Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3067

Appeal PA10-161

Ministry of Community Safety and Correctional Services

March 30, 2012

Summary: A member of the media made a request for video and audio evidence gathered by the Ontario Provincial Police during the arrest and incarceration of a named individual on a murder charge. The request was made to the Ministry of Community Safety and Correctional Services. In this order, the ministry's decision to deny access to the records under section 21(1) (personal privacy) is upheld. The public interest override at section 23 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 21(1)(c), 21(1)(e), 21(1)(f), 21(3)(b) and 23.

Orders and Investigation Reports Considered: Orders 2033-I, 2056-I, PO-2063-R, PO-3025.

NATURE OF THE APPEAL:

[1] The appellant, a media outlet, submitted an access request under the *Freedom of Information and Protection of Privacy Act*, to the Ministry of Community Safety and Correctional Services (the ministry) for the following:

> All information in the form of video and audio evidence given by [a named individual (affected party A)] and gathered by the Ontario Provincial Police [OPP] in [an identified murder case in Ontario].

> This video and audio evidence is no longer subject to publication ban, and transcripts of the video are publicly available. I seek access to the complete body of video and audio evidence gathered by the police during the arrest and incarceration of [affected party A] …

[2] The ministry denied access to the requested information on the basis of the exemption in section 21(1) (personal privacy), with reference to the presumption in 21(3)(b) and the factor in 21(2)(f) of the *Act*.

[3] The appellant's representative (who I will refer to as the appellant) appealed the ministry's decision.

[4] Along with his appeal, the appellant also provided detailed submissions in which he indicated the reasons why he believes the information does not qualify for exemption under section 21(1) (citing the exceptions to the section 21(1) exemption in sections 21(1)(c),(e),(f) and the factors favouring disclosure in sections 21(2)(a),(b),(d),(h) of the *Act*). The appellant also took the position that, if the exemption in section 21(1) was found to apply, the public interest override in section 23 applies to override the application of that exemption.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I decided to send a Notice of Inquiry identifying the facts and issues in this appeal to the ministry, initially. I also provided the ministry with a copy of the detailed submissions the appellant sent to this office with his appeal letter, and the ministry was invited to have reference to this material as it prepared its submissions on the issues.

[6] The ministry provided representations in response. I then sent the Notice of Inquiry, along with a copy of the representations of the ministry, to the appellant, who also provided representations in response.

[7] In addition, I invited the appellant to identify what impact, if any, a recent decision of the Ontario Court of Appeal [*R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726] had on the circumstances of this appeal.

RECORDS:

[8] The records at issue consist of a number of videotaped interviews of affected party A by various police officers.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the information in the records qualify for exemption under section 21(1) of the *Act*?

C. Does the public interest override in section 23 of the *Act* apply?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except where they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] The ministry submits that the records contain the personal information of the individual interviewed on the videotape (affected party A), as well as other identifiable individuals. It states:

> The records contain personal information of [affected party A] and individuals he names, including a person who was a victim of crime. The personal information belonging to [affected party A] is extensive, and includes address information, his views of others, and his personal recollections.
>
> The personal information belonging to individuals he names is also extensive. In addition, it is reasonable to expect that many of these people do not know that they were being discussed as part of the OPP investigation.

[11] The appellant accepts that the videotape contains personal information; however, he also states:

> I have not seen or heard the Video, but submit that, no matter how extensive it may be, it can be severed and faces obscured should you require. In the recent case of *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 … (the "Ashley Smith case") there is clear provision for the digital obscuring of faces, and the same could be done in this case.

[12] The records at issue include a number of videotaped interviews of affected party A, some of which are quite lengthy. I find that these records contain the personal information of affected party A including his address [paragraph (c)], his personal views and opinions [paragraph (e)], and his name along with other personal information relating to him [paragraph (h)].

[13] I also find that the records contain the personal information of a number of other identifiable individuals, including their names, along with other personal information relating to them [paragraph (h)].

[14] With respect to the appellant's position that portions of the records which contain the personal information of identifiable individuals could be severed, in the circumstances of this appeal and because of my findings below, I find that there is no useful purpose to be served in severing the records. The records in this appeal consist of the videotaped interviews of an identified, named individual. Severing portions of the interviews or obscuring his face would not de-identify the information, and these records will continue to consist of the personal information of the individual being interviewed. Although the portions of the interviews which contain the personal information of other individuals might be severable, the records would still contain the personal information of affected party A.

B. Does the information qualify for exemption under section 21(1) of the *Act*?

[15] Where an appellant seeks the personal information of other individuals, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

[16] The appellant submits that the information at issue is not exempt due to the application of the exceptions at sections 21(1)(c) and (e). The ministry claims that these sections, as well as section 21(1)(f), do not apply. These sections read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(c) - public record

[17] In the appellant's appeal letter, he takes the position that this section applies, arguing that:

> The OPP clearly collected and maintained the Video for the purpose of using it in the public prosecution of [affected party A].

[18] The ministry addresses this issue in its representations, and states:

> … the fact that a record is used in a public prosecution does not mean that it is being maintained by the OPP as a record available to the general public within the meaning of this clause. To the extent that there is any public access to the records, it is through the judicial process….

[19] Previous orders have stated that in order to satisfy the requirements of section 21(1)(c), the personal information must have been collected and maintained specifically for the purpose of creating a record available to the general public (see, for example, Orders P-318 and PO-1736). In addition, this office has found that where information in a record may be available to the public from a source other than the institution receiving the request, and the requested information is not maintained specifically for the purpose of creating a record available to the general public, section 14(1)(c) (the equivalent to section 21(1)(c) found in the *Municipal Freedom of Information and Protection of Privacy Act*) does not apply. For example, in Order M-170, former Commissioner Tom Wright stated the following with respect to records in the custody of a police force:

> The various witness statements and the officer's statement were prepared and obtained as part of a police investigation into a possible violation of law. In my view, the specific purpose for the collection of the personal information was to assist the Police in determining whether a violation of law had occurred and, if so, to assist them in identifying and apprehending a suspect. The records are not currently maintained in a publicly available form, and it is my view that section 14(1)(c) does not apply.

[20] I adopt the approach to section 21(1)(c) set out above. The records at issue in this appeal are videotaped statements taken as part of a police investigation, and were collected to assist in the investigation. The records were not collected and maintained specifically for the purpose of creating a record available to the general public and, in my view, section 21(1)(c) has no application in this appeal.

Section 21(1)(e) – research purpose

[21] If the requirements set out in the exception in paragraph (e) of section 21(1) are met, the personal information is not exempt from disclosure under section 21(1).

[22] Section 21(1)(e) requires that all three elements set out in the provision be satisfied in order for it to apply [Order PO-1741]. The term "research" in this section has been defined by this office as "the systemic investigation into and study of materials, sources, etc., in order to establish facts and reach new conclusions, and as an endeavour to discover new or to collate old facts etc., by the scientific study or by a course of critical investigation" [see Orders P-666, P-1493 and PO-1741].

[23] The appellant states:

> There is a research component in the appellant's request in that he wishes to review it with a view to possibly including portions in a television documentary program concerning [the disappearance of an identified individual], the subsequent arrest and charging of [affected party A], and the ultimate staying of those charges by the Crown, and the release of [affected party A].

[24] The ministry states:

> The Appellant claims that there is a "research component" in his request because he may be using a portion of the records in a television documentary. … the Appellant's stated purpose for using the records as part of a television documentary do not meet the requirements of this clause. This clause is meant for individuals who are normally affiliated with an academic institution, who are conducting research for a predominantly academic purpose, and who need records containing personal information for that purpose. Further, the Ministry is legally obliged to enter into a research agreement with researchers, and the conditions of these agreements strictly control the collection, use and dissemination of personal information.

[25] In my view, the section 21(1)(e) exception was designed to permit disclosure for the purpose of a technical, scientific, social scientific or similar study, not, as in this case, for the purpose of making the record or portions of it available to the public

through a televised documentary program. In addition, the appellant has not provided sufficient information to demonstrate that the requirements of clauses (i), (ii) and (iii) under section 21(1)(e) has been met here. As a result, I find that the exception at section 21(1)(e) does not apply.

Section 21(1)(f) – unjustified invasion of privacy

[26] The ministry claims that disclosing the records would constitute an unjustified invasion of personal privacy, and that the exception in section 21(1)(f) does not apply.

[27] Sections 21(2) and (3) 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 institution to consider in making this determination; 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(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. 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 section 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Representations

[28] The ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) of the *Act* in support of its position that section 21(1) applies. This section reads:

> 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;

[29] With respect to the section 21(3)(b) presumption, the ministry submits that subsection 21(3)(b) applies to the records in their entirety and, as such, the disclosure of the records is presumed to be an unjustified invasion of personal privacy in accordance with subsection 21(1)(f). The ministry states:

> Subsection 21(3)(b) applies to records that are compiled and are identifiable as part of an investigation into a possible violation of law.

The Ministry submits that subsection 21(3)(b) applies to the records for the following reasons:

- The records were compiled by the OPP, a law enforcement agency;
- The records are part of a law enforcement investigation conducted by members of the OPP resulting from a homicide, which is a *Criminal Code* offence; and,
- The records are clearly identifiable as being part of a law enforcement investigation, given that they record interrogations of [affected Party A].

The Appellant submits that "subsection 21(3)(b) no longer applies" given that there is no ongoing investigation, and that the charges have been stayed. However, the Ministry's position is that subsection 21(3)(b) applies to records regardless of whether there is an ongoing investigation or whether charges have been withdrawn….

[30] In his appeal letter the appellant states:

The Video was doubtless originally compiled as part of the investigation into a possible violation of law by [affected party A], but since then the charges against him were stayed in 2006, and he was released four years ago.

In Order P-849 Inquiry Officer Laurel Cropley stated:

> The presumption in section 21(3)(b) does not apply to the remaining records at issue. Section 1(a)(ii) of the *Act* states that exemptions from the right of access should be limited and specific. In my view, section 21(3)(b) is limited to records which are compiled and identifiable as part of an **investigation** into a possible violation of law. (emphasis in original).

There is no longer any risk of prejudicing a trial due to disclosure of sensitive matters involved in an on-going investigation. There is no investigation going on. The charges have been stayed and [affected party A] was released 4 years ago. Section 21(3)(b) no longer applies. And if there were to be any suggestion that there might be a continuing investigation into the [matter involving affected party A] it is our

> submission that it would be nominal and not actual. On this basis alone the Video should be released.

[31] In his later representations, the appellant states:

> The words in section 21(3)(b) above: "except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation" create what I submit is an exception to the presumed unjustified invasion of personal privacy where the personal information is "necessary to prosecute the violation." That is precisely what happened in this case; the Crown recognized that the information was necessary to prosecute the violation, and found itself attempting in open court to convince a judge that the Video was admissible at the scheduled trial. The Video was shown to all those present in the courtroom, including the public. At that point, in my submission, the Video lost any practical and legal quality of privacy, and became "public." I further submit that what has been made public can no longer be made private; it is a practical and legal impossibility.

Analysis and findings

[32] Regarding the application of the presumption in section 21(3)(b), previous orders have established that, even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply; the presumption only requires that there be an investigation into a possible violation of law [see Orders P-242 and MO-2235]. In addition, the presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

[33] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086, PO-1819 and PO-2019].

[34] Based on the representations of the ministry and my review of the records, I am satisfied that the records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. The records consist of videotaped interviews of affected party A conducted by police officers in the course of conducting a criminal investigation. They include interviews of affected party A prior to him being charged with a crime, and after he was charged with a crime. I am satisfied that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, the personal information in the records falls within the ambit of the section 21(3)(b) presumption.

[35] With respect to the appellant's position that this section no longer applies because the charges have been stayed, that there is no ongoing investigation, and that there is no risk of prejudicing a trial, I find that these circumstances do not affect the application of section 21(3)(b) to the personal information contained in the records. The section simply requires that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Previous orders have found that this presumption can apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

[36] Accordingly, I find that the disclosure of the records is presumed to constitute an unjustified invasion of the privacy of affected party A, as well as the other identifiable individuals referred to in the records under section 21(3)(b). As set out above, a presumption cannot be rebutted by the factors in section 21(2), and there is no suggestion that the exceptions in section 21(4) apply. Therefore, I find that disclosing the information in the records would constitute an unjustified invasion of personal privacy under section 21(1), subject to my review of the "public interest override" below.

Severance

[37] With respect to the appellant's position regarding the possible severance of portions of the records, section 10(2) of the *Act* does oblige institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt from disclosure. Having found that the records at issue qualify for exemption under section 21(1), I must now determine whether any portions of those records could reasonably be severed.

[38] In examining this issue, I reiterate my position set out above that, in the circumstances of this appeal, it is not possible to sever the exempt information contained in the records. The records in this appeal involve the videotaped interviews of an identified, named individual, and all of the information in the records contains his personal information, in some instances mixed with the personal information of other identifiable individuals. In the circumstances, the disclosure of any information in the records would necessarily disclose the personal information of affected party A, and severance is not possible in these circumstances.

PUBLIC INTEREST

[39] As indicated above, the appellant takes the position that the public interest override at section 23 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption in section 21(1).

[40] Section 23 of the *Act* states:

> 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.

[41] 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.

[42] In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

[43] A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

[44] A public interest is not automatically established where the requester is a member of the media.

[45] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."

[46] Any public interest in *non*-disclosure that may exist also must be considered.[1] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.

[47] A compelling public interest has been found to exist where, for example, the integrity of the criminal justice system has been called into question.

[48] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

[1] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Representations

[49] In his initial letter of appeal, the appellant refers to the public interest in the records at issue and reviews the circumstances which resulted in the creation of the records. These circumstances involved an investigation into the disappearance of a named individual in 1993, and affected party A's statements made to the police 11 years later, which resulted in him being arrested and charged with first degree murder. During this time, the police interviewed affected party A on a number of occasions. Some of these interviews were recorded and some were not. It is the videotapes of the recorded interviews which form the records at issue in this appeal.

[50] The appellant also states that, in a pre-trial *voir dire* held in 2006, the justice hearing the *voir dire* determined that much of the interview evidence given by affected party A was inadmissible "because, *inter alia*, of the failure of the OPP to properly caution [affected party A]." The appellant states that, in the aftermath, the proceedings were stayed and affected party A was released from custody. He also states that, since then, no further proceedings have been initiated, and that the identified individual, who disappeared in 1993, has never been found.

[51] The appellant then submits:

> The Ministry has refused to provide access to the Video. While excerpts from transcripts of the Video are publicly available it is the Video itself that the appellant seeks since pictures convey much more accurately the true circumstances of the events than a transcript.
>
> The disappearance and presumed death of [the identified individual] attracted considerable media attention at the time of her disappearance, as well as the time of [affected party A's arrest]. There is remaining a great deal of public interest in the circumstances of her disappearance and in the subsequent OPP investigation, prosecution and its abrupt termination on the eve of the trial. It is hard to imagine a subject of greater public interest than [the circumstances relating to the disappearance of the identified individual in 1993], both for her family, and the public at large.

[52] The appellant also refers to more recent tragedy involving the abduction and death of a young girl in Ontario as evidence of the great public interest in matters of this nature. He identifies how important it is to have resolution of matters such as these (to the extent that this is possible). He reviews the circumstances surrounding the disappearance in 1993 and the nature of the information given by affected party A in the videotapes and states:

> There can surely be few if any subjects of public interest more compelling than that. The Video is the best evidence of what happened during the police interviews, and how the OPP investigation was conducted. Disclosure of the Video is therefore of great public interest.

[53] The appellant summarizes his position as follows:

> The public interest concerns raised by this case are substantial, and require that disclosure of the Video be made. The questions raised by the conduct of the investigation by the OPP into the role of [affected party A] in the very public disappearance and probable death of [the identified individual] implicate the government. The Video would have formed part of the evidence at the trial of [affected party A], had it proceeded, and, more significantly for the purposes of this appeal, was screened in open court at the *Voir Dire*. The Video has already been viewed by all members of the public who attended the *Voir Dire*.

[54] Later in his submission, in support of his position that the public interest in the requested information is compelling, he states:

> The appropriateness and effectiveness of police investigations is clearly a compelling matter. As Justice Iacobucci explained on behalf of the Supreme Court in *R. v. Mentuck*, [2001] 3 S.C.R.442 at paragraph 51:
>
>> As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged," a principle fundamental to a free and democratic society. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law

> and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy. [citations omitted]

[55] In addition, in support of his position that the public interest outweighs the purposes of the section 21(1) exemption, the appellant states:

> The purpose behind the section 21 exemption is to protect an individual's legitimate privacy interests. This is a critical concern. However, in the present case the public interests supporting disclosure vastly outweigh the privacy interests at stake. The information requested relating to [affected party A] is being sought potentially in order to find answers about the disappearance and probable death of [an identified individual] where the OPP investigation and the efforts to prosecute [affected party A] were unsuccessful.
>
> The public interest in this matter is thus highly compelling. The questions and suspicions of Canadian citizens in the OPP's ability to conduct responsible investigations which enable the Crown to conduct successful prosecutions implicate the government of Ontario and touch on the safety and political transparency of the country. It is telling that the requestor in this case is acting on behalf of a national media organization. There can be little question that the information requested will "serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to it to make effective use of the means of expressing public opinion or making political choices." [reference to Order P-1363] The disclosure of the Video will potentially permit the public interest in the disappearance and death of [the identified individual], the investigation surrounding it and the unsuccessful prosecution of [affected party A] to be satisfied.
>
> [The ministry] has not provided evidence that harm will come to [affected party A] should the information be disclosed, and the public's confidence in the police is so pressing a concern that even if there were harm, the public interest would outweigh the private.

> Moreover, since the Video has already been seen and heard by members of the public who attended the *Voir Dire*, allowing [the ministry] to continue to suppress this information forestalls the resolution of questions surrounding the abortive prosecution of the trial of [affected party A].
>
> Finally, much of the information sought to be disclosed has already been publicized through the media coverage surrounding the disappearance and probable death of [the identified individual]. To the extent that only part of the story is being told through these fragments of information, there is a pressing public interest in comprehensive disclosure of the Video in order to prevent conjecture. As long as there remains obvious selective disclosure, there is a great risk of public conjecture and suspicion.

[56] The appellant then refers to previous decisions of this office in which the public interest override was found to apply to a videotape of a witness interview. He states:

> The IPC's decisions relating to Ontario Provincial Police videos taken during the protest at Ipperwash Provincial Park at which Dudley George was killed, including a videotape of a witness interview (see e.g. Orders PO-2033-I and 2063-I), are instructive. In those decisions, Assistant Commissioner Mitchinson concluded that despite the privacy interests involved, the public interest override applied and required disclosure of the vast majority of the records in issue, including the majority of the audio portion of the witness statement. Similarly, here, the public interest in the untimely probable death of [the identified individual] in mysterious circumstances that have not been resolved by either the OPP investigation or a trial outweighs any privacy interests at stake.

[57] In the ministry's representations, the ministry takes the position that the appellant has not met either of the two requirements needed to establish that the public interest override in section 23 applies. The ministry states:

> The Ministry's position can best be summarized by Order MO-1254, which in interpreting the public interest override provision, quotes from the Williams Commission Report, which states that "*[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure*." The Ministry submits that the scale has been tipped when it comes to these records, and that the privacy interests of [affected party A] and other individuals must therefore prevail.

[58] The ministry then summarizes its view of the appellant's position and the ministry's response, and states:

> The Appellant states that the records are being sought "*in order to find answers about the disappearance and probable death*" of an individual. The Appellant does not explain why a media organization should be taking on the role of a law enforcement agency. It seems … that this type of reasoning could be applied to suggest that anytime the police cannot find out who committed a crime, they should turn their records over to media so that they can find the answers instead. This outcome would defy common sense.
>
> The Appellant notes that the records have already been seen and heard by members of the public who attended the judicial proceedings that were commenced against [affected party A]. The Ministry believes that this fact does not support a section 23 argument, but rather suggests the opposite, that to the extent there is a compelling public interest in viewing the records, that interest was satisfied at the judicial proceeding.
>
> The Appellant claims that the Ministry "*has not provided evidence*" that harm will come to [affected party A] should the records be disclosed. In response, we believe that harm is self-evident, based on the sensitive nature of the records, the circumstances in which they were created, and the fact that we have withheld them based on a mandatory exemption.
>
> Finally, the Appellant states that the records must be disclosed to "prevent conjecture" and "suspicion". But the Appellant does not back this statement with any evidence. Being a national media organization with significant resources at its disposal, the Appellant should be in a position to introduce substantial evidence to support its arguments but does not do so. As a result, the Ministry submits that section 23 should not override the privacy interests of [affected party A] and the individuals he names.

[59] In response to the ministry's representations, the appellant reviews some of the arguments provided earlier in his appeal letter. In addition, in support of his position that the public interest clearly outweighs the purposes of the exemptions, the appellant states:

> Canadians have, in recent months, learned of the macabre murders and sexual assaults of two women in the Trenton area by former Colonel Russell Williams, who pleaded guilty to those crimes, as well as to another sexual assault and a number of related crimes. They have also read about, and viewed video footage of the interrogation by a remarkable

RCMP interrogator of Mr. Williams which led to his confessing to his crimes on camera. It was disturbing but immensely revealing viewing which was watched by large audiences of Canadians. Not only was the public interest in the matter highly compelling, it was so compelling that, had an application for access to the video been made under this act, I submit that the public interest would have clearly outweighed the purposes of the exemptions such as those proposed in this case. As it turned out in the Williams case, the court provided wide access to the media and the public interest in the case was satisfied.

Another case, … the "Ashley Smith case," has, since the tragic death in custody of Ashley Smith, similarly aroused intense public interest. In that case, applications were made to the court for access to surveillance videotape recorded of Ashley Smith in her cell where she ultimately died. Charges against her jailors were eventually withdrawn by the Crown, but the Ontario Court of Appeal last month ordered that the videotape be made available to the public. It upheld the finding of the lower court judge who held that:

> … the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *X. v. Mentuck,* [2001] 3 S.C.R. 442, generally known as the "*Dagenais/Mentuck*" test, applied to CBC's request. The *Dagenais/Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

Once again, although the Ashley Smith case did not involve an application under this *Act*, the court found that there was great public interest in learning about the tragic end of Ashley Smith's life as well about her treatment by government agents during her incarceration. I submit that the "*Dagenais/Mentuck*" test which the Court of Appeal applied is remarkably analogous in its intent, and application, to the section 23 Public Interest Override test, at least insofar as there is in both tests a sliding scale which measures how compelling the public interest is in relation to the value of personal information and its protection from public access.

The purpose behind the section 21 exemption is to protect an individual's legitimate privacy interests. This is a critical concern. However, in the present case the public interest supporting disclosure vastly outweighs the

> privacy interests at stake. The information requested relating to [affected party A] is being sought potentially in order to find answers about the disappearance and probable death of [the identified individual] where the OPP investigation and the efforts to prosecute [affected party A] were unsuccessful.

[60] The appellant reviews his position that the public interest in this matter is highly compelling (as set out above) and goes on to state:

> The Ministry says it need not provide evidence that harm will come to [affected party A] or other identifiable individuals should the information be disclosed other than to say it is self-evident under the circumstances of the case. In my submission, the public's confidence in the police is so pressing a concern that even if there were harm, the public interest would outweigh the private.

[61] The appellant then again reviews some of the arguments made in his appeal letter, above. Furthermore, in addition to the Ipperwash decisions referenced above, the appellant also refers to Interim Order PO-2056-I. He states:

> In Interim Order PO-2056-1, the Ministry made submissions very similar to those it has made in this case, for example, that the more sensitive the information the more the balance should tip in favour of non-disclosure. Nevertheless, Assistant Commissioner Mitchinson saw fit again to order production of many of the records sought. Similarly, here, the public interest in the untimely probable death of [an identified individual] in mysterious circumstances that have not been resolved by either the OPP investigation or a trial outweighs any privacy interests that may be at stake. In the Ipperwash case, prosecutions were held and convictions resulted; the public's interest was significantly satisfied. And yet, Assistant Commissioner Mitchinson still saw fit to recognize that section 23 applied, and to order production much of the videotape, even that of interviews with third party witnesses. In this case, there have been no prosecutions and no convictions; the unfortunate victim's body has not even been found. The family's, and the public's interest, remain totally unsatisfied.
>
> Finally, the Ministry argues that the fact that members of the public have already seen and heard the Video at the proceedings of the pre-trial *Voir Dire* suggests that any "compelling public interest in viewing the records ... was satisfied at the judicial proceeding." The *Voir Dire* was held in … a relatively small community in Ontario. I am not aware of the number of people who attended the proceedings, but it is not likely to have been large. That is rendered more likely by the fact that the media in general

> do not attend pre-trial voir dires in jury trials since they are invariably not permitted to publish the proceedings until after the trial is completed. They could not have known at that time that the Crown would stay the charges against [affected party A], and by the time the charges had been stayed it was, of course, too late for them to attend the *Voir Dire*. So, on account of this unfortunate irony occurrence the whole matter was permitted to slip under the media's, and consequently the public's, radar and disappear from people's attention. It should not have happened, and, in my submission, there is here an opportunity to enable the public's interest to now be satisfied

Findings

[62] I have carefully reviewed the appellant's representations on the public interest override, as well as the attachments to his representations and the records at issue in this appeal.

[63] Generally speaking, and based on the information provided by the appellant, as well as the content of the records and the nature of the issues which the records relate to, I accept that there is a public interest in the records. There are a number of factors which confirm the public interest in the subject matter contained in the records including the circumstances surrounding the unsolved disappearance of the individual, the detention and release of affected party A, the reasons why he was released, the newspaper articles and coverage of this matter in the past, and the interest the appellant has in this information. However, I must determine whether, in the circumstances, there is a compelling public interest in the disclosure of the records themselves and, if so, whether that clearly outweighs the purpose of the exemption in section 21(1).

[64] To begin, as indicated above, section 23 requires that the information contained in the 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.

[65] One of the reasons cited by the appellant in support of his position that the public interest override ought to apply is the public interest that exists in the actions of the police, particularly the manner in which they conducted the investigation. The appellant refers to the fact that the efforts to prosecute affected party A were unsuccessful, and also states that the questions raised about the conduct of the OPP investigation into affected party A implicate the government. The appellant states:

> In my submission, the public's confidence in the police is so pressing a concern that even if there were harm, the public interest would outweigh the private.

[66] In the circumstances of this appeal, I accept that this reason involves the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. In that regard, questions about police actions "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." [Order P-984] The appellant has identified the fact that the police investigations, and specifically the interviews of affected party A by the police, resulted in the proceedings against affected party A being stayed and in affected party A being released from custody. In the "Reasons for Ruling" issued by the judge hearing the *voir dire*, one of the reasons for the granting of the stay was the OPP's failure to properly caution affected party A prior to and during some of the interviews. In this regard, I am satisfied that an examination of issues of this nature involve the *Act*'s central purpose of shedding light on the operations of government (in this case, the specific actions of the police).

[67] However, my analysis of whether there exists a public interest does not end there. As set out above, previous orders have found that a compelling public interest does not exist where a significant amount of information has already been disclosed which is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

[68] In the circumstances of this appeal, I am satisfied that a significant amount of information has already been disclosed, and that this is adequate to address any public interest considerations concerning the police's actions. This information is contained in the judge's "Reason for Ruling" on the hearing of the *voir dire* held to determine the admissibility of evidence given by affected party A. That decision, referred to and provided by the appellant, contains a lengthy and detailed review of the circumstances resulting in the statements made by affected party A (both the statements made in the records at issue in this appeal, as well as other statements allegedly made that were not recorded).

[69] In this ruling, which resulted from the public *voir dire*, the judge provides a step-by-step review of the police's actions and also comments on their conduct, and the reasons why he found that affected party A's statements were inadmissible. This ruling, which is 53 pages long and includes a table of the statements made by affected party A, as well as lengthy quotations from some of these statements, also identifies specifically the errors made by the police in conducting the interviews and failing to properly caution affected party A. It includes a chart listing the various interviews, including whether they were videotaped, whether they included appropriate cautions or not, and the actions resulting from those interviews.

[70] I find that the extensive reasons in the decision and the information provided in the judge's reasons clearly identify the police's errors in conducting the investigation. Although the appellant refers to the fact that the OPP investigation and the efforts to

prosecute affected party A were unsuccessful, and states that "the questions raised by the conduct of the investigation by the OPP into the role of affected party A in the disappearance of the identified individual implicate the government," in my view the details regarding the conduct of the investigation (specifically, the reasons why certain statements were found to be inadmissible) are clearly set out in the reasons for judgement. Accordingly, I find that the disclosure of the information in the records at issue in this appeal would not necessarily "add 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."

[71] As a result, because of the significant amount of information that has already been disclosed concerning the activities of the police, which adequately addresses the identified public interest considerations, I find that a compelling public interest does not exist in the disclosure of the records at issue.

[72] I have also considered the appellant's arguments about disclosure of the information because of the public's interest in the circumstances surrounding the disappearance of the identified individual, and the possibility that the information in the records might provide answers about the disappearance. I note that Assistant Commissioner Beamish recently addressed a similar concern in Order PO-3025. In that decision, the Assistant Commissioner considered the public interest in disclosure of audio and/or video recordings of interviews and interrogations of a convicted criminal by officials or representatives from the Ontario Provincial Police and/or the OPP Behavioural Science Section. The appellant in that appeal sought access to the undisclosed portions of these records, arguing that disclosure would, *inter alia*, allow the public to be provided with additional answers to questions which were "assumed to be addressed in the records." In addressing the public interest argument, Assistant Commissioner Beamish stated:

> In my opinion, there is a strong interest by members of the media and public in the actions taken and potential crimes committed by the named individual. There has been extensive media coverage and public discussion of the named individual's crimes for which he has been convicted.
>
> However, section 23 requires that the information contained in the 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.[2]

[2] See note 12.

> I agree with the submissions made by the ministry that the criminal activities of the named individual have already come under a very significant amount of scrutiny. This has occurred through intensive media scrutiny, as well as a lengthy sentencing process during which portions of his interrogations were released. Given this, I find that the disclosure of the information contained in the records would not serve the purpose of informing the citizens of Ontario about the activities of their government, or providing them with additional information in which to assess government activities.
>
> In addition, as noted earlier, the records consist of interrogations between the OPP and the named individual. There is no evidence to suggest that the records contain information about the OPP's decision-making process or the screening procedures of the named individual's employer. Consequently, I find that disclosure of the content of the interrogations would only inform the citizens of Ontario about the named individual's potential criminal activities and not about the workings or decision making processes of government. …
>
> *In addition, although there may be widespread curiosity about the contents of the records, and their release would be newsworthy, that does not automatically lead to the application of the public interest override, which must assess whether the broader public interest would actually be served by disclosure. That is the purpose of weighing a compelling public interest, where one is found to exist, against the purpose of applicable exemptions….* [emphasis added]

[73] I agree with the approach taken by the Assistant Commissioner in Order PO-3025. I have found above that, due largely to the information already available to the public concerning the activities of the police, there is not a compelling public interest in the disclosure of the records. With respect to the appellant's argument that the public has an interest in the records because disclosure may provide answers about the circumstances surrounding the disappearance of the identified individual, I find that disclosure of the records at issue in this appeal would only inform the citizens of Ontario about the statements made by affected party A (some of which were found to be inadmissible) and would not inform them about the workings or decision making processes of government. Although release of the records may be newsworthy and of widespread interest, I am not satisfied that the broader public interest would actually be served by disclosure of them.

[74] Furthermore, even if I had found there to be a compelling public interest in the disclosure of the records, I would then have had to determine whether the disclosure outweighed the purpose of the section 21(1) exemption.

[75] I have found above that the records contain the personal information of affected party A, as well as the personal information of other identifiable individuals. In its representations, I note that the ministry characterizes the personal information at issue as follows:

> In particular, we view the records as being "highly sensitive" … given that they record police interrogations. Moreover, we are concerned that the disclosure of the records could "unfairly damage the reputation of individuals named in the records," because of the stigma associated with being associated with a homicide investigation…." These records were created 6 years ago, and to release them now could have a damaging effect on people named in them who are simply trying to get on with their lives, and who are not expecting these records to be released….

[76] I have reviewed the records at issue in this appeal, which include hours of police interviews involving affected party A. In these interviews, very sensitive personal information of affected party A and others is discussed in considerable detail. A number of these interviews were ultimately found to be inadmissible. In my view, even if I had found there to be a compelling public interest in the disclosure of the records, I would not have found that this public interest is sufficiently compelling to override the privacy protection purpose of the section 21(1) exemption in the circumstances of this appeal.

[77] Finally, in making my findings, I have carefully considered the previous orders referred to by the appellant, specifically, Orders 2033-I, 2056-I and PO-2063-R, which the appellant refers to in support of his position that the public interest override has been applied to override the personal privacy provisions in section 21(1), including records involving videotaped evidence. I note that these orders all addressed issues stemming from the situation involving the Ontario Provincial Police actions taken during the protest at Ipperwash Provincial Park at which Dudley George was killed. I find that the circumstances of those appeals are quite different from the ones at issue in this appeal. In those appeals, evidence was tendered that the public interest in the matter included calls from a number of organizations, including the United Nations Human Rights Committee, for a public inquiry. It also involved criticism of federal and Ontario authorities on human rights abuses by Amnesty International, and that "public calls for disclosure of the facts about what happened [at Ipperwash] have continued unabated in the six years." A number of articles and editorials, a book, and debates in the Legislative Assembly published in Hansard were also cited as evidence of the public interest in the records. I also note that, in those orders, although certain videotapes were disclosed, many of the identifiable individuals in those records had provided a form of consent to the disclosure of their information, and the adjudicator also decided to sever the identifiers of other identifiable individuals. In my view, the public interest considerations in those orders are quite different from the ones raised in this appeal.

[78] Accordingly, I find that there does not exist a compelling public interest in disclosure of the records that outweighs the purpose of the section 21(1) exemption in the circumstances of this appeal.

ORDER:

I uphold the ministry's decision to deny access to the records, and I dismiss this appeal.

Original Signed by: ___ March 30, 2012
Frank DeVries
Adjudicator