee with his representations. The appellant acknowledges that the Certificate has not been filed with the Court Registrar, but maintains that this will occur.

The Ministry submits:

> By the appellant's own admission, however, [his appointment as Estate Trustee] has not happened yet. Until such time as the appellant's application for a Certificate of Appointment of Estate Trustee has been duly court-approved, it is the Ministry's position that the appellant is not the "personal representative" of the deceased's estate and, consequently, cannot rely on section 66(a) of the *Act*.

The Ministry relies on Orders P-294 and M-243 in support of its position.

I concur with the Ministry. Until the appellant's application for a Certificate of Appointment as Estate Trustee receives court approval, he is not the administrator of his brother's estate, and is not entitled to utilize the provisions of section 66(a) of the *Act* (*Adams v. Ontario (Information and Privacy Commissioner)* (Ont. Div. Ct.) [1996] O.J. No. 2269).

Although failure to establish the first requirement of section 66(a) is sufficient to eliminate its application in this appeal, I have decided to consider the second requirement as well, in order to provide clarity on the application of section 66(a) should the appellant in future be appointed as Estate Trustee.

Relates to the Administration of the Estate

In Order M-1075, I reviewed the scope of the access right of a personal representative under section 54(a) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 66(a):

> The rights of a personal representative under section 54(a) 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 Order M-1075, I accepted the argument of a personal representative that access to certain records was required in order to determine whether the major beneficiary of the estate was disentitled from benefiting under the will because that individual had contributed to the death of the testator. I found that access to the records was required in order for the personal representative to make an informed decision about matters relating to the beneficiary's entitlement to assets of the estate, and met the second requirement under section 54(a).

Other orders have applied section 54(a) in circumstances where access to the records was required in order to defend a claim being made against an estate (Order M-919), to exert a right to financial entitlements being denied to the estate or said to be due to the estate (Orders M-934 and MO-1315) or to investigate allegations of fraud which might affect the size of the estate (MO-1301). However, section 54(a) has been held not applicable in cases where the only monetary claim being investigated was one the estate was clearly not entitled to pursue (see Order MO-1256).

The Ministry submits that the statement of claim in the civil suit that is being brought by the appellant amounts to a wrongful death claim against several of the police officers involved in the incident and their employers. The Ministry takes the position that "section 38(1) of the *Trustee Act* precludes a deceased individual's estate from commencing or participating as a plaintiff in an action for wrongful death", and argues that because the estate is not entitled to bring such an

action on its own behalf, "access to the records in question would not relate to the administration of the deceased's estate in the fashion contemplated by the appellant."

The appellant submits that, while the wording of the *Trustee Act* precludes the estate from claiming damages resulting from the death itself, it is not precluded from recovering damages for the injuries that led to the death and the pain and suffering incurred by the deceased between the time of the accident and his death. The appellant takes the position that the estate requires access to the records in order to substantiate its claim for pain and suffering on behalf of the estate. The appellant anticipates the Ministry's position that the individual died instantly and is therefore not entitled to damages for pain and suffering, and submits that this is a question of fact to be determined by a trial judge and should not form the basis for a finding that section 66(a) of the *Act* does not apply.

The appellant elaborates:

> … The estate of [the deceased individual] has sustained compensable injuries. The right of access being asserted by the estate relates to a claim for financial entitlement being denied to the estate. As a result, the estate will directly benefit from a successful action against the defendants. The *Trustee Act* indicates that the personal estate of a deceased individual includes choses in action. At the same time, there is a positive duty on the Estate Trustee to administer the entire estate of the deceased individual. This means that the Estate Trustee must pursue all claims or monies owing to the estate in the administration of that estate. Civil actions have been commenced against various defendants. In order for those actions to be properly instituted (pleadings) and litigated, the SIU documentation currently in the possession of the Ministry of the Attorney General must be disclosed to the Estate Trustee. More specifically, the documents are needed in order to assess the damages that the Estate is entitled to, to amend the claims to include further heads of damages where appropriate, and to advance the claims at trial. Clearly, the litigation of these civil actions falls within the scope of [the appellant's] duties in administering his brother's estate. The estate of [deceased individual] cannot be disposed until these actions have been resolved. Therefore, the disclosure of the documentation in the possession of the Ministry of the Attorney General is necessary for the administration of [the deceased individual's] estate.

In response, the Ministry relies on Orders M-205 and M-243 to support its argument that "the records do not relate to the financial matters to which the personal representative requires access in order to wind up the estate." In both of these previous appeals, requesters sought access to records in order to further and facilitate possible lawsuits brought by the estate in relation to the death of the deceased, and both orders found that the records at issue did not relate to the administration of the estate of the deceased in the sense contemplated by the *Act*.

The Ministry also submits:

> ... The adjudicator's task is to simply ask whether access to the records in question relates to the administration of the deceased's estate. This may, it is submitted, involve "looking beyond the pleadings to determine whether the action can succeed," as it may involve an examination of the records in question to determine whether they can assist in the administration of a deceased's estate in the manner contemplated by a requester. With respect to the records to which the appellant seeks access, the Ministry submits that they do not in fact contain information bearing on any "pain and suffering" endured by the deceased between the time he was injured and when he died, much less that they relate to the administration of the deceased's estate in the manner the appellant posits.
>
> And beyond that, however, the Ministry submits that the appellant's claims regarding the second prong of the section 66(a) analysis are without factual foundation in the pleadings. That is, while the appellant contends that access to the records would assist him in the lawsuits he has launched to recover damages owing to the deceased's estate for pain and suffering suffered by the deceased between the time he was injured and when he died, these damages are nowhere alleged or particularized in either of the statements of claim that have been filed. [The Amended Statement of Claim and the Statement of Claim] allege the damages suffered by the various plaintiffs, *except* for the estate of the deceased individual. Moreover, while the appellant urges the Commissioner's Office to accept at face value his pleadings alleging pain and suffering on the part of the deceased prior to his death, nowhere in either of the statement of claim or amended statement of claim is this alleged pain and suffering pleaded. …

I concur with the Ministry's position on this issue. Although the appellant argues that the purpose of his request is to obtain documents in support of a damages claim for pain and suffering on behalf of the estate, the actual pleadings filed by the appellant make no mention of any damages suffered by the estate itself. Rather, the action brought by the appellant is a wrongful death claim made on behalf of family members of the deceased, which past orders have found does not satisfy the requirements of section 66(a). In addition, although the appellant bases his arguments on a claim for "pain and suffering" incurred by the deceased individual between the time of the accident and his death, the statement of claim states that the deceased "died instantly". Although it is clearly not my role to determine whether or not damages can be awarded to an estate in circumstances described by the appellant, the actual pleadings filed by the appellant would not appear to be consistent with a claim of this nature in any event.

Moreover, any damages recovered by family members as a result of a derivative action such as the one being considered by the appellant here, go to individual family members, not to the estate (*Adams* v. *Ontario (Information and Privacy Commissioner*) (1996), 136 D.L. R. (4th) 12 (Div. Ct.)). As such, I am not satisfied that the request relates to the administration of the deceased's estate as this term has been applied in previous orders.

Accordingly, even if the appellant is eventually appointed as Estate Trustee of his brother's estate, thereby satisfying the first requirement of section 66(a), his request for access does not "relate to the administration of the deceased's estate", and therefore fails to satisfy the second requirement. As a consequence, section 66(a) does not apply in the circumstances of this appeal, and I will treat this as a request for access by an individual under Part 1 of the *Act* for records containing the personal information of another individual.

PERSONAL INFORMATION

General Principles

The sections 21/49(b) personal privacy exemptions apply only to information that qualifies as "personal information". Section 2(1) of the *Act* defines "personal information" as recorded information about an identifiable individual.

The Ministry submits that the records contain personal information of individuals other than the appellant:

> These persons include various police officers involved in the incident and subsequent investigation, including the officer whose conduct was the very focus of the SIU's investigation; a significant number of civilian witnesses who were interviewed during the course of the investigation; and other persons involved in the investigation. It is also important to note that the appellant was not involved in the incident that was investigated by the SIU, whether as a participant or witness. The personal information contained in these records includes information relating to such things as: race, age, sex, marital and family status (paragraph (a) of the definition); criminal and medical histories (paragraph (b)); identifying numbers (paragraph (c)); addresses, telephone numbers and fingerprints (paragraph (d)); the personal opinions or views of witnesses, other than the appellant and not related to the appellant (paragraphs (e) and (g)); and names of individuals together with other personal information about them or in circumstances where the disclosure of the names would reveal other personal information about the individuals (paragraph (h)).

The appellant takes the position that records containing the personal information of his deceased brother do not qualify for exemption under section 21 because of the rights accorded the appellant under section 66(a). I have already determined that section 66(a) does not apply, and the appellant has no higher right of access to records containing the personal information of his deceased brother than any other individual making a request for access under Part 1 of the *Act*.

The appellant relies on two previous orders involving SIU investigations (Orders PO-1819 and PO-1959) for his position that records that do not contain personal information of any identifiable individual should be disclosed. The appellant also argues that records containing information about the "witness officers" relates to them in a professional rather than a personal capacity, and therefore falls outside the definition of "personal information" in section 2(1).

All of the records relate to the SIU investigation into the circumstances leading to the death of the appellant's brother and two other individuals. As such, I find that the records are all about these three identifiable individuals and contain information that qualifies as their "personal information" under section 2(1) of the *Act*. Section 2(2) of the *Act* provides that personal information does not include information about an individual who has been dead for more than 30 years. The fatal car accident took place on April 9, 2002, so section 2(2) has no application in the circumstances of this appeal.

Although some records reflect statements made by "witness officers" acting in their professional capacities, these records also contain the personal information of the deceased individuals and fall within the scope of the definition of "personal information" under section 2(1) for that reason.

Some records also contain the personal information of other identifiable individuals, including witnesses, the next of kin of the other individuals killed in the accident and other individuals involved in the investigation, including the subject officer. Unlike Orders PO-1819 and PO-1959 (and with two minor exceptions that I will discuss shortly), none of the records contain the appellant's personal information, and the discretionary exemption in section 49(b) that comes into play when dealing with records containing personal information of both an appellant and others is not relevant in the circumstances of this appeal.

Records 4 and 26 identify the appellant as one of his brother's next of kin and list his home and/or business phone numbers. I find that these two records contain the appellant's personal information as well as the personal information of other identifiable individuals, including his brother and the other individuals killed in the traffic accident.

INVASION OF PRIVACY

Because Records 4 and 26 contain the personal information of the appellant and other individuals, I will consider them under the discretionary section 49(b) exemption. All other records, which do not contain the appellant's personal information, will be considered under the mandatory section 21 exemption.

Section 21

General Principles

Where records contain the personal information of individuals other than the appellant, section 21(1) of the *Act* prohibits the Ministry from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances of this appeal, the only exceptions that could apply are found in sections 21(1)(a) and (f), which read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> (a) upon the written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a)

The appellant submits that, because certain civilian witnesses gave statements to the media that were subsequently published, these individuals have "implicitly waived their right to be free from any invasion of privacy". I do not accept this submission. In order to fall within the scope of the section 21(1)(a) exception: (1) consent must be explicit and in writing; and (2) the individual must have a right of access to the information in question. Neither of these conditions has been established with respect to the civilian witnesses in this case.

The appellant also relies on a letter from a lawyer purporting to represent the estate of one of the other individuals killed in the accident as having "waived [this individual's] protection of privacy rights". In fact, the letter simply states that the lawyer "supports the release" of the requested information to the appellant. In my view, this does not constitute written consent, nor is it clear that any records could be disclosed to this other individual's estate without compromising the privacy interests of the other deceased individuals.

For these reasons, I find that the section 21(1)(a) exemption has no application in the circumstances of this appeal.

Section 21(1)(f)

Turning to section 21(1)(f), the Ministry must withhold access to records containing personal information of individuals other than a requester unless disclosing the information would not constitute an unjustified invasion of privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosing personal information would result in an unjustified invasion of privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(2) provides some criteria for the institution to consider in making this determination. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Ministry has relied on the presumption in section 21(3)(b), which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal 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 fact that no criminal proceedings were commenced as a result of the investigation does not negate the applicability of subsection 21(3)(b). The presumption only requires that there be an investigation into a possible violation of law. [See Order P-242]

The Ministry submits that section 21(3)(b) applies in the circumstances in this appeal. The Ministry states that the SIU is a law enforcement agency which, under section 113 of the *Police Services Act*, is empowered to conduct "criminal investigations surrounding the circumstances of incidents which fall within its jurisdiction in order to determine whether the officer or officers who is/are the focus of the investigation has/have committed any criminal offence" in relation to a particular incident. Accordingly, the Ministry submits:

> The personal information herein at issue was compiled and is clearly identifiable … as "part of an investigation into a possible violation of law", namely, the criminal law as contained in the *Criminal Code of Canada*.

The appellant appears to accept that records gathered during the course of the SIU investigation meet the requirements of section 21(3)(b), but points out that 5 specified records (Records 1, 2, 36, 27 and 38) were prepared after the investigation was completed and therefore fall outside the scope of the presumption.

The appellant is correct in stating that section 21(3)(b) cannot apply to records created after an investigation is completed. This has been established in many previous orders, including Order M-1086 and Order PO-1918, referred to by the appellant in his representations.

The accident that led to the SIU investigation took place on April 9, 2002. The Report of the Director (Record 3) is dated May 9, 2002, establishing that the investigation was completed by this date.

Records 1 and 2 are cover letters dated May 9, 2002 and May 10, 2003 from the SIU Director to the Attorney General and the Chief of Police respectively, and attaching the actual report. It is clear from the content of these letters that they were created following the completion of the investigation and therefore fall outside the scope of section 21(3)(b). Record 38 is a fax cover sheet and attached correspondence from a lawyer to the SIU concerning one of the other individuals killed in the accident. It is dated May 27, 2002, which is after the investigation was completed, so Record 38 also falls outside the scope of section 21(3)(b).

Records 36 and 37 are dated April 11, 2002 and May 3, 2002, within the timeframe of the investigation, so both of these records are not excluded from the scope of section 21(3)(b) by virtue of the time in which they were created and compiled by the SIU.

With the exception of Records 1, 2 and 38, I find that the personal information in all of the other records at issue in this appeal was compiled and is identifiable as part of the SIU investigation into possible criminal activity occurring in the context of the fatal car accident on April 9, 2002 involving the appellant's brother and others. Accordingly, I find that disclosing these records would constitute a presumed unjustified invasion of privacy under section 21(3)(b). As stated earlier, *John Doe* has established that a presumption cannot be rebutted by either one or a combination of the factors set out in 21(2). Therefore, I find that all records, with the exception of Records 1, 2 and 38, qualify for exemption under section 21 of the *Act*.

The appellant's submissions focus on information relating to his deceased brother. They contain no evidence or argument supporting access to records exclusively containing the personal information of the other individuals killed in the accident. In the absence of any representations of this nature, I am not persuaded that disclosing Record 38 would not constitute an unjustified invasion of the privacy of the other deceased individual, and I find that this record also qualifies for exemption under section 21 of the *Act*.

As far as Records 1 and 2 are concerned, they contain the personal information of the three deceased individuals; however, this information is already known to the appellant through the disclosure of Records 64 and 65. In my view, denying access to these two records would lead to an absurd result, and I find that disclosing them would not constitute an unjustified invasion of any individual's privacy in the particular circumstances of this appeal (Orders MO-1449, PO-1679). Therefore, Records 1 and 2 fall within the section 21(1)(f) exception and do not qualify for exemption under section 21 of the *Act*.

Section 49(b)

Under section 49(b), where a record contains the personal information of both the appellant and another individual and the Ministry determines that the disclosure of the record would constitute an unjustified invasion of the other individual's personal privacy, the Ministry has discretion to deny the appellant access to that information.

Sections 21(2) and 21(3), described above, provide guidance in deciding whether disclosure of a record would constitute an unjustified invasion of privacy under section 49(b).

Applying the same reasoning outlined above for records that do not contain the appellant's information, I find that Records 4 and 26 were compiled and are identifiable as part of the SIU's investigation into a possible violation of the Criminal Code, and they fall within the scope of the section 21(3)(b) presumption. I find these two records qualify for exemption under section 49(b). However, I also find that the portions containing the appellant's personal information can easily be severed from and disclosed without revealing the personal information of other

individuals, and that these portions of Records 4 and 26 do not qualify for exemption under section 49(b) and should be disclosed.

LAW ENFORCEMENT

Section 14(2)(a) of the *Act* provides:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The only records that remain under considering in this appeal are Records 1 and 2 which do not qualify for exemption under section 21. They are both cover letters from the SIU Director to the Attorney General and the Chief of Police, summarizing the results of the investigation and attaching the investigation report itself (Record 3). While Record 3 may qualify as a "report" for the purpose of section 14(2)(a), in my view, the cover letters transmitting the report clearly do not, and I find that Records 1 and 2 do not qualify for exemption under section 14(2)(a) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that under section 23 of the *Act* there is a "compelling public interest in the disclosure of the records and that interest clearly outweighs the purpose of the personal information exemption."

Section 23 of the *Act* provides that:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [my emphasis]

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosing the records; and second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "arousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the

> purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

The appellant submits that "although the estate has an interest in obtaining the SIU documents, there is an overall overriding public interest as well".

The appellant argues that "there is a public interest in maintaining public confidence in the manner in which the Toronto Police conduct high-speed pursuits". He identifies a speech given by the Chair of the RCMP Public Complaints Commission, where the Chair identifies high-speed police pursuits as a national issue requiring immediate attention. The appellant goes on to submit:

> It is respectfully submitted that issues of public safety, injuries and death in high-speed pursuits constitute compelling public issues that are separate and distinct from the interests of the estate. Without the SIU documents, [the estate] cannot effectively litigate its civil actions. As a result, important and compelling issues of public safety will not be raised and the public will once more be deprived of this vital information. Unless these issues are debated in an open and impartial forum, the civil litigation system, the public will lack the necessary knowledge to take proactive steps to deal with this serious public issue.

The Ministry responds:

> The Ministry acknowledges that civil actions in our system of justice can have an educative, deterrent and reformative impact that extends beyond the parties in their private capacities. This reality is not unique to the lawsuits in questions and, in this regard, the appellant is in no different position than any other plaintiff that initiates a lawsuit. However, unlike other processes in our justice system, such as criminal proceedings, coroner's inquests and investigations, or public inquiries, these broader consequences are ancillary to the primary purpose of a civil action, which is to settle a dispute between private parties. The Ministry submits, therefore, that the appellant's interest in the disclosure of the records to him is predominantly a personal one – that of a private litigant in civil proceedings. As such, the requirement that there be a compelling public interest in disclosure has not been satisfied: see Order M-319. This is precisely why, the Ministry submits, the Rules of Civil Procedure that govern the course of civil actions generally limit the parties' production and disclosure rights to records in the custody and control of the parties themselves, with only limited access in defined circumstances to non-party records where, *inter alia*, access is necessary to a material issue in the trial, not some broader public interest: see enclosed Rule 30.10.
>
> The Ministry also recognizes that police pursuits are a matter of public interest. The Ministry rejects, however, the appellant's assertion that the "public has not been properly informed about the gravity of this issue because there has simply

> been a lack of accessible information". The fact is that there exists in place a comprehensive regime served by various public institutions to further the pubic interest in, as the appellant put it, "maintaining public confidence in the manner in which the Toronto Police conduct high-speed pursuits". The SIU is one such body. Its very mandate, set out in section 113 of the *Police Services Act*, calls upon it to investigate incidents or serious injury or death that have occurred in incidents involving the police. … Police pursuits comprise a significant portion of the SIU's annual workload of investigations. By investigating these and other incidents that fall within its mandate, such as was done in this case, the SIU is intended to foster public confidence in the policing services of our province.

I accept, as does the Ministry, that there is a public interest in the whole issue of police pursuits. However, I am not persuaded that there is a compelling reason to disclose the particular records at issue in this appeal in order to address these public interest considerations.

In my view, the appellant's primary interest in obtaining access to the records is to pursue the wrongful death civil law suit brought on behalf of various of his deceased brother's family members. This is a private rather than a public interest.

While I agree with the appellant that there are interests at play that go beyond his specific private interests, and that the accident leading to his brother's death received some local media coverage, I do not accept that disclosing the records would "rouse strong interest or attention", as required in order to meet the definition of "compelling" for the purposes of section 23.

In my view, the SIU investigation process is itself put in place in order to address public interest considerations involving police conduct, including issues specifically related to police pursuits. I have not been provided with any evidence to substantiate a compelling public interest in the manner in which the SIU investigation was conducted or the conclusions that it reached. At no time was the SIU investigation itself the subject of public interest and, in my view, any public interest considerations relating to police pursuits is adequately addressed by other means such as the SIU investigation itself, without the disclosure of the records at issue in this appeal.

For these reasons, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Ministry to provide the appellant with copies of Records 1 and 2 in their entirety and the portions of Records 4 and 26 containing the appellant's personal information by **January 7, 2004**. I have attached a highlighted version of Records 4 and 26 with the copy of this order sent to the Ministry, which identifies the portions that should be disclosed.

2. I uphold the Ministry decision to deny access to the remaining records.

3. In order to verify compliance with Provision 1 of this Order, I reserve the right to require the Ministry to provide me with a copy of the records that it discloses to the appellant.

Original signed by: December 12, 2003
Tom Mitchinson
Assistant Commissioner