



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

ORDER 170

Appeal 880222

Ministry of the Attorney General



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O R D E R

INTRODUCTION

This appeal arises under section 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which enables the person who has made a request for access to information from a government institution covered by the Act to exercise a right of appeal to the Information and Privacy Commissioner from any decision made by the head of the institution in question with respect to the request. On July 27, 1989, the undersigned Inquiry Officer received from the Commissioner a delegation of the power to conduct inquiries and make Orders under the Act with respect to this appeal.

The present appeal arises in the following circumstances. Two formal requests, dated January 22, 1988, were made by an individual (the "requester") for access to certain kinds of information held by the Ministry of the Attorney General. The first request sought access to information in the following terms:

Any and all information retained by this Ministry on [the requester] in all information banks or records.

Your Ministry and others begun to collect information on me in March 1983 and without knowing the extent of your files and locations, it seems inappropriate to place the onus on me to identify where files might be retained, as some of the methods of collecting information were dubious.

However, areas where something might be retained are job competitions, employment history, payroll information, grievances and applications, medical information, Ombudsman/Human Rights Commission, performance management, investigator's reports, briefing notes, inquiries, letters, memos,

correspondence, retention of newspaper articles and background material, OPP briefing notes, Deputy Minister and Minister briefing notes, etc.

Attached are copies of material showing the creation of some of the above material. Your Ministry has a copy of the Ombudsman's report dated October 30, 1986 containing 136 pages of descriptive complaints, police actions, harassment, innuendo and threats, making your task under the Freedom of Information Act easier, keeping in mind the process of creating information and documents on me has continued from 1983 to the present.

Much of the information obtained in your Ministry's witch-hunt is inflammatory, false, misleading and hearsay, constituting harassment. When all the material is collected, I will pursue correcting the misinformation. Additionally, you may wish to draw upon the OPP's 3,000 page investigator's report initiated through my actions. A copy of same is requested.

The second request sought access to information in the following terms:

Any and all information available under the Freedom of Information Act concerning events, programs, activities, newspaper accounts, internal reports, police reports, memos, letters, correspondence, briefing notes, etc. created as a result of the police investigation into the York County Sheriff's Office arising from complaints initiated in March 1983 alleging and later substantiating corruption, mismanagement, slush funding, intimidation, etc. in the Sheriff's Office, York county.

The records you maintain and keep concern senior personnel identified in newspaper accounts taking part directly in the Sheriff's probe conducted by the Ontario Provincial Police.

Records created by your Ministry's participation with the Ombudsman's office investigating fraudulent competitions, mismanagement and fraud.

For your convenience references made to an Ombudsman's report submitted to your Ministry and dated October

30, 1986 on [the requester], that report will help guide to records pertaining to the investigation of me and others in the Sheriff's Office. The Ontario Provincial Police have also produced a 3,000 page

report which the Attorney General can also refer to for help in providing the records under this Act requested.

The Ministry acknowledged receipt of these requests for access on February 4th, 1988 and, in due course, communicated its decisions concerning them to the requester. On May 31, 1988 the Ministry's Freedom of Information Co-ordinator wrote a letter to the requester in the following terms:

Further to your request under the Freedom of Information and Protection of Privacy Act, we wish to advise you that partial access to the record in question has been granted.

Access has been denied in part under section 49(a), 49(b) and 49(c) of the Act. A more detailed record of the exemptions being claimed and the person responsible for making the decisions will be provided at the time of the viewing.

This correspondence will permit you to view that part of the original record to be provided at the Human Resources Branch or the Freedom of Information Office at 18 King Street East. Please telephone this office to arrange a mutually convenient time to view the original record.

The following response to the second request was forwarded on May 30, 1988:

Further to your access request under the Freedom of Information and Protection of Privacy Act, we wish to advise you that partial access to the record in question has been granted.

The fee for this service will be \$37.25. This fee was calculated as follows:

| | | |
|-------|---|-------------|
| a) | cost of preparing the record one hour at \$24.00 per hour | \$24.00 |
| b) | photocopying costs | 11.60 |
| c) | shipping cost | <u>1.65</u> |
| TOTAL | | \$37.25 |

Upon receipt of \$37.25, the record will be released to you.

In the event, the requester decided that he would not accept the partial access to the requested material suggested by the Ministry and lodged a formal appeal to the Office of the Information and Privacy Commissioner in the following terms on June 30, 1988:

This letter is a formal appeal for access to the deleted information referred to in letters dated May 30 1988, and May 31, 1988 and signed by Ruth Maillard, Co-ordinator, Freedom of Information, Ministry of the Attorney General.

In order to reasonably assess the material for incorrect and misleading documentation or errors and omissions, the complete and unrestricted file should be accessible. Particularly, in this instance where the Ministry is accused by the Toronto Sun of providing information to "go and hang" yours truly, I attach a copy of that article to emphasize just what it is that makes it important to view all documents retained by the Ministry concerning my requests.

An Appeals Officer was assigned, in due course, to the task of investigating and attempting to mediate the issues raised by the appeal and the records in issue were received and reviewed at the Office of the Commissioner. By letters to the requester dated January 6, 1989, the Ministry provided further

clarification of the reasons for its decision concerning the two requests. With respect to the first request, the Ministry indicated that access was being denied on the basis of section 13(1), 19(1), 21(1), 22(a), 49(a), 49(b) and 49(c). With respect to the second request, the Ministry indicated that the denial of access rested upon the application of 13(1), 14(1)(b), 14(1)(c), 14(2)(a), 14(3), 19, 21(1), 22(a) and 49(a). In addition, the Ministry indicated that it believed that access to certain records must be denied under subsection 178.2 of the Criminal Code of Canada.

In an effort to narrow the issues in what promised to be a rather complex appeal, the Appeals Officer requested that the requester attend at the Ministry of the Attorney General in

order to view those records which the Ministry had indicated that it was willing to disclose pursuant to the two requests. It was hoped that that process might result in an agreement between the requester and the Ministry with respect to the appropriate treatment of some of the material subject to the appeal. Although the requester did visit the Ministry's offices for this purpose, no settlement with respect to any of the issues in dispute was thereby effected and both parties indicated that they were content to proceed to an inquiry.

An Appeals Officer's Report outlining the circumstances of the appeal and the issues in dispute was prepared on May 19, 1989, and forwarded to the parties for comment. Written submissions were filed by the requester on August 21, 1989 and by the Ministry on October 13, 1989. A meeting at which the requester was invited to make any submissions he deemed appropriate was scheduled at a date which was thought to meet the convenience of

the requester in late January 1990. The Office of the Commissioner was notified on the day scheduled for the meeting, that the requester was unable to attend. No meeting was conducted on that or on any subsequent occasion. No further written submissions have been filed by the requester.

ORGANIZATION OF THIS ORDER

The large volume of documents identified in response to this request has given rise to organizational difficulties in the preparation of submissions by the Ministry of the Attorney General and in the consideration of this Appeal. As has been previously indicated, documents subject to consideration for these purposes have come from a variety of files from a variety of locations with multiple copies of documents sometimes appearing in several of those files. Further, with respect to any particular document, it is possible that the Ministry has argued that more than one and, indeed, several of the exemptions to the disclosure principle in the Act apply to all

of or portions of the document in question. The approach taken by the Ministry in organizing its submissions was to group the documents together in categories identified by the particular sections of the Act which, in the Ministry's view apply to the documents in question. Thus, all documents with respect to which an argument is made by the Ministry for exemption under 13 have been grouped together, as have documents with section respect to which other exemptions have been claimed. These groups of documents have been bundled together, in the numerical order of the sections in question, in a large multi-volume document referred to by the Ministry as the Appeal Record. As has been indicated, many documents are the subject of claims for

exemption under more than one section of the Act. Accordingly, as one reads through the Appeal Record, references are made under subsequent section headings to documents which are reproduced in earlier sections of the Appeal Record. The Ministry's submissions are then contained in a separate document which proceeds to consider the exemptions claimed in their application to particular documents in the order in which the documents are reproduced in the Appeal Record.

The organization of the discussion in this Order follows a similar pattern. Thus, the Ministry's submissions with respect to the application of a particular section are considered with respect to each of the documents concerning which the exemption is claimed. The discussion then proceeds to consider the application of the next section of the Act, in numerical order, to the documents for which an exemption is claimed by the Ministry and continues until the application of each of the statutory provisions relied on by the Ministry has been considered with respect to each of the documents contained in the Appeal Record.

The fact that more than one exemption is often claimed with respect to a particular document leads to further organizational matters that must be noted. With respect to such documents, the fact that it may be determined in the course of this Order that a particular exemption is not applicable to the document in question will not necessarily dispose of the question of the requester's entitlement to access, for it may well be that the document may be subject to an exemption from access under another section of the Act. Thus, it is necessary to read this Order cumulatively in the sense that each and every reference to a particular document contained in this Order must

be considered in order to determine whether or not any part or all of the document is accessible to the requester under the Act.

In order to facilitate a cumulative reading of this Order in this sense, I have added record numbers to each of the documents in the Appeal Record. When a particular record reappears for consideration under a second claimed exemption, reference is then made in this Order to the record number which I have earlier assigned to that document. Thus, for example, the first document contained in the Appeal Record is a one-page memorandum which I have identified as Record #1. The records contained in the first section of the Appeal Record, including Record #1, are the subject of a claim by the Ministry that they are exempt under section 13 of the Act. In the next section of this Order, the question of the applicability of section 13 to Record #1 will be considered. Record #1 is also the subject of a claimed exemption under section 19 of the Act. Thus, when the Ministry's claims for the application of section 19 are considered in a later section of this Order, Record #1 will surface again for consideration. In order to determine, then, whether Record #1, or any part thereof, is accessible to the requester under the Act, attention must be drawn to both of these passages of this Order.

I now turn, then, to consider in numerical order the sections of the Act relied upon by the Ministry as a basis for refusing to disclose documents contained in the Appeal Record. In each case, before turning to consider the application of the particular exempting provision to the documents in question, a brief description of the scope of the provision of the Act in question will be set forth.

SECTION 13

Section 13 provides an exception for records containing advice or recommendations of a public servant. This section provides, in part, as follows:

13.--(1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

. . .

Sub-paragraphs (b) through (j) of section 13(2) identify a variety of studies, reports or other documents that are considered to be principally factual in nature and therefore not subject to exemption under section 13(1).

Section 13 thus requires the drawing of a distinction between the disclosure of advice and recommendations on the one hand and factual material on the other. Further, section 10(2), which requires the severance of material to the extent possible, suggests that in an appropriate case, although a document may contain advice and recommendations, portions of the document containing factual material might be severed and disclosed. Indeed it is arguable that the same result is achieved by section 13(2)(a) itself. This point has been the subject of previous discussion in Orders of the Commissioner from which I draw guidance in the present case. In Order 24 (Appeal Number 880006) dated October 21, 1988, the Commissioner stated the following at page 7:

In my view the overwhelming majority of records providing advice and recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2)(a)... 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record.

Further, in Order 48 (Appeal Number 880038) dated April 6, 1989, the Commissioner further reasoned (at page 18) that where 'the factual information in the record is interwoven with the advice and recommendations in such a way that it cannot reasonably be considered a separate and distinct body of fact ... it does not meet the criteria of 'factual material' under section 13(2)(a). In other words, the severable material must constitute, in itself, a meaningful response to the request for access to information. In applying this section, then, the first question must be whether the document would, if disclosed, reveal advice or recommendations and, if so, whether there is a coherent body of separate and distinct factual material which could be severed and disclosed to the requester.

Record #1 (Appeal Record page 1)

This document is a one page memorandum reporting on an interview with a particular named individual in the Office of the Ombudsman. The author had attended the interview and provided, in his memorandum, a brief account of that event. The document does not contain either "advice" or "a recommendation". Section

13, therefore, does not render this document exempt from the right of access.

Record #2 (Appeal Record page 2)

This one page document is a memorandum from a Ministry official to the Assistant Deputy Attorney General proposing that the author of the memorandum pursue a particular course of action in responding to a so-called "action slip" from the Deputy Attorney General. The document contains an account of advice previously given and, as well, a proposal for a particular course of action. The document therefore comes within the section 13 exemption. Although this record contains occasional statements of fact, these do not together constitute a "coherent body of facts separate and distinct from the advice and recommendations contained in the record".

Record #3 (Appeal Record page 3)

This document is a one page memorandum providing a report to a personnel administrator in the Ministry concerning the decision of the Grievance Settlement Board in case #237/83. The document does not contain "advice" or "recommendations" in the requisite sense and is factual in nature. Section 13 does not apply so as to render this document exempt.

Record #4 (Appeal Record page 4)

This one page document is a memorandum from a Ministry official to the Assistant Deputy Attorney General providing advice with respect to the appropriate manner of responding to allegations made by a named individual in a letter forwarded to another

public agency. The entire document consists of "advice" or "recommendations" and is therefore exempt from access by virtue of section 13.

Record #5 (Appeal Record page 5)

This one page memorandum consists of a series of recommendations concerning the commencement of preparation for a hearing to be held before the Grievance Settlement Board with respect to termination of the requester's employment with the Sheriff's Office. As such, it is exempt from access on the basis of section 13.

Record #6 (Appeal Record page 6)

In this one page memorandum, an account is provided by a Ministry official to the Director of Human Resources of advice and recommendations received from the Director of the Criminal Law Office concerning aspects of the requester's status under certain contracts of employment. This document is exempt as containing advice or recommendations within the meaning of Section 13.

Record #7 (Appeal Record page 7)

This document is a one page memorandum setting out certain advice and recommendations concerning the proper manner of responding to a letter addressed to the Deputy Attorney General from a third party. The context of the memorandum suggests that the third party may have been a union official or other interested party making submissions with respect to the

requester's grievance. As the document consists entirely of advice and recommendations it is exempt from access.

Record #8 (Appeal Record pages 8 - 10)

This three page memorandum consists entirely of advice rendered by counsel to the Director of Crown Attorneys concerning the question of access to an investigative report prepared by the Ontario Provincial Police. The document consists exclusively of legal advice coupled with recommendations for action and is exempt under section 13.

Record #9 (Appeal Record pages 11 - 19)

This eight page document consists of legal advice rendered to a senior official in the Ministry of the Attorney General. The document provides advice both in the form of an assessment of the purport of certain factual evidence, and as well, the legal analysis applicable to such factual circumstances. The document is, in its entirety, exempt by virtue of section 13.

Record #10 (Appeal Record page 20)

The Ministry claims an exemption for a severable portion of this one page memorandum which reports certain information to the Deputy Attorney General concerning an investigation of allegations of unlawful misconduct on the part of a public servant. The severed portion contains an account of advice which the writer of the memorandum had received from investigating officers and which is, therefore, exempt under section 13. The remainder of the document, however, contains

purely factual information which is not exempt under this section.

Record #11 (Appeal Record page 21)

This one page memorandum from an official in the Sheriff's Office to a Ministry official consists of advice and recommendations concerning the appropriate nature of the response recommended to a letter of inquiry received by the Ministry from a third party. The document is exempt, therefore, under section 13.

Record #12 (Appeal Record pages 22 - 24)

This three page memorandum consists of a report from the Director of the Audit Services Branch to the Assistant Deputy Attorney General concerning the participation of that branch in certain investigations being undertaken by the Ontario Provincial Police. The report is entirely factual in nature and is therefore not exempt under section 13 of the Act. Further consideration will be given to the question of whether this document may be exempt under another provision of the Act.

Record #13 (Appeal Record pages 25 - 38)

This document consists of a one page covering memorandum from the Director of the Audit Services Branch to the Assistant Deputy Attorney General providing attachments which consist of a summary of a preliminary report of the Ontario Provincial Police concerning certain investigations the force had undertaken. The covering memorandum and the attachment are entirely factual in

nature and accordingly, are not exempt under section 13 of the Act. Again, further consideration will be given in this Order to the possibility that these materials are in exempt under other provisions of the Act.

Record #14 (Appeal Record page 39)

This one page document is a memorandum from counsel to the Deputy Director, Courts Administration offering a legal opinion with respect to certain materials that had been reviewed by the author. The document is essentially a brief report of the author's advice and, as such, is exempt under section 13.

Record #15 (Appeal Record pages 40 - 41)

This two page document is a letter from the Director of the Audit Services Branch to an Ontario Provincial Police Corporal requesting certain information concerning an investigation undertaken by the Ontario Provincial Police. The document does not communicate advice or recommendations and accordingly, is not exempt under section 13 of the Act.

Record #16 (Appeal Record page 42)

This document is a one page memorandum from the Executive Director of Courts Administration to the Director of the Human Resources Branch communicating the nature of certain recommendations made by others concerning a disciplinary matter and instructing the recipient of the memorandum to prepare the necessary paperwork. This document is exempt on the basis that it consists of a record of recommendations with respect to this matter.

Record #17 (Appeal Record page 43)

This document is similar in all material respects to record #16. It is exempt, therefore, for the same reason.

Record #18 (Appeal Record pages 44 - 47)

This document is an opinion letter from counsel to a Ministry official providing legal advice with respect to a disciplinary matter. The entire document consists of the advice rendered and the reasons therefor and accordingly, it is exempt under section 13 of Act.

Record 19 (Appeal Record pages 48 - 49)

This two page document is a letter from the Executive Director of Courts Administration to a Detective Inspector in the Criminal Investigation Branch of the Ontario Provincial Police. The letter responds to a request for information concerning disciplinary actions taken with affected individuals who were the subject of a police investigation. The letter is informational in nature and therefore is not exempt under section 13 of the Act.

Record #20 (Appeal Record page 50)

This two page document is a memorandum from counsel to the Deputy Attorney General concerning certain allegations made by a newspaper reporter concerning alleged misconduct of certain named individuals and an alleged failure to properly investigate these allegations. The Ministry seeks severance of the second

paragraph and the concluding sentence of this document on the ground that they contain counsel's advice with respect to this matter. This is an accurate description of the contents of those portions of the document and they are therefore exempt under section 13.

Record #21 (Appeal Record page 52)

This document is a one page letter from the Executive Director, Courts Administration to counsel communicating a Ministry decision to attempt to negotiate a settlement of a particular grievance and instructing counsel to commence appropriate negotiations. The document does not contain either advice or recommendations and is therefore not exempt under section 13.

Record #22 (Appeal Record pages 53 - 54)

This two page document consists of a memorandum from the Director of the Supreme Court and District Court Services Branch to the Executive Director, Courts Administration reporting on an investigation made by the author into certain allegations made with respect to the conduct of a particular employee. The Ministry seeks severance of the final paragraph of the memorandum which communicates the author's recommendations concerning this matter. This paragraph is exempt from access under section 13.

Record #23 (Appeal Record page 55)

This document is a one page memorandum from the Executive Director, Courts Administration to the Assistant Deputy Attorney General to which are attached copies of records 22, 24 and 25.

The Ministry seeks severance of the final paragraph of Record #23 on the ground that it sets forth the author's recommendations concerning the matters discussed in those documents. This is an accurate characterization of the contents of that paragraph and it is therefore exempt under section 13.

Record #24 (Appeal Record page 56)

This one page memorandum is similar in material respects to record #22 except that it concerns an investigation of allegations concerning another named individual. The Ministry argues for severance of the final paragraph of that memorandum on the basis, which I hold to be correct, that that paragraph contains the author's advice and recommendation concerning the matter under investigation.

Record #25 (Appeal Record pages 57 - 58)

This document is parallel in material respects to records 22 and 24 except that it concerns the investigation of allegations concerning a third named individual. Again, the Ministry's argument that the final paragraph ought to be severed and considered exempt under section 13 on the basis that it contains the author's advice and recommendations concerning the matter under investigation is soundly based.

Record #26 (Appeal Record page 59)

This one page document contains a statement of a chronology of events prepared with respect to a disciplinary matter and the resulting grievance. The Ministry seeks severance of the 6th

and 7th paragraphs of this document on the basis that they provide accounts of advice given by public officials with respect to the matter in question. These paragraphs are indeed exempt on this basis and severable from the remainder of the document.

Record #27 (Appeal Record pages 60 -92)

This document consists of a report to the Deputy Attorney General prepared by the Director, Legal Services, of the Ministry of Energy pursuant to a delegation to the author by the Deputy Attorney General of the power conferred upon the Deputy by section 18(4) of Regulation 881 of the Revised Regulations of Ontario, 1980 to conduct a hearing for the purpose of considering the possible dismissal of a public servant from employment. The bulk of the document (Appeal Record p. 61 - 92) consists of the report itself. The first page is a copy of the covering letter to the Deputy Attorney General which accompanied the report. The report itself consists of a lengthy summary of the evidence presented at the hearing, followed by a summary of the arguments made by counsel at the hearing after which the author sets forth his assessment of the evidence led and the arguments presented at the hearing and then formulates a recommendation with respect to the ultimate issue raised in the proceeding. The Ministry seeks to withhold all of this Record under section 13 on the theory that the entire document constitutes a communication of advice and recommendations to the Deputy Attorney General in whom the power to make the ultimate decision to dismiss or not to dismiss the employee in question resides. Although I am persuaded that the statutory power to decide does in fact reside in the Deputy Minister, and, accordingly that this report does contain advice in the

requisite sense, the first fourteen and two thirds pages of the report (down to the heading, "Consideration of the Evidence") and the covering letter are entirely factual in nature and therefore constitute severable portions of the record which are

not exempt under section 13 of the Act. This severable portion of the record could be withheld only if some other exemption in the Act were held to apply. The remainder of the report, however, does contain the author's advice and recommendations with respect to the inferences to be drawn from the evidence, the weight to be given to the arguments presented by counsel and the author's recommendation with respect to the ultimate question before him. This material I find to be exempt under section 13.

Record #28 (Appeal Record pages 93 - 95)

This three page document is a memorandum to the Deputy Attorney General from the Director of Crown Attorneys concerning certain reports prepared by an Assistant Crown Attorney with respect to police investigation of certain allegations concerning the York County Sheriff's Office. The Ministry seeks severance of all of the first page of this document but for the first paragraph and the first three paragraphs of page 2 of the document on the ground that these paragraphs contain an account of the recommendations made by the Assistant Crown Attorney and by other officials. This is an accurate description of those paragraphs and they are therefore exempt under section 13 of the Act.

Record #29 (Appeal Record page 96)

This document consists of a one paragraph memorandum from the Director of Crown Attorneys to the Assistant Deputy Attorney General reporting a recommendation made by an Assistant Crown Attorney concerning a particular matter and communicating, as well, the author's own advice concerning the same issue. The entire document is therefore exempt under section 13.

Record #30 (Appeal Record page 97)

This document is a letter from an Ontario Provincial Police Corporal to the Director of Crown Attorneys providing advice concerning a report prepared by an Assistant Crown Attorney. The entire document is exempt under section 13.

Record #31 (Appeal Record pages 98 - 100)

This document is a letter from an Assistant Crown Attorney to the Director of Crown Attorneys providing advice concerning the laying of criminal charges with respect to certain matters under investigation. The letter does not contain a reasonably severable body of factual material and therefore is exempt under section 13 in its entirety.

Record #32 (Appeal Record pages 101 - 102)

This document is a two page handwritten memorandum from the Director of Crown Attorneys to the Attorney General providing a description of the nature of recommendations made with respect to particular matters by an Assistant Crown Attorney and then providing the author's own advice with respect to these same matters. The entire document consists of either an account of advice or recommendations given by another or of the author's

own advice or recommendations and is therefore exempt under section 13.

Record #33 (Appeal Record page 103 - 117)

This fifteen page document is a report prepared for the Ministry by an Assistant Crown Attorney which provides legal advice with respect to the conduct of certain investigations and the implications to be drawn therefrom. Although the author's advice rests on certain kinds of information, the document does not contain a severable account of factual material upon which the advice is based. The entire document is exempt under section 13.

Record #34 (Appeal Record pages 118 - 129)

This twelve page document is a memorandum providing legal advice prepared by counsel for the Assistant Deputy Attorney General relating to certain investigations undertaken concerning conduct of employees other than the requester. In this document, the author provides legal advice concerning the legal implications of evidence uncovered in various investigations. The body of the report consists of such advice and does not severable discussions of factual materials. The first three pages of the document, however, provide an account of the fact that certain allegations were made concerning the employees in question. This portion of the memorandum thus does not constitute advice or recommendations within the meaning of section 13. This portion of the memorandum, then, contains a severable factual discussion. This material may be exempt of course under section 21 on the basis that this material contains personal information concerning identifiable individuals, disclosure of which may

constitute an unwarranted invasion of privacy within the meaning of that section. This is a point to which I will return.

Record #35 (Appeal Record pages 130 - 132)

This three page document is a photocopy of subsections 17(2), 224(1) of Ontario Regulation 881, apparently taken from the 1980 edition of the Revised Regulations of Ontario. This is a photocopy of a public document and obviously not exempt from disclosure under the Act under section 13.

Record #36 (Appeal Record page 133)

This one page document is a blank form entitled "Notice of Intended Action" which appears to be a document intended to be utilized, when appropriate information has been inserted in the form, for the commencement of legal proceedings. The name of a furniture and appliance store appears at the bottom of the form

thus suggesting that the document is one prepared for use by that firm. The document does not, however, contain any information concerning any named individual nor does it contain any advice or a recommendation. This document is not exempt from access under section 13 of the Act.

Record #37 (Appeal Record pages 134 - 135)

This document is a two page memorandum from counsel to the Director of Crown Attorneys communicating the nature of certain advice given by the author to the Ontario Provincial Police. The memorandum sets out the nature of the advice requested and the response given by the author, coupled with a suggestion that

the Director of Crown Attorneys should alter the response if he did not agree with the advice rendered by the author. The document does not contain a severable portion of factual material and accordingly, is exempt in its entirety under section 13.

Record #38 (Appeal Record pages 136 - 138)

This document is a three page letter to the Assistant Deputy Attorney General from a Corporal of the Ontario Provincial Police reporting on his investigation of certain allegations of wrongdoing. Although the penultimate paragraph in the letter offers the author's advice with respect to the substance of his inquiries, the remaining material in the letter is factual in nature. Accordingly, this document, apart from the second last paragraph, is not exempt under section 13 of the Act. The letter may, of course, be exempt under other sections of the Act.

Record #39 (Appeal Record pages 139 - 140)

This two page document is a letter from a Detective Inspector of the Ontario Provincial Police to the Director of Crown Attorneys. The letter is a covering letter for a five volume report prepared by the Ontario Provincial Police concerning allegations of corruption in the Sheriff's Office of the Judicial District of York. The Ministry seeks severances of material which is alleged to be exempt under section 13 from paragraph 3 of the letter and further submits that paragraphs four and five are exempt on the basis that they contain the author's advice and recommendations. These points are well

taken and this material is both severable and exempt under section 13.

Record #39A (Appeal Record pages 141 - 145)

This document is a five page letter from a Detective Inspector of the Ontario Provincial Police to an Assistant Director in the Office of the Ombudsman of Ontario answering certain inquiries made by the latter with respect to what would appear to have been a complaint or inquiry made to the Office of the Ombudsman by the requester. The letter contains information provided in response to these inquiries and does not contain advice or recommendations. It is therefore not exempt under section 13, though some of the information pertaining to identifiable individuals may be exempt under other sections of the Act.

Record #40 (Appeal Record page 146)

This one page document is a "Critical Issues" memorandum apparently prepared within the Office of the Ombudsman. The document contains only factual information and is not exempt under section 13 of the Act.

Record #41 (Appeal Record page 147)

This document, like Record #40, is a "Critical Issues" memorandum from the Office of the Ombudsman. Again, it is not exempt under section 13 for the reason that it also contains only factual information.

Record #42 (Appeal Record page 148)

This is also a "Critical Issues" memorandum from the Office of the Ombudsman. The first five paragraphs of the document contain recommendations concerning a "Suggested Response" of the Office of the Ombudsman concerning the matter under discussion. These paragraphs of the document are therefore exempt under section 13. The remaining severable portions of the document contain factual information and are therefore not exempt under section 13. Some portions of the remainder of the document may, however, be exempt under section 21 of the Act.

Record #43 (Appeal Record page 149)

This document is also a "Critical Issues" memorandum from the Office of the Ombudsman. As in the case of Record #42 the first five paragraphs of the document contain the author's advice or recommendations concerning a "Suggested Response" and these paragraphs are both severable and exempt under section 13 of the Act.

Record #44 (Appeal Record page 150)

As in the case of Records 42 and 43, this document is a "Critical Issues" memorandum of the Office of the Ombudsman. The first two paragraphs are both severable and exempt under section 13 for the reason that they contain advice concerning a "Suggested Response".

Record #45 (Appeal Record page 151)

As with the previous three records, this document is a "Critical Issues" memorandum from the Office of the Ombudsman which contains, in its first three paragraphs, advice and

recommendations concerning a "Suggested Response". These paragraphs are severable and exempt under section 13.

Record #46 (Appeal Record pages 152 - 154)

This three page document is essentially a handwritten draft of Record #44. For the reasons indicated above with respect to Record #44, the first two paragraphs of the document are severable and exempt under section 13.

Record #47 (Appeal Record pages 155 -156)

This document is essentially a handwritten draft of Record #45. For the reasons indicated in the above discussion of Record #45, the first three paragraphs of the document are severable and exempt under section 13 of the Act.

Record #48 (Appeal Record pages 157 - 158)

This two page document is a briefing note concerning an article published in the Toronto Star on November 17, 1986. The document contains only factual information, most of it relating to the requester. It does not contain advice or recommendations that would render the document exempt under section 13.

Record #49 (Appeal Record pages 159 - 160)

The origins of this two page handwritten briefing note are not revealed in the document. The document contains in its third paragraph a proposed "response" which constitutes severable and exempt material under section 13. The remainder of the document contains factual information which is not exempt under this section.

Record #50 (Appeal Record pages 161 - 167)

This document is a seven page briefing note prepared by the Director of the Supreme & District Court Services Branch relating to certain allegations relating to the investigation of allegations of irregularities at the Toronto Sheriff's office made by the requester. The Ministry submits that the portions of the document in which the author characterizes the "issue" and "likely questions" and in which he makes recommendations concerning a proposed "response" constitute advice or recommendations under section 13 of the Act. This point is well taken with the result that two sentences on page one, one sentence on page two, one sentence on page three and three paragraphs on page five of the record under these headings are severable and exempt as portions of the document as are the entirety of pages six and seven.

Record #51 (Appeal Record page 168)

This document contains advice concerning a "Suggested Response" with respect to inquiries concerning a particular issue. Although the origins of the document are not abundantly clear from the face of the document, it would appear to have been created within the Supreme and District Courts Services Branch. The entire document contains advice and recommendations within the meaning of section 13 of the Act and is therefore exempt from disclosure.

Record #52 (Appeal Record 169 - 170)

This document is entitled "Confidential Attachment Briefing Response". The origins and authorship of the document are not indicated on its face. This document contains only factual information, however, and is therefore not exempt under section 13 of the Act.

SECTION 14 (1) (b)

Section 14(1)(b) sets forth an exception to the general access principle in the following terms:

14.--(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

. . .

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

. . .

The evident purpose of this exception is to preclude access to documents in circumstances where disclosure will interfere with an ongoing investigation. Although the Ministry initially included two documents in the Appeal Record under this heading, the Ministry further indicates in its submissions that no exemption is claimed pursuant to section 14(1)(b) for the two records in question, Records 53 and 54.

Record #53 (Appeal Record page 171)

This one page memorandum instructs the Director of the Supreme and District Court Services Branch to undertake an investigation into various allegations made concerning improper conduct by the

staff of the York Sheriff's office. Again, no exemption is now claimed under section 14(1)(b) for this document.

Record #54 (Appeal Record pages 172 - 174)

This document is a three page letter to the Director of Crown Attorneys from a Corporal of the Ontario Provincial Police providing information concerning certain concerns, that had arisen concerning an alleged problem of intimidation of employees. Again, no exemption is now claimed under section 14(1)(b) for this record.

SECTION 14(1)(c)

Subsection 14(1)(c) provides as follows:

14.--(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

. . .

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

. . .

The submissions made by the Ministry with respect to the application of section 14(1)(c) raise two points of difficulty. First, the Ministry submitted that the concept of "law enforcement" upon which this exemption is constructed is broad enough to include investigations undertaken for the purpose of possible disciplinary action against Ministry employees. In making this submission, the Ministry draws support from the definition of "law enforcement" to be found in section 2(1) of the Act, which reads as follows:

"law enforcement" means

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

The Ministry argues that disciplinary proceedings might "lead to proceedings in the court or tribunal" in which "a penalty or sanction could be imposed". Presumably, the Ministry has in mind that in a case in which discipline has been imposed by the Ministry as a result of its investigation of the conduct of a particular employee, that employee might launch a grievance contesting the imposition of discipline and that such a grievance could ultimately lead to an adjudication of the dispute by a "tribunal" which might be said to have the power to "impose" something in the nature of a "penalty or sanction".

It will be evident that the submission made by the Ministry offers a broad reading of the concept of "law enforcement". Without the benefit of a statutory definition, one might come easily to the conclusion that an investigation pertaining to "law enforcement" would involve investigation of conduct that might be thought to be "unlawful " in the sense that it may constitute a violation of a statute or regulation. Employees may, of course, be disciplined by reason of conduct which is not unlawful in that sense but which merely constitutes a failure to properly discharge their responsibilities as an employee. Supervisors who attempt to ensure that employees do their jobs properly would not normally consider themselves to be engaged in "law enforcement". Thus, unless the statutory definition of the

concept of "law enforcement" in the Act dictates to the contrary, it would appear that disciplinary proceedings per se, would not engage the "law enforcement" exemptions contained in the Act.

In my view, the statutory definition of "law enforcement" does not extend to disciplinary matters. In particular, subsection (b) of the definition does not carry with it the implication that it may involve the investigation or inspection of conduct which is not "unlawful" in the sense referred to above. That is to say, there is nothing in subsection (b) that would dislodge the usual understanding that "law enforcement" involves the investigation of conduct that may be "unlawful" in the sense that it may constitute conduct that is proscribed by a statute or regulation. Accordingly, it is my view that the preferable reading of subsection (b) is that the "penalty or sanction" referred to in the definition is one that can be imposed as a result of a violation of a statute or regulation.

While the foregoing analysis is sufficient to dispose suggestion that investigations with the view to the imposition of discipline are not embraced by the statutory definition of "law enforcement", one further difficulty in acceding to the Ministry's submission may be noted. While it is true that an

employee who grieves discipline imposed by the employer may find that the resolution of the dispute is ultimately adjudicated by an arbitration panel of some kind and while it is also true that the arbitration panel would normally have the power to either relieve from the employer's decision to impose discipline entirely or substitute a lesser penalty, it is not at all obvious that the power of an arbitration panel to review an

employer decision in this matter constitutes the arbitration panel a "court or tribunal" in the sense intended by subsection (b) of the statutory definition of "law enforcement". The panel has the power to confirm or reduce the sanction imposed by the employer but normally would have no independent power to impose a sanction on its own motion. For this additional the definition of "law enforcement" does not appear to embrace disciplinary proceedings of the kind envisaged by the Ministry in this case.

On the other hand, of course, it is entirely possible that investigations relating to possible discipline may well involve the investigation of conduct which is unlawful in the requisite sense. It is also entirely possible that such investigations could lead to the institution of proceedings of a kind envisaged by subsection (b) of the statutory definition of "law enforcement" even though the actual investigation was undertaken for disciplinary purposes. That is to say, they may lead to a prosecution of the employee in question for the alleged commission of an offence. In such a case, it is possible that the initial investigations could be appropriately characterized as "investigations or inspections that lead or could lead to proceedings in court or tribunal . . ." and thereby come within the statutory definition of "law enforcement". Accordingly, while investigation for disciplinary purposes does not, by virtue of its disciplinary nature, constitute a "law enforcement" investigation, it is conceivable that a particular investigation for disciplinary purposes may constitute a law enforcement investigation in the requisite sense.

The second issue raised by the Ministry's invocation of section 14(1) (c) relates to the nature of the "investigative techniques

and procedures" that are subject to protection from disclosure under that subsection. On a broad view, virtually any procedure, protocol or device utilized in the course of investigation could be considered to be an "investigative technique or procedure". On a narrow view, this subsection might be interpreted only to refer to investigative techniques and procedures which are of such a nature that their disclosure would compromise their effectiveness. In favour of the narrow view, of course, it might be argued that unless the investigative technique or procedure in question had such a character, there would be no purpose served by withholding disclosure. This issue has arisen for consideration under an equivalent provision of the American Freedom of Information Act. Indeed the wording of the equivalent provision of the American statute, prior to revisions effected in 1986, was very similar to the Ontario provision. That version of the Act, 5 U.S.C. sec. 552(b)(7)(E), exempted investigatory records compiled for law enforcement purposes to the extent that production of such records would "disclose investigative techniques and procedures". In a series of cases, American courts have held that in order to constitute an investigative technique or procedure in the requisite sense, the technique or procedure in question must not be so routine in nature that it is already well known to the public. (See, for example, Jaffe v. CIA [1983], 573 F. Supp. 549 (DDC) and see generally, J. T. O'Reilly, Federal Information Disclosure (Sheppard's/McGraw-Hill Inc., Colorado; 1987), chapter 17.11.1.

In my view, a similar reading should be given to the Ontario provision. In order to constitute an "investigative technique or procedure" in the requisite sense, it must be the case that disclosure of the technique or procedure to the public would

hinder or compromise its effective utilization. The fact that the particular technique or procedure is generally known to the public would normally lead to the conclusion that such compromise would not be effected by disclosure and according that the technique or procedure in question is not within the scope of the protection afforded by section 14(1)(c).

Against this background, I turn to a consideration of the Ministry's submissions with respect to the particular records which it argues to be subject to the exemption set forth in subsection 14(1)(c).

Record #15 (Appeal Record pages 40 - 41)

This two page letter contains an instruction to a corporal in the Ontario Provincial Police to provide certain investigative information concerning a named individual. This document does not disclose an investigative technique or procedure in the requisite sense and is therefore not exempt under section 14(1)(c).

Record #55 (Appeal Record pages 175 - 489)

This three hundred and fifteen page document consists of a report prepared by a member of the staff of the Audit Services Branch of the Ministry which essentially summarizes the substance of investigations undertaken with respect to an identified individual. The report consists of a one page covering memorandum explaining the nature of the report, and then a series of short statements of the author's views of the nature of the allegations which have been made about the

individual in question. To each of these short statements, there are appended various documents which the author extracted from the investigative reports of the Ontario Provincial Police concerning this matter. The short statements of the allegations are essentially extracts from Record #34 (Appeal Record, pages 118 - 129 which has been previously discussed. The Ministry has argued that the entire report is exempt on the

ground that its release would disclose "investigative techniques and procedures" within the meaning of section 14(1)(c). Those techniques and procedures are described by the Ministry as "interviewing techniques, establishing 'a paper trail' of documents, preparing draft statements and keeping interview notes". Further, the Ministry suggests that the "integration of these techniques illustrates how evidence is collected and organized". Although the Ministry has argued that the entire report is exempt for this reason, it is evident that the principal focus of concern are the supporting documents drawn by the author of this report from the investigative files of the Ontario Provincial Police. This supporting documentation constitutes all but very few pages of the entire report.

Having reviewed the report in its entirety, I am not persuaded that disclosure of the document would reveal "investigative techniques and procedures" in the sense intended by subsection 14(1)(c). Although the extracts from the investigative files from the Ontario Provincial Police provide abundant evidence of the thoroughness with which the investigation of the allegations made concerning this individual were undertaken, the actual methods employed by the investigators do not appear to be anything other than what a lay person would expect. Persons who may have information concerning the allegations, including the

person who was the subject of the allegations, were carefully interviewed and detailed records of those interviews were created. Attempts were made to find supporting documentation. While a lay reader of this material might be surprised and/or impressed by the apparent thoroughness and professionalism involved in carrying out these tasks a lay person would not be surprised by the nature of the methods used. Accordingly, although all or some portions of this report might be exempt under other provisions of the Act, disclosure of the report would not provide the requester with information that would hinder or compromise effective utilization of the investigative methods employed in this investigation. Accordingly, the report is not exempt from disclosure by reason of section 14(1)(c).

SECTION 14 (2) (a)

Section 14(2)(a) provides an exemption for reports prepared for law enforcement purposes in the following terms:

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

. . .

The Ministry has argued in its submissions that various documents in records created in the course of investigations undertaken by officials of the Ministry of the Attorney General and by investigative officers of the Ontario Provincial Police constitute reports within the meaning of section 14(2)(a) and are therefore exempt from disclosure. There can be no doubt but

that this exemption applies to many of the records at issue in the present appeal. Both the Ministry of the Attorney General and the Ontario Provincial Police are properly considered to be agencies which have the "function of enforcing and regulating compliance with a law". Moreover, it must be noted that section 14(2) (a) does not require the Ministry to establish that disclosure will result in some injury being inflicted upon either a particular investigation or upon law enforcement activity more generally. As the Commissioner noted in Order 38 (Appeal Number 880106) at pages 4 - 5:

Subsection 14(2)(a) is unusual in the context of the Freedom of Information and Protection of Privacy Act, 1987, in that it exempts a type of document, a report. The exemption does not require that a report need additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.

Further, subsection 14(2) (a) enables the head of the agency to refuse to disclose the entire "report". Thus, unlike other exempting provisions in the statute, there is no obligation to sever portions of the documents which do not contain sensitive material and disclose them to the requester.

Finally, it might be noted that the term "report" embraces a broad range of kinds of documents. In Order 37 (Appeal Number 880074) at page 6, the Commissioner derived assistance from the dictionary definition of the word "report" as "an account given or opinion formally expressed after investigation or consideration or correlation of information ...". Thus, the exemption is not limited in its coverage to documents which might formally be referred to by some such phrase as

"Investigative Reports", but, rather, may include any one of a broad range of documents providing information or opinions that have been prepared in the course of law enforcement inspections or investigations.

It must further be noted, however, that the Ministry has in this context argued once again that the concept of "law enforcement" for purposes of interpreting subsection 14(2) (a) includes investigations that may lead to disciplinary action of some kind. This submission has been considered above in the context of my discussion of the proper interpretation of subsection 14(1) (c). For the reasons there indicated, it is my view that the Ministry submission on this point does not rest on a sound interpretation of the Act and, more particularly, of

the definition of "law enforcement" contained in subsection 2(1) of the Act. As has been indicated, investigations or inspections for disciplinary purposes do not, per se constitute law enforcement investigations or inspections in the requisite sense. On the other hand, where the disciplinary investigations or inspections are undertaken with a view to investigating conduct that may be "unlawful" in the requisite sense of involving a failure to comply with a prohibition set out in a statute or regulation, and where the disciplinary investigation could therefore lead to enforcement proceedings (i.e. a prosecution for the alleged commission of an offence) in a "court or tribunal" in addition to or in substitution for whatever disciplinary action might be undertaken, the disciplinary investigation or inspection could constitute an investigation or inspection for "law enforcement" purposes in the requisite sense. Accordingly, in considering the submissions made by the Ministry with respect to subsection

14(2) (a) it has been necessary to keep in mind the proposition that only those disciplinary investigations that carry with them the possibility of "law enforcement" proceedings are engaged by the definition of law enforcement in subsection 2(1) and therefore, in turn, subject to the possible application of subsection 14(2) (a).

Record #55 (Appeal Record pages 175 - 489)

As has been indicated above, this document is a summary of information gathered in the course of certain law enforcement investigations by the Ontario Provincial Police. The document is prepared by a ministry official and addressed to another ministry official. It is not obvious from the face of the document whether the addressee is an individual who would be involved exclusively in disciplinary aspects of the matter being investigated or whether that individual might offer advice both in respect to disciplinary actions and possible law enforcement proceedings. Nonetheless, it is in any event clear that even if the addressee's immediate interest was limited to

disciplinary concerns, the focus of the investigation is on allegedly "unlawful conduct" in the sense referred to above and accordingly, even if the author's investigation was undertaken only for disciplinary purposes, the investigation is of such a nature that it comes within the definition of "law enforcement" set forth in subsection 2(1) of the Act. Accordingly, I am of the view that the entire record is a report prepared in the course of a law enforcement investigation and therefore exempt under subsection 14(2) of the Act. It should be noted, moreover, that, but for a few pages, the report consists of extracts from the investigative files and reports of the Ontario

Provincial Police, all of which extracts appear to be portions of reports prepared in the course of a law enforcement investigation within the meaning of subsection 14(2)(a).

Record #18 (Appeal Record pages 44 - 47)

This record has been previously held, in this Order, to be exempt under section 13 as a letter containing advice or recommendations from counsel to the Ministry. The letter relates to the investigation which is the subject matter of Record #55. Although Record #18 relates to disciplinary aspects of the investigation, the disciplinary investigation, as has been indicated, relates to the investigation of unlawful conduct. Accordingly, Record #18 is also exempt as a report prepared in the course of the law enforcement investigation under section 14(2)(a).

There are two further Records to which precisely the same analysis applies. That is to say, in each case the record is one which has been found exempt under section 13, the record is a report relating to disciplinary aspects of the investigation which is the subject matter of Record 55 and constitutes, therefore a report prepared in the course of the "law enforcement" investigation. The two records are the following:

Record #17 (Appeal Record page 43)

Record #16 (Appeal Record page 42)

Record #61 (Appeal Record page 498)

This document is a one page letter to the Ministry employee who was the subject of the investigation which forms the subject-matter of Record #54, communicating to that employee a decision to dismiss the employee as a result of findings arising from that investigation. The letter sets out the number of allegations which the author of the letter, the Assistant Deputy Attorney General, believed to have been substantiated by the investigation. The Ministry argues that this letter constitutes a report prepared in the course of a law enforcement investigation inasmuch as it is a document that communicates the findings of an investigation and the author's opinion with respect to their significance. Although, as has been indicated above, the term "Report" in subsection 14(2)(a) is not limited to documents which might formally be referred to as "Reports", it nonetheless appears to strain the meaning of this term to suggest that it can apply to what is essentially a dismissal letter, that is to say, a letter communicating to an employee a decision to terminate that individual's contract of employment and setting out the reasons for that decision. Accordingly, it is my view that Record #61 does not constitute a "report" in the sense intended by subsection 14(2)(a). If this document is exempt from disclosure, it must be on the ground that its disclosure would constitute an unwarranted invasion of privacy of the employee in question. This is a point to which I will return a later point in this Order.

Record #58 (Appeal pages 492 - 493)

This document is a two page letter from the Assistant Deputy Attorney General to an employee of the Ministry communicating a

decision taken pursuant to section 18 of Public Service Regulation 881, R.R.O., 1980 to conduct a hearing on the question of whether or not there may exist cause for dismissal of the addressee of the letter and communicating the time and place for the hearing. As well, the letter communicates a number of allegations made in respect to the conduct of the addressee which would be the subject-matter of investigations at the said hearing. The Ministry argues that this document constitutes a report prepared in the course of "law enforcement" because it communicates, in effect, an opinion the author on the basis of an investigation that there may exist a cause for dismissal. Again, however, as was the case with Record #61, it appears most unlikely that, in ordinary parlance, the term "report" would be used to refer to a document which, in this case, is essentially a notice of a hearing providing particulars of the allegations to be investigated at that hearing. Again, the document may be exempt on other grounds, but it appears not to be a "report" prepared in the course of "law enforcement, inspections or investigations".

Record #57 (Appeal Record page 491)

This one page document is a letter forwarded to the addressee of Record #58 by the Assistant Deputy Attorney General to provide particulars of further allegations to be investigated at the hearing, notice of which is given in Record #57. The same analysis that applies to Record #57 applies to Record #56 and is therefore not exempt under section 14(2) (a).

Record #56 (Appeal Record page 490)

This document is a one page handwritten memorandum to the Assistant Deputy Attorney General from a ministry employee which was the covering memorandum accompanying Record #57 which was being forwarded to the Assistant Deputy Attorney General

for his signature. Record #56 communicates the nature of advice given by counsel with respect to Record #57. Therefore it constitutes a "report" in the requisite sense provided that the investigation to which it relates can properly be characterized as relating to "law enforcement". Although the investigation is clearly of a disciplinary character in this instance, the allegations which are the subject matter of investigation relate in most, if not all, instances to possible violations of the law. Accordingly, this disciplinary investigation is a "law enforcement" investigation within the statutory definition of this term set out in section 2(1) of the Act. Accordingly, Record #56 is exempt as a law enforcement record "report" under section 14(2)(a) of the Act.

Record #59 (Appeal Record pages 494 - 496)

This three page document consists of a covering letter from counsel to an administrative official enclosing a document setting forth certain policies relating to the administration of the Sheriff's Office of the Judicial District of York. Both the letter and enclosed document appear to be "reports" in the requisite sense, prepared in the course of an investigation which engages the exemptions set out in section 14(2)(a).

Record #27 (Appeal Record pages 60 - 92)

This record consists of the report made by the individual who was assigned by the Deputy Attorney General to the task of conducting the hearing which is the subject matter of the notices issued in Records 57 and 58. Although that hearing, as has been indicated, had a disciplinary objective in view, the allegations investigated therein relate to possible violations of the law thus giving the investigation a "law enforcement" character in the requisite sense. Accordingly, the entire report prepared as a result of this investigation is exempt under section 14(2)(a) of the Act.

Record #60 (Appeal Record page 497)

This document is a one page memorandum from counsel to the Assistant Deputy Attorney General providing the author's opinion with respect to the contents of Record #27. More particularly, the author provides advice with respect to the appropriateness of the procedures followed by the author of Record #27 and the sufficiency of the evidence led at the hearing to support the findings made by the author of Record #27. While the document is, therefore, a "report" within the meaning of section 14(2)(a), it is perhaps even more obviously a document which would, if disclosed, "reveal advice or recommendations of a public servant" and which is, therefore, exempt from disclosure under section 13 of the Act.

Record #19 (Appeal Record pages 48 - 49)

This record, which has been previously described in this Order, is a two-page letter responding to a request for information from a Detective Inspector, in the Criminal Investigations Branch of the Ontario Provincial Police. The addressee was

obviously engaged in a law enforcement investigation in the requisite sense and the letter therefore constitutes a "report" that is exempt under section 14(2)(a) of the Act.

Record #62 (Appeal Record pages 499 - 500)

This document is a two page letter from counsel to a Staff Relations Co-ordinator in the Ministry concerning certain matters relating to the grievance of the dismissal of a ministry employee. The letter provides an account of recent events, including a request for an adjournment and an expression of opinion on the identity of witnesses whom it would be necessary to call in the proceeding. The Ministry argues that this is a "report prepared in the course of law enforcement, inspection or investigations" within the meaning

of section 14(2)(a). There is some difficulty, however, in determining a basis for characterizing Record #62 in this fashion. The document is a letter providing information and advice with respect to a proceeding which has been launched by an individual or by that individual's union to challenge disciplinary action taken by the Ministry as a result of certain investigations made into the conduct of the employee. Thus, the document does not appear to be a report prepared in the course of an "inspection" or an "investigation". The question which must be asked, then, is whether the report is one which can be said to have been prepared in the course of "law enforcement". The concept of "law enforcement", as has been noted previously in this Order, is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

- (c) the conduct of proceedings referred to in clause (b);

If Record #62 is not a report prepared in the course of an inspection or an investigation, it would appear to come within the definition of "law enforcement" only if it were a report "prepared in the course of", "the conduct of proceedings referred to in clause (b)" pursuant to subparagraph (c) of the above definition of "law enforcement". As has been noted previously in my discussion of the scope of section 14(1)(c), it is my view that arbitration proceedings brought with a view to challenging the imposition of discipline do not constitute proceedings in the sense required by subsection (b) of the definition of "law enforcement". Accordingly, Record #62 does not constitute a "report prepared in the course of law enforcement" and is therefore not exempt under section 14(2) (a) of the Act.

Record #26 (Appeal Record page 59)

The authorship of this one page document is not indicated on its face. The document is, however, a summary of the chronology of events leading up to the grievance proceedings which are the subject of discussion in Record #62. As has been previously determined in this Order, paragraphs 6 and 7 of the document provide an account of advice or recommendations which renders them exempt under section 13 of the Act. However, the remainder of the document is, for the reasons indicated in the above discussion of Record #62, not a "report" prepared in the course of "law enforcement" and is therefore not exempt under section 14(2) (a).

Record #53 (Appeal Record page 171)

This one page memorandum from one Ministry official to another reports that certain allegations have been made with respect to wrongdoing by certain employees during the course of a hearing relating to a disciplinary matter and instructs the addressee to investigate these matters and report back to the author of the memorandum. This document is obviously one which initiates an investigation and raises, therefore, the question of whether a document which initiates, in some sense, an investigation can be said to have been "prepared in the course of law enforcement, inspections or investigations" within the meaning of section 14(2) (a). The document initiating an investigation may, of course, contain a good deal of information about the subject-matter to be investigated. It may contain information concerning allegations made, information concerning possible witnesses, advice concerning investigative methods to be employed and so on. Thus, an initiating document may, in itself, constitute an important source of the information and/or opinion concerning the matter under investigation. Accordingly, it would in my view be highly artificial to draw a distinction between reports which in some sense initiate the investigative activity by assigning particular investigative

tasks and reports prepared in the course of carrying out such responsibilities. This suggests, in turn, that the proper interpretation of section 14(2) (a) is that a report prepared by an individual that contains, amongst other things, instructions to the addressee to conduct investigative activity may itself be considered to be "a report prepared in the course of law enforcement, inspections or investigations" because the author of the document was, at the time of preparing the document, engaged in the conduct of an investigation. For this reason,

and by virtue of the fact that the alleged misconduct appears to amount to a possible violation of a statute or regulation, Record #53 is exempt under section 14(2) (a) .

The following three documents may be considered together:

Record #22 (Appeal Record pages 53 - 54)

Record #24 (Appeal Record page 56)

Record #25 (Appeal Record pages 57 - 58)

Each of these three records were prepared by the addressee of Record 53 and report on the investigations made with respect to each of three sets of allegations. These documents are reports prepared in the course of a law enforcement investigation and, as such, are exempt under section 14(2) (a) .

Record #23 (Appeal Record page 55)

This document is a memorandum from the addressee of Records 22, 24 and 25 to the Assistant Deputy Attorney General reporting on the investigations described in those three records and, in the final paragraph of Record #23, providing advice with respect to the implications of those investigations. As has been previously held in this Order, the final paragraph of

Record #23 is exempt under section 13 of the Act. The entire document, however, is a "report prepared in the course of law enforcement" and therefore exempt under section 14(2) (a) of the Act.

Record #69 (Appeal Record page 575)

This document is a one page memorandum from the Assistant Deputy Attorney General to the Director of the Audit Services Branch instructing the Director to participate in certain investigations being undertaken by the Ontario Provincial Police. The author outlined the reasons for this instruction and steps taken to facilitate its implementation. This document is a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2)(a).

Record #12 (Appeal Record pages 22 and 24)

This three page document is a reporting memorandum from the Director of the Audit Services Branch to the Assistant Deputy Attorney General concerning the participation of that branch in certain investigations undertaken by the Ontario Provincial Police and the work done up to that point in time. The document is a report prepared in the course of law enforcement investigations and is exempt under section 14(2)(a).

Record #13 (Appeal Record pages 25 - 38)

This document consists of a covering memorandum from the Director of the Audit Services Branch to the Assistant Deputy Attorney General together with a summary of a Preliminary Report of investigations being undertaken by the Ontario Provincial Police. This document is a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2)(a).

Record #70 (Appeal Record pages 576A - 582)

This eight page document is a report prepared by a Detective Inspector of the Ontario Provincial Police concerning certain allegations of unlawful conduct. The document sets out the nature of the allegations in question and reports on the preliminary investigation that the author had conducted at that point in time. The document is a report prepared in the course of a law enforcement investigation and is exempt under section 14(2) (a) of the Act.

Record #37 (Appeal Record pages 134 - 135)

This two page document is a letter from Counsel to the Director of Crown Attorneys reporting on a meeting held by the author with an Inspector of the Ontario Provincial Police. The letter reports on the nature of advice requested by the Inspector and the nature of the advice given concerning a particular investigation. As has been previously indicated in this Order, Record 37 is exempt in that it provides an account of advice rendered by a public servant. The document is also a report prepared in the course of a law enforcement investigation and is exempt under section 14(2) (a).

Record #54 (Appeal Record pages 172 - 174)

This three page document is a letter from a Corporal of the Ontario Provincial Police to the Director of Crown Attorneys reporting on certain incidents that had allegedly occurred in the course of investigations being undertaken by the Ontario Provincial Police. This document is a report prepared in the course of a law enforcement investigation and is exempt under section 14(2) (a).

Record #9 (Appeal Record pages 11 - 19)

This eight page document, previously held exempt under section 13, provides a legal analysis of information contained in an investigative report. This is a report prepared in the course of a law enforcement investigation and is exempt under section 14(2) (a).

Record #68 (Appeal Record page 574)

This document is a one page memorandum to file written by the Director of Crown Attorneys providing an account of his conversation with a lawyer representing a public servant who was then subject to a police investigation. This document is a report prepared in the course of a law enforcement investigation and is exempt under section 14(2) (a).

Record #38 (Appeal Record pages 136 - 138)

This three page letter from a Corporal in the Ontario Provincial Police to the Assistant Deputy Attorney General provides a report of an investigation undertaken by the author with respect to certain allegations of unlawful conduct by public servants. This letter is a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2) (a).

Record #34 (Appeal Record pages 118 - 129)

This 12 page document is a memorandum from Counsel to the Assistant Deputy Attorney General providing advice with respect

to the legal implications of evidence uncovered in investigations undertaken by the Ontario Provincial Police into alleged unlawful conduct of certain public servants. The purpose of the memorandum is to consider the disciplinary implications of the alleged misconduct. This document is,

therefore, a report prepared in the course of a disciplinary investigation running parallel to an investigation undertaken for the purpose of considering the possibility of prosecution of these same public servants. As has been indicated previously in this Order, disciplinary investigation in which the alleged misconduct amounts to a possible violation of law comes within the statutory definition of "law enforcement" within section 2(1) of the Act and therefore Record 34 constitutes a report prepared in the course of law enforcement within the meaning of section 14(2)(a).

Record #10 (Appeal Record page 20)

This one page memorandum from the Director of Crown Attorneys to the Deputy Attorney General provides a brief report on the current status of certain investigations undertaken by the Ontario Provincial Police. As has been previously indicated, a portion of the document provides an account of advice received from the police which is therefore exempt under section 13. The entirety of the document, however, is a report prepared in the course of a law enforcement investigation which is therefore exempt under section 14(2)(a).

Record #39 (Appeal Record pages 139 - 140)

This two page memorandum is from a Detective Inspector of the Ontario Provincial Police to the Director of Crown Attorneys is at one and the same time a covering memorandum for a five volume report concerning certain investigations undertaken by the Ontario Provincial Police and, as well, a brief statement of advice concerning the possibility of laying charges and other related questions. This letter is itself a report prepared in the course of a law enforcement investigation and therefore exempt under section 14(2)(a).

Record #67 (Appeal Record pages 554 - 573)

This 20 page document is a memorandum from a Detective Inspector to the Director of the Criminal Investigation Branch of the Ontario Provincial Police. The document is a report of certain investigations into allegations of unlawful conduct undertaken by the Ontario Provincial Police. This document is a report prepared in the course of a law enforcement investigation and is exempt under 14(2)(a).

Record #64 (Appeal Record page 549)

This one page letter is a brief reporting letter from an Assistant Crown Attorney to the Director of Crown Attorneys to which was appended a preliminary report prepared by the author of the letter based on the author's review of an investigative report prepared by the Ontario Provincial Police. The letter briefly indicates the nature of the contents of the Preliminary Report and indicates when a final report might be available. The letter is itself a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2)(a).

Record #33 (Appeal Record pages 103 - 117)

This document is the preliminary report referred to in Record 64. It is also a report within the meaning of section 14(2)(a) and therefore exempt from disclosure.

Record #63 (Appeal Record pages 501 - 548)

This 48 page document consists of a two page covering letter and a series of attachments. The letter is written by a Detective Inspector of the Ontario Provincial Police to an

Assistant Crown Attorney who had evidently been asked to give a legal opinion with respect to an investigation undertaken by the Ontario Provincial Police. The letter is written in response to a request for further information from the investigative files of the Ontario Provincial Police. The covering letter describes the nature of the attachments and the attachments are documents of various kinds drawn from investigative files. This record is a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2)(a).

Record #32 (Appeal Record pages 101 - 102)

This document is a handwritten memorandum from the Director of Crown Attorneys providing a brief account of advice rendered by an Assistant Crown Attorney with respect to a particular investigation and adding the author's own advice. This document has previously been held in this Order to be exempt under section 13 of the Act. It is also a report prepared in the

course of a law enforcement investigation which is exempt under section 14(2)(a).

Record #31 (Appeal Record pages 98 - 100)

This document is a further letter from the Assistant Crown Attorney that authored Records 64 and 33. It is the supplementary report anticipated by those documents. Record #31 is a report within the meaning of section 14(2)(a) and is therefore exempt from access.

Record #30 (Appeal Record page 97)

In this one page letter, the investigating officer indicates his reaction to Record #31 to the Director of Crown Attorneys. This document is also exempt under section 14(2)(a).

Record #29 (Appeal Record page 96)

This document is a one page covering memorandum from the Director of Crown Attorneys to the Assistant Deputy Attorney General which accompanied a copy of Record #31. In the covering memorandum, the Director indicated his own reaction to Record #31. This document is also a report within the meaning of section 14(2)(a) and is therefore exempt from disclosure.

Record #28 (Appeal Record pages 93 - 95)

This document is a three page memorandum from the Director of Crown Attorneys to the Deputy Attorney General communicating the author's reaction and advice concerning Records #33 and #31. As has been indicated previously in this Order, severable portions

of this document are exempt under section 13 of the Act. The entire document, however, is a report within the meaning of section 14(2)(a) and is therefore exempt from disclosure.

Record #71 (Appeal Record pages 583A - 583B)

This two page memorandum from an Executive Inspector to the Director of the Criminal Investigation Branch of the Ontario Provincial Police provides a report on disciplinary action taken against a public servant whose conduct was the subject of investigation by the Ontario Provincial Police. This document is a report prepared in the course of a law enforcement investigation and is therefore exempt under section 14(2)(a).

Record #20 (Appeal Record pages 50 - 51)

This document is a two page memorandum from Counsel to the Deputy Attorney General relating to certain allegations made by a newspaper reporter with respect to an alleged failure of the Ontario Provincial Police to investigate certain allegations of misconduct by public servants. In this memorandum, Counsel indicates that he has studied the investigative files in question and offers his views with respect to the nature of an appropriate response to the allegations of inadequate investigation. In undertaking this work, it would appear that Counsel is, in effect, investigating a complaint about the quality or thoroughness of an investigation undertaken by the Ontario Provincial Police. Investigating such a complaint is not, in my view, itself a law enforcement investigation and accordingly Record #20 is not a report within the meaning of section 14(2)(a). As has been previously indicated in this

Order, however, severable portions of the document provide an account of advice or recommendations which are therefore exempt under section 13 of the Act.

Record #66 (Appeal Record pages 552 - 553)

This document is a two page document from a Detective Inspector of the Ontario Provincial Police to the author of Record 20. It is evident from the content of Record #66 that the author of Record #20 had made certain inquiries concerning the investigation which was the subject-matter of the complaint which led to the creation of Record #20. Like Record #20, then, Record #66 is a document which provides information about an investigation and is not a report prepared in the course of a law enforcement investigation within the meaning of section 14(2) (a).

Record #8 (Appeal Record pages 8 - 10)

This document is a three page memorandum from Counsel to the Director of Crown Attorneys providing advice with respect to a request made by the Office of the Ombudsman to have access to certain investigative files of the Ontario Provincial Police. In the course of investigating a complaint made by the Requester, the Office of the Ombudsman evidently wished to acquire detailed knowledge of the nature of certain investigations. This memorandum provides advice with respect to the nature of an appropriate response to that request. Like Records #20 and #66, Record #8 may be said to be about or concerned with a law enforcement investigation but it is not

created in the course of such an investigation and accordingly is not exempt under section 14(2)(a).

Record #73 (Appeal Record page 585)

This one page document is a memorandum to file prepared by the author of Record #78 pertaining to a meeting facilitated by the author between the representative of the Office of the Ombudsman and a representative of the Ontario Provincial Police with a view to providing information to the Office of the Ombudsman concerning certain law enforcement investigations which might be of assistance to that Office in investigating a complaint. Again, this is a document created in the course of following up on certain inquiries concerning the nature of a particular law enforcement investigation and is not a report created in the course of such an investigation. It is therefore not exempt under section 14(2)(a).

Record #72 (Appeal Record page 584A - 584C)

This document is a three page letter from the Office of the Ombudsman to a Detective Inspector of the Ontario Provincial Police. The letter evidently results from the arrangements reached at the meeting described in Record #73. In this letter, the Office of the Ombudsman sets forth a number of detailed inquiries concerning the investigation of certain allegations made by the Requester. The Ministry argues that this document 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" within the meaning of section 14(2)(a) on the basis that

the record was created in the course of an investigation undertaken by the Office of the Ombudsman. In the Ministry submissions, no basis is offered for the suggestion that the Office of the Ombudsman is an "agency" which has the function of enforcing and regulating compliance with a law. In my view, this is not an accurate characterization of the function of the Office of the Ombudsman and accordingly, Record #72 is not exempt under section 14(2)(a).

Record #39A (Appeal Record pages 141 - 145)

This document is five page letter from a Detective Inspector of the Ontario Provincial Police to the Office of the Ombudsman responding to the inquiries made by the Office of the Ombudsman in Record #72. Although the letter contains information that was uncovered by the Ontario Provincial Police in the course of a law enforcement investigation, this letter was not itself produced in the course of such an investigation. Rather, it is a response to a request for information thought by the Office of the Ombudsman to be relevant to its attempt to investigate and resolve a complaint brought by the Requester. Accordingly, this document is not a "report" within the meaning of section 14(2)(a).

Record #50 (Appeal Record pages 161 - 167)

This document is a seven page briefing note anticipating and recommending appropriate responses to various inquiries that might be made with respect to the investigation of certain alleged "irregularities and improprieties in the Toronto Sheriff's Office". The Ministry has argued that pages 165 - 167

of this Record constitute a report prepared in the course of law enforcement and of an investigation within the

meaning of section 14(2)(a). The Report is entirely retrospective in nature, however. The investigation into the alleged irregularities had obviously been completed by the time this document was prepared. The passages on pages 165 - 167 describe certain administrative steps taken to revise administrative practices of various kinds in the light of the information disclosed by the original investigation. Hence, this is a document which provides some information about the nature of an investigation and some subsequent events. It is not a document created in the course of a law enforcement investigation of the kind embraced by section 14(2).

Record #52 (Appeal Record page 169)

This document, which is similar in its character and content to Record #51, contains an account of some information uncovered by certain investigations undertaken by the Ontario Provincial Police. The Ministry argues that those portions of this document which provide such information are exempt as they relate the results of a police investigation and the document is therefore in some sense a "report" of that information. As was the case with Record #51, however, this document is a document which provides information about a law enforcement investigation which has long since concluded. Accordingly, the document is not a "report prepared in the course of law enforcement, inspections or investigations" within the meaning of section 14(2)(a).

SECTION 14 (3)

The first two subsections of section 14 provide a series of exemptions or discretionary powers to withhold disclosure of information in order to protect what might be referred to as law enforcement interests or values. The rather comprehensive approach taken to the exemption of law enforcement information

in these two subsections indicate that the statute rests on an assumption that a significant degree of confidentiality or secrecy is necessary to ensure the effectiveness of law enforcement activity. Subsection (3) provides a further and alternative means of serving this interest in the following terms under section 14(3):

14.--(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

The underlying rationale of this provision is not obscure. The mere disclosure of the existence or non-existence of an investigation may well provide useful information to the subjects or possible subjects of an investigation and accordingly, the disclosure of that fact could compromise the effectiveness of law enforcement activity.

In the present appeal, the Ministry indicates that its head is refusing to confirm or deny the existence of certain documents on the basis that a discretion to do so has been conferred by section 14. I have reviewed those documents and am satisfied that they are, indeed, documents to which one or another of the subparagraphs of subsection (1) and (2) of section 14 apply. In its submissions, however, the Ministry further indicates that the reason for choosing to exercise a discretion to confirm or deny relates essentially to questions of personal privacy relating to certain identifiable individuals. The reason for exercising the section 14(3) discretion in this case, then,

appears to have nothing to do with the protection of the public interest in effective law enforcement. Indeed, there is no reason suggested in the Ministry's submissions nor is any reason apparent on the face of these documents in support of the proposition that the effectiveness of law enforcement activity would be compromised by disclosure of this material.

Accordingly, it may be asked whether the purported attempt to exercise the discretion conferred by section 14(3)

in the present case represents a proper exercise of that discretion. In the present case, however, it is unnecessary to resolve this point inasmuch as the statute also confers upon the head a existence of records where privacy interests would be placed at risk by disclosure. Thus, section 21(5) provides as follows:

21.--(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Again, the underlying purpose of this provision is patently particular circumstances, the mere disclosure of the or non-existence of a particular record could communicate personal information about an individual that might be embarrassing or that might, for some other reason, constitute "an unjustified invasion of personal privacy" within the meaning of section 21(1)(f). For reasons that require no explanation, this might obviously be the case with respect to law enforcement. Again, having reviewed the documents with respect to which, in the present case, the head is purporting to exercise a discretion to refuse to confirm or deny their existence, I am satisfied that such refusal would represent a proper exercise of the discretion conferred by section 21(5) to make such a refusal in order to prevent unwarranted invasions of personal privacy.

It is unnecessary, in the present context, to engage in a more elaborate consideration of the proper application of section 21 to the present appeal, as this is a subject to which it will be necessary to return in a later section of this Order.

SECTION 19

Section 19 sets out an exception to the general principle of disclosure in the following terms:

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

It may be noted that section 19 has two branches. They were described by the Commissioner in Order 49 (Appeal Numbers 880017 and 880048) in the following terms at page 12:

- (1) a head may refuse to disclose a record that is subject to either of the two branches of the common law solicitor-client privilege; or
- (2) a head may refuse disclosure if a record was prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or for use in litigation.

The two branches of the common law solicitor-client privilege were described in that Order by the Commissioner in the following terms at page 13:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and
2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege").

The Commissioner went on to note that there are at least three important differences between the first and second branches of the common law solicitor-client privilege. These were summarized by the Commissioner in the following terms at pages 13 and 14:

- (1) The first branch applies only to confidential communications between the client and his or her solicitor; litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties, and even includes material of a non-communicative nature.
- (2) The first branch exists any time a client seeks legal advice from his or her solicitor, whether or not litigation is involved; litigation privilege, on the other hand, applies only in the context of litigation itself.
- (3) The rationale for the first branch is very different from that which underlies litigation privilege. The interest which underlies the protection accorded communications between a client and his/her solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual

cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for the individual to obtain proper candid legal advice; litigation privilege, on the other hand, is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.

As there are thus two branches to the common law doctrine, the second branch of section 19 is in fact a third exemption pertaining to solicitor-client privilege. In Order 123, the Commissioner emphasized that the second branch of section 19 contains two elements. First, the records in question must have been prepared by or for "Crown Counsel". Further, the records must have been prepared either "for use in giving legal advice or in contemplation of or for use in litigation. In Order 52 (at page 10), the Commissioner concluded that "...the term "Crown Counsel" should be read expansively to include any legal advisor to any institution covered by the Act". Although it will be obvious that the second branch of section 19 is parallel, in some respects, to the two branches of the common law solicitor-client privilege, it is also evident that it is a broader exemption than that which is

provided by the common law privilege. Thus, the second branch of section 19 extends, to the phenomenon of obtaining legal advice for non-litigious purposes, the expansive protection accorded by the litigation privilege to all records created for that particular purpose. In order to qualify under the second branch of section 19, it is necessary that the document be prepared "by or for Crown Counsel" but this has been

interpreted, and properly so in my view, as referring to any legal advisor employed or retained by the Crown. In essence, then, the second branch of section 19 avoids any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is and provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not as well as for all documents prepared in contemplation of or for use in litigation.

The Ministry has claimed that one or another of the privileges or exemptions created by section 19 applies to a number of the documents that have been previously described in this Order and to a number of further records. The records which have been previously considered in this Order and which, therefore, need not be described again for purposes of considering here whether section 19 applies to them are Records, 1, 3, 6, 8, 9, 10, 14, 16, 17, 18, 20, 21, 26, 27, 28, 29, 30, 31, 32, 34, 37, 38, 39, 54, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71 and 73.

As well, the Ministry has argued in its submissions that one or another of the branches of the section 19 exemption applies to the following additional records:

Record #74 (Appeal Record pages 586A - 587)

This three page document is a draft letter prepared by Counsel for the Deputy Attorney General setting out certain legal arguments relating to a complaint then under investigation by the Office of the Ombudsman.

Record #75 (Appeal Record pages 588 - 599)

This twelve page document is a photocopy of a statute of the Province of Ontario which has been heavily annotated by Counsel for the purpose of preparing to give legal advice on a particular issue.

Record #76 (Appeal Record pages 600 - 601)

Although this two page document is a letter from the Office of the Ombudsman to the Deputy Attorney General which would not appear to be exempt in itself, this record is similar to Record #75 in a sense that it is heavily annotated by Counsel for the purpose of providing legal advice to the Deputy Attorney General.

Record #77 (Appeal Record pages 602 - 640)

This thirty-nine page document consists of a series of drafts of Record #74 prepared by Counsel. The pages are either annotated or marked up for corrections of various kinds.

Record #78 (Appeal Record pages 641 - 643)

This three page document is a handwritten draft of a proposed reply to a letter of inquiry from someone outside the Ministry. The draft was prepared by a Ministry employee and forwarded to Ministry Counsel for advice.

Record #79 (Appeal Record pages 644 - 672)

This twenty-nine page document consists of handwritten notes prepared during the course of a grievance arbitration hearing by

Counsel who was, at that time, representing the Province in that proceeding.

Record #80 (Appeal Record page 673)

This document is a one page letter from an Executive Co-ordinator within the Ministry to a law firm providing instructions with respect to proceedings in which the law firm in question would represent the Ministry.

Record #81 (Appeal Record page 674)

This one page letter is similar to Record #80 in that it is a letter from a Ministry official to a law firm offering instructions and seeking advice with respect to a proceeding in which the law firm represented the Ministry.

Record #82 (Appeal Record page 675)

This one page letter is from Counsel representing an employee in proceedings against the Ministry concerning certain procedural aspects of the proceeding and requesting an adjournment. The letter is addressed to the law firm that was representing the Ministry in these proceedings.

Record #83 (Appeal Record page 676)

This one page document is a memorandum to file prepared by the Ministry counsel recording certain advice given by the author to a Detective Inspector of the Ontario Provincial Police.

Record #84 (Appeal Record page 677)

This one page document consists of some handwritten notes prepared by the author of Record #83 which record briefly certain facts and note certain legal issues with respect to which advice would apparently be given in an on-going investigation involving the Ontario Provincial Police.

The many documents which are argued to be subject to the section 19 exemptions can be broadly grouped into three categories. Each of these categories contains documents which are clearly exempt from the access principle by virtue of section 19. There is a further category of miscellaneous records which do not come within the first three categories and with respect to which the application of section 19 is problematic. Each of these categories will be considered in turn.

First, there is a group of records prepared by various members of the Ontario Provincial Police force and provided to the Ministry of the Attorney General in response to a request to conduct an investigation into certain allegations of wrongdoing. The request for an investigation was initiated by the Director of Crown Attorneys and was clearly an investigation undertaken with a view to possible prosecution, a matter on which the Director would in due course offer his legal advice. Accordingly, these records are "prepared ... for Crown Counsel for use in giving legal advice or in contemplation of or for use in litigation" within the meaning of section 19 and are exempt from the disclosure scheme. Those records which clearly come within this first category and are therefore exempt on this basis are Records 30, 38, 39, 54, 63, 65, 66, 67, 70 and 71.

A second group of records consists of communications between various officials within the Ministry and a law firm which had been retained by the Ministry to represent it in certain grievance arbitration proceedings. In this context, it is evident that the Ministry and the law firm have a solicitor-client relationship. Accordingly, the common law solicitor-client privilege set out in section 19 applies to such communications, provided that they are directly related to the seeking, formulating or giving of legal advice. Those records which clearly are so related and therefore come within the first branch of the exemption set out in section 19 are Records 18, 21, 59, 62, 80 and 81.

The third and more general category of the documents consists of records prepared by various Crown Counsel, employed by the Ministry, for the purpose of or in the course of providing legal advice either to other branches of the Ministry of the Attorney General or to other ministries of the Crown. In providing services of this nature, Crown Counsel are discharging the responsibilities conferred upon the Attorney General in section 5 of the Ministry of the Attorney General Act, R.S.O. 1980, c. 271, which stipulates that the Attorney General:

. . .

- (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him by the Government;

. . .

- (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;
- (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;

. . .

Records created in the course of performing these various functions may engage the exemptions set out in section 19 on either one or both of two grounds. First, such activity may cast Crown Counsel in the role of solicitor in a solicitor-client relationship with the Government or with another agency or ministry of the Crown or, indeed, with another branch of the Ministry of the Attorney General itself. Although it is not necessary for present purposes to set out a definitive test as to when a solicitor-client relationship is established in this context, one critical indicator would be whether the advice sought, in the particular situation, is of a kind which might have been sought from counsel outside Government or, alternatively, whether the advice rendered is of a kind which would, in other contexts, normally be provided by a member of the legal profession.

The second basis on which records prepared by Crown Counsel might engage the section 19 exemption in circumstances of this kind is that they may constitute records "prepared by ... Crown Counsel for use in giving legal advice or in contemplation of or for use in litigation". Thus, and this may be particularly so where the advice is being rendered by Crown Counsel to another official within the Ministry of the Attorney General, even though some difficulty may be found in establishing the lines of a solicitor-client relationship, it may be the case that the document has been prepared by someone who is clearly a "Crown Counsel" in circumstances in which he or she is clearly "giving legal advice" or has prepared the document "in contemplation of or for use in litigation".

Having thus noted that there are two possible reasons why section 19 might apply to records of this kind prepared by Crown Counsel, two further observations may usefully be made. First, it is evident that these two reasons and, therefore, the two branches of section 19 may overlap and apply to the same document. Second, it must also be noted, however, that the two branches are different in their reach. Thus, communications from the "client" in the Ministry may be exempt under the first branch of section 19 but not under the second branch. Further, as has been suggested, the second branch may apply even in circumstances where the relationship between Crown Counsel and the addressee of the record in question is not plainly that of the solicitor and client.

Against this background, it is possible to identify a series of records falling within this third category that are clearly exempt under either one or both branches of section 19. Those

which appear to be clearly captured by the common law branch of the exemption are Records 1, 3, 8, 14, 34, 60, 74, 78 and 83. Those documents which are less obviously created in the context of a solicitor-client relationship but which, in any event, are captured by the second branch of section 19 are Records 9, 10, 20, 28, 31, 33, 37, 64, 73, 75, 76, 77, 79 and 84.

The fourth category of documents is a miscellany of documents for which the Ministry claims an exemption but with respect to which the application of the section is more problematic than those records referred to above. Accordingly, a more detailed consideration of each of these records is required.

Record #6 (Appeal Record page 6)

As indicated above, this document provides a report of legal advice sought on behalf of a Ministry official from Crown Counsel. This appears to be a situation in which the relationship between the person seeking advice and the person giving the advice would appropriately be considered to be solicitor-client in nature. Accordingly, the question that must be addressed is whether this particular document can be said to be a communication of a confidential character between solicitor and client. Generally speaking, a document in which a third party reports that certain legal advice was given by a particular solicitor to a particular client would not attract this branch of the privilege. In the case of this particular record, however, the communication in question appears to be the device by which the advice of the solicitor is being communicated to the client.

If Crown counsel had communicated the advice in written form directly to the addressee of Record #6, there is no question but that the common law privilege would attach. In my view, it must also attach in circumstances such as these where the oral or written communication of an intermediary is the device by which the advice is communicated by the solicitor to the client.

Accordingly, this document is exempt under Section 19.

Record #16 (Appeal Record page 42)

This memorandum, although it indicates the nature of advice received from counsel, has as its purpose the communication of a

decision taken on the basis of that advice to the Ministry official who is required to implement it. Accordingly, this document is not itself a communication between solicitor and client pertaining to the seeking, formulating or giving of legal advice. Further, the document has not been prepared by or for Crown counsel and thus is not exempt under the second branch of Section 19. It must further be noted, however, that a carbon copy of the document was forwarded to a law firm which had been retained by the Ministry as counsel with respect to the matter under discussion. Thus, this document might be said to have a dual function. Nonetheless, the copy in issue here is that which was sent to the Ministry official and which, for the reasons indicated above, is therefore not exempt under section 19. No doubt the copy forwarded to the law firm would be covered by the common law branch of the privilege as a communication between solicitor and client. That, however, does not affect the status of Record #16 itself and it is therefore not exempt by virtue of section 19.

Record #17 (Appeal Record page 49)

This document is a covering memorandum from a Ministry official to the Acting Deputy Attorney General which would appear to have been originally attached to Record #18, this latter document being an opinion letter from counsel providing legal

advice to a Ministry official. Record #17 outlines the nature of that advice. As well, the author recommends that the advice be followed. As was the case with Record #6, above, this document appears to be the device by which the advice obtained from the solicitor is being communicated to the individual who must make a decision with respect to this matter, and who

therefore can properly be considered to be the "client" for purposes of the application of section 19. Accordingly, this document is also exempt under section 19.

Record #26 (Appeal Record page 59)

This record, with respect to which the authorship and date of creation is unknown, is a chronology of events concerning a particular matter. The Ministry has argued in its submissions that a paragraph which states the substance of advice rendered by Crown counsel constitutes a severable portion of material which is exempt under section 19. No basis has been established for applying this exemption, however, inasmuch as there is no indication that the document has been prepared by or for Crown counsel. Nor is there any evidentiary basis for the conclusion of the document has been created as a confidential communication between solicitor and client.

Accordingly, the paragraph in question is not exempt under section 19.

Record #27 (Appeal Record pages 60 - 92)

This document is a covering letter to which is attached a report to the Deputy Attorney General prepared by the author of the letter who had, on behalf of the Deputy Attorney General, conducted a hearing under section 18(4) of Regulation 881 of the Revised Regulations of Ontario, 1980. Such a hearing is undertaken with a view to determining whether grounds exist

for dismissing an employee whose conduct is the subject-matter of the hearing. Under section 18(8) of that Regulation, the

Deputy Minister may delegate his powers to hold such a hearing to a public servant in his Ministry. Understandably, in the present instance, the Deputy Minister delegated his powers and duties under the Regulation to a public servant who is also a Crown counsel as the matters to be investigated included a number of questions of law. Thus, it must be asked whether the resulting report, Record #27, constitutes material which is subject to the Section 19 exemption.

At first impression, it appears inappropriate to characterize such a delegation as a request, in effect, for legal advice which would bring into existence a solicitor-client privilege under section 19. On the other hand, it is apparent that the advice being rendered to the Deputy Minister by the author of Record #27 is very much legal in character. The hearing produced evidence of various kinds concerning the possible commission of offences. Further, the determination of whether the conduct in question constitutes a sufficient violation of the contractual duties of the public servant in question raises issues of some legal complexity which were the subject of analysis in Record #27. If an employer in the private sector were to undertake a similar exercise, it seems very likely that after determining what had believed to be the circumstances of the employee's misconduct, the employer would seek legal advice with respect to the implications of those facts with respect to the possible commission of criminal offences and further, with respect to the extent to which the misconduct in question meets a legal standard necessary to support a decision to dismiss the employee in question. In the present instance, however, given that the hearing was being conducted by Crown counsel, there would be no need to divorce the fact-finding exercise from the obtaining of advice concerning the legal implications of those

facts. Accordingly, it is my view appropriate to consider this situation to be one in which Crown counsel, that is the author of Record #27, has been requested to provide legal advice to the Deputy Minister and that Record #27, therefore, is a document "prepared by ... Crown counsel for use in giving legal advice...". The document is therefore exempt under section 19.

Record #29 (Appeal Record page 96)

Record 29 is a memorandum to the Assistant Deputy Attorney General from the Director of Crown Attorneys forwarding to the former a report prepared by a Crown Attorney with respect to the desirability of laying criminal charges with respect to certain matters. The memorandum communicates the substance of the advice and the Director's own advice with respect to the matter. As has been previously noted, this document is clearly exempt under section 13 of the Act. Although it is therefore unnecessary to determine whether the document is also exempt under section 19, it is possible that it is so exempt on the basis either that, as in the case of Record #6, it constitutes the means by which advice is being conveyed from solicitor to client or alternatively, on the ground that the Director, as Crown counsel, is in this document providing legal advice to the Assistant Deputy Attorney General.

Record #32 (Appeal Record pages 101 - 102)

This document is similar in material respects to Record #29. It is therefore plainly exempt under Section 13 of the Act and arguably exempt under section 19, as well.

Record #68 (Appeal Record page 574)

This document is a one page memorandum to file from the Director of Crown Attorneys reporting on the substance of a telephone conversation he had with a lawyer representing an employee of the Ministry who was then subject to investigation. The memorandum records the comments made by the

lawyer in question and, as well, the replies offered by the author of Record #68. The Ministry has submitted that this is a document prepared by Crown counsel in contemplation of or for use of in litigation. The second branch of section 19, however, has as its obvious purpose the protection of the confidentiality of materials prepared for adversarial use in pending or anticipated litigation. This record, on the other hand, records information that has been either provided by or provided to the lawyer who has been retained by the anticipated other party to the litigation. Accordingly, it is a record which does not engage the protection accorded by section 19.

Record #69 (Appeal Record page 575)

This document is a one-page memorandum from the Assistant Deputy Attorney General to the Director of the Audit Services Branch instructing the addressee to provide assistance in certain investigations undertaken by the Ontario Provincial Police. The relationship between the author and the addressee is obviously not that of solicitor-client. The document has not been prepared for use in giving legal advice or, in the requisite sense, in contemplation of or for use in litigation. This record is therefore not exempt under section 19.

Record #82 (Appeal Record page 675)

This document is a letter from a lawyer representing the employee who was the subject of the proceedings which formed the subject matter of Record #27, to counsel retained by the Ministry for advice with respect to this matter. The letter addresses certain procedural questions relating to anticipated further proceedings. As was the case with Record #68, this being a communication from opposing counsel, it does not come within the confidentiality rationale of section 19 and is therefore not exempt under this provision.

SECTION 21

Section 21 of the Act sets out a mandatory exception to the access principle which has as its object protection of personal privacy through a refusal to disclose personal information concerning identifiable individuals. It will be obvious, therefore, that the application of section 21 to the records at issue in the present appeal is a matter of considerable importance. The two requests made by the requester relate, in the first instance, to information concerning the requester himself and in the second, to information concerning the investigation of various allegations of wrongful conduct made by the requester and by others concerning third parties. In both instances, then, the bulk of the material which is responsive to the request contains personal information. It should be noted that there is very little documentary information in the appeal record that is responsive to the first request. The voluminous collection of documents prepared by the Ministry rarely refers to the requester. The vast bulk of the material arises from the investigations which arose, in the main, from allegations of

wrongdoing made by the requester concerning certain officials in the York County Sheriff's office. Another group of documents contains information concerning various participants in a job competition. Again, very little of that information relates to the requester but, rather, pertains to the employment histories of other candidates for the appointment in question. Thus, one of the central questions raised in this appeal is whether an individual in the position of the requester is entitled, under the Act, to obtain copies of documents containing personal information concerning other individuals.

The mechanism set out in section 21 of the Act for resolving questions of this kind requires the head to refuse to disclose personal information concerning individuals other than the

requester in a variety of circumstances. Of particular interest in the present appeal is section 21(1)(f) which creates what is often referred to as a "balancing test" for determining whether disclosure must be refused. This section provides as follows:

21.--(1) 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.

Section 21 then provides in subsections (2) and (3) a series of guidelines and/or presumptions that are to be taken into account by the head in determining whether or not a particular disclosure constitutes an unjustified invasion of personal privacy. Those provisions stipulate as follows:

21.--(2) A head, in determining whether a disclosure of personal information constitutes an unjustified

invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (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;

- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Ministry relied upon both the general balancing test set out in section 21(1)(f) and on many of the subparagraphs of subsections (2) and (3) of section 21 in its submission as a basis for exempting numerous documents containing personal information or for severing exempt material from such documents. Although it will be necessary to consider each of the documents with respect of which an exemption or severance is claimed, it is possible to make a few preliminary observations with respect to issues which will recur in the discussion of individual items in the expectation that this may reduce the necessity for more detailed consideration of these points below.

It is evident that the argument in favour of access to these various types of personal information referred to above rests on

considerations drawn from 21(2)(a). That is to say, it may be argued on behalf of the requester that disclosure of the requested material will grant the requester an opportunity to satisfy himself that appropriate steps were taken by Ministry officials in response to the allegations of wrongdoing made by himself. Further, it may be suggested that if it is the case that the requester feels, whether rightly or wrongly, that his rights as a former employee of the Ministry has been infringed by the conduct of a Ministry official, it might be argued that, in the words of section 21(2)(d), that "personal information is relevant to a fair determination of rights affecting the person who made the request". I should add, however, that no explicit theory has been advanced by the requester to indicate the nature of any rights that might have been infringed nor has there been any suggestion of the existence of a means whereby such a "fair determination of rights" might occur. Further, it may be noted that the requester filed, with his request, a copy of a report of the Ombudsman pertaining to a complaint brought to the Ombudsman by the requester in which the Ombudsman concludes that he was unable to reach the conclusion that a

violation of the requester's rights had occurred. Nonetheless, it is perhaps not unreasonable to assume that, at least from the requester's point of view, some such violation might have occurred and that the request might be thought, therefore, to draw some support from section 21(2)(d). It may be added, however, that the extent to which support can be drawn to section 21(2)(d) is substantially undermined by the absence of a precise theory of the type of rights violation that may be alleged to have occurred.

If some support may, in the foregoing manner, be drawn from the statute for the granting of access, considerable support can also be drawn for the view that disclosure of the kinds of personal information at issue in the present case, may, as a general matter, constitute an unjustified invasion of personal privacy. Subparagraphs (f), (g), (h) and (i) of section 21(2) will be relevant to the consideration of many of the records at issue in the present appeal. In some cases, the information is "highly sensitive". In other instances, where individuals who were the subject of allegations of wrongdoing were ultimately found to be innocent of wrongdoing, the information is "unlikely to be accurate or reliable". In still other cases the information was evidently supplied "in confidence" and in others, disclosure might "unfairly damage the reputation of any person referred to in the record". Moreover, a number of the subparagraphs in section 21(3) are also engaged by the documents. Many of them are subject to the presumption set out in subparagraph (b) as having been compiled "as part of an investigation into a possible violation of law". Others come under the presumption set out in subparagraph (d) as relating to "employment or educational history". Still others, in the language of subparagraph (g) consist of "personal recommendations or evaluations". More than this, however, it should be noted that the factors set out in subparagraphs (2) and (3) are not fully dispositive of the issue. The head is obliged, under subsection (2) "to consider all the relevant circumstances". The head is thus under a legal duty to consider any relevant factors there might be in addition to those expressly mentioned in the statute in determining whether a particular disclosure constitutes "an unjustified invasion of personal privacy".

A further general observation may usefully be made at this point. It should be noted that, as a general matter, section 21 appears to be inhospitable to the basic thrust of the present request. Thus, it is no doubt arguable that public access to investigative material gathered by public agencies would facilitate public scrutiny of the investigative activities of the agencies in question, this being a factor which the guideline set out section 21(2)(a) indicates should weight in favour of disclosure. Nonetheless, this very type of is stipulated in 21(3)(b) to be subject to a that its disclosure constitutes an unjustified personal privacy. In weighing the privacy interests of individuals who are subject to investigation and of individuals interviewed in the course of such investigations, and, indeed, of members of the family of individuals who are subject to investigation against the public interest in access to information, the statute has evidently been designed to implement a policy which generally favours the protection of privacy. It follows from this policy choice embedded in section 21 that many of the documents subject to the present request are exempt, either in whole or in part, under this provision of the Act.

One final preliminary point should be noted. To the extent that the records subject to the present request contain information concerning the employment history of identified individuals, it must be added that section 21(4) provides that

certain information concerning such history does not, if disclosed, constitute an unjustified invasion of personal privacy. That provision stipulates as follows:

21.--(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
- (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

. . .

When these provisions are considered together with the presumptions set out in section 21(3) (d) to the effect that disclosure of information concerning employment history constitutes an unjustified invasion of privacy, it appears that the Act has explicitly adopted a fairly comprehensive code with respect to the disclosure and non-disclosure of information relating to employment history. This is not to say that a case could not be made for disclosure of information relating to the employment history in a particular case. Rather, it is suggested that, apart from the information described in section 21(4), the Act appears to adopt a policy weighing very heavily against disclosure of information of this kind.

Against this background, I turn to consider the particular records with respect to which exemption or severances have been claimed by the Ministry. Many of the documents with respect to which claims have been made are documents which have been previously described in this Order. With respect to such documents, then, it will be unnecessary to provide further description of the contents of the record in question in this section of this Order. Many of the documents with respect to

which claims are made, beginning with Record #85, are considered for the first time in this section of this Order and brief description of their nature will therefore be necessary.

Record #85 (Appeal Record page 678)

Record #86 (Appeal Record page 679)

Record #87 (Appeal Record page 680)

Record #87 is a letter of complaint from a restaurateur who objected to the conduct of a member of the Sheriff's office staff. Record #86 constitutes a reply to Record #87 and, among other things, indicates that the Officer named in Record #87 was probably not responsible for the conduct in question. Record #85 is a further letter from the restaurateur acknowledging that the references to the individual named in Record #87 constitute a case of mistaken identity. The Ministry seeks severances in these three documents of the name of the individual who was mistakenly identified in Record #87. There is little, if any, public interest in the disclosure of the identity of this individual and the considerations set forth in section 21(2)(g) and 21(3)(d) weigh against disclosure. These severances are therefore permissible under section 21.

Record #88 (Appeal Record page 681)

This letter contains information concerning the actual remuneration of a number of employees of the Sheriff's Office, including the requester. The Ministry seeks a severance of the names and payment information concerning individuals other than

the requester. For the reasons indicated in section 21(3)(d), this severance is appropriate.

Record #89 (Appeal Record pages 682 - 683)

This two page memorandum outlines certain information concerning identified individuals who were employed during the 1982-83 fiscal year on what are referred to as "P104" contracts. The memorandum describes some of the terms and conditions of their employment and then goes on in the final three paragraphs and in the closing sentence of the document, to discuss an issue that had arisen with respect to the proper calculation of wages for these individuals. The Ministry seeks a severance of the names of all named individuals other than the requester. In my view, however, deletion of those names would be inconsistent with section 21(4)(a) insofar as this document discloses information concerning "classification or salary range and benefits or employment responsibilities" of particular individuals. The final three paragraphs of the document and the final sentence, however, deal with matters which are not covered by section 21(4)(a) and, as they do relate to employment history, those portions of the document are exempt and severable pursuant to the considerations indicated in section 21(3)(d).

Record #1 (Appeal Record page 1)

The Ministry seeks a severance of references in this document identifying Ministry employees who were interviewed by the Office of the Ombudsman with respect to a complaint made by the requester. The Ministry seeks a severance on the basis that information relates to "employment history" within the meaning of subsection 21(3)(d). In my view, this gives the notion of

employment history too broad a reading. The statutory notion of employment history appears to relate to what might be referred to as "personnel matters" and should not, in my view, be construed to include every action of an individual employee which might cumulatively be said to constitute that employee's "history". Nonetheless, the information in question is very sensitive in nature and its disclosure would constitute an unjustified invasion of personal privacy. The severances requested are therefore warranted.

Record #90 (Appeal Record page 684)

This one page document is a covering letter from a Ministry official to counsel in the Office of the Ombudsman enclosing a copy of a Public Service Grievance Board decision concerning an identified ministry employee. Although, as the Ministry submission argues, the decision of the Board may well be a public document, the fact that the individual in question was implicated in an investigation undertaken by the Office of the Ombudsman is not public information. Moreover, that information is sensitive in nature and is exempt for the same reason that the severed material in Record #1 is exempt. The Ministry's request that the decision number and the name of the individual in question be severed from Record #90 must therefore be granted.

Record #91 (Appeal Record page 685)

This one page record is the request from counsel in the Office of the Ombudsman that provoked the reply contained in Record #90. On the same grounds as those identified in discussing

Record #90, the references to the identified individual employee in Record #91 are both exempt and severable.

Record #92 (Appeal Record pages 686 - 687)

This two page memorandum from a Director in the Human Resources Branch to the Assistant Deputy Attorney General outlines certain information concerning the requester's employment history. More particularly, a lengthy paragraph provides an account of certain aspects of a competition for appointment to a particular position in which the requester participated. The Ministry seeks a severance of information identifying

individuals who provided reference checks concerning the requester, though the Ministry does not seek severance of the information provided by the referees. Further, the Ministry seeks a severance of the names of two other unsuccessful candidates for the position who were excluded, on-the basis of their reference checks, from the interview phase of the competition. This information is both exempt and severable. In the first instance, the considerations identified in subsection 21(3)(g) are critical. The names of the unsuccessful candidates are exempt on the basis that the information is highly sensitive and the reasons favouring disclosure are insubstantial. Accordingly, the requested severances are granted.

Record #93 (Appeal Record pages 688 - 689)

This record is a duplicate of #89 and is therefore subject to the same analysis leading to the severance of the final portions of the document. In addition, however, Record #93 contains a notation concerning action to be taken with respect to certain

of the employees. This additional notation is, for the same reasons as pertained to the final portions of the document, both severable and exempt.

Record #94 (Appeal Record page 690)

This one page letter is a letter providing notice of the withdrawal of a grievance launched by the requester to a ministry employee who was an interested party. Although the information contained in the letter is not highly sensitive, it does pertain to a personnel matter and therefore is appropriately considered to constitute part of that individual's employment history. For this reason, by virtue of the fact that the public interest in disclosure appears to be insubstantial, the name of the interested party is both exempt and severable.

Record #95 (Appeal Record page 691)

Record #96 (Appeal Record page 692)

Records #95 and #96 are similar in all essential characteristics to Record #94. Accordingly, the names of the addressees of these two further letters are both exempt and severable.

Record #97 (Appeal Record page 693)

This one page document is a completed reporting form relating to a particular job competition. The Ministry seeks severance of the names of the two successful candidates, one of whom accepted an offer of appointment. This information relates to the employment history of the individuals in question and, though

not particularly sensitive, appears to be protected from disclosure by the considerations indicated in section 21(3)(b).

Record #98 (Appeal Record pages 694 - 696)

This document, entitled "Applicant List and Screening, Sheriff's Officer 2 - York" is a handwritten list of the names and qualifications of individuals, including the requester, who applied for a particular job. The notations on the list include check marks and crosses against various categories and handwritten comments of various kinds. This information, together with the apparent fact that most, if not all, of these individuals were unsuccessful applicants for the position, is sensitive information of the kind protected for the reasons indicated in subsection 21(3)(d). The Ministry's request that the names on this list, other than that of the requester, be deleted is therefore allowed.

Record #99 (Appeal Record page 697)

This one page document is a completed form concerning the appointment of a member of the probationary staff. The Ministry seeks deletion of the individual's name, Social Insurance Number, salary rate and other related information concerning merit pay. Although one might, on reviewing a document of this kind, conclude that Section A of the document might be disclosable on the basis of section 21(4) because it discloses information concerning "classification", the disclosure of this particular document concerning an identified individual inescapably discloses other information concerning the circumstances under which the individual's appointment to the position was made and the date of its commencement. I am

satisfied that this would amount to a disclosure of the individual's employment history which would, in the circumstances of this case, constitute an unjustified invasion of privacy. Accordingly, the severances sought by the Ministry are granted.

Record #100 (Appeal Record page 698)

This one page letter is directed to the requester and is an acknowledgement of the receipt of an application for appointment from him. The Ministry concedes that no exemption can be claimed with respect to this document.

Record #101 (Appeal Record pages 699 - 703)

This document is a two page covering letter and a resume prepared by the requester which constitutes the application, receipt of which is acknowledged by Record #100. The Ministry concedes that this document is not exempt from disclosure under the Act.

Record #102 (Appeal Record page 704)

This one page letter is the offer of employment executed pursuant to Record #99. For the reasons indicated in the discussion of Record #99, the name, address and salary rate included in this offer of employment are both severable and exempt.

Record #103 (Appeal Record page 705)

This one page document is an interview schedule relating to a particular job competition. The Ministry seeks severance of the names of the interviewees on the basis that the document contains employment history information concerning these individuals. I share the view that the fact that individuals have applied for a particular appointment is normally not disclosable information. If the candidate is successful, the constitutes a portion of his or her employment history. If the candidate was unsuccessful the information is very sensitive. In either case, then, disclosure would in my view constitute an unjustified invasion of privacy in the absence of a compelling reason for disclosure. The requested severance is therefore allowed.

Record #104 (Appeal Record pages 706 - 707)

This two page document is another copy of Record #89. As was the case with Record #93, there are additional annotations on this copy of the record that contain information relating to employment which is not rendered accessible by subsection 21(4). Accordingly, the same analysis that applied to Record #93 applies to this record. The final paragraphs of the document and the handwritten annotations are both severable and exempt.

The next four documents can be considered together.

Record #105 (Appeal Record pages 708 - 713)

Record #106 (Appeal Record page 714)

Record #112 (Appeal Record pages 726 - 732)

Record #113 (Appeal Record pages 733 - 747)

The four documents are all Casual Attendance Reports concerning certain employees, including the requester. The Ministry seeks severance of the names of other employees together with certain potentially identifying information including their Social Insurance Numbers, positions and indications of gender on the ground that this information constitutes employment history information protected for the reasons indicated in section 21(3) (d). The Ministry's position is, in this respect, quite sound and the requested severances are therefore allowed.

Record #107 (Appeal Record page 715)

This one page memorandum records certain information concerning the termination of the employment contract of the requester and that of another individual. The Ministry seeks severance of the name of the other individual, which appears twice in this document. This information is employment history information of a sensitive character, disclosure of which would constitute an unjustified invasion of privacy. The requested severance is therefore granted.

Record #108 (Appeal Record pages 716 - 721)

This record consists of a series of Selection Criteria Rating Sheets which were obviously completed by members of a job competition selection panel. The rating sheets contain the author's evaluation of individual candidates in the competition, including the requester, under various headings. The Ministry seeks severance of the names of candidates other than the requester. A severance of this information is as the

information is both sensitive personal and, as well, an evaluation of the kind which is subject to a presumption favouring non-disclosure under subsection 21(3) (g) .

Record #109 (Appeal Record page 722)

This one page memorandum from an Assistant Deputy Minister of the Ministry of Revenue to a Deputy Director in the Ministry of the Attorney General forwarded a letter written to the Ministry of Revenue by the requester making allegations concerning the activities of a named individual. The Ministry seeks severance of the name of that individual, on the basis that it constitutes information concerning the handling of a complaint against that individual and that such information constitutes personal information of a sensitive nature. This point is well taken and the name of the individual is therefore exempt and severable from the remainder of the record.

Record #114 (Appeal Record page 749)

This record is similar in its essential characteristics to Record #109. It is therefore subject to the same analysis. The name of the individual in question must be severed, thus rendering the remainder of the document accessible under the Act.

Record #9 (Appeal Record pages 11 - 19)

This document is exempt in its entirety under section 21 for a number of reasons. The document contains contains highly sensitive personal information. It was compiled as part of an "investigation into a possible violation of law". Thus,

notwithstanding the fact that there may indeed be a public interest in disclosure of information of this kind, section 21 of the Act appears to tilt the balance in favour of privacy protection with respect to this particular kind of information. Further, once the sensitive personal information is deleted from the document, there appears to be no information remaining which would be responsive to the request.

Record #110 (Appeal Record pages 723 - 724)

This two page document contains records of hours worked by certain employees of the Sheriff's Office in the Judicial District of York, including the requester. The Ministry seeks severance of the names of individuals other than the requester on the basis that this constitutes employment information of the kind protected by section 21. As was the case with Records 105, 106, 112 and 113, it is my view that this type of information is normally protected under section 21 and therefore both exempt and severable from Record #110.

Record #111 (Appeal Record page 725)

This document is an equipment loan card for the requester. The Ministry concedes that no exemption is applicable to this record.

Record #115 (Appeal Record page 752)

This one page memorandum communicates certain information concerning a job competition to the Office of the Ombudsman. The Ministry seeks to sever the names of the successful

candidates and, in the case of one of them, information the reasons for his or her dismissal. This information constitutes employment history and the normal presumption against its disclosure under section 21(3)(d) should prevail. The names and dismissal information are therefore both severable and exempt.

Record #12 (Appeal Record pages 22-24)

This document provides an account of certain investigations being undertaken at the time with respect to allegations of wrongful activity within the Sheriff's Office of the Judicial District of York. The Ministry argues that the entire document is exempt on the basis that it indicates the nature of an investigation and indeed was compiled as a "part of an investigation into a possible violation of law" within the meaning of section 21(3)(b). On this basis, the Ministry claims that the entire document is exempt. In my view, however, the first four paragraphs of the document, which indicate the nature of the investigation undertaken, do not contain sensitive personal information concerning any or identifiable individuals. The next paragraphs, beginning with the phrase "the joint investigation", do, however, contain information about the investigation that would communicate information about individuals who could be identified by someone who is knowledgeable with respect to the identity of members of the staff of the Sheriff's Office at the time in question. This material does contain highly sensitive personal information, the disclosure of which would constitute an unjustified invasion of privacy. The final paragraph and final sentence of the memorandum do not contain sensitive information, however, and are therefore not subject to exemption on this ground.

Record #13 (Appeal Record pages 25-38)

The same analysis as that applied above to Record #12 applies to the Ministry's submission with respect to Record #13. This record consists of a covering memorandum, title page and an extensive summary of a preliminary report of an investigation undertaken by the Ontario Provincial Police. The information

contained in the summary is protected from disclosure by section 21 for the reasons indicated in subsections 2(f), 3(b), (d) and (f). The covering memorandum and title page are, however, not exempt on this basis.

Record #14 (Appeal Record page 39)

This document contains comments on investigative interviews of certain employees and a recommendation of disciplinary action concerning them. The names of the employees are both severable and exempt under section 21 as sensitive personal information of an employment-history nature.

Record #80 (Appeal Record page 673)

The Ministry claims an exemption with respect to this document in its entirety on the theory that once the name and office of the identified individual in the document is removed, the remainder of the document is not responsive to the request. In my view, however, although the sensitive nature of the information contained in the document does render the name and office of the individual both severable and exempt, the remainder of the document does remain accessible as it

communicates information concerning a particular process that might be of interest to a requester.

Record #15 (Appeal Record pages 40-41)

For the reasons indicated above in discussing the application of section 21 to Records #12 and #13, the Ministry's submission that the names of identified individuals and certain allegations made concerning them are exempt and severable from Record #15 is correct.

The next three records may usefully be considered together.

Record #56 (Appeal Record page 490)

Record #57 (Appeal Record page 491)

Record #58 (Appeal Record pages 492-493)

These documents relate to a decision to raise certain allegations at a disciplinary hearing concerning a Ministry employee. This information is protected from disclosure under section 21 for the reasons suggested by subsections 21(2)(f), (3)(b) and (3)(d). If the name of the individual in question is deleted from Record #56, however, the remainder of the document does not disclose sensitive personal information. In the context of the present request, however, disclosure of any portion of Records #57 and #58, even with the name of the employee deleted, would communicate sensitive personal information about an identifiable individual. These two records are therefore exempt in their entirety by virtue of section 21.

Record #59 (Appeal Record pages 494-496)

The Ministry claims an exemption under section 21 for the entirety of this record. The only sensitive information, however, would appear to relate to the employee named in the second paragraph of the letter. That name is both exempt and severable. Accordingly, the disclosure of the remainder of the document is not prevented by section 21.

Record #60 (Appeal Record page 497)

The Ministry's submission that the name of the individual referred to in this memorandum, who was the subject of a disciplinary investigation and hearing, is both exempt and severable on the basis of section 21 is well founded.

Record #55 (Appeal Record pages 175 - 489)

This lengthy document is similar in its essential characteristics to Records #12 and #13, considered above. It is exempt in its entirety under section 21 on the basis of the reasons applicable to these records, there being, in my view, no portions of Record #55 which are severable and disclosable.

Record #81 (Appeal Record page 694)

Although the Ministry has claimed an exemption for this entire document on the basis that it contains information concerning the dismissal of a named employee and proceedings undertaken to appeal that decision, it is my view that deletion of the name of the employee in question would afford sufficient protection to the privacy of the individual in question.

The next three records may be usefully considered together:

Record #16 (Appeal Record page 42)

Record #17 (Appeal Record page 43)

Record #18 (Appeal Record pages 44 - 47)

These three records concern disciplinary proceedings pertaining to a named Ministry employee. The privacy of the individual in question would be adequately protected if his or her name was deleted from Records #16 and #17. Accordingly, the name of the individual is severable and exempt information in those two records. As was the case with Record #58, however, Record #18 is exempt in its entirety as it provides a detailed account of allegations which would, even if the name of the employee in question were deleted, render the name of the individual ascertainable to individuals who are knowledgeable with respect to the place of employment of the individual in question.

Record #19 (Appeal Record pages 48 - 49)

The Ministry argues for exemption of this document in its entirety as it refers to the dismissal of certain employees and anticipated future action relating to those decisions. If the names of the individuals in question were deleted from the document, however, the document would not communicate personal information concerning an identifiable individual. Accordingly, the names of the individuals are both severable and exempt but the remainder of the document is not exempt under section 21 of the Act.

Record #61 (Appeal Record page 498)

This one-page letter sets out the reasons for a decision to dismiss the addressee of the letter. Even if the name of the addressee were deleted, the remainder of the document would disclose information which is likely to render the identity of the addressee ascertainable. The information is highly sensitive and the entire document is exempt under section 21.

The next two documents can be considered together:

Record #116 (Appeal Record page 753)

Record #117 (Appeal Record page 754)

These two documents consist of a covering letter from a staff representative of the Ontario Public Service Employees Union to the Deputy Attorney General to which is attached a grievance form. The information contained in the grievance form is highly sensitive and, if severed, would not provide meaningful information which is responsive to the request. The covering letter, however, would, if the three references to the name of the grievor were deleted, not disclose sensitive information

concerning an identifiable individual. Accordingly, although the references to the named individual who is the grievor are both severable and exempt, the remainder of the document is not exempt by virtue of section 21.

Record #20 (Appeal Record pages 50 - 51)

The Ministry proposes severance of the names of individuals who were questioned by the Ontario Provincial Police as a result of allegations of an unspecified nature being made against two of the individuals in question. The names of the individuals, in the context of this highly sensitive information, are both severable and exempt under section 21.

Record #21 (Appeal Record page 52)

This letter contains instructions relating to the negotiation of a settlement of a dismissal grievance being brought by a named individual. For the reasons suggested by subsections 21(2)(f) and (3)(d), the identity of the individual ought not to be disclosed. The individual's name is therefore both severable and exempt.

Record #118 (Appeal Record page 755)

This one page memorandum contains information concerning the transfer of a named individual from one position to another with certain stated salary implications. Disclosure of any of the information appears likely to disclose, to a knowledgeable individual, the identity of the employee in question and the entire document is therefore exempt under section 21.

The same analysis as that applicable to Record #118 also applies to the following two records.

Record #119 (Appeal Record page 756)

Record #120 (Appeal Record pages 757 - 758)

Record #82 (Appeal Record page 675)

The Ministry seeks a total exemption for this record on the basis that it relates to employment history. In my view, however, although the document does contain sensitive information concerning employment history, the nature of the information contained in the record is such that the deletion of the name would prevent disclosure of sensitive information concerning the named individual through this document. Accordingly, the name of the individual employee who is the subject of discussion in this letter is both exempt and severable.

Record #62 (Appeal Record pages 499 - 500)

The Ministry seeks severances of the names of a number of individuals who are identified in this record as potential witnesses in a proceeding. Disclosure of the fact that these individuals had apparently provided material information and either would or would not be willing to testify in these proceedings on a voluntary basis is sensitive personal information, as is the name of the individual who is the subject of the proceeding. Accordingly, the Ministry's submission that these names are both exempt and severable is well-founded.

Record #121 (Appeal Record page 759)

This document is a Notice of Continuation of Hearing before the public service Grievance Settlement Board. The analysis set out above with respect to Record #62 also supports a severance of a reference in this document to the name of an individual with respect to whom a summons has been issued.

The following five records may be considered together.

Record #22 (Appeal Record pages 53 - 54)

Record #23 (Appeal Record page 55)

Record #24 (Appeal Record page 56)

Record #25 (Appeal Record pages 57 - 58)

Record #53 (Appeal Record page 171)

These five documents are all memoranda reporting on investigations made by the author into certain allegations of wrongdoing made with respect to certain Ministry employees. In each case, the author of the memorandum concludes that there was nothing improper in the activities of the employees in question. The fact of the investigation and the nature of the allegations are sensitive personal information which is both exempt and severable on the basis of the considerations set out in subsections 21(2)(g) and (i), and (3)(b) and (d).

Record #26 (Appeal Record page 59)

This document contains a statement of a chronology of events concerning the dismissal of an identified employee. The Ministry seeks an exemption under section 21 for the entire document. If, however, the name of the employee in question is deleted, disclosure of the document will not constitute an unjustified invasion of privacy. Accordingly, subject to that severance, the document is not protected under section 21(1).

Record #27 (Appeal Record pages 60 - 92)

The Ministry seeks a total exemption for the report contained in pages 61-92 of the Appeal Record on the ground that this report of a disciplinary investigation of an identified employee is protected from disclosure by reason of the considerations outlined in subsections 21(3)(b), (d) and (g). There is merit in the Ministry's submission. Although the investigation is disciplinary in nature, the document is subject to the considerations raised in subsection 21(3)(b) by reason of the fact that the investigation related to certain alleged violations of law.

Further, deletion of the name of the employee under investigation and the names of other individuals, such as witnesses, together with other identifying information would create a document which would not constitute a meaningful response to the request for information. The covering page set out at page 60, however, is disclosable, provided that the name of the individual subject to investigation is deleted.

Record #63 (Appeal Record pages 501 - 548)

Similar considerations as those outlined above with respect to Record #27 apply to Record #63. However, the covering letter reproduced at pages 501-502 is disclosable if the names of identifiable individuals subject to investigation or participating in the investigation are deleted. The body of the attached report, however, is exempt from disclosure for the reasons suggested in subsections 21(3)(b) and (d).

Record #28 (Appeal Record pages 93 - 95)

The Ministry seeks a severance of the names of individuals subject to the investigation which is the subject-matter of this memorandum together with the names of certain individuals implicated in the investigation. The Ministry seeks as well deletion of the name of a corporate entity, disclosure of which would have the effect of disclosing certain information concerning an identifiable individual. The Ministry's position on this point is well taken and the names are therefore both severable and exempt.

Record #30 (Appeal Record page 97)

This record indicates that the author believes there to be a number of evidentiary difficulties in prosecuting a named individual. The Ministry, quite properly in my view, seeks a severance of the name of that individual on the basis of subsections 21(3)(b), (d), and (g). The record is otherwise disclosable.

Record #31 (Appeal Record pages 98 - 100)

This letter contains information concerning investigations undertaken into the activities of particular individuals, and, as well, a certain business entity which could be associated with an identifiable individual. The Ministry seeks exemption of the entire document on the basis that once the names of individuals and other potentially identifying information is deleted, the remainder of the document is not responsive to the request. The claimed exemption is supportable on the basis of subsections 21(3)(b), (d) and (g).

Record #32 (Appeal Record pages 101 - 102)

For reasons which are similar to those indicated with respect to Record #31, the two numbered paragraphs in Record #32 are both exempt and severable on the basis that they disclose information concerning the nature of investigations undertaken with respect to certain identified individuals.

Record #64 (Appeal Record page 549)

The Ministry concedes that no exemption pursuant to section 21 is supportable for this one-page letter.

Record #33 (Appeal Record pages 103 - 117)

This document provides an account of certain police investigations. The personal information contained in the document pertains to the individuals under investigation and others implicated in those investigations. That information is exempt on the basis of subsections 21(3)(b), (d) and (g). If that information were severed, the remainder of the document would not constitute a meaningful response to the request. Accordingly, the entire document is exempt by virtue of section 21.

Record #65 (Appeal Record pages 550 - 551)

This document provides an account of employment-related information which is highly sensitive in nature and which would, if disclosed, constitute an unjustified invasion of privacy. It is therefore exempt pursuant to section 21.

Record #66 (Appeal Record pages 552 - 553)

The Ministry seeks severances of the names of various individuals subject to investigation and other individuals implicated in those investigations. Such information is both severable from the present document and exempt on the basis of subsections 21(3)(b) and (d).

Record #67 (Appeal Record pages 554 - 573)

This investigative report is exempt in its entirety on the basis of subsections 21(3)(b), (d), (f) and (g).

Record #18 (Appeal Record page 20)

The Ministry has indicated that no exemption is claimed on the basis of section 21 with respect to this document.

Record #34 (Appeal Record pages 118 - 129)

This document contains a detailed account of the results of certain investigations undertaken into the activities of identifiable individuals and provides advice with respect to various matters. The personal information disclosed therein is plainly exempt under subsections 21(3)(b), (d), (f) and (g) and is so intertwined with the advice as not to be severable. Accordingly, the entire document is exempt pursuant to section 21.

Record #36 (Appeal Record page 133)

The Ministry does not claim an exemption pursuant to section 21 with respect to this document.

Record #68 (Appeal Record page 574)

The Ministry seeks an exemption for this document in its entirety on the basis of subsections 21(3)(b) and (d). In my view, however, if the name of the individual under investigation and his or her position and the lawyer who made the inquiries recorded in this record were deleted, the remaining information would not, if disclosed, constitute an unjustified invasion of privacy. With this information deleted, then, the remainder of the document is not exempt pursuant to section 21.

Record #69 (Appeal Record page 575)

A similar analysis as that outlined above with respect to Record #68 applies to this document. Once the name of the individual subject to investigation and the name of a co-worker are severed, the remainder of the document is not protected under section 21. More particularly, the suggestion made by the Ministry that references to the Ministry personnel and to a member of the Ontario Provincial Police contained therein are exempt on the basis that this information constitutes employment history is not well taken. As has been indicated previously, it is my view that the concept "employment history" pertains only to information of a personnel character. The mere fact that a named public servant has performed or undertaken a specific particular task is not "employment history" in the requisite sense.

Record #37 (Appeal Record pages 134 - 135)

The Ministry seeks a severance of the entire second paragraph of this document and the references in the third paragraph to certain individuals on the ground that these passages of the document provide an account of information gathered in the course of an investigation into a possible violation of the law. This material is both severable and exempt for the reasons indicated in subsection 21(3)(b).

Record #70 (Appeal Record pages 576a - 582)

The Ministry seeks severances of the names of certain individuals whom the police interviewed or whom they wanted to interview. These names are both severable and exempt for the reasons indicated in section 21(3)(b).

Record #54 (Appeal Record pages 172 - 174)

The personal information contained in this memorandum from a Corporal of the Ontario Provincial Police is clearly exempt by reason of section 21(3)(b). Once deleted, the remainder of the document is not responsive to the request. Accordingly, the entire document is exempt under section 21.

Record #71 (Appeal Record pages 583a - 583b)

This document contains information concerning identified individuals which is exempt for the reasons indicated in section 21(3)(b) and (d). Once deleted, the remainder of the document is not responsive to the request, and accordingly, the entire document is exempt.

Record #38 (Appeal Record page 136 - 138)

This entire document consists of an account of personal information obtained by the author of the document in the course of a law enforcement investigation. The document is exempt by virtue of subsections 21(3) (b), (f) and (g).

Record #39 (Appeal Record pages 139 - 140)

References in this document to named individuals and to the fact that they may or may not be vulnerable to the laying of criminal charges are the subject of a requested severance by the Ministry. The information in question is both severable and exempt by reason of subsection 21(3) (b).

Record #39A (Appeal Record pages 141 - 145)

The Ministry seeks severances of certain kinds of information from this document, principally on the ground that the information constitutes either employment history or financial transaction information within the meaning of section 21(3) (d) and (f). The first requested deletion provides information concerning the manner in which work was assigned at Sheriff's auctions. This information does not constitute employment information in the requisite sense and is not particularly sensitive. It is therefore not exempt under section 21. The second requested deletion does not identify any individual and is therefore not exempt under section 21. The third requested deletion contains information concerning an investigation of an allegation which the author believes to have been unwarranted.

The information is severable and exempt for the reasons indicated in subsections 21(2)(f), (g) and (i), and (3)(b). The final requested deletion does not, apart from the references to an identified employee and a general reference to co-workers, disclose sensitive personal information. Accordingly, if the reference to the identified individual and to his or her co-workers is deleted, the remainder of the paragraph would not be subject to exemption pursuant to section 21.

Record #72 (Appeal Record pages 584a - 584c)

The Ministry seeks severances from this letter of enquiry from the Office of the Ombudsman of names of identified individuals and certain business names that would serve to identify particular individuals. The severances are warranted on the basis of the considerations set forth in subsections 21(3)(a), (b), (d), (f) and (g).

Record #84 (Appeal Record page 677)

These handwritten notes contain investigative information concerning two identified individuals. Once those names are deleted from the document, however, the remainder of the document does not communicate personal information concerning an identified individual. Accordingly, the requested severances are appropriate under section 21(3)(b).

Record #42 (Appeal Record page 148)

The Ministry requests severances of sensitive personal information concerning the employment history of certain

identified individuals. The information is both severable and exempt for the reasons suggested in section 21(3)(d).

The following two documents contain material which is worded similarly, if not identically, to the passages severed from Record #42. This material is therefore also both severable and exempt as it appears in these 2 records.

Record #43 (Appeal Record page 149)

Record #50 (Appeal Record page 161 only)

The next two records may be considered together:

Record #122 (Appeal Record page 760)

Record #123 (Appeal Record page 761)

This document provides an account of an investigation undertaken concerning certain allegations of wrongdoing on the a public employee and, further, of disciplinary action arising from that investigation. The entire document is exempt by reason of the considerations set out in subsections 21(3)(b), (d), (f) and (g). Record #123 is almost a precise copy of Record #122. Both records are therefore exempt in their entirety.

The next three records may be considered together:

Record #44 (Appeal Record page 150)

Record #46 (Appeal Record pages 152 - 154)

Record #50 (Appeal Record pages 161 - 162 only)

The Ministry seeks severance of information relating to salary lost by a named employee as a result of discipline imposed by the Ministry. While this information is plainly exempt pursuant to section 21(3)(f), the remainder of the document also appears to be exempt by reason of that and other subsections of section 21. It is not obvious why the Ministry has not sought the severance of the other information contained on these pages but, as section 21 is a mandatory exemption, the information concerning the individual in question is exempt and therefore all but the first two paragraphs of Records #44 and #46 and the material contained in the last paragraph of the first page of Record #50 and the first three paragraphs of the second page are exempt on this basis.

The next three records may be considered together:

Record #45 (Appeal Record page 151)

Record #47 (Appeal Record pages 155 - 156)

Record #50 (Appeal Record pages 162 - 163 only)

The Ministry seeks deletions of sensitive personal information concerning allegations made about investigations of certain activities of a number of employees of the York Sheriff's Office. The requested severances are warranted on the basis of the considerations set forth in subsections 21(3)(b), (d), (f) and (g).

The next two documents may be considered together:

Record #48 (Appeal Record pages 157 - 158)

Record #50 (Appeal Record pages 163 - 165 only)

The Ministry seeks a severance from these records of information indicating the nature of personnel decisions taken with respect to identifiable individuals as a result of the investigation of allegations of misconduct made by the requester. The information in question is exempt by virtue of the considerations set out in subsections 21(3)(b) and (d) and the severances are therefore granted.

Record #51 (Appeal Record page 168)

This entire document is constituted by the type of information referred to above in the discussion of the severances requested for Record #48. On the same basis, therefore, the entire record in this instance is exempt.

SECTION 22 (A)

This section confers a discretion upon the head to refuse disclosure where "the record or information contained in the record has been published or is currently available to the public". The Ministry has submitted that it is entitled to exercise its discretion to refuse to disclose information on this basis with respect to the following categories of material:

Statutes

The Ministry has refused to disclose copies of sections from the Ombudsman Act and the Public Service Act on the basis that provincial statutes are published by the Queen's Printer and are available to the public through libraries, and, in their consolidated form, for purchase in the Government Bookstore. The following records are, indeed, exempt from disclosure on this basis:

Record #75 (Appeal Record pages 588 - 599)

Record #129 (Appeal Record pages 799 - 802)

Hansard

The following record, being an excerpt from Hansard for July 9th, 1986, is both published by the Queen's Printer and available in public libraries and therefore covered by this provision:

Record #133 (Appeal Record pages 806a - 806b)

Grievance Settlement Board Materials

The following records are documents pertaining to a proceeding before the Ontario Crown Employees Grievance Settlement Board:

Record #125 (Appeal Record pages 763 - 795)

Record #120 (Appeal Record page 757)

Record #121 (Appeal Record page 759)

Record #126 (Appeal Record page 796)

Record #127 (Appeal Record page 797)

Record #128 (Appeal Record page 798)

The first of these six documents is a decision of a panel of the Board pertaining to a particular matter. The second record is a copy of minutes of settlement which were entered, by consent of the parties, as an Order of the Board. The other four documents are notices of hearings concerning a grievance brought on behalf of the requester. The Ministry has submitted that as decisions and orders of the Board are made available to the public in the library maintained by the Board at its offices at 180 Dundas Street West in Toronto, the decisions of the Board are available to the public within the meaning of section 22(a). On this basis, the first two documents would appear to be available to the public within the meaning of section 22(a). The Ministry further submits that dates of hearings are recorded on the front page of decisions of the Board. Accordingly, in any case where a proceeding terminated or resulted in an Order of the Board, the information related to the dates of hearings would be, on the same reasoning, available to the public within the meaning of section 22(a). It is my view that the Ministry's submissions on these points are consistent with a proper interpretation of section 22(a).

Having thus determined that the Ministry possesses a discretion to withhold the materials identified above as coming within the scope of section 22(a), it remains to consider whether the discretion to withhold disclosure has been properly exercised. The Ministry explains in its submission that the decision to withhold has been made "because the documents in this case are

quite readily accessible to the requester, who has already had access to a great number of Ministry documents through the processing of his grievances and the Ombudsman's investigation". The Ministry appears to be of the view that the balance of convenience favours the imposition of this burden on the requester, especially in the light of the level of access which he has previously enjoyed to documents of the kind at issue in the present appeal.

In general terms, the Ministry appears to be correct in suggesting that the purpose of the discretion conferred by section 22(a) relates to questions of convenience. Obviously, there is no other public interest to be served by withholding disclosure of information which is readily available elsewhere. Accordingly, the discretion to disclose is conferred for the evident purpose of enabling a head to avoid disclosure where that process merely involves expending the resources of the Ministry on the photocopying of material which is otherwise readily and, from the Ministry's point of view, more conveniently available to the requester in another form. It would, on the other hand, be an abuse of the discretion conferred by section 22(a) if the head disclosure of information otherwise publicly available where the refusal does not rest on a balance of convenience of this kind and/or where the refusal to disclose will have the effect of refusing to disclose the nature of the information contained in the Ministry's records which is thought by the Ministry to be responsive to the request. Both of these points arise in the present context. Thus, where the record in dispute constitutes a copy of the entire published document, the balance of convenience leans in favour of the Ministry and the record can properly be withheld. In the present instance, this is the case

with the copy of the Ombudsman Act which is reproduced in its entirety as Record #75. On the other hand, Records #129 and #133 are constituted by only a few pages of much larger documents. In such circumstances, the balance of convenience does not favour the Ministry. Moreover, if the requester is denied knowledge of the precise passages retained by the Ministry in its records of these public documents, the requester will simply be sent on a fishing expedition to attempt to discern the identity of the materials thought to be relevant by the Ministry. In such circumstances, it would be an abuse of the discretion conferred by section 22(a) to withhold disclosure. Thus I find that the head has not properly exercised his discretion under subsection 22(a) of the Act with respect to Records 129 and 133. The head appears to

have ignored relevant factors and, indeed, appears to have been influenced by an irrelevant consideration, the fact that the requester has previously had access to other documents.

Accordingly, I order that the head reconsider the exercise of his discretion under subsection 22(a) with respect to Records 129 and 133 within twenty (20) days of the date of this Order, and to provide me with written notification of his decision regarding the exercise of discretion along with accompanying reasons within five (5) days of the date of the decision.

The documents of the Grievance Settlement Board raise a more difficult question. In each case, the record retained by the Ministry constitutes the entire document created by the Grievance Settlement Board and thus the balance may appear to lean in favour of the Ministry. On the other hand, to suggest that material which can be, as the Ministry alleges, obtained by attending at the offices of a public institution in downtown

Toronto is "available to the public" stretches the statutory notion of "availability" to an unattractive degree. There is, on the other hand, a different reason for suggesting that this material not only may be withheld but must be withheld. Disclosure of these records would have the effect of communicating information of a kind which, as has been indicated previously in this Order, would disclose highly sensitive personal information concerning the discipline imposed on a particular employee and the proceedings which were launched by that employee's union to challenge that discipline. To the extent that such information is contained in a document created by the Ministry - and many of the records considered above in this Order contain such information - the record in question is, in my view, exempt pursuant to the provisions of section 21. So too, in my view, must be Ministry-retained copies of decisions of the Grievance Settlement Board, and related documents, which disclose information of this kind. Accordingly, it is my view that

while the withholding of these six records cannot be defended on the basis of section 22(a), their withholding is required by virtue of the provisions of section 21.

The resulting position may be thought to be an unusual one. It is alleged by the Ministry that these documents and/or the information contained in some of them are available to the public at the offices of the Grievance Settlement Board. While this may be the case, and while disclosure of those materials may or may not be an unjustified invasion of privacy within the context of the operations of an adjudicative body such as the Grievance Settlement Board, it nonetheless appears to be an unjustified invasion of privacy to disclose materials of this

kind held by the Ministry. The Grievance Settlement Board, it may be noted, is not a scheduled institution under the present Act. For this, and other reasons, it is unnecessary to consider in the present case whether the disclosure of such information to the general public is consistent with the policies on privacy protection embraced by the Act under which this appeal must be considered. It is only material to the present dispute to determine whether the Ministry is entitled to disclose the materials within the rubric of the privacy protection scheme established by section 21. In my view, the information cannot be disclosed by reason of the considerations indicated in subsections 21(2)(f), (g), (i) and (3)(b), (d), (f) and (g). Perhaps I should add, for purposes of clarity, that a different result might well obtain if the information in question had already been publicly disclosed by the Grievance Settlement Board and, say, had become the subject of discussion in the daily press. In such a case, the privacy interest in information which, though formerly private, has become public would recede if not disappear.

Finally, it should be noted that the Ministry has submitted that the following record, which is a one page letter from the Secretary of the Grievance Settlement Board to the Attorney is not captured by section 22(a). I am in agreement with this submission.

Record #124 (Appeal Record page 762)

SECTION 49 (A)

In addition to the general right of access conferred on requesters by section 10 of the Act, section 47 provides a specific right of access to personal information concerning the requester and, as well, a right to request correction of the

personal information in question where the requester believes that it is erroneous or incomplete. Section 49 of the statute then deals, broadly speaking, with the question of the integration of the right of access to personal information conferred under section 47 and the general right of access conferred by section 10. Section 49 ensures that the right of access conferred by section 47 does not violate the interests protected by the various exemptions to the general right of access conferred under section 10. Section 49 provides as follows:

49. A head may refuse to disclose to the individual to whom the information relates personal information,
- (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;
 - (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
 - (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
 - (d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;
 - (e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or
 - (f) that is a research or statistical record.

Section 49(a) thus indicates that, with the exception of section 21, the major exceptions to the general right of access set out

in the Act may inhibit the disclosure of personal information concerning the requester to the requester. Thus, for example, where the personal information in question constitutes advice or recommendations concerning the requester rendered by a public servant within the meaning of section 13(1), the record or relevant portion thereof remains exempt under section 13, notwithstanding the fact that the information accurately characterized as personal information to a right of access would otherwise obtain under 47. Section 21 is excluded from the scope of section for the obvious reason that the section 47 right of to personal information should not be inhibited by the operation of section 21, which is designed to inhibit the disclosure of sensitive personal information to a requester. Where the information concerns the requester himself or herself, there is no reason to refuse disclosure on the basis of the privacy protection policies implemented in section 21. Where, on the other hand, the personal information concerning the requester is also personal information concerning a third party, that third party's privacy interests need to be taken into account and that policy concern is addressed by subparagraphs (b) and (c) of section 49.

Very few of the records at issue in the present appeal contain information concerning the requester and accordingly the disclosure scheme set out in sections 47 and 49 of the Act has little relevance to the present appeal. Nonetheless, there are some records containing personal information concerning the

requester with respect to which the Ministry seeks to rely on the exemptions set forth in sections 49(a) and (c). The records with respect to which a section 49(a) exemption is claimed - all

of which have been previously described in this Order - are the following:

Record #8 (Appeal Record pages 8 - 10)

This document provides legal advice concerning the Ministry's response to an investigation by the Office of the Ombudsman into a complaint made by the requester and has previously, in this Order, been held to be exempt under both section 13 and section 19. It is therefore exempt from this section 47 right of access by virtue of section 49(a).

Record #40 (Appeal Record page 146)

Record #41 (Appeal Record page 147)

The Ministry has decided not to make any submissions pursuant to section 49(a) with respect to Records #40 and #41.

Record #39A (Appeal Record pages 141 - 145)

The Ministry seeks deletion of all or portions of numbered paragraphs 1, 2 and 5, and the paragraph following paragraph #9 in this document on the basis of section 49(a). It is not obvious what the underlying basis is for the Ministry's suggestion that this section is applicable to these passages. More particularly, with the exception of the last sentence of the last-mentioned paragraph, the information contained in these paragraphs does not appear to pertain to the requester and therefore is not material which is subject to the section 47 access right. Thus, there appears to be no room for the invocation of section 49(a) with respect to these paragraphs.

Paragraph #5, however, contains information concerning an allegation made by the requester concerning the conduct of a named Ministry employee and further, reports that the author of Record #39A investigated the matter and believes that the allegation is not substantiated by that investigation. That information is personal information concerning a third party which is sensitive and subject to the mandatory exemptions set forth in section 21 for the reasons indicated in subsections 21(2)(f), (g), and (j) and subsection 21(3)(b). Accordingly, this paragraph is both severable and exempt.

SECTION 49(C)

Section 49(c) provides a further exemption to the section 47 right of access to personal information concerning the requester in the following terms:

49. A head may refuse to disclose to the individual to whom the information relates personal information,

. . .

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

. . .

In applying section 49(c), it is important to note that the exemption to the right of access contained therein does not apply to all evaluative or opinion material compiled for

employment purposes. Rather, the exemption applies to such material only "where the disclosure would reveal the identity of the source" who may reasonably have assumed that his or her identity will be held in confidence. Thus, in the normal case, the head would be obliged, in seeking to defend a decision to withhold information under this provision, to demonstrate that the material in question was supplied in the said circumstances. Further, even where the evidence may suggest that such circumstances were present, it may be possible to disclose the contents of such material after severing the name of the author of the document and any other identifying information. If, however, the head is of the view that such severances cannot be successfully made, submissions on that point should be expressly made. In the present case, however, no such submissions have been made and I am therefore left with the somewhat difficult task of attempting to determine from the mere content of the documents themselves appropriate inferences with respect to these issues.

The documents with respect to which the Ministry seeks to rely on section 49(c) are as follows:

Record #135 (Appeal Record page 808)

Record #136 (Appeal Record page 809)

Record #137 (Appeal Record page 810)

Record #138 (Appeal Record page 811)

These four documents consist of both typewritten and handwritten versions of references provided by two individuals with respect to the requester's suitability for permanent employment. In each case, the authors provide accounts of their experiences of working with the requester. Accordingly, disclosure of the contents of the memoranda, even with the names of the authors deleted, would very likely disclose the identity of the authors of the documents to the requester. Further, it is obvious from the content of these documents that they were written in circumstances where the author expected that his or her identity would not be revealed. Accordingly, in the rather unusual circumstances of these particular documents, appropriate inferences can be drawn from the documents themselves that support the application of the exemption set out in section 49(c). These four documents are therefore exempt from disclosure on this basis.

SECTION 178.2 OF THE CRIMINAL CODE R.S.C. 1970, C-34

The Ministry has submitted that it is entitled to rely on a provision of the Criminal Code of Canada which proscribes the disclosure of information obtained through the interception of what are referred to as private communications. Section 178.2(1) of the 1970 version of the Code appears in the most statutory revision, R.S.C. 1985, c-46, as section 193(1). That provision stipulates as follows:

178.2(1) Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

- (a) uses or discloses such private communication or any part thereof or the substance,

meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for two years.

Subsections (2) and (3) of 178.2 then set forth a series of exceptions to the general prohibition set out in subsection 1. None of the exceptions appear to apply to the present circumstances and, accordingly, the Ministry has argued that disclosure of certain documents is precluded by this section of the Code.

The Ministry's reliance on this provision raises a number of difficult legal issues. In the present context, however, it is my view that none of these issues are required to be resolved. Nonetheless, it may be useful to simply advert to some of these difficulties. First, the application of this section of the Criminal Code to the records at issue in the present appeal initially appeared to me to be quite problematic. More particularly, the decision of the Ontario Court of Appeal in R. v. Duarte (1988), 38 C.C.C. (3d) 1 appeared to be inconsistent with the interpretation placed on the provision by the Ministry in its submissions in this appeal. To the extent that there was an initial apparent inconsistency, however, that problem appears to have disappeared as a result of the decision rendered on January 22, 1990 by the Supreme Court of Canada on appeal from the decision of the Ontario Court of Appeal in that case. In R. v. Duarte (1990), 53 C.C.C. (3d) 1, the Supreme Court of Canada overruled the decision of the Ontario Court of Appeal and offered an interpretation of section 178.11(1) which appears to be consistent with the underlying assumptions of the Ministry's submissions in the present appeal.

A second point of difficulty relates to the relationship between the prohibition against disclosure contained in the Criminal Code and the operation of the provisions of the Ontario Freedom of Information and Protection of Privacy Act, 1987. The Ministry has suggested, in its submissions, that this provision of the Criminal Code can function as a confidentiality provision within the meaning of section 67 of the Ontario Act. On first impression, however, section 67 appears to be directed to the question of the interaction of this Act to other provincial statutes and not to the laws of Canada. Alternatively, it might be considered whether the Ontario Act should be interpreted as subject to an implied limitation that disclosure is not mandated where such disclosure would constitute an offence under federal law. Even one adopted that view, however, it might well be asked whether such a limitation ought to be interpreted to apply to a case where there might be argued to be a provincial interest in disclosure of information which might suggest non-compliance with a federal law. As has been suggested, it is not necessary to resolve these somewhat difficult points in the present context.

The Ministry has relied on section 178.2(1) of the Code with respect to a number of documents which have already been considered in this Order. As well, the Ministry retained a number of similar volumes of records pursuant to the provisions of section 52(6) of the Act in the Office of the Ministry's Freedom of Information Co-ordinator. All of the foregoing records have been reviewed with the Ministry's submissions on this point in mind and, as I will indicate, I am satisfied that it is unnecessary to determine whether or not disclosure of

these documents is, in fact, prohibited under section 178.2(1) of the Code. In each case, the record in question is plainly exempt under either one or both of section 14(2) (a) as 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" or section 21(1) (f) on the basis that disclosure would constitute an unjustified invasion of personal privacy. To the extent that such documents or portions of documents have been considered previously in this Order, they have already been found to be exempt under either one or both of these exemptions. I am satisfied that the same considerations apply to those records that were retained by the Ministry in the Office of the Freedom of Information Co-ordinator.

The Ministry does, however, make further submissions with respect to other documents which do not appear to be subject to these considerations. Thus, it is apparently the Ministry's view that any reference, in a Ministry record, to the fact that it is the opinion of an identified individual that section 178.2(1) applies to information obtained by or on behalf of the Ministry is itself subject to the prohibition against disclosure in that provision. The Ministry apparently relies on section 178.2(1) (b) for this proposition which proscribes disclosure of the "existence" of information which is subject to section 178.2(1). In my view, however, subparagraph (b) of that provision must be read together with subparagraph (a) which refers to the use or disclosure of a "private communication" which has been intercepted in the manner described in the section. That is to say, section 178.2(1) stipulates that where a "private communication" has been intercepted in a particular way, it shall be an offence to wilfully disclose that

communication or to disclose the existence of that private communication. In order to infringe the prohibition set out in subparagraph (b), however, it would be necessary for the accused individual to have disclosed the existence of a particular "private communication". The apparent purpose of subparagraph (b) is to protect the privacy of the individual whose private communication has been intercepted. Thus, the mere fact that a Ministry official might suggest that in an investigation undertaken by the Ontario Provincial Police with respect to certain alleged kinds of wrongdoing, some of the information gathered by the police may have been gathered in such fashion as to engage this provision would not involve the disclosure of the existence of a particular private communication of a particular identified or identifiable individual and therefore would not constitute a breach of section 178.2(1)(b).

In the following documents, references of this kind to the fact that some information gathered in a particular investigation may engage section 178.2 of the Criminal Code are to be found:

Record #8 (Appeal Record pages 8 - 10)

Record #139 (Appeal Record pages 812 - 813)

Record #73 (Appeal Record page 585)

Record #39A (Appeal Record pages 141 - 145)

In each of these instances, the reference contained in the document refers to the possible applicability of section 178.2 to some of the information gathered in a particular investigation. However, none of the references indicates either

that a particular private communication occurred or that a particular private communication may be subject to the application of that section of the Criminal Code. Accordingly, for the reasons suggested above, the Ministry's submission that section 178.2(1)(b) would be offended by disclosure of these passages is not well founded.

CONCLUSION

The unusual length of the appeal record in this appeal and the complexity of the issues raised by various documents contained therein has resulted in an Order which is, by necessity, similarly lengthy and complex. In the result, however, while the overwhelming majority of the documents which the Ministry has sought to withhold have been found to be subject to one, and in many cases, two or more exemptions from the access principles set out in the Act, there are nonetheless other documents, or portions of documents, which have been found to be accessible to the requester. In order to determine whether any particular document is, in whole or in part, accessible under the Act, it will be necessary for the parties to trace through each of the references to that document in the foregoing discussion in order to determine whether it has been held herein that any of the exemptions claimed by the Ministry to be applicable to all or any portion of that document do, in fact so apply.

I anticipate, therefore, that the parties may encounter some difficulty in implementing the terms of this Order. Accordingly, I will remain seized of this matter in order to provide whatever assistance the parties may need, upon application to myself, in determining the manner in which this

Order applies to any of the records subject to the present appeal.

For the foregoing reasons, I therefore order that the institution disclose those records and those portions of records contained in the Appeal Record with respect to which I have found no legitimate basis for a withholding of access under the Act within sixty (60) days of the date of this Order. I also order the head of the institution to advise me, in writing, within five (5) days of the date of disclosure, of the date on which disclosure was made.

As has previously been indicated in this Order, I also order the head to reconsider the exercise of discretion under subsection 22(a) with respect of Records 129 and 133 within twenty (20) days of the date of this Order, and to provide me with written notice of the decision regarding the exercise of discretion along with accompanying reasons within five (5) days of the date of the said decision.

The said notices should be forwarded to the attention of Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
John D. McCamus
Inquiry Officer

_____ May 25, 1990
Date

ADDENDUM TO ORDER 170

**Ministry of the Attorney General
Appeal Number 880222**

This is an addendum to Order 170, an Order which disposed of an appeal concerning a request for access to what proved to be volumes of documents from the Ministry of the Attorney General (the "Ministry"). In its submissions concerning the appeal, the Ministry sought the application of various sections of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") to each of the documents which appeared to be responsive to the request. In many instances, the Ministry relied on several sections as a basis for refusing to disclose all or some portion of a particular document. In view of the resulting complexity of the Order -- Order Number 170 -- issued concerning this matter, the undersigned at page 121, remained "seized of this matter in order to provide whatever assistance the parties may need, upon application to myself, in determining the manner in which [Order Number 170] applies to any of the records subject to the present appeal."

I have been advised by counsel to the Ministry that such assistance is required with respect to Record Number 134 which is reproduced in the Appeal Record as page 807. Record Number 134 is a photocopy of the covering letter forwarded by the Registrar of the "Public Service Grievance Board" to counsel retained by the Ministry-to act in a particular manner, enclosing a copy of that Board's decision concerning that matter. The Ministry has submitted that the information concerning the individual employee -- that is the individual's

name and the case or file number -- should be severed from the document in order to protect the personal privacy of the individual as is required by section 21 of the Act. Once this information is deleted, the Ministry concedes that the remainder of

the document can be disclosed to the requester. I have reached the conclusion that the Ministry's submission is sound and is consistent with the analysis offered at pages 109 - 110 of Order Number 170 concerning the application of section 21 to related documents concerning the same matter. It is unnecessary to repeat that analysis here.

Accordingly, I hereby order that the remaining portion of Record Number 134 be disclosed to the requester within thirty (30) days of the date of this addendum. I also order the head of the institution to advise me within five (5) days of the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

In the course of reviewing this particular matter, my attention has been drawn to an inaccuracy in the discussion set out at page 110 of Order Number 170. It is there stated that a body variously referred to as the "Grievance Settlement Board" and the "Ontario Crown Employees' Grievance Settlement Board" in this proceeding is not a scheduled institution under the Act. It should be noted however, that this Board is a scheduled institution under the title "Crown Employees' Grievance Settlement Board".

Although nothing of consequence in the present appeal turns on this point -- the request subject to this appeal was made to the Ministry, not to the Board -- the text of Order 170 should be considered to be amended accordingly.

Original signed by:
John McCamus
Inquiry Officer

November 26, 1990
Date