Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3321

Appeal PA12-289

Archives of Ontario

March 17, 2014

Summary: The requester submitted a request to the Public Archives of Ontario (the archives) for information related to a specific prosecution for a murder that occurred in 1975. The archives identified the relevant file and granted partial access to the records based, in part, on consent. The remainder of the information was withheld pursuant to the law enforcement, solicitor-client privilege and personal privacy exemptions. During mediation and adjudication, the archives issued revised decision letters, disclosing additional records to the appellant. In this order, the adjudicator finds that some records are removed from the scope of the appeal, either because they are duplicates or because they are court records. The adjudicator partly upholds sections 19 (solicitor-client privilege) and 21(1) (personal privacy), but finds that section 14(2)(a) (law enforcement report) does not apply. Additionally, some of the withheld information does not qualify for exemption under section 21(1) because it is not "personal information" due to the operation of sections 2(2) and 2(3) of the *Act.* Applying the principles of severance and absurd result, the adjudicator orders that the non-exempt portions of the records be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) definition of "personal information," 2(2), 2(3), 14(2)(a), 19 and 21(1), 21(2)(f), 21(2)(i), and 21(3)(b).

Orders and Investigation Reports Considered: Orders M-50, MO-1192, P-1151, PO-1717, PO-1923, PO-1936, PO-2494, PO-2733, PO-2739, PO-2751, and PO-2802-I.

Cases Considered: *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (CanLII); *Ontario (Attorney General) v. Ontario*

(Information and Privacy Commissioner), [2009] O.J. No. 952; motion for leave to appeal dismissed, Doc. M37397 (C.A.); *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); and *Ontario (Ministry of the Attorney General) v. Big Canoe (2002)* 67 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.).

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to the Archives of Ontario (the archives) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for prosecution file records relating to an incident that resulted in the death of an identified individual in 1975. The requester provided the archives with a record series number identifying a particular district's crown attorney prosecution case files.

[2] After searching for the record series number, the archives located a file that was identified as responsive to the request. The archives issued a decision letter to the requester disclosing the records, in part, and granting access to "Indictments, Informations [*sic*] and the transcript of the preliminary inquiry." The remaining records were withheld, in their entirety, pursuant to sections 14 (law enforcement) and 21(1) (personal privacy) of the *Act*.

[3] The archives advised the requester that additional records could be disclosed with the consent of the individual to whom the prosecution related. The requester subsequently provided a consent form signed by the individual and the archives issued a revised decision, disclosing an additional 63 pages. The archives advised the requester that "249 pages remain withheld in full pursuant to sections 14, 19 [solicitor-client privilege] and 21 of the *Act.*"

[4] The requester appealed the archives' decision to this office and a mediator was appointed to explore the possibility of resolution. The archives issued a second revised decision, disclosing additional information, based on the fact that one of the individuals in the records has been deceased for more than 30 years. Under section 2(2) of the *Act,* this individual's information no longer fits within the definition of personal information in section 2(1). The archives granted full or partial access to 23 more pages and also provided a copy of the index of records to the appellant.

[5] The appellant advised the mediator that she still wanted to seek access to the remainder of the undisclosed information in the records. She also advised the mediator that two other individuals she had identified as witnesses are also deceased. Since it was not possible to resolve this appeal through further mediation, it was transferred to the adjudication stage where an adjudicator conducts an inquiry.

[6] I began my inquiry by sending a Notice of Inquiry to the archives seeking its representations, which I received, along with a copy of a third revised decision and a

revised index of records that clarified the exemption claims. At this time, the archives withdrew its claim that sections 14(1)(d) and 21(2)(e) applied. The appellant was then provided with copies of the archives' representations and a revised index of records and invited to respond. The appellant provided representations for my consideration.

[7] In this order, as a preliminary matter, I find that certain records are duplicates of one another. I also find that several records fall outside the *Act* because they are court records. Regarding the exemptions claimed by the archives to deny access, I find that the two Crown briefs are exempt under section 19(b) of the *Act,* but that section 19 does not apply to the other records for which it was claimed. I find that section 14(2)(a) does not apply. Some of the remaining portions of the records are exempt under section 21(1), together with the presumption against disclosure in section 21(3)(b). However, I order the archives to disclose the personal information for which consent has been obtained or that is not subject to section 21(1), due to the consideration given to the unlisted factor in section 21(2) for a diminished privacy interest after death or the application of the absurd result principle. I uphold the archives' exercise of discretion under section 19.

RECORDS:

[8] Remaining at issue in this appeal are approximately 200 pages (including duplicates) of records relating to the investigation and prosecution of the incident, either in part or in their entirety. The records consist of reports, lists, correspondence, witness statements and other miscellaneous court documents.

ISSUES:

A. Preliminary Issues: duplicate records and court records

B. Are the records exempt under the solicitor-client privilege exemption in section 19?

C. Does the discretionary exemption in section 14(2)(a) apply?

D. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

E. Would disclosure result in an unjustified invasion of personal privacy under section 21(1)?

F. Did the archives exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Preliminary Issues: duplicate records and court records

Duplicate records

[9] In the revised index provided during the inquiry, the archives identified a number of records as duplicate copies of other records at issue in this appeal. My own review of the records, including those disclosed by archives in its most recent revised decision, identified a few other instances of duplicate records. Some of the records identified by the archives as duplicates are typewritten versions of handwritten statements: one provided by the accused and another provided by one of the witnesses. Based on my review of these duplicates, I am satisfied that their transcription has not altered the content of the records such that it affects my finding as to whether the copies are duplicates.

[10] Accordingly, I will review the possible application of the exemptions claimed in relation to the typewritten statements at pages 59[1] and 63-64, but not their handwritten counterparts at pages 61, 65-68 and 69-72. There are other duplicate records: pages 75-76 are duplicates of pages 73-74; and page 86 is a duplicate of page 85. Effectively, this removes 12 pages from the scope of my review in this order. However, although the list of witnesses at page 41 is very similar to the one found at page 85, I will review the exemptions claimed for both of these records because there is a slight variation in content.

[11] In addition, there are two Crown briefs at pages 89-167 and 168-252, which have been withheld by the archives under section 19(b). These briefs are also largely identical to each other in their content, with limited exceptions, which I find to be inconsequential for the purposes of my review of the solicitor-client privilege exemption. The briefs also include some of the same records that appear earlier in the index. Importantly, however, these two briefs are considered together as a "type" of record, below. In this context, I will not be making findings as to the duplications (with earlier records) and differences between them.

Court records

[12] As a second preliminary matter, I find that several records for which the archives had claimed exemption under section 19 and/or 21(1) fall outside the scope of the *Act.* These two records are page 54, which is an "action request" written on behalf of the local judge, which was sent to an unidentified recipient, and pages 82-84, a list (or "Panel") of "Petit Jurors" containing names, addresses, and occupations of potential

[1] Page 60, the second page of this statement, was disclosed to the appellant in the revised decision issued during mediation.

jurors. For the following reasons, I conclude that these records are not subject to the *Act* because they are "court records."

[13] The right of access under the *Act* is created by section 10(1), which states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[14] If an institution's custody or control of a record is established, the right of access under section 10(1) applies, subject to the exceptions in paragraphs (a) and (b).

[15] The courts and this office have applied a broad and liberal approach to the custody or control question.[2] Past orders, however, have determined that "court records" are not in the custody or under the control of an institution, even though the institution may possess such a record.[3] An institution's limited ability to use, maintain, care for, dispose of and disseminate such records does not necessarily amount to "custody" for the purposes of the *Act*.[4] The issue here is connected to the concept of judicial independence, which has both an individual and an institutional dimension relating to the independence of a particular judge and to the independence of the court of which the judge is a member. In the 2011 judicial review of Order PO-2739,[5] the Court explained that:

> Judicial independence consists of three core components: security of tenure, financial security and administrative independence. It is the third component that is relevant in this case. Judicial administrative independence requires judicial control with respect to matters of administration bearing directly and immediately on the exercise of the judicial function…[6]

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[2] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

[3] Order P-994.

[4] Order P-994.

[5] Paragraphs 27, 28 and 31, *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (CanLII); 104 O.R. (3d) 588.

[6] *R. v. Valente*, 1985 CanLII 25 (SCC), at paras. 27, 40, 47; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)* [2005] S.C.J. No. 47, at paras. 7, 115; *Ell v. Alberta*, 2003 SCC 35 (CanLII), at para. 28.

> Where the Chief Justice or a judge of a court is exercising responsibilities relating to administrative matters that bear directly on the exercise of the judicial function, the principle of judicial independence requires judicial control. Similarly, any information or documentation created by and for the judiciary to carry out these judicial administrative functions is also constitutionally protected. In order to ensure judicial independence, the judiciary, by necessity, must have supervisory control over access to, and disclosure of, this information.

[16] On my review of the content of page 54, I find that it qualifies as a "court record" because it reflects an administrative matter directly related to the exercise of the judicial function in relation to a specific court proceeding. Therefore, I conclude that page 54 was not, at the time of its creation, in the custody or under the control of the institution that provided it to the archives, and that it continues to be not in the custody or control of the archives. I find that page 54 is not subject to the *Act*. Therefore, it is not necessary for me to review the possible exemption of this record under section 19.

[17] I have reached the same conclusion regarding the jurors' list on pages 82-84. This list was prepared by the local sheriff, under the supervision of the local Justice of the Peace, pursuant to the *Juror's Act* (as it was known in 1975). Past orders have established that this type of record is a "court record." In Order P-1151,

> … former Assistant Commissioner Tom Mitchinson found that the information contained in the jury roll was prepared under the *Juries Act* by the Sheriff who was an employee of the courts. He also found that the responsibility for the preparation and the administration of the jury list, and the supervision and management of the jury selection process is under judicial control. Most significantly, he found that the information contained in the database was not integrated with other records held by the Ministry. Having regard to all of these circumstances, Assistant Commissioner Mitchinson found that the information requested was not in the custody and/or under the control of the Ministry. This order is an important illustration of the manner in which the *Act* respects judicial independence over court records and over administrative matters under judicial control.[7]

[18] I agree. Applying this reasoning to the jury list at pages 82-84, I find that it is a "court record" and is not, therefore, subject to access under the *Act*. Accordingly, it is unnecessary to decide whether this record is exempt under sections 19 or 21(1), as claimed by the archives.

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[7] As excerpted by the current Assistant Commissioner in Order PO-2739. See also Orders PO-2323 and PO-3044.

[19] Having concluded that pages 54 and 82-84 are court records and not subject to the *Act*, these records are removed from the scope of this appeal, and I will not be addressing them again in this order.

B. Are the records exempt under the solicitor-client privilege exemption in section 19?

[20] The archives withheld most of the records remaining at issue under branch 2 of section 19 of the *Act*. Section 19 states:

> A head may refuse to disclose a record,
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> (a) that is subject to solicitor-client privilege;
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> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
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> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[21] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c).

[22] As stated, the archives relies on the statutory exemption in branch 2, which is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[23] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

[24] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.[8] However, as will be discussed in greater detail below, "branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[9]

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[8] Order PO-2733.

[9] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952; motion for leave to appeal dismissed, Doc. M37397 (C.A.).

[25] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.[10]

[26] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[11] However, the application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts: waiver of privilege by the *head of an institution* and the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[12]

Representations

[27] The archives' original claim of section 19 related solely to pages 89-167 and 168-252. In its representations, the archives explains that it added section 19 as an exemption claim for additional documents at the time of its third revised decision (during this inquiry) because "these documents were included as part of the Crown prosecution brief and should be subject to solicitor-client privilege." The records that are now subject to the section 19 claim, as well as sections 14 and 21(1), are pages 11-15, 41, 63-64, 73-74, 77-78, 79-81, 85 and 87.[13]

[28] In support of its claim that branch 2 of section 19 applies to these records, the archives submits that the exemption is specifically designed to protect information prepared by, or for, Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of government. The archives submits that the records at issue came into existence as a result of a criminal investigation and the prosecution of that criminal matter. Accordingly, the privilege in section 19(b) is claimed for all records created by, or for, Crown counsel to further the contemplated litigation. Further, the archives argues that the plain meaning of the words in branch 2 is that Crown records are subject to permanent exemption because the exemption is not limited temporally or by the end of the litigation in question.

[29] According to the archives,

> The records on their face reveal that either Crown counsel prepared the record or it was prepared for Crown counsel for use in litigation. The Archives submits that the records featuring communications from the

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[10] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.

[11] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer), supra*.

[12] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) ("*Big Canoe 2006*").

[13] The archives' original claim to section 19 included page 54 and it had also added a claim of section 19 to the juror panel list at pages 82-84, but these records were removed from the scope of the appeal as a preliminary matter, above.

> Police to Crown Counsel clearly fall under the protection of Branch 2 of section 19. …
>
> [T]he records … by their very nature, dealt with sensitive matters, and these matters continue to be sensitive long after a matter is completed.

[30] The archives refers to Order PO-2733 in support of the assertion that a Crown brief is protected from disclosure to the public "by simple request," and the principle that "there should be no generalized public access to the Crown's work product even after the case has ended." The archives states that it is not aware of any steps that would represent waiver of the privilege in these records.

[31] The appellant's representations focus on her motivation and reasons for making the request for access to these records. Her submissions do not directly address the solicitor-client privilege exemption, except in passing to say that she would:

> … be grateful to receive the remainder of the file contents in whole, even if it means blacking out references to witnesses [names] and sources of information. Perhaps, taking this into consideration would permit me to access the remaining paperwork and also address the matters concerning personal privacy and solicitor-client privilege.

[32] The appellant also urges me to take into account the length of time that has passed since the incident in 1975 and suggests that this is a relevant consideration in favour of making these records available, as with records from the trial. The rest of the appellant's representations on the age of the records are addressed under the personal privacy and exercise of discretion discussion, below.

Analysis and findings

[33] To begin, I will address the records that are collectively identified as the Crown brief, and which consist of pages 89-167 and 168-252. In doing so, I refer to Order PO-2733, where former Senior Adjudicator John Higgins discussed the application of the Branch 2 statutory privilege to the contents of a Crown brief, including the rationale for the permanent protection of the Crown brief as a class of record, as follows:

> A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. In *Ontario (Ministry of the Attorney General) v. Big Canoe (2002)*[14] … ("Big Canoe 2002") Justice Carthy applied branch 2 of section 19 to Crown brief materials. In doing so, he observed as follows:

[14] 67 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.).

> In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the Freedom of Information Act and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request. [para. 14]

Earlier in the judgment, Justice Carthy rejected an interpretation of branch 2 that would end its application upon the termination of litigation, as would occur under common law litigation privilege. He found that "the intent was to give Crown counsel permanent exemption. … **Thus, if branch 2 applies to a record, that record remains exempt even after the litigation concludes** [emphasis added].

Subsequently, in [*Big Canoe 2006*, *supra*] … Justice Lane considered the application of section 19 to the Crown brief. He stated:

> The scheme of the Act clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth. [para. 23]
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> …
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> The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the language of section 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest

> that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. **There should be no generalized public access to the Crown's work product even after the case has ended.** [para. 44]

…

… [Therefore,] the contents of the Crown brief are, generally speaking, exempt under branch 2. Based on a third judgment of the Divisional Court, *Ontario (Ministry of Correctional Services) v. Goodis*,[15] … however, it appears that there may be an exception to this view for some records copied for inclusion in the Crown brief. …

Two principles emerge from the Divisional Court's judgment in *Goodis* and the authorities to which it refers, as follows:

1. records related to the fact-finding and investigation process of counsel and resulting from selective copying, research or the exercise counsel's skill and knowledge would fall within branch 2 of the exemption; and

2. **branch 2 does not reach back to original records in the hands of other parties solely on the basis that they have been copied for inclusion in the Crown brief** [emphasis added]. …

… In Order PO-2494 (reconsidered in Order PO-2532-R but unchanged on this point)[16], Assistant Commissioner Brian Beamish found that section 19 did not apply to police records on the basis that copies might be found in the Crown brief. He stated:

> With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.
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> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of

[15] [2008] O.J. No. 289.

[16] Order PO-2494 (along with Order PO-2498) was upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, *supra*.

> deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.
>
> In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.
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> The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.
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> …
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> If I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the *Act*. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):
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> > . . . The broad rationale of public accountability underlying freedom of information schemes . . . requires some degree of openness with respect to the conduct of law enforcement activity . . . (p. 294)

…

On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (i.e., the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (i.e., investigation files held by the police). However, courts have made findings of this nature with respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms*,[17] the majority of the court stated:

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[17] 1988 CanLII 181 (BC CA), (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.).

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not.

...

> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [18].
>
> This approach was also applied in Order PO-2498, which is, like Order PO-2494, subject to an application for judicial review.[19] As noted above, it appears to be consistent with the approach taken by Swinton J. in *Goodis*.
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> Accordingly, based on the approach taken in *Big Canoe 2002*, *Big Canoe 2006* and *Goodis*, I conclude that among other records capable of falling within its terms, branch 2 of the exemption exists to protect the Crown brief from being accessible to the public "upon simple request" and thus provides a form of blanket protection for prosecution records in the hands of Crown counsel, including copies of police records, without the need for showing interference with a particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context.

[34] I agree with and adopt the reasoning of the former Senior Adjudicator in Order PO-2733, which has been adopted in a number of subsequent orders, including Orders PO-2769, PO-2801 and PO-3095. In this appeal, I am reviewing the archives' decision

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[18] See, for example, Orders MO-1316, MO-1616 and MO-1923.

[19] Upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, *supra*. The court decision post-dates Order PO-2733 by four months. See also Orders PO-2769 and PO-2801.

to deny access to the two copies of the Crown brief under branch 2 litigation privilege in section 19 *and* copies of other original records that were prepared by the Ontario Provincial Police, both of which have ended up in the possession of the Archives of Ontario due to the age of the file.

[35] While I am sympathetic to the appellant's reasons for seeking this information, with regard to pages 89-167 and 168-252, the law relating to Crown briefs is clear. Accordingly, for the reasons outlined above, I find that branch 2 of section 19 applies to these pages and that they are exempt from disclosure, subject to my review of the ministry's exercise of discretion under section 19.

[36] However, as stated, the archives has also claimed section 19 for other records and has made the same arguments about them, even though some of these records exist not only as part of the Crown brief but also, with some variations, as part of the Ontario Provincial Police investigation into this incident. With regard to pages 11-15, 41, 63-64, 73-74, 77-78, 79-81, 85 and 87, I adopt the reasoning of Assistant Commissioner Brian Beamish in Order PO-2494. I find that these records were prepared by the police for the purpose of investigating this criminal matter, a purpose that "is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges." As the Assistant Commissioner observed, records of this nature, such as witness statements, Criminal Investigation Branch memos, and witness lists, are "prepared" twice: first, when the record is brought into existence, and second, when the police, applying their expertise, exercise their discretion to select certain records for inclusion in the Crown brief, and then make copies of those records for Crown counsel. I agree with the Assistant Commissioner that the fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared.

[37] In the judicial review of Order PO-2494 (and PO-2498), *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), supra,* Swinton J. stated (at paragraphs 14 and 15):

> The respondent IPC submits that s. 19(b) applies only where the requester seeks access to the copies of the records contained in the Crown brief. It does not apply to records remaining in the hands of the police. To exempt those records from disclosure, the police must rely on other provisions of the *Act*, such as s. 14, which specifically deals with law enforcement. I agree with the submissions of the IPC. The applicant's interpretation of s. 19 of the *Act* is inconsistent with the terms of that provision and fails to take into account other provisions of the *Act* which provide exemptions that directly address the interests of the police in effective law enforcement.

[38] In this context, I find that section 19(b) does not apply to the witness list at page 41 and its variation at page 85; the statement of the accused 59(-60),[20] the witness statements at page 63-64, 73-74, 77-78, 87; and the police reports at pages 11-15 and 79-81. With specific regard to pages 11-15, I note that this December 30, 1975 memo was prepared by a Detective Inspector of the Criminal Investigation Branch for the Director of the branch. The record is date-stamped as having been received by the Crown Attorney on January 7, 1976, but it is not listed in the Index of the Crown brief at pages 89-167 or 168-252. In any event, while many (if not all of) these records may ultimately have been provided to the Crown, I find that they were originally prepared for investigative purposes by the police and that, as they exist outside the Crown brief, they are not exempt under section 19(b).

[39] In sum, I find that section 19(b) applies to pages 89-167 and 168-252. Based on the evidence before me, I am satisfied that there has been no waiver of the privilege attaching to them. In view of this finding, it is not necessary for me to review the possible application of section 21(1) to those same records.

C. Does the discretionary exemption in section 14(2)(a) apply to pages 11-15 or 79-81?

[40] The archives claims that section 14(2)(a) applies to exempt the Criminal Investigation Branch memo at pages 11-15 and the OPP Crime Against Person Supplementary Report at pages 79-81.

[41] Section 14(2)(a) states:

> 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.

[42] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the archives must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

[20] Page 60 has already been disclosed to the appellant.

> 3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[21]

[43] The word "report" is not defined in the *Act*. However, previous orders of this office have established that for the purpose of section 14(2)(a), the word "report" means "a formal statement or account of the results of the collation and consideration of information." The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[22]

[44] Section 14(2)(a) exempts "a report prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law," rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.[23]

Representations

[45] The archives submits that past orders have held that the law enforcement exemption applies to police investigations into a possible violation of the *Criminal Code.* The archives states that the records in this appeal relate to an investigation conducted by the OPP into the death of an individual and that, therefore, "the law enforcement exemption is appropriate and applicable based on the records at issue."

[46] Referring to Order MO-1192, the archives acknowledges that section 14(2)(a) requires a record to contain analysis, conclusion and organization of information that goes beyond a mere factual update to meet the definition of "report." According to the archives,

> The records identified above contain an analysis and assessment of information obtained during the investigation and go beyond a mere factual update. The records contain recreations of the crime from information gathered. In this way, the records are similar to the Occurrence Report that was held to meet the requirements of a "report" in Order MO-1192… Consistent with MO-1192, the information and factual observations contained in the records currently at issue are used to come to conclusions about the crime. It is precisely this process of analyzing and coming to a determination based on the factual information that renders the records "reports" within the meaning of subsection 14(2)(a).

[47] In view of my finding, below, the remainder of the archives' representations on the second and third parts of the test under section 14(2)(a) are not set out here.

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[21] Orders 200 and P-324.
[22] Order MO-1337-I.
[23] Order PO-2751.

[48] The appellant's representations do not specifically address the law enforcement exemption.

Analysis and findings

[49] In this appeal, I am satisfied that the two records were prepared as a result of an investigation into a murder by the OPP, an agency which has the function of enforcing and regulating compliance with a law. However, my determination respecting the application of section 14(2)(a) in this appeal turns on the interpretation of the word "report" in the exemption.

[50] Previous orders have found that as a general rule, occurrence reports, supplementary reports and similar records of other police agencies do not to meet the definition of "report" under the *Act*, because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations.[24] Further, I note that in orders more recently decided than Order MO-1192, this office has found that the wording used in section 14(2)(a) supports a strict reading of the exemption. As former Senior Adjudicator John Higgins explained in Order PO-2751:

> In my view, an overbroad interpretation of this section is not appropriate because the detailed provisions of section 14(1), which is a harms-based exemption, provide broad protection for specific law enforcement interests, and in that context, a sweeping interpretation of section 14(2)(a) would be contrary to the public access and accountability purposes of the *Act* elaborated in section 1(a). The latter section refers to the principles that government-held information "should be available to the public," and "necessary exemptions from the right of access should be limited and specific."

[51] In the passage following this excerpt, the senior adjudicator enumerated the "wide variety of law enforcement interests addressed by section 14(1)," including the specific protections or facilitating roles offered by each part of section 14(1) of the *Act.* I agree with this approach to section 14(2)(a) and adopt it in my analysis in this appeal.

[52] As past orders have observed, police occurrence reports are "a form document routinely completed by police officers as part of the criminal investigation process" and typically consist primarily of descriptive information.[25] Based on my review of pages 11-15, a memo prepared by a Detective Inspector of the Criminal Investigation Branch for the Director of the branch, and pages 79-81, a Crime Against Person Report, I find that they do not meet the definition of "report" under the *Act*, as they consist essentially of observations and recordings of fact. Although there are a few comments in the Criminal

[24] See Orders M-1109, MO-2065 and PO-1845.
[25] Orders M-1109 and PO-2870-I.

Investigation Branch memo which might be considered evaluative, I am satisfied that the record consists primarily, and essentially, of descriptive information.

[53] Accordingly, I find that section 14(2)(a) does not apply to pages 11-15 or 79-81 and that these records are not exempt on this basis. However, these same records must still be reviewed to determine whether they are exempt under section 21(1).

D. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[54] The archives also relies on the mandatory personal privacy exemption in section 21(1) to support the denial of access to information. Before I determine the application of section 21(1), however, I must first decide whether the records contain "personal information" and, if so, to whom it relates. The personal privacy exemption in section 21 can only apply to records that contain "personal information" as that term is defined in section 2(1) of the *Act.*

[55] "Personal information" means recorded information about an identifiable individual, including the types listed in paragraphs (a) to (h) of the definition. The list of examples of personal information in the definition is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) of section 2(1) may still qualify as personal information.[26] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.[27] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[28]

Representations

[56] According to the archives, the records at issue contain information that fits within paragraphs (b) (medical, criminal or employment history), (d) (address), (f) (confidential correspondence), (g) (view and opinions about the individual) and (h) (name with other personal information) of the definition of "personal information" in section 2(1) of the *Act.*

[57] The archives notes that under section 2(2) of the *Act*, "personal information does not include information about an individual who has been dead for more than thirty years." According to the archives,

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[26] Order 11.
[27] Order PO-1880, upheld in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[28] Orders P-1409, R-980015, PO-2225 and MO-2344.

> The records relate to individuals who were witnesses to the incident that resulted in the death of an individual, the OPP investigation into the death of an individual and the subsequent trial of an individual in relation to the death of an individual.

[58] Further, the archives submits that since there is no evidence that the individuals identified in the records are deceased, "the information relating to individuals other than the accused in the records at issue is personal information." The archives also argues that none of the withheld information about identifiable individuals qualifies as "professional information" for the purpose of the exception in section 2(3) to the definition of "personal information." These submissions appear to be directed at establishing that the information about the witnesses and spouses of involved individuals is not "professional" information, rather than at the information relating to the OPP and other professionals who were involved in the incident and subsequent events.

[59] The appellant indicates that she is not seeking the names of witnesses, although the names and identities of the two men who were present when the murder occurred are clearly known to her. With her representations, the appellant included a letter from a local funeral home that indicates that it provided funeral services for the (main) two witnesses in December 1984 and March 2010. The appellant submits that she understands that "there is a 30 year rule" regarding access to information about deceased individuals, but one of the witnesses has been deceased for nearly that long, and both their direct and cross examination statements were released to her in another context. The appellant requests that the decision about access to the information about the two deceased witnesses be reconsidered, rather than requiring her to re-submit the request when the 30-year period is finished.

Analysis and findings

[60] Based on my review of the records remaining at issue, I find that they contain the personal information of at least seven identifiable individuals that fits within the definition of "personal information" in section 2(1) of the *Act.* This information includes, ages, family status, medical and employment history, addresses and telephone numbers, views or opinions about an individual, and names along with other personal information, thereby falling within the ambit of paragraphs (a), (b), (d), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act.*

[61] However, I also find that information about the individual who died as a result of the incident in November 1975 no longer qualifies as personal information, due to the operation of section 2(2) of the *Act*, which states:

> Personal information does not include information about an individual who has been dead for more than thirty years.

[62] There are no exceptions.[29] The enactment of section 2(2) demonstrates that the Legislature turned its mind to the issue of when an individual's privacy rights in personal information ought to cease, and determined that this should occur 30 years after death.[30] It represents a clear indication by the Legislature that the privacy protections afforded under the *Act* will not continue indefinitely.

[63] As 38 years have passed since the death of this individual, I find that any information relating to him is not personal information and cannot, therefore, be exempt under section 21(1) of the *Act.* Accordingly, where information about this individual appears in the records that are not exempt under section 19, I will order it disclosed to the appellant.

[64] In addition, there is information relating to OPP personnel, as well as medical and mortuary staff, in the records. I find that this information fits within the exception to personal information in section 2(3) which provides that: "Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." Furthermore, I am satisfied that there is nothing about that particular information that would, if disclosed, reveal something of a personal nature about the individuals.[31] Accordingly, I will also order this information disclosed.

[65] I will now review the application of section 21(1) to the personal information of the other identifiable individuals.

E. Would disclosure result in an unjustified invasion of personal privacy under section 21(1)?

[66] The archives relies on the factors favouring privacy protection in sections 21(2)(f) and (i), as well as the presumption in section 21(3)(b), in support of its position that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy.

[67] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The exceptions in sections 21(1)(a) to (e) are relatively straightforward. The exception in section 21(1)(a) (consent) has been raised in this appeal The exception in section 21(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires a consideration of additional parts of section 21.

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[29] Order P-521.
[30] Order M-731.
[31] Orders P-1409, R-980015, PO-2225 and MO-2344.

[68] Sections 21(2) to (4) provide guidance in determining if disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[69] If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

[70] A presumption can, however, be overcome if the personal information is found to fall under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 21 exemption.[32]

Representations

[71] According to the archives, the information in the records that could be disclosed to the appellant, either pursuant to the consent exception in section 21(1)(a) or "where the information was determined not to constitute an unjustified invasion [of privacy]," has been disclosed.

[72] The archives submits that section 21(3)(b) applies to the correspondence, memoranda, statements and other documents at pages 6-7, 9, 11-15, 59, 63-64, 73-74, 77-78 and 87[33] because the information contained in those records was compiled and is an "identifiable part of an OPP investigation … into the murder of an individual." The archives notes that the records were all created and gathered as part of that investigation and do not reach temporally beyond the time period of the investigation. The archives refers to three orders in which the presumed invasion of privacy provision in section 21(3)(b) was found to apply to records similar to those at issue in this appeal: Orders MO-2062, PO-2473 and PO-2448.

[73] Respecting the factors in section 21(2), the archives takes the position that paragraphs (f) and (i) are relevant to the consideration of disclosure of the pages mentioned above, and, additionally, pages 41, 55, 58, 79-81 and 85. According to the archives, the personal information in those records is "highly sensitive" for the purpose

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[32] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[33] Other pages were included in this list by the archives, but these pages are the only ones left at issue under section 21(1), in light of my findings regarding duplication and section 19.

of section 21(2)(f) because its disclosure would result in significant personal distress to those individuals, as this office has interpreted the factor. The archives notes that this factor has been held to apply to the personal information of "complainants, witnesses or suspects in their contacts with the police" (in Order P-1618) and "contained in a police occurrence report (Order MO-2075). The archives further submits that because the records relate to an investigation into criminal activity and are highly sensitive, the factor in subsection 21(2)(f) ought to be given a "high degree of weight" against disclosure in my determination.

[74] The archives also takes the position that the factor in section 21(2)(i) is relevant in this appeal because disclosure of the withheld information "would unfairly damage the reputation of the individuals who were involved in the incident resulting in the death of an individual." The archives observes that the factor in section 21(2)(i) is "triggered by unfairness, not actual presence or foreseeability of damage or harm." The archives specifically identifies that the factor is relevant regarding disclosure of the names and addresses of individuals involved in the police investigation.

[75] Referring to Order MO-2019, the archives states that this office has distinguished between the disclosure of information relating to convictions and information relating to charges for the purpose of determining unfairness under section 21(2)(i). However, since the archives received the consent of the individual against whom the investigation and charges were directed, these submissions are not set out further here. Additionally, the archives relies on Order PO-2657, where this office found section 21(2)(i) to be a relevant factor in determining the disclosure of personal information of individuals whose legitimacy as lottery winners was questioned. The archives suggests that section 21(2)(i) should also be applied to the weighing of factors considered in determining the disclosure of the personal information of other individuals identified in this particular criminal investigation, "as to their possible involvement in unlawful acts…"

[76] In conclusion, the archives submits that the assessment of criteria in this appeal favour non-disclosure. Specifically, the archives states that:

> The highly sensitive nature of the information, the expectation of confidentiality and the possibility of reputational harm lead to the conclusion that disclosure of the records would be an unjustified invasion of personal privacy under the mandatory exemption at subsection 21(1) of the *Act.*

[77] The appellant states that she is not expecting to obtain, nor is she seeking, the names of witnesses. She also states that she does not wish to obtain "the sources of information supplied throughout the course of this investigation" but does seek "any evidence, statements, or documentation of any kind; including anything of a graphic nature (ie: pictures that are on file)…" The appellant emphasizes that she is only interested in the "facts" and that:

> If it means having certain information (ie; names) blacked out, please feel free to do so, but reconsider my request and release the remainder of the file to me for my own use.

[78] The appellant submits that the information on file should be made available to the public and that a relevant factor to be considered is the "length of time since this incident took place (November 1975)."

Analysis and findings

[79] I will begin by addressing the consent provision in section 21(1)(a) of the *Act*. This section provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[80] In this appeal, the archives received a written consent from the individual to whom the investigation related. The archives suggests in its representations that all information in the records that could be disclosed to the appellant pursuant to this consent has been released. I disagree.

[81] My review of the information remaining at issue reveals that personal information about this individual remains undisclosed. Under section 10(2) of the *Act,* the archives was obligated to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Since consent for the purpose of section 21(1)(a) was provided to the archives (with a copy submitted to this office), I will order the disclosure of any personal information about this individual that remains withheld. For clarity, this disclosure will include information that represents the views and opinions of other individuals about the individual who provided his written consent, as contemplated by paragraph (g) of the definition of "personal information" in section 2(1) of the *Act.*

[82] However, the archives also denies access to the remaining personal information (about other identifiable individuals) based on the presumption against disclosure in paragraph (b) of section 21(3), 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;

[83] I accept the archives' submission that the personal information of other individuals on pages 6, 7, 9, 11-15, 59, 63-64, 73-74, 77-78 and 87 was compiled by the OPP as part of an investigation into a fatal incident in order to determine the laying of charges under the *Criminal Code of Canada*. For the presumption to apply, only an investigation into a possible violation of law is required;[34] in this case, criminal proceedings were, in fact, commenced. I find, therefore, that section 21(3)(b) applies to the personal information about other identifiable individuals on these pages.

[84] As stated previously, the application of section 21(3)(b) to various portions of the records can be overcome if the personal information is found to fall under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record that clearly outweighs the purpose of the section 21 exemption.[35] In this appeal, the public interest override in section 23 has not been raised and, in my view, it does not apply. Additionally, none of the exceptions in section 21(4) apply, including the "compassionate grounds" exception in section 21(4)(d)."[36]

[85] I find, therefore, that section 21(3)(b) applies to the undisclosed personal information remaining at issue on pages 6, 7, 9, 11-15, 59, 63-64, 73-74, 77-78 and 87 and that it is exempt under section 21(1), subject to my findings under Absurd Result, below.

[86] The archives also withheld personal information from pages 41, 55, 58, 79-81 and 85 based on the privacy-protecting factors in section 21(2)(f) and (i). In its summary statement, the archives also refers to "the expectation of confidentiality" as weighing in favour of privacy protection. However, this apparent allusion to section 21(2)(h) is the sole reference to that factor. The archives did not expressly rely on the consideration in its decision and did not otherwise support its application, and I find that it does not apply.

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[34] Orders P-242 and MO-2235.

[35] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[36] Section 21(4)(d) can only be invoked in circumstances where the requester is seeking another individual's personal information as a "close relative." Section 21(4)(d) states: "Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it, …discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons." Where this provision applies, disclosure of that information would not be an unjustified invasion of personal privacy and the information is not exempt under section 21(1). See Orders MO-2237, MO-2245 and MO-2292.

[87] In support of its position that the factor in section 21(2(f) applies to the information remaining at issue, the archives relies on Interim Order PO-2802-I, a decision of Adjudicator Steven Faughnan. In the relevant portion of that order, Adjudicator Faughnan was reviewing the decision of the Public Guardian and Trustee to deny access to the identity of beneficiaries. As the archives submits, the PGT did, in fact, find the factor in section 21(2)(f) relevant. However, as the adjudicator noted there,

> This is because it would leave them open to being contacted by the appellant in connection with concerns over the PGT's administration of the estate, a consequence unlikely to be expected or welcome. Furthermore, I find that disclosure of the personal information at pages 95 to 97 would also qualify under that section [see in this regard Order PO-1936]. The balance of the information remaining at issue in this appeal, in my view, is not the type of information that would qualify as "highly sensitive" under section 21(2)(f).

[88] In my view, the factor in section 21(2)(f) cannot be applied for the same reasons here. Obviously, it would not be possible for the appellant to contact the two witnesses who died in 1984 and 2010. However, I note that there are several other identifiable individuals whose names and other personal information appears in the records, and I have no evidence that these individuals are deceased. In the circumstances, I accept that the disclosure of the limited personal information of these individuals may result in significant personal distress to them for reasons similar to those provided in Interim Order PO-2802-I and, therefore, qualifies as "highly sensitive" under section 21(2)(f). Given the limited nature of that personal information, however, I find that it attracts only low weight against disclosure of the information that I have not already found to be exempt under section 21(3)(b).

[89] As for the factor in section 21(2)(i) respecting unfair damage to reputation, I find that it does not apply. Much of the archives' representations were taken up with arguments about disclosure of the personal information of the charged individual. However, this is the same individual whose written consent to disclosure was provided to the archives. His personal information will already be disclosed pursuant to section 21(1)(a) and the terms of this order accordingly. The factor cannot apply to his personal information.

[90] As for the application of the factor in section 21(2)(i) to the personal information of other individuals, I am not persuaded that it applies to the personal information of the two deceased witnesses, or any other identifiable individuals. The archives submitted that section 21(2)(i) should also count against the disclosure of the personal information of other individuals identified in this particular criminal investigation, "as to their possible involvement in unlawful acts…." I reject this argument. There is no suggestion of wrongdoing by other individuals, including the two deceased witnesses,

who provided information to the OPP, or who were incidentally involved in this investigation in a personal capacity. Therefore, I find that the factor in section 21(2)(i) does not apply.

[91] I am cognizant of the fact that the appellant has indicated that she does not seek access to the names of individuals listed in the records. However, there are reasons for the disclosure of these names and, possibly, other personal information.

[92] First, I am of the view that another factor is relevant to my decision. The factors listed in section 21(2) of the *Act* are not exhaustive. Unlisted factors may also be relevant, depending on the particular circumstances of an appeal. One such factor that has been recognized in a number of past orders is a diminished privacy interest after death.[37] The key determination in considering the relevance and effect of this circumstance is the nature of the record that is under consideration.[38]

[93] As discussed earlier in this order, by section 2(2) of the *Act*, the Legislature has made it clear that information about an individual remains his or her personal information until 30 years after death, signalling a strong intention to protect the privacy rights of deceased persons. The rationale for the unlisted factor was introduced by former Commissioner Tom Wright in Order M-50, as follows:

> Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

[94] Past orders have held that the privacy interests of an individual diminish with their death and that these interests are further reduced with the passage of time.[39] In Order PO-1936, where the individual had been deceased for only two years, privacy interests were only moderately reduced. By contrast, the privacy interests of individuals who had been deceased for more than 20 years were significantly decreased in Orders PO-1717 and PO-1923.

[95] In the circumstances of this appeal, I accept that the unlisted factor of a "diminished privacy interest after death" applies upon the death of the individual to whom the information relates. Therefore, the factor weighs in favour of disclosure of

[37] Orders M-50, PO-1717, PO-2877 and PO-3060.
[38] Orders PO-1936 and PO-2802-I.
[39] Orders PO-1717 and PO-1936.

the personal information relating to the two witnesses whose deaths in 1984 and 2010 have been verified. With regard to the former individual, the length of time being so close to the statutory 30 year limit on whether information fits within the definition of personal information leads me to find that this factor weighs significantly in favour of disclosure. As the latter individual has only been deceased for four years, I find that the factor for diminished expectation of privacy attracts moderate weight in favour of disclosure.

[96] With regard to the personal information relating to the other witnesses or individuals otherwise involved, I have been provided with no evidence that these individuals are deceased. In the absence of such evidence, I must assume that these individuals are still living. There being no evidence that these other individuals are deceased, I find that the unlisted factor of "diminished privacy interest after death," does not apply to their personal information.

[97] In the circumstances of the present appeal, the inherent privacy interests of the two deceased witnesses must be balanced against the unlisted factor which I have found lessen the weight of any privacy interests and favour disclosure. In weighing these competing interests and considering previous orders, I have concluded that the factors favouring disclosure are stronger. Therefore, I find that disclosure of certain information from the witness statements would not constitute an unjustified invasion of privacy, and the exception in section 21(1)(f) applies.

[98] Of further relevance in the circumstances of this appeal is the absurd result principle. Consideration of the potential for an "absurd result" arises, in part, due to the inconsistency of the archives' access decisions. In particular, in its representations, the archives opposes the release of certain personal information that has already been disclosed to the appellant. For example, while the archives' submissions refer to the withheld records containing the names and addresses of individuals involved in the police investigation, my review of the index of records and the October 2012 and February 2013 revised decisions demonstrates that this same information was disclosed, among other forms, through release of all of the witness subpoena records.

[99] According to the absurd result principle, whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[40] One of the grounds upon which the absurd result principle has been applied is where the information is clearly within the requester's knowledge.[41]

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[40] Orders M-444 and MO-1323.
[41] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

[100] In this section, I am concerned with certain details or personal information contained in records such as the Criminal Investigation Branch memo and witness statements, including the names and addresses of the witnesses (in 1975). I have considered the personal information in the records and, in my view, much of this information is within the appellant's knowledge in that it was provided to her through disclosure of the preliminary inquiry transcripts relating to this criminal proceeding. Furthermore, as noted above, certain information has already have been disclosed to her through this appeal. For example, while the subpoenas for four witnesses and affidavits of service relating to them were disclosed in full to the appellant by the February 2013 revised decision, the archives denies access to the very same information where it appears elsewhere in the records. Accordingly, I reject the archives' position that disclosure of this specific information would result in an unjustified invasion of another individual's personal privacy under section 21(1), whether or not any of the presumptions in section 21(3) apply. Under the circumstances, therefore, I find that refusing to disclose this specific information to the appellant would lead to an absurd result.[42]

[101] Therefore, I will order the archives to disclose this information, along with the other information that I have already found to fall outside of section 21(1) and the other exemptions.

F: Did the archives exercise its discretion under section 19?

[102] Sections 14 and 19 are discretionary. The archives had the discretion to disclose the withheld portions of the records, even if they qualified for exemption. This is the essence of a discretionary exemption. As I have upheld the archives' decision to deny access, in part, under section 19 only, I will now consider its exercise of discretion under that exemption.

[103] On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the archives erred in exercising its discretion where, for example, it appears to have done so in bad faith or for an improper purpose, where it takes into account irrelevant considerations, or where it fails to take into account relevant considerations. In such a case, I may send the matter back to the archives for an exercise of discretion based on proper considerations. However, I may not substitute my own discretion for that of the archives.[43]

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[42] Orders PO-1679 and MO-1755.
[43] See section 54(2) of the *Act* and Order MO-1573.

[104] With the inquiry documentation on this issue, I provided the parties with a list of considerations that were possibly relevant, noting that not all those listed will necessarily be relevant, and additional unlisted considerations may also be relevant.[44]

[105] The archives maintains that it exercised its discretion appropriately and it outlines the initial and later disclosures made to the appellant during the appeal, including at the adjudication stage. From the list of relevant considerations, the archives excerpted the following five and explained the relevance of each in the circumstances of the appeal:

- the purposes of the *Act*, including the principles that information should be available to the public, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected. The archives submits that it made additional disclosures in recognition of this balancing;

- the appellant is not seeking her own personal information;

- the nature of the information and the extent to which it is significant or sensitive to the institution. The archives refers, in particular, to the criminal investigation and prosecution context in which the records were created;

- the age of the information. The archives maintains that it considered the age of the records in reconsidering its access decisions and disclosing as much information to the appellant as possible, while protecting a limited amount of sensitive information; and

- whether the requester has a sympathetic or compelling need to receive the information. The archives indicates that it considered the position of the appellant in relation to the main individual involved in this incident and released additional information to her accordingly.

[106] As suggested above, the appellant's representations candidly and descriptively outline her reasons for seeking the information at issue, which effectively convey a sympathetic and compelling need to access the information in the file. She also refers to the age of the information, suggesting that this ought to be a relevant consideration in favour of the archives reconsidering, or re-exercising it discretion to disclose further information to the public, or at the very least, to her for her own purposes.

[44] Orders P-344 and MO-1573.

Findings

[107] To begin, I accept that the appellant's need to receive the information at issue in this appeal is sympathetic and compelling and that her reasons for seeking access are genuine. On the other hand, I accept that the archives considered the circumstances surrounding the request, including the appellant's position, and the purposes of the *Act* in choosing to exercise its discretion not to disclose the information that is subject to exemption under section 19.

[108] I am mindful that additional information that I did not find exempt will be disclosed to the appellant pursuant to the terms of this order. I note that the archives in fact re-exercised its discretion during the mediation and adjudication stages of the appeal and granted additional access to the information in the records. Further, even though I am upholding the archives' exemption claim under section 19 in relation to the Crown brief, I note that large portions had previously been disclosed to the appellant, through the two revised decisions. Moreover, I find the purpose of the solicitor-client privilege exemption to be germane in this context. I have specifically considered the rationale behind the rule that there should be no generalized public access to the Crown's work product even after the case has ended, as outlined extensively earlier in this order.[45]

[109] In the circumstances, I am satisfied that the archives properly exercised its discretion under section 19 in deciding not to disclose the Crown brief, and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant factors. I see no basis upon which to disturb the archives' exercise of discretion, and I uphold its decision to deny access to the undisclosed portions of the Crown brief under section 19.

ORDER:

1. I uphold the archives' section 19(b) exemption claim, only with respect to the Crown briefs at pages 89-167 and 168-252.

2. I uphold the archives' section 21(1) exemption claim, only in relation to small portions of the other witnesses' personal information contained throughout the records. For the sake of clarity, I have highlighted the portions of the records that ought **not** to be disclosed in orange on the copies provided to the archives with this order.

3. I order the archives to disclose to the appellant the non-exempt portions of the records by **April 23, 2014** but not before **April 16, 2014**. This includes the

[45] *Big Canoe, 2006, supra.*

personal information of the individual for whom consent was provided under section 21(1)(a) and information relating to the other involved individuals.

4. In order to verify compliance with this order, I reserve the right to require the archives to provide me with a copy of the records disclosed to the appellant.

Original Signed By: March 17, 2014
Daphne Loukidelis
Adjudicator