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

ORDER P-237

Appeal 900066

Ministry of the Solicitor General

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O R D E R

BACKGROUND:

On November 14, 1989, the requester submitted a request to the Ministry of the Solicitor General (the "institution") for access to
a copy of an Ontario Provincial Police (OPP) report relating to an investigation referred to in an OPP news release dated September 12, 1989.

The institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") advised the requester that the request might affect the interests of other individuals (the "affected parties") and therefore these individuals were being given the opportunity to make representations concerning disclosure of the record. The institution told the requester that it would make a decision by January 20, 1990 as to whether or not it would disclose the record.

The institution notified five affected parties on December 22, 1989 pursuant to section 28 of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"). The affected parties were given severed versions of the record.

Three of the affected parties responded to the institution's notification. One gave his consent to the release of the information; the other two requested that the information not be released.

On January 16, 1990, the Co-ordinator responded, under her own signature, to the requester. She advised him that the institution had decided to grant partial access to the record. As the affected parties had 30 days to appeal this decision, the requester was told that he would be contacted on or before February 16, 1990 to arrange for access.

The requester was not contacted by the institution by that date, nor did any of the affected parties appeal the institution's decision to grant partial access. Consequently, on February 19, 1990, the requester again wrote to the Co-ordinator asking when the institution intended to grant partial access.

On that same date, February 19, 1990, the requester appealed the decision of the institution. In his letter of appeal the appellant stated:

> I enclose a copy of a letter dated January 16th, 1990 from the Ministry of the Solicitor General which may have been intended to constitute a notice pursuant to Section 28(8) of the **Freedom of Information Act**. This letter fails to contain the required notice regarding my own right of appeal and for that reason alone, probably cannot constitute the statutory notice.
>
> In any event, by this letter I wish to give you notice that I wish to appeal the decision referred to in the enclosed letter. Again, it is not clear to me whether the decision referred to was made by the "head" of the Ministry or bysome person to whom he may have delegated certain of his powers or duties.

On February 22, 1990, notice of the appeal was given to the institution and the appellant.

By letter dated March 8, 1990, the Executive Director, Administration Division of the institution wrote a letter to the appellant informing him that he now felt that it was appropriate to deny access to the record in its entirety. He claimed that the record was a report prepared in the course of law enforcement and would therefore be exempt from disclosure pursuant to subsection 14(2)(a) of the Act. He also indicated that he took into account sections 13, 19 and 21 of the Act in making his decision.

After receiving the March 8th letter, the appellant wrote to this office enclosing a copy of the aforementioned letter. In his letter the appellant stated:

> ...
>
> Without prejudice to any of my rights, would you please regard this letter as my notice of appeal from the decision referred to in the enclosed letter [the institution's letter of March 8, 1990] if, indeed, it does contain a decision. In particular, it may be that I will seek to require compliance with the earlier decision of the Ministry to provide partial access to me.

The record in question and all relevant correspondence was obtained and reviewed by the Appeals Officer. In the course of investigating the circumstances of this appeal and exploring avenues of settlement the Appeals Officer met with

representatives of the institution and had several telephone conversations with the appellant.

The Appeals Officer asked the representatives of the institution if they would reconsider their March 8, 1990 letter and disclose to the appellant the information that they had intended to disclose pursuant to the letter of January 16, 1990. This was not acceptable to the institution.

The appellant was contacted and advised of the above. He maintained that his appeal related to both the initial decision of the institution to refuse to disclose a portion of the record and the March 8, 1990 letter which advised him that he would not receive the part of the record which the institution had previously indicated it would disclose to him. He felt that, since no affected party appealed the initial decision, he was entitled to receive the part of the record that the institution had originally decided to disclose.

The appellant also raised the issue of the validity of the delegation of authority to make a decision under the Act. He asked the institution to produce for his review a copy of the head's delegation to the individuals who made the decisions contained in the two decision letters. A copy of the delegation was obtained by the Appeals Officer and sent to the appellant. After reviewing the delegation document the appellant stated that the delegation did not satisfy the requirements of the Act since the officials of the institution who signed both decision letters were not mentioned by name in the document and the head who delegated her power was no longer the head when the decisions being appealed were made.

A mediated settlement could not be effected in this matter. The parties indicated that they were content that the matter proceed to an inquiry with the issues to be decided by the Commissioner.

Written representations were received from the appellant and the institution.

While preparing the order in this appeal, I was advised that, because of a change in circumstances, the institution wished to reconsider its decision of March 8, 1990. A representative of the institution contacted this office and informed the Appeals Officer that it was possible that a settlement of the appeal might be reached. Accordingly, I delayed the issuance of my order to give the institution the opportunity to complete its settlement initiatives.

As a result of the changed circumstances, the institution withdrew the exemptions claimed pursuant to subsection 13(1) and section 19 of the Act. At this point it maintained that subsection 14(2)(a) of the Act applied to exempt only one short phrase in the record from disclosure. In subsequent written correspondence to this

office, the Co-ordinator indicated that the institution was now relying on subsection 21(3)(b) to deny access to this phrase. The appellant was advised of the general nature of this severance and indicated that he was not interested in pursuing the disclosure of this phrase.

The institution requested that this office attempt to mediate the outstanding section 21 personal privacy issues. The

institution identified five individuals whose privacy interests might be affected by the disclosure of the record.

The Appeals Officer contacted the affected parties who had not previously consented to disclosure. Three of the affected parties declined to consent to the release of their personal information. The fourth did not express an opinion either way. The Appeals Officer also contacted another individual who had not yet been notified by the institution or this office. This individual gave his consent to the disclosure of his personal information contained in the record.

As a mediated settlement of all issues arising in this appeal could not be effected, I resumed my inquiry.

On April 25, 1991, a Supplementary Notice of Inquiry was sent to the appellant, the institution and the four affected parties who had declined to consent to the disclosure of their personal information contained in the record. Further written representations were received from the institution, the appellant and two of the affected parties. The institution limited its representations to the question of whether information in the record pertaining to the affected persons is personal information.

ISSUES:

As a result of the extensive mediation and negotiation that occurred throughout the course of this appeal, the issues arising in the appeal have been narrowed to the following:

A. Whether the head's powers under the Act were properly delegated to the identified decision-makers.

B. Whether the record contains any information that qualifies as "personal information", as defined in subsection 2(1) of the Act.

C. Whether disclosure of the "personal information" would constitute an unjustified invasion of the personal privacy of the individuals to whom the personal information relates.

D. Whether there is a compelling public interest in the disclosure of the record or part of the record that clearly outweighs the purpose of the exemption provided by section 21 of the Act.

SUBMISSIONS/CONCLUSION:

ISSUE A: Whether the head's powers under the Act were properly delegated to the identified decision-makers.

In his initial written submissions dated June 18, 1990, the appellant challenged the authority of the individuals who made the decisions in response to his request. He stated his position as follows:

> In response to my request for access to the report I was entitled to the personal decision of the Solicitor General or of such a person to whom he may have properly delegated his authority under the Act. Having regard to the importance of my request for access, I was entitled to be given strict compliance with the provisions of the Act. The Solicitor General was not entitled to rely on
> a blanket delegation of authority by which one of his predecessors by personal decree effectively sought to substantially alter an essential provision of the Act.

In my view, this argument raises two issues:

(1) Whether the delegation of powers and duties must come from the individual who is the "head" of the institution at the time the decision is made; and

(2) Whether the delegation must refer to the delegatees by name.

It is the head of an institution who is charged with the decision-making responsibilities under the Act. "Head" is defined in subsection 2(1) of the Act as follows:

> "head", in respect of an institution, means,
>
> (a) in the case of a ministry, the minister of the Crown who presides over the ministry, and
>
> (b) in the case of any other institution, the person designated as head of that institution in the regulations;

Therefore, for the purposes of the Act, the "head" of the Ministry of the Solicitor General is the Solicitor General.

Pursuant to subsection 62(1) of the Act, the head may delegate his or her powers and duties. Subsection 62(1) reads as follows:

> A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions,

> conditions and requirements as the head may set out in the delegation.

On January 4, 1988, the then Solicitor General, Joan Smith, executed such a delegation. The delegation reads as follows:

> Pursuant to section 62(1) of the Freedom of Information and Protection of Privacy Act, 1987, I hereby delegate the powers and duties under the Act as set out in the attached Schedule, to the officers or employees in the institutions headed by me as identified by the position titles indicated, and defined above, including the incumbents of the positions and the officers or employees who have been appointed from time to time in an acting capacity to the positions, such delegations to take effect on January 1, 1988.

Attached as Schedule A to the delegation is a list of decision-making sections of the Act, the power or duty described therein and the title of the position-holder who received the delegation. At the time the decisions currently under appeal were made, Steven Offer held the office of Solicitor General.

In Omeasoo v. Canada (Minister of Indian Affairs and Northern Development), (1988, F.C.T.D.), a case decided under the provisions of the federal Access to Information Act, S.C. 1980-81-82-83, c.111
(the "Access Act"), the same issue arose as to the validity of the delegation from the head of a government institution to an officer or employee of the institution. In that case, one of the arguments of the applicant was that the decision not to

disclose records should be reversed, since it was not, inter alia, made by a properly designated official under section 73 of the Access Act. That section reads as follows:

> The head of a government institution may by order designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

In that case, the decision to disclose was made by the Director General of Finance of the respondent institution. By order dated July 8, 1983, the then Minister of Indian and Northern Affairs, the Honourable John Munro, designated officials holding the position of Director General to decide, pursuant to subsection 28(5)(b) of the Access Act, whether to disclose requested records following third party representations. At the time the decision was made to disclose, there was a new Minister of Indian and Northern Affairs, the Honourable David Crombie. The appellant alleged that because the designating order was not renewed under the new Minister's signature, the Director was not authorized to make a decision under subsection 28(5)(b). The issue was then whether a properly authorized delegation would survive a change in Ministers.

The court in Omeasoo followed the decision of the Ontario Divisional Court in Re Putnoki and Public Service Grievance Board,
[1975] 56 D.L.R. (3rd) 197, in which it was decided that a consent given by a previous Minister continued to be valid until revoked or varied by an incoming Minister. The Divisional Court stated in that case:

> While it is undoubtedly good practice that a new Minister should, immediately upon assuming office, ensure that he exercises his authority in respect of all necessary consents and delegations under the statutes which he administers, previously existing authorities granted or conferred by his predecessors continue until such time as he is able to put his mind to endorsing or otherwise disposing of them. To hold otherwise would be to cause great difficulties in the administration of statutes
>
> during the period of transition in the normal transfer of portfolios from one Minister to another. Such acts represent the authority of the office, not the individual, and they do not cease to have effect because the incumbent changes, unless the statute otherwise declares.

Applying this reasoning to the facts of this appeal, I am of the view that the individuals who made the decisions did have a delegation of authority from the Solicitor General and the fact that this delegation was from a previous Solicitor General does not affect the validity of the delegation.

It is also my opinion that a proper delegation need not refer to the delegatees by name. The following provisions of the Interpretation Act, R.S.O. 1980, c. 219 are applicable:

> 27. In every Act, unless the contrary intention appears,
>
> (f) where a power is conferred or a duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the holder of

> the office for the time being;
>
> ...
>
> (m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to him by his name of office, include his successors in office and his lawful deputy.

In my view, it is clear from these provisions that the powers and duties are vested in the holders of various offices and not the individuals who may occupy an office at any given time. Accordingly, I am of the view that the individuals who made the decisions with respect to the appellant's request had a delegation of authority from the head that satisfies the requirements of subsection 62(1) of the Act.

ISSUE B: Whether the record contains any information that qualifies as "personal information", as defined in subsection 2(1) of the Act.

Before deciding whether an exemption under subsection 21(1) of the Act applies, I must determine whether the information in question falls within the definition of "personal information" contained in subsection 2(1) of the Act.

Subsection 2(1) states, in part:

> In this Act,

"personal information" means recorded information about an identifiable individual, including,

...

(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,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(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;

In my view, there is information contained in the record that falls within the definition of personal information. This information includes information about the four affected parties who have not given their consent to the disclosure of their personal information.

ISSUE C: Whether disclosure of the "personal information" would constitute an unjustified invasion of the personal

privacy of the individuals to whom the personal information relates.

I found under Issue B that the record contains some "personal information" as defined in the Act. Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act prohibits, except in certain circumstances, the disclosure of this personal information to any person other than the individual to whom the information relates.

One such circumstance is contained in subsection 21(1)(f) of the Act which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

The considerations outlined in subsections 21(2) and (3) of the Act assist in the determination of whether disclosure of personal information would constitute an unjustified invasion of privacy.

Subsection 21(2) provides some criteria to consider in making this determination. Subsection 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

One of the affected parties submits that the presumption of an unjustified invasion of personal privacy contained in subsection 21(3)(b) applies. Subsection 21(3)(b) states:

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

Considering the circumstances under which this record was created, the steps taken during the course of the investigation and the materials reviewed by the OPP officers, it is my view that the subsection 21(3)(b) presumption applies. The record describes an investigation into allegations of certain criminal offences having been committed by the individuals whose personal information is at issue.

In my view, the fact that no criminal proceedings were commenced against these individuals does not negate the applicability of subsection 21(3)(b). The presumption in subsection 21(3)(b) only requires that there be an investigation into a possible violation of law. Thus, there is a presumption raised that disclosure of the

personal information would result in an unjustified invasion of the personal privacy of the four affected parties who have not given their consent to the disclosure of their personal information.

Once it has been determined that the requirements for a presumed invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption. Subsection 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under subsection 21(3). In my view, the record does not contain any information that pertains to subsection 21(4). Consequently, none of the circumstances listed in subsection 21(4) operate to rebut the presumed unjustified invasion of privacy under subsection 21(3).

In Order 20, dated October 7, 1988, former Commissioner Sidney B. Linden stated that "...a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual."

In Order 99, dated October 3, 1989, Commissioner Linden discussed whether the list of criteria under subsection 21(2) was exhaustive. At pages 20 - 21 he stated:

> The subsection lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria.

I agree with Commissioner Linden that the circumstances of each case should be examined to identify any factors under subsection 21(2), listed or unlisted, that might be relevant in the

determination of whether disclosure of personal information constitutes an unjustified invasion of personal privacy.

While the appellant has not specifically raised the issue of the application of subsection 21(2)(a) in his written representations, it is clear that he is referring to the substance of that subsection in his most recent representations. Subsection 21(2)(a) reads as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

The appellant claims that what is really at issue in this case is the conduct of the OPP in reviewing the actions of the Metropolitan Toronto Police. It is his position that, because there is a conflict between the court's findings on the matter and those of the OPP, the public has a real interest in scrutinizing the investigation conducted by the OPP. In addition, he claims that because the press release issued by the OPP upon the completion of the investigation indicated that the report exonerated the officers, it is inappropriate that the entire report not be released to the public. He claims that the disclosure of the evidence upon which the report was based is necessary to protect the integrity of both police forces involved and to advance confidence in the judicial system.

In addition, his position is that the widespread public interest in this case is reflected in the considerable media attention which it continues to attract. He states:

> If the report is not ultimately produced, public confidence in the administration of police activities in Ontario will suffer greatly and the entire criminal justice system will be seriously adversely affected.

One of the affected parties maintains that there is no public interest involved in the release of this information. He maintains that the appellant has a personal interest in having this information released.

The other affected party who submitted written representations on this issue claimed that his rights to privacy far outweighed any public interest in disclosure. His position is that the public interest has already been satisfied in that the public has already been informed of the allegations and the fact that the investigation exonerated the individuals involved.

In my view, the facts of this case are unusual. The OPP investigation which culminated in the creation of the record was prompted by the public statements of a judge adversely commenting on the conduct of certain Metropolitan Toronto Police Officers. These comments were made in open court at the conclusion of the trial of a named individual. Not only are these statements publicly available in the form of a transcript of the oral judgment, they were given wide coverage in the media. While any notoriety associated with the Judge's statements does not change the character of the information contained in the OPP report (i.e. it is still personal

information), nonetheless the public nature of the statements has relevance to the issue of whether the disclosure of the information is an unjustified invasion of personal privacy.

At the conclusion of the OPP investigation, the then Attorney General made a public statement describing only the conclusion of the investigation. In addition, the news release issued by the OPP
on September 12, 1989, identified only the conclusion of the investigation. The statements of the Attorney General and those contained in the news release which only described the conclusion of the investigation have led to speculation about the manner in which this conclusion was reached. Media reports have continued to comment on the discrepancy between the Judge's comments on the conduct of the Metro Police Officers and the conclusion of the OPP that their actions did not warrant the laying of any criminal charges.

At present, the four affected parties do not wish to be the subject of further public attention. They believe that the matter has attracted enough media attention and that, since it was reported that they were exonerated, any disclosure of their personal information would constitute an unjustified invasion of their personal privacy. While I appreciate these concerns, the fact of the matter is that, at least in the short term, the matter will most probably continue to be reported in the press.

As the institution has now exercised its discretion and withdrawn its claim for exemption under subsection 14(2)(a) (law enforcement), much of the report will be disclosed in any event. In addition, most of the personal information still at issue is already available to the public. In my view, until the public

has had the opportunity to assess the matter in full, there will continue to be concerns and speculation about this investigation, the OPP, the Judge who made the initial statements and the affected parties. Disclosure of all of the facts may well serve to dispel the speculation that has surrounded this matter.

In my opinion, having regard to the circumstances outlined above, subsection 21(2)(a) applies in this case.

In addition to the criterion identified in subsection 21(2), in very unusual circumstances, disclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution. This could be considered as an additional unlisted circumstance to be taken into consideration under subsection 21(2).

In my view, the release of the record with the personal information severed would only lead to conjecture as to what was being withheld and therefore would not assist in ensuring public confidence in the integrity of the institution. To accomplish that goal I feel that it is necessary to release the record in its entirety.

In reaching my conclusion I have also reflected upon the very special position that the police occupy in the community. Police officers have been entrusted by society to enforce the law. In order to properly perform their duties, police officers are given significant powers which other members of the public do not possess e.g. powers of detention and arrest. In my view, in return for society granting police officers such a special position the public has certain expectations. One of these

expectations is that within reasonable limits, the public should be aware of how the police are carrying out their duties.

I have also considered the nature of the personal information itself. Although I have found that the information in issue is personal information as defined in the Act, I do note that the information does not relate to the "private lives" of the four affected parties. The information specifically relates to events that transpired during the course of the four affected parties' performance of their professional duties.

Having carefully considered all of the circumstances of this appeal I find that the presumption contained in subsection 21(3)(b) has been rebutted. In my view, any invasion of the privacy of the four affected parties is outweighed by the desirability of subjecting the institution to public scrutiny and ensuring public confidence in the integrity of the institution. Although the disclosure of the information is, to a degree, an invasion of the four affected parties' privacy, in the unusual circumstances of this case I find that it is a justified, rather than an unjustified invasion. It is always a difficult task to balance the right of access with the right to privacy. In the circumstances of this appeal, I believe that the appropriate balance is in favour of access.

As I have decided that the disclosure of the personal information would not be an unjustified invasion of personal privacy, it is unnecessary for me to address Issue D.

ORDER:

1. I order the head to disclose all of the record with the exception of the severed phrase on the page numbered by the institution as FI0007. This phrase is highlighted on the copy of the record provided to the institution by this office.

2. I further order the head not to disclose that portion of the record described in provision 1 of this Order until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give the affected parties sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided that notice of an application for judicial review has not been served on the institution or my office within this thirty (30) day period, I order that the record as described in provision 1 of this Order be disclosed within thirty-five (35) days of the date of this Order.

3. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: August 6, 1991
Tom Wright Date
Commissioner