



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

ORDER P-991

Appeal P-9400768

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 requester, a journalist, requested copies of records from the Ministry of Community and Social Services (the Ministry) with regard to investigations conducted by the Ministry, and the Leeds and Grenville Children's Aid Society, into the unreported disappearance of a Crown ward from a Smith Falls area group home. The Crownward was later found dead and criminal charges were laid against four individuals in connection with his death.

This request has been the subject of several appeals and judicial review applications. I will briefly outline the history of this matter, in order to provide the necessary context for this order and the records which will be considered.

In its initial response to the request, the Ministry gave the requester a copy of a memo detailing revisions to its "Serious Occurrence Reporting Procedures". Access to the other 15 responsive records identified by the Ministry was denied in full pursuant to the exemption found in section 14(1)(b) of the Act, which pertains to interference with law enforcement investigations.

The requester appealed this denial of access. Upon receipt of the appeal, the Commissioner's office forwarded a Confirmation of Appeal notice to the Ministry. In this notice, the Ministry was asked to provide copies of all responsive records directly to the Commissioner's office.

In response to the Confirmation of Appeal, the Ministry provided the 15 records at issue but made the decision to delete parts of eight records which it considered to fall within the non-disclosure provisions of the Young Offenders Act (the YOA). As a result of this decision, Assistant Commissioner Irwin Glasberg issued Order P-736, in which the Ministry was ordered to produce to the Commissioner's office the parts of these eight records which the Ministry claimed to withhold under the YOA. The Ministry brought an application for judicial review of Order P-736.

Subsequently, the Ministry revised its view that the non-disclosure provisions of the YOA applied to these records, withdrew its application for judicial review, and forwarded the previously withheld portions of these records to the Commissioner's office. These portions of the records are the subject of this order.

In the meantime, however, the Commissioner's office proceeded to rule on the parts of the records which **were** originally provided by the Ministry in response to the Confirmation of Appeal. This was done in order to ensure that any information which might be found not to be exempt would be disclosed in the most timely fashion which could be achieved in the circumstances. This aspect of the matter was dealt with in Order P-805. Substantial disclosure was ordered. The Ministry then brought an application for judicial review of Order P-805. That matter was recently resolved by the Ontario Court (General Division), Divisional Court (Attorney General for Ontario et al. v. John Higgins, Inquiry Officer et al., (19 June 1995), Toronto Docs. 1/95 and 2/95). The Court declined to overturn Order P-805, and the materials ordered to be disclosed by that order have now been given to the appellant.

The table below identifies the record pages which contain the passages previously withheld by the Ministry under the YOA (i.e. the passages under consideration in this order). As previously mentioned, these withheld passages occur in eight of the fifteen responsive records originally identified by the Ministry. For greater certainty, I am enclosing a copy of each of the eight records, in full, with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator. The passages which are at issue in this appeal are indicated on these copies in **square brackets**. The parts of these eight records which were found to be exempt in Order P-805 are highlighted in blue on these copies.

The record numbers used throughout this order are those originally assigned by the Ministry, which have also been used in all other orders dealing with this request.

Record Number	Description	Page Numbers of Pages Partly Withheld
1	Interoffice Memo	1
2	Contentious Issue Sheet	5
4	Answers to Minister's questions	3
7	Contentious Issue Report (with handwritten notes)	1-7
8	Untitled; includes chronology re deceased	1-5
9	Interoffice memo	1-3
11	Contentious issue sheet	1-5
15	Draft Interim Report of Ministry Review Team	1-7.

A Notice of Inquiry was provided to the appellant, the Ministry and the Crown Attorney for Lanark County (the Crown Attorney), who was also notified in connection with Order P-805. This Notice was also sent to counsel for four individuals facing criminal charges as a result of the death of the Crown ward. Because the records appeared to contain personal information, the Notice of Inquiry raised the possible application of the mandatory exemption in section 21(1) of the Act (invasion of privacy). Representations were received from the Crown Attorney and the Ministry.

PRELIMINARY ISSUES:

WHETHER THE DISCLOSURE SCHEME IN THE YOA APPLIES TO THE RECORDS

As noted above, in Order P-736, Assistant Commissioner Irwin Glasberg ordered the Ministry to provide the full texts of the records at issue to the Commissioner's office. In the course of the order, the Assistant Commissioner indicated that, upon receipt of the records, the Commissioner's office would consider whether they fall within the scope of the YOA, and only in the event that they do not would the inquiry proceed.

On this basis, the Notice of Inquiry issued in this appeal requested representations on the question of whether the YOA applies, stating as follows:

The Ministry's previous reluctance to provide parts of the records to this office was based on the provisions of sections 43(1) and 46(1) of the YOA (copies attached). The parties are invited to comment on this issue in their representations and to indicate whether, in their view, this is a relevant factor with respect to access under the Act.

No representations were submitted in this regard. However, in view of the approach taken in Order P-736, I must consider this issue. In essence, the issue is whether the non-disclosure provisions of the YOA apply to the records.

Section 43(1) of the YOA describes a category of records authorized to be kept under the YOA. Several other sections also serve this function, but my review indicates that section 43(1) is the only provision which could possibly be construed as referring to records such as those at issue in this case. This section states:

A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
 - (b) for use in proceedings against a young person under this Act;
 - (c) for the purpose of administering a disposition;
 - (d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under the Act against a young person, to use alternative measures to deal with the young person;
- or

- (e) as a result of the use of alternative measures to deal with a young person.

Section 46(1) of the YOA states as follows:

Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.

If section 46(1) of the YOA applies to the records, the doctrine of legislative paramountcy indicates that it would preclude access to the records under the Act. Section 46(1) can only apply to a record kept pursuant to sections 40 to 43 of the YOA. If the records at issue are not included in the categories described in these sections, the non-disclosure provisions of section 46(1) would not apply.

As well, another non-disclosure provision, found in section 38(1) of the YOA, could also apply in the circumstances of this case. That section states:

Subject to this section, no person shall publish by any means any report

- (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
- (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence

in which the name of the young person, a child or a young person who is a victim of the offence or a child or young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, or child, is disclosed.

In ordinary circumstances, I would decide this issue by analyzing the records in light of these provisions, and determining whether disclosure of the records would contravene section 38(1) or 46(1) of the YOA. However, in the circumstances of this case, I believe there is a simpler way to resolve this issue. This way of dealing with the issue arises because the only references in the records which could identify an individual, contrary to these sections, pertain to someone who is deceased.

In this regard, I will refer to two cases decided under the YOA. Both of these cases indicate that the non-disclosure provisions of the YOA do **not** apply to someone who is deceased.

In Canadian Broadcasting Corporation v. A.C.McE., deceased (Man. Prov Ct., 30 August 1994, Y.O.S. 94-120), the Court granted access to the criminal record of a deceased young offender on the ground that the deceased "is not a person within the meaning of the law entitled to the privacy protection of the [YOA]." Similarly, the decision of the Quebec Court of Appeal in R. v. Publications Photo-Police Inc. (1986), 52 C.R. (3d) 301, 31 C.C.C. (3d) 93, upholds a trial judge's conclusion that the deceased fourteen-year-old victim of a young offender is not a young person whose private life the YOA seeks to protect, because she is deceased.

I am in agreement with these views, and I believe that they support a conclusion that neither section 38(1) nor 46(1) apply in the circumstances of this case. Accordingly, I find that the non-disclosure provisions of the YOA do not apply to the records at issue. Therefore, I will proceed with my inquiry under the Act to determine whether the records are exempt from disclosure.

LATE RAISING OF DISCRETIONARY EXEMPTIONS

In its representations, the Ministry notes that the representations of the Crown Attorney, which it supports, did not identify the applicable exemptions by section number. The Ministry states that the exemptions which arise from the Crown Attorney's representations are sections 14(1)(a) and (f). As noted above, the Ministry's original decision letter referred only to section 14(1)(b).

Generally speaking, the Commissioner's office will only permit new discretionary exemptions to be raised within the first thirty-five days after the issuance of the Confirmation of Appeal. This policy is outlined in an issue of IPC Practices entitled "Raising Discretionary Exemptions During an Appeal".

This raises the question of whether I should consider the application of the discretionary exemptions in sections 14(1)(a) and (f) in this order. I will address this issue separately for each of these two sections.

Section 14(1)(f)

After the expiry of the thirty-five day period referred to above, and before Order P-805 was issued, the Crown Attorney wrote to this office concerning the request which was at issue in Order P-805 and which remains at issue here. It appeared from the Crown Attorney's letter that the exemption provided by section 14(1)(f) (right to fair trial) might be an issue. In Order P-805, I decided to permit the Ministry to argue that this exemption applied, stating as follows:

... 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.

Because this order deals with different parts of the same records as those addressed in Order P-805, and because this inquiry is, in effect, a continuation of the appeal process of which Order P-805 forms a part, I decided to consider the possible application of this exemption to the parts of the records which are at issue here, and for this reason, the Notice of Inquiry sought representations in that regard.

Accordingly, I will consider the possible application of section 14(1)(f) to the parts of the records which are at issue in this order.

Section 14(1)(a)

With regard to section 14(1)(a), the Ministry did not claim this exemption until it submitted its representations in connection with this inquiry, despite having ample opportunity to do so previously. When the Ministry made its original decision in November 1993, prior to claiming that the YOA applied, it claimed that section 14(1)(b) applied to exempt all of the records. In December 1994, after the Ministry had discontinued its application for judicial review of Order P-736, it forwarded the deleted portions of the records to this agency, without stating that any additional exemptions applied.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to renotify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. In many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of this approach is to provide government organizations with an 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.

The Ministry has not advanced any arguments to indicate why it should be allowed to claim section 14(1)(a) at this stage in the proceedings. The representations of the Ministry essentially only support those of the Crown Attorney and do not provide evidence or other information to explain why it should now be permitted to raise the possible application of section 14(1)(a).

Accordingly, I will not consider section 14(1)(a) in this order. The exemptions to be considered with respect to the portions of the records which are at issue are sections 14(1)(b), 14(1)(f) and 21(1).

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits disclosure of this information except in certain circumstances.

I have reviewed the records to determine whether they contain personal information, and if so, to whom the personal information relates.

Because parts of the following pages contain information about the case history of the deceased Crown ward, I find that they contain his personal information: Record 4, page 3; Record 7, pages 4 and 5; Record 8, pages 2-5; Record 9, pages 1-3; Record 11, pages 2-4; Record 15, pages 1-7. In several instances the Crown ward is not mentioned by name but the context makes it clear that the reference is to this individual; hence the information pertains to an "identifiable individual" as contemplated in the definition of "personal information" mentioned above.

Parts of several pages also contain information about one of the accused individuals, and others contain information about the deceased Crown ward's relatives. I find that this constitutes the personal information of these individuals. This information appears in parts of the following pages which are at issue: Record 7, pages 4 and 5; Record 8, page 3; Record 9, pages 1-3; Record 11, pages 2-4; and Record 15, pages 2 and 3.

Once it has been determined that a record contains personal information, section 21(1) precludes disclosure of this information except in certain circumstances which are listed in the section. In this appeal, the only one of these listed exceptions which could apply is section 21(1)(f), which indicates that the exemption does not apply "if the disclosure does not constitute an unjustified invasion of personal privacy".

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 particular case.

The Ministry's representations refer only to section 14, and do not address the application of section 21. However, because this is a mandatory exemption, I have conducted an independent review of the records to determine whether section 21(1) should apply to exempt them from disclosure.

I have reviewed section 21(3) to determine whether any of the presumptions against disclosure apply. Section 21(3)(h) applies if the personal information "indicates the individual's racial or ethnic origin ...". Several passages in the records do indicate the racial origin of the deceased Crown ward. However, as this

information has already been reported in the press on numerous occasions, it would not be reasonable to apply this presumption in the circumstances. None of the other presumptions in section 21(3) apply in this case. Accordingly, I find that section 21(3) does not apply to the personal information in the records.

Section 21(2) states, in part, as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- ...
- (f) the personal information is highly sensitive.

The personal information in the records all pertains to the Crown ward's case history and to his relations with other individuals. In my view, in the circumstances of this case, it would be reasonable to view all of the personal information in the records as highly sensitive. Accordingly, I find that the factor in section 21(2)(f), which favours non-disclosure, applies.

The disappearance and death of the Crown ward have generated a great deal of local publicity and press coverage. In particular, there has been considerable interest in the fact that the disappearance of the Crown ward from the group home was not reported to the police. Given that one purpose of the Ministry's investigation was to determine whether the steps taken after the Crown ward's disappearance were adequate, I am satisfied that disclosure of personal information pertaining to the Crown ward and another individual, relating to the Crown ward's disappearance and subsequent attempts to locate him, would be desirable for the purpose of subjecting the activities of the Government and its agencies to public scrutiny. Accordingly, I find that the factor favouring disclosure in section 21(2)(a) applies, but only to the personal information described in the preceding sentence.

The preamble to section 21(2) indicates that, in deciding whether disclosure would be an unjustified invasion of personal privacy, "all relevant circumstances" should be considered.

In Order P-237, Commissioner Tom Wright identified another factor under the authority of the preamble to section 21(2). He stated as follows:

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

I will now consider whether this factor applies in this appeal. In my view, the welfare of young persons is a topic of considerable public interest. In this case, a ward of the Crown, living in a publicly funded group home, disappeared from that facility. Apparently this disappearance was not reported to police. The Crown ward was subsequently found dead, and criminal charges have been laid. The Ministry has conducted an investigation into this incident. One purpose of this investigation was to determine whether the Ministry's policies and procedures regarding such incidents needed to be amended. In my view, in the circumstances of this appeal, the very unusual circumstances described by Commissioner Wright exist. For this reason, I find that this unlisted factor, which favours disclosure, applies to the same personal information to which I have applied section 21(2)(a), as described above.

To summarize, I have found that the factor favouring non-disclosure in section 21(2)(f) applies to all the personal information in the records. I have also found that the factor favouring disclosure in section 21(2)(a), and the non-listed factor (also favouring disclosure) relating to public confidence in the integrity of an institution, apply to any personal information in the records which pertains to the Crown ward and another individual, relating to the Crown ward's disappearance and subsequent attempts to locate him.

Having considered all these factors, I find that disclosure of all the personal information of the records, except personal information relating to the Crown ward's disappearance and subsequent attempts to locate him, would constitute an unjustified invasion of personal privacy, and the exemption in section 21(1) applies.

The information which I have found to be exempt under section 21 appears on page 4 of Record 7, pages 1, 2 and 3 of Record 9, pages 2 and 3 of Record 11, and pages 1, 2 and 3 of Record 15, and is highlighted in yellow on the copies of these records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

However, I also find that the section 21(1) exemption does **not** apply to personal information in the records which relates to the Crown ward's disappearance and subsequent attempts to locate him.

RIGHT TO FAIR TRIAL

I will now consider the possible application of the exemption in section 14(1)(f) to all the remaining parts of the records, including those parts which I have found are not exempt under section 21(1).

Section 14(1)(f) of the Act states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

deprive a person of a the right to a fair trial or impartial adjudication.

The Crown Attorney, whose representations are expressly adopted by the Ministry, submits that his only concern with respect to disclosure of the records at issue relates to timing. He requests that nothing be disclosed until after the trials of those accused in connection with the Crown ward's death are completed.

He argues that any disclosure at the present time will generate publicity which will, in and of itself, prejudice the rights of these individuals to receive a fair trial.

In Order P-948, I considered several aspects of the section 14(1)(f) exemption. In that order, I reached the following conclusions which, in my view, also apply in the circumstances of this appeal:

- The phrase "could reasonably be expected to" requires that the expectation of harm not be "fanciful, imaginary or contrived, but one that is based on reason" (Order 188). In other words, there must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying the exemption.
- Section 14(1)(f) should be interpreted in a way that affords no less protection to the right of an accused to a fair trial than do sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.
- In interpreting the substantive harm mentioned in section 14(1)(f) with respect to the right to a fair trial or impartial adjudication, several comments in the case of Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, relating to publication bans, provide useful guidance. In particular, a real and substantial risk of interference with this right must be demonstrated.

Unlike the parts of these records which were at issue when I considered this exemption in Order P-805, some passages under consideration here deal directly with information which could reasonably be expected to have a bearing on the trials of the accused individuals. On this basis, I find that there is a logical connection between disclosure of this information and the harm mentioned in section 14(1)(f). In my view, non-disclosure of this information at the present time would also be consistent with the accused individuals' Charter rights with respect to their trials. Moreover, disclosure of this information would, in my view, pose a real and substantial risk of interference with the accused individuals' right to a fair trial or impartial adjudication.

Accordingly, I find that the exemption provided by section 14(1)(f) applies to these particular passages, which appear on page 3 of Record 4, pages 2, 4, 5 and 6 of Record 7, pages 2 through 5 of Record 8, pages 1 through 3 of Record 9, pages 2 through 5 of Record 11, and pages 1 through 7 of Record 15. The passages which are exempt under section 14(1)(f) are highlighted in pink on the copies of the records which are being provided to the Ministry with this order.

However, there are also passages in the parts of the records which are at issue in this inquiry for which there is no logical connection between disclosure and the harm discussed in section 14(1)(f). This information is similar to the information about the Ministry's investigation which I ordered disclosed in Order P-805, as upheld by the Divisional Court. I also find that disclosure of this information would not prejudice the

accused individuals' Charter right to a fair trial, nor would it pose a real and substantial risk of interference with their right to a fair trial. Accordingly, the exemption provided by section 14(1)(f) does not apply to this information.

In the hope that my findings in this order may be useful to the parties in the future, I would like to clarify one aspect of the way I have applied the "invasion of personal privacy" exemption in section 21(1), and the "right to a fair trial" exemption in section 14(1)(f). The parties should note that a significant part of the information which I exempted under section 14(1)(f) (to protect the accused individuals' rights to a fair trial) is personal information which I did **not** exempt under section 21(1). In large part, the section 21(1) exemption did not apply to this information because I found that section 21(2)(a) (desirability of public scrutiny) applied to it, as well as the unlisted factor pertaining to public confidence in the integrity of an institution. This information pertains to the Crown ward's disappearance and the efforts made to locate him.

The fact that I did not exempt this information under section 21(1) is important because the exemption in section 14(1)(f) will only apply until the completion of the accused individuals' trials and any resulting appeals. Moreover, the entire thrust of the Crown Attorney's representations, which the Ministry adopted, was to avoid disclosure before the accused individuals' trials are completed. On this basis, if the requester submits another request for the information I have withheld under section 14(1)(f) **after** the trials of the accused individuals have concluded, the Ministry may then wish to consider disclosing the information which I have withheld under section 14(1)(f), and which was not exempt under section 21(1).

LAW ENFORCEMENT

The Ministry also claimed, in its initial decision letter, that the records at issue are exempt under section 14(1)(b). This section states:

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.

The Ministry has not submitted representations to substantiate the application of this exemption. Given that the law enforcement matters connected with the Crown ward's death are being prepared for trial, and in view of the fact that the records themselves do not provide any basis for concluding that section 14(1)(b) applies, I find that the application of this exemption has not been established.

ORDER:

1. I uphold the Ministry's decision to deny access to the parts of page 3 of Record 4, pages 2, 4, 5 and 6 of Record 7, pages 2 through 5 of Record 8, pages 1 through 3 of Record 9, pages 2 through 5 of Record 11 and pages 1 through 7 of Record 15, which are highlighted (either in yellow or

pink) on the copies of those records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order.

2. I order the Ministry to disclose the remaining parts of the records which are at issue in this appeal to the appellant within twenty-one (21) days after the date of this order.
3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the information which is disclosed to the appellant pursuant to Provision 2.
4. As explained at the outset of this order under "Nature of the Appeal", parts of Records 1, 2, 4, 7, 8, 9, 11 and 15 were dealt with in Order P-805, and the remaining parts were considered in this order. In order to avoid fragmentary and confusing disclosure, I direct the Ministry to consider complying with Provision 2 by disclosing all parts of these records which have not been found to be exempt either in this order or in Order P-805. To assist the Ministry in this regard, I am enclosing a copy of each of the eight records, in full, with the copy of this order sent to the Ministry's Freedom of Information and Privacy Co-ordinator. The passages which are at issue in this appeal are indicated on these copies in **square brackets**. The parts of these eight records which were found to be exempt in Order P-805 are highlighted in blue on these copies. The parts found to be exempt in **this** order are highlighted in yellow and pink.

Original signed by: _____

John Higgins
Inquiry Officer

August 31, 1995