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

ORDER P-805

Appeal P-9400274

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, who is a journalist, has requested copies of records from the Ministry of Community and Social Services (the Ministry) relating to investigations conducted by the Ministry, and the Leeds and Grenville Children's Aid Society (the CAS), into the unreported disappearance of a Crown ward from a Smith Falls area group home. The Crown ward was later found dead and four persons face criminal charges in connection with his death.

The records at issue in this appeal are described in Appendix "A" to this order. They include interoffice memoranda, notes for the Minister, contentious issue charts and reports, and publicly available materialsuch as newspaper clippings and Hansard excerpts. The records also include a draft "interim" report by the Ministry's team assigned to review the situation.

The Ministry has deleted portions of the records from the copies which it supplied to this office, stating that the Young Offenders Act (the YOA) applies to remove these portions of the records from the operation of the Act. Production of these deleted portions was ordered by Assistant Commissioner Irwin Glasberg in Order P-736, and any future decision concerning the portions which the Ministry has deleted in relation to the YOA will be dealt with in a separate order. Since Record 8 was entirely deleted on this basis, I will not consider it further in this order.

Accordingly, this order will deal only with those portions of the records at issue which the Ministry **has** supplied to this office to date.

In its decision letter in response to the request, the Ministry relied on the following exemption in denying access to the records at issue:

- law enforcement - section 14(1)(b).

A Notice of Inquiry was provided to the appellant and the Ministry. In response to this notice, representations were received from the Ministry only.

Subsequently, the Commissioner's office received a letter from the Crown Attorney for Lanark County (the Crown Attorney), whose office is responsible for prosecuting the individuals charged in connection with the death of the Crown ward. In this letter, the Crown Attorney expressed a concern that premature disclosure of the records at issue would lead to adverse publicity which could affect the right of the four accused persons to a fair trial. The Ministry subsequently adopted the contents of this letter as part of its representations.

I reviewed the Crown Attorney's letter and reached the conclusion that it raised the possible application of the exemption in section 14(1)(f) (right to fair trial). I also reviewed the records at issue and determined that, although the mandatory exemption in section 21 (invasion of privacy) was not claimed by the Ministry,

parts of the records did contain the personal information of the deceased Crown ward, and disclosure might constitute an unjustified invasion of personal privacy. Because section 21 is a mandatory exemption, I decided to raise it as an issue in this appeal. In addition, based upon comments made by the appellant in her letter of appeal, I concluded that public interest in disclosure (under section 23 of the Act) should be identified as an issue in this appeal.

Accordingly, I notified counsel for the four accused persons of the appeal and invited them to make representations concerning these issues, as well as those raised in the initial Notice of Inquiry. In addition, I notified the appellant and the Ministry of the additional issues and invited them to submit representations concerning them. In response to these invitations, representations were received from the appellant and counsel for one of the accused persons. The Ministry indicated it would not be submitting additional representations.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTION

As noted in the foregoing discussion, the Crown Attorney's letter raised the possible application of the discretionary exemption in section 14(1)(f). This letter was received at a late stage in the appeals process. This raises the question of whether this exemption should be considered in this appeal, in view of the IPC's policy regarding the raising of new discretionary exemptions during the appeal process.

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

> The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.
>
> Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Confirmation of Appeal sent to the Ministry when this appeal was filed, indicated that the institution had 35 days from the date of the Notice (until June 20, 1994) to claim any additional discretionary exemptions. The letter from the Crown Attorney was received on August 23, 1994.

The appellant and counsel for the four accused persons were invited to comment on whether this exemption should be considered. Only the appellant made representations on this subject. She objected to the exemption being raised at this stage, and indicated that in her view, it is a roadblock interfering with the flow of information.

While I sympathize with the appellant's frustration, the four accused persons face serious criminal charges, and an accused person's right to a fair trial is fundamental to our legal system. In my view, in the circumstances of this appeal, this factor outweighs the objective of expeditious resolution of access appeals which underlies the approach outlined in the edition of IPC Practices referred to above.

Accordingly, I am prepared to consider the possible application of the exemption provided by section 14(1)(f) in this appeal.

DISCUSSION:

LAW ENFORCEMENT

Section 14(1)(b) of the Act states the following:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

In order for a record to qualify for exemption under section 14(1)(b), the investigation that generated the records must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition 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 has not argued that its own investigation, which is referred to in the records, meets the definition of "law enforcement" in section 2(1). Instead, its representations refer to the Ministry's understanding that the criminal investigation (which is completely distinct and separate from the investigation conducted by the Ministry) is still continuing into the disappearance and death of the Crown ward, and that criminal charges have been laid.

Most of the information in the records relates to the Ministry's investigation into the failure of the CAS to report the disappearance of the Crown ward to the police. This investigation arose from the Ministry's supervisory role with regard to Children's Aid Societies generally, as set out in the Child and Family Services Act. For example, section 22 of that statute gives the Minister of Community and Social Services the power to revoke or suspend the designation of a Children's Aid Society if it fails to perform its prescribed functions, and the power to operate and manage a Children's Aid Society in place of the Board of Directors.

The purpose of the Ministry investigation referred to in the records was to examine, explain and possibly change institutional response to such serious situations when they arise. I have no evidence to indicate that the Ministry's investigation was undertaken with a view to proceedings before a court or tribunal. Even if the Ministry were to claim that a civil action could be instituted at some future time, such proceedings are not those where a penalty or sanction could be imposed, as required by the legislation.

For these reasons, I find that the Ministry's investigation does not satisfy the definition of law enforcement in section 2(1), and the exemption in section 14(1)(b) cannot apply based upon any possible interference with that particular investigation.

Turning to the investigation conducted by the police, I am of the view that it satisfies the definition of law enforcement since it led to several criminal charges being laid. Clearly, a penalty or sanction could be imposed in the proceedings resulting from those charges.

However, in order to successfully argue the application of section 14(1)(b), the Ministry must also provide sufficient evidence to establish that the disclosure of the records could reasonably be expected to result in the harm described in that section. The mere possibility of harm is not sufficient. At a minimum, the Ministry must establish a clear and direct linkage between disclosure of the information and the harm alleged (Order P-557).

The Ministry has stated that, while it is not in a position to determine the status of the criminal investigation or the court case, it recognizes the seriousness of the matter and does not wish "to **possibly** interfere" through the release of any material. Its position is that by such disclosure, it "**may** be prejudicing law enforcement proceedings" (emphases added), including investigations and court proceedings.

These representations are very general in nature. They do not specify what particular contents of the records at issue could have a negative effect on any ongoing criminal investigation if disclosed. The records themselves do not contain any information about the police investigation. Moreover, the Ministry's representations do not provide any evidence to indicate **how** disclosure could reasonably be expected to interfere with the police investigation.

The representations made by the Crown Attorney relate to the ability of the accused persons to receive a fair trial in Lanark County. This also applies to the representations made by counsel for one of the accused persons. I will consider these submissions in my analysis of section 14(1)(f), below, but in my view, they are not relevant to the issue of whether or not the records at issue are exempt under section 14(1)(b).

In my view, given the content and purpose of the records at issue, the submissions of the Ministry fail to establish a clear and direct linkage between the disclosure of the information in the records and the harm described in section 14(1)(b).

Accordingly, I find that the records do not qualify for exemption under section 14(1)(b).

RIGHT TO FAIR TRIAL

Section 14(1)(f) of the Act provides as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > deprive a person of the right to a fair trial or impartial adjudication;

In his representations, the Crown Attorney states as follows:

> ... the purpose of this letter is in no way directed towards **what** information should or should not be released. ... The sole purpose of my writing this letter is to express to you my concern about **when** any information concerning the C.A.S. file on [the deceased Crown ward] is released. [emphasis added]
> ...
>
> Any publicity surrounding [the deceased Crown ward] and his connection with the ... Children's Aid Society at this time will only exacerbate the present situation, and could, by itself, be the one extra thing which would prevent the accused from getting a fair trial in Lanark County and necessitate moving the trials out of this area altogether.
> ...

> The timing of the release of such information is fundamental to the rights of the accused to have a fair trial and the rights of the community in which the offence was committed to sit in judgment upon it.

While these submissions do relate to whether the records at issue are exempt under section 14(1)(f), their principal thrust is that, in the interest of ensuring that the four accused individuals receive fair trials, disclosure should be delayed until the trials are finished. With respect to the issue of delayed disclosure, the Crown Attorney's submissions could be interpreted in two ways:

(1) I have the authority to delay disclosure even if no exemption applies; or

(2) I have the authority to delay disclosure if I find that the material is exempt under section 14(1)(f) until the trial is over, at which point the exemption will no longer apply.

The submissions made by counsel for one of the accused individuals also refer to the possibility of delaying disclosure, stating that I have the power to do so under section 14(1)(f). This is consistent with the submission summarized in item (2).

Neither the Crown Attorney nor the counsel who made representations on behalf of one of the accused persons has expressly argued that I have the authority to delay disclosure of records which are not exempt. Nor do their submissions advance any authorities which would support such a view. Accordingly, in my view, the submission summarized in item (1) has not been substantiated.

I will now turn to item (2). In my view, in the circumstances of this appeal, my responsibility under the Act is to determine whether this exemption applies when the matter is before me. I cannot engage in speculation as to whether it will apply in the future; much of the evidence which would be relevant to such a determination (e.g. whether or not the trials have been completed on the projected disclosure date) does not yet exist. If I do determine that this exemption applies, and the trials are completed at a later date, the appellant would have the option of requesting the information again.

Therefore, I will now consider whether the exemption in section 14(1)(f) applies to the records at issue. I have already quoted from the Crown Attorney's submissions on this point. He argues that **any** disclosure of information relating to the deceased Crown ward will generate publicity which could interfere with the accused persons' right to a fair trial. Counsel for the accused person makes the same argument.

The Ministry did not make representations with respect to section 14(1)(f).

In order to establish the application of section 14(1)(f), there must be sufficient evidence to indicate that the disclosure of the records could reasonably be expected to result in the harm described. The mere possibility of harm is not sufficient. At a minimum, the evidence must establish a clear and direct linkage between disclosure of the information and the harm alleged. In my view, the evidence presented in this regard is not sufficiently detailed to meet this requirement.

Moreover, I have reviewed the records at issue, and in my view they relate primarily to the actions of the Ministry in response to the failure of the CAS to report the Crown ward's disappearance to the police. Some portions of the records consist of information which is already in the public domain, such as newspaper clippings and excerpts from Hansard. Based on the evidence presented, I am unable to see how the disclosure of any of the records at issue could be related in any logical way to the trials of the accused individuals.

For these reasons, I find that the exemption in section 14(1)(f) does not apply.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

I have reviewed the records at issue and I find that the following pages contain personal information: Record 4, pages 3 and 4; Record 6; Record 7, pages 3, 4, 5 and 6; Record 10; and Record 11, pages 2, 3, 4 and 5.

Most of this personal information pertains to the deceased Crown ward. The majority of this information relates to his case history. Records 7 and 11 also contain personal information pertaining to one of the accused persons. In addition, Records 6 and 11 contain the personal information of their author (namely, his home telephone number).

In addition, the newspaper clippings (Record 12) and the first page of Records 7 and 11 contain personal information pertaining to the deceased Crown ward and other individuals. However, in my view, this information is already in the public domain, and in the circumstances of this appeal I am satisfied that its disclosure would not constitute an unjustified invasion of personal privacy. Accordingly, it is not exempt under section 21(1) and I will not consider this information further in this discussion.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.
The appellant submits that the public interest argument in favour of disclosing the records at issue is compelling, because a public agency, mandated to provide care, failed to report the disappearance of a young person who was later found dead.

These comments will be considered in my discussion of section 23 of the Act, below. However, in the context of section 21, they also suggest the possible relevance of section 21(2)(a). That section provides a factor favouring disclosure of personal information where "the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny".

However, in my view, the portions of the records whose disclosure might be desirable for the purpose of subjecting the activities of the government to public scrutiny are the portions which do **not** contain personal information. In my view, disclosure of the personal information would not assist in subjecting the activities of the government or its agencies to public scrutiny. Accordingly, I find that section 21(2)(a) is not relevant in the circumstances of this appeal.

The appellant also states:

> I realize that the Act protects the right of privacy of a deceased person for 30 years after his or her death. This does not mean, however, that a person who has been dead for less than 30 years necessarily has a privacy interest.

The reference to protection of privacy rights for 30 years after an individual's death is a reference to section 2(2) of the Act, which provides that:

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

In this case, the deceased Crown ward has been dead for less than 30 years. However, Orders M-50 and M-51 indicated that in some circumstances, the fact that an individual is deceased may represent an unlisted factor favouring disclosure under section 21(2). In Order M-50, Commissioner Tom Wright commented on this unlisted factor as follows:

> In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of

> personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

In Orders M-50 and M-51, the requester acted on behalf of the mother of the deceased. In this case, the appellant is not related to the deceased Crown ward and I have not been provided with any information to support the view that his death has diminished his privacy interests in the personal information at issue. Accordingly, in my view, the factor identified in Order M-50 is not applicable in the circumstances of this appeal.

Since no factors favouring disclosure have been established with respect to the personal information in the records, the exemption in section 21(1) applies to all of it. I have highlighted the portions of Records 4, 6, 7, 10 and 11 which are exempt under section 21(1) on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act provides as follows:

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

I will consider the possible application of this section to the information which I have found to be exempt under section 21(1).

There are certain requirements in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of the disclosure of the particular record in question (Order 16).

The appellant's arguments in support of the relevance of this section are the same as those mentioned earlier with respect to section 21(2)(a). In addition, she has provided newspaper clippings which demonstrate that there has been considerable discussion of the issue in the press.

However, having reviewed the records, I am of the view that there is no public interest in disclosure of the exempt information sufficient to outweigh the purpose of the exemption in section 21(1). In my view, any public interest which might exist with respect to the requested information will be satisfied by disclosure of the information in the records which I have found **not** to qualify for exemption.

Accordingly, in my view, section 23 is not relevant in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the portions of Records 4, 6, 7, 10 and 11 which are highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose Records 4, 6, 7, 10 and 11 to the appellant, except those portions which I have highlighted on the copy of these records which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, and except those portions which the Ministry has deleted with reference to the YOA, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. I order the Ministry to disclose Records 1, 2, 3, 5, 9, 12, 13, 14 and 15 to the appellant, except those portions which the Ministry has deleted with reference to the YOA, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 2 and 3.

Original signed by: November 30, 1994
John Higgins
Inquiry Officer

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORD	NUMBER OF PAGES	NUMBER OF YOA DELETIONS
1	Inter-office memorandum from a lawyer within the Ministry's Legal Services Branch, October 6, 1993	2	1
2	Contentious issue charts	5	1 page
3	Notes for Minister, October 14, 1993	1	0
4	General questions and answers regarding contentious issue	7	1
5	Questions and answers related to adoption of an aboriginal child	2	0
6	Inter-office memorandum from a Ministry Program Supervisor, September 25, 1993	1	0
7	Contentious issue report	7	14
8	Document on Ministry letterhead, "Confidential" handwritten at top	5	entirely deleted
9	Inter-office memorandum from a Ministry Area Manager, September 29, 1993	3	almost entirely deleted
10	Inter-office memorandum from a Ministry Program Supervisor, September 25, 1993	1	0
11	Contentious issue report (duplicate of Record 7)	6	9
12	Newspaper clippings	11	0
13	Inter-office memorandum from a Ministry Information Officer, September 29, 1993	2	0
14	Hansard excerpts, September 27 and 28, 1993	12	0
15	Draft "Interim" Report of Ministry Review Team, October 5, 1993	8	13