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

ORDER PO-1882

Appeal PA_990402_1

Ministry of the Solicitor General

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BACKGROUND:

The appellant and her husband were the owners of a vacation property in eastern Ontario. Over the past ten years, they were involved in a number of disputes with their neighbours which resulted in a series of complaints to the local Ontario Provincial Police (OPP) detachment and charges being laid against the appellant's husband. As a result of these complaints and counter-complaints to the OPP, a number of investigations were undertaken, which resulted in the creation by the OPP of a large number of records such as occurrence reports, witness statements and notebook entries.

The appellant initiated several requests with the Ministry of the Solicitor General (the Ministry) and the Ministry of the Attorney General seeking access to a wide range of records relating to various investigations and prosecutions undertaken by the OPP, the local Crown Attorney's office and the office of the Public Complaints Commission, for example. These requests have also given rise to several appeals to the Commissioner's office which have resulted in the issuance of Orders PO-1708, P-1618, P-1472, P-1457 and P-585, as well as other pending decisions. Many of the records at issue in these appeals are common to each other. In this decision, I will make certain findings with respect to those records which have been adjudicated upon in previous orders of this office, consistent with the earlier decisions made on access.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the complete OPP file relating to an investigation of the appellant and her husband, with the exception of four specified occurrence reports. The appellant made the request on behalf of herself and her husband and provided further details of the type of information that she felt should exist and be contained in the file.

The Ministry did not issue an access decision within the prescribed 30 day time limit, nor did it extend the time limit to respond to the request pursuant to section 27 of the *Act*. The appellant appealed the Ministry's deemed refusal pertaining to her request. This Office opened Appeal File PA-990302-1. On October 13, 1999, the Ministry issued a decision letter to the appellant. Accordingly, the matter of the deemed refusal was resolved and Appeal File PA-990302-1 was closed. In its decision, the Ministry granted partial access to the requested records and claimed the application of the following exemptions contained in the *Act* to the remaining records, or parts of records:

- law enforcement - sections 14(1)(a) and (c);
- facilitate commission of an unlawful act - section 14(1)(l);
- solicitor-client privilege - section 19;
- invasion of privacy - section 21(1) and 49(b), with reference to the consideration listed in section 21(2)(f) and the presumptions in sections 21(3)(a),(b) and(d);
- information published or available - section 22(a); and
- discretion to refuse requester's own information - section 49(a).

The Ministry also informed the appellant that some information in the records is "not relevant" to her request. Finally, the Ministry advised the appellant that certain records are "not available" because they cannot be located or cannot be recovered because of a computer system failure or because they have been purged.

The appellant appealed the Ministry's October 13, 1999 decision. The Commissioner's office opened the current appeal file (PA-990402-1). Following extensive mediation, the Ministry agreed to provide the appellant with access to additional records, in whole or in part, and also created a detailed Index of Records to assist the appellant and this office in determining which records remained at issue. The appellant advised that she wished to continue with her appeal and maintained that additional records responsive to her request should exist. The appellant also requested that the Adjudicator confirm that the information contained in the records which the Ministry indicates is not responsive to her request does, in fact, fall outside the ambit of the request.

I provided a Notice of Inquiry to the Ministry initially, seeking its representations on the issues identified above. Following a further review of its record-holdings, the Ministry identified a further four pages of records, designated as Pages 75, 76, 77 and 78, which are responsive to the request. Portions of these pages were disclosed to the appellant along with a decision letter dated December 13, 2000. In addition, the Ministry decided to disclose additional information from Pages 6, 7, 235 and 243 and in doing so, withdrew its reliance on the exemptions in sections 14(1)(a) and (c) of the *Act*. In a further decision letter dated December 13, 2000, the Ministry also clarified its position with respect to the responsiveness of certain records and other discrepancies identified by the appellant.

In response to a Notice of Inquiry, the Ministry provided me with representations which were shared, in their entirety, with the appellant, along with a modified version of the Notice. The appellant also submitted representations, which were shared with the Ministry, who submitted additional reply representations.

The appellant indicated that she was not seeking access to any medical reports or medical information concerning any individuals other than herself or her husband; nor was she interested in any OPP message codes, "10-codes" or computer access codes from various police databases, thereby removing the possible application of the presumption in section 21(3)(d) and the exemption in section 14(1)(l) from the scope of this inquiry.

Accordingly, I will not address the application of these sections to the undisclosed portions of Pages 2, 4, 6, 8, 9, 13, 14, 19, 34, 38, 60, 61, 62, 63, 64, 65, 68, 70, 71, 76, 87, 88, 89, 90, 91, 92, 93, 117, 168, 169, 171, 173, 174, 175, 176, 177, 178, 180, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 211, 214, 215, 216, 218, 219, 225, 226, 231, 247, 251, 256, 258, 260, 263, 265, 266 and 267 which contain medical information or reports relating to individuals other than the appellant and her husband, as well as OPP message codes, "10-codes" or computer access codes from various police databases. In the records which I have attached to the Ministry's copy of this order, I have highlighted in pink those portions of the records which are either not responsive to the appellant's request or have been removed from the scope of this inquiry by the appellant.

DISCUSSION:

PERSONAL INFORMATION/DENIAL OF REQUESTER'S OWN INFORMATION

Section 2(1) of the *Act* defines "personal information", in part, to mean recorded information about an identifiable individual.

I have examined the records and parts of records which remain at issue in this appeal and find that they contain the personal information of the appellant, her husband, and other identifiable individuals.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

The Ministry submits that it has applied section 49(a) to exempt portions of the requested records from disclosure on the basis of the exemptions contained in sections 19 and 22(a).

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or **22** would apply to the disclosure of that personal information. [emphasis added]

I will consider whether the records qualify for exemption under sections 19 and 22(a) as a preliminary step in determining if section 49(a) applies.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that portions of Page 9 in Record 2 and Pages 11, 12, 13-15, 17, 31, 32, 36, 37, 38, 63, 64, 66, 76, 77, 117, 117(d), 118(a), 118(b), 118(c), 118(d), 118(e), 118(f), 162 and 164 of Record 3 are exempt from disclosure under sections 19 and 49(a).

The Ministry argues that the undisclosed information in these records reflects confidential communications between the OPP and Crown counsel responsible for the prosecution of the appellant's husband which relate directly to the provision of legal advice to the OPP by Crown counsel. It also submits that portions of these records were prepared or used by Crown counsel "for use in giving legal advice, in contemplation of litigation and for use in litigation relating to criminal charges that were laid against the appellant's husband." In addition, the Ministry suggests that although the initial litigation relating to the prosecution of the appellant's husband has been terminated, the subject records continue to be subject to litigation privilege as "other related litigation may arise in the future", relying on certain statements contained in the appellant's original request. It also submits that any privilege which may exist in the undisclosed portions of the records has not been waived by the Ministry.

The appellant argues that solicitor-client privilege cannot apply to information which has been tendered in evidence in a proceeding, such as that which is pending before the Ontario Court of Appeal following an application for the judicial review of Order P-1618 by the Divisional Court involving an earlier request by the appellant. In addition, the appellant submits that a solicitor-client relationship does not exist between a Crown Attorney and OPP. The appellant also submits that the privilege in certain portions of the records may have been waived if the records were disclosed by an OPP officer to an individual outside the OPP or the Crown Attorney's office. Finally, the appellant submits that litigation privilege in the records has terminated and that any further litigation involving the Ministry before the Ontario Court of Appeal or the Ontario Civilian Commission on Police Services (OCCPS) is not related to the prosecution of her husband.

Solicitor-Client Privilege Generally

Section 19 of the *Act* reads:

> 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.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is . . . In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Thus, section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue. The Ministry has applied both solicitor-client communication privilege to certain of the undisclosed records, or parts of records, and litigation privilege to others.

Solicitor-Client Communication Privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the

> solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P_1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

In Order PO-1799, Assistant Commissioner Mitchinson commented on the question of whether the relationship between Crown Attorney and the OPP can be that of a solicitor and client. He found that:

> However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

I adopt the approach elucidated by Assistant Commissioner Mitchinson for the purposes of the present appeal. Based on my review of the records to which the Ministry has applied the solicitor-client privilege branch of the section 19 exemption, I find that portions of Page 9 of Record 2 and all of Pages 17, 18, 117(d), 118 and 118(a)-(f) of Record 3 represent confidential communications passing between

the OPP and Crown counsel involving the giving and seeking of legal advice with respect to the prosecution of the appellant's husband. I have not been provided with any evidence to indicate that the privilege in these documents has been waived.

Accordingly, I find that portions of Page 9 of Record 2 and all of Pages 17, 18, 117(d), 118 and 118(a)-(f) of Record 3 qualify for exemption under section 19 and are, therefore, exempt from disclosure under section 49(a). I have highlighted in green those portions of Page 9 of Record 2 which are exempt from disclosure under sections 19 and 49(a).

The remaining records and parts of records to which the Ministry has applied the section 19 exemption do not represent confidential communications between a solicitor and his or her client and these records do not qualify for exemption under the solicitor-client communications portion of section 19.

Litigation Privilege

In Order PO-1855, Assistant Commissioner Mitchinson reviewed the current state of the law with respect to the concept of litigation privilege. He found that:

> As far as the litigation privilege component of section 19 is concerned, the Ontario Court of Appeal recently issued a judgement interpreting the doctrine of litigation privilege (*General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321). I considered this case in Order MO-1337-I, and its application to the scope of the litigation privilege component of section 19. In that order, I stated:
>
> > In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege ...
> >
> > ...
> >
> > In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:
> >
> > > The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
> > >
> > > > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its

> contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.

Thus, there must be more than a vague or general apprehension of litigation.

Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

Based on my review of the records, bearing in mind the above-noted principles, I find that only those portions of Page 11 of Record 3 which represent notes made by Crown counsel contain information which was created for the dominant purpose of anticipated litigation, in this case the prosecution of the appellant's husband. That litigation has, however, been completed. I do not accept the Ministry's argument that this information may also find its way into the litigation brief of counsel in some other proceeding before the Ontario Court of Appeal or some proceeding before the OCCPS. The notes

contained in Page 11 of Record 3 relate only to the criminal prosecution of the appellant's husband and not to either of the proceedings referred to by the Ministry. As such, I find that while privilege may have existed at some point in time in these notes, it has long since lapsed with the conclusion of the criminal litigation against the appellant's husband.

In my view, litigation privilege cannot be said to have attached to any of the other records, or parts of records, which the Ministry has claimed. I will address the application of section 49(b) to these documents below, however.

INFORMATION PUBLISHED OR AVAILABLE

The Ministry claims the application of section 22(a) of the *Act* to three court transcripts which are contained in the responsive records at Pages 126 to 161 of Record 3. This section states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

The Ministry indicates that it believes that the appellant has already received at least two of the transcripts and that it informed her as to how the third may be obtained. The Ministry relies on the following statement by former Inquiry Officer Anita Fineberg in Order P-729:

> The purpose of section 22(a) relates to questions of convenience (Order 170). Where the record in dispute constitutes a copy of the entire published document, the balance of convenience leans in favour of the institution and the record can be properly withheld. Where the records at issue constitute only a portion of a much larger document, the balance of convenience does not favour the institution.

and submits that the balance of convenience in this case favours the Ministry.

The appellant provided me with a copy of a transcript she received of a proceeding before a Justice of the Peace on September 18, 1998 at which time the charges against the appellant's husband were stayed following the successful appeal of his conviction to the Ontario Court of Appeal. She also quotes extensively in her representations from the transcript taken of her husband's trial in May and August of 1997, which indicates that she has also received a copy of that transcript. The appellant also has provided me with evidence of her unsuccessful efforts to receive copies of the other transcripts which are at issue in this appeal from the responsible court reporter.

Pages 126 to 146 of Record 3 consist of the transcript of the pre-trial hearing of the appellant's husband on September 20, 1996. Pages 147 to 161 of Record 3 consist of the Reasons for Judgment and Sentencing dated September 22, 1997 delivered orally by the trial judge who heard the case against the appellant's husband.

In my view, given the difficulties which the appellant has encountered in obtaining copies of the pre-trial transcript, I find that the balance of convenience favours the disclosure of this information, contained at Pages 126 to 146 of Record 3, to her. Insofar as the Reasons for Judgment and Sentence

which form Pages 147 to 161 of Record 3 in the present appeal are concerned, the appellant's husband successfully appealed his conviction of the offence described in the reasons to the Ontario Court of Appeal. I find it reasonable to assume that the appellant and her husband have been provided with a copy of the reasons upon which the appeal was based through some other means of disclosure. In the case of Pages 147 to 161 of Record 3, I find that the balance of convenience does not favour the appellant. Accordingly, these pages qualify for exemption under section 22(a) and are properly exempt under section 49(a).

INVASION OF PRIVACY

I have found above that the records remaining at issue, in whole or in part, contain the personal information of the appellant and her husband, along with a number of other identifiable individuals who were involved in the complaints and counter-complaints which have given rise to the creation of the records by the OPP.

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the *Act* or where a finding is made under section 23 of the *Act* that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 23 exemption.

The Ministry states that disclosure of the exempted information would constitute an unjustified invasion of personal privacy of other identifiable individuals in accordance with section 49(b) of the *Act*. The Ministry refers to section 21(3)(b), which states:

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

and the consideration listed in section 21(2)(f), which reads:

> A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,
>
> (f) the information is highly sensitive;

The Ministry submits that the exempted information describes the investigation undertaken by the OPP in response to various allegations concerning the appellant, her husband and their neighbours to determine whether criminal offences may have been committed. Having examined the records, I find that the majority of the personal information contained in the records was compiled as part of the OPP investigation into the possible commission of a violation of the *Criminal Code*. Accordingly, I find that the disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of the individuals identified in these records. None of the considerations listed in section 21(4) apply in the circumstances of this appeal and the appellant has not raised the application of section 23 of the *Act*.

I find, therefore, that the information contained in the records which was compiled as part of the various OPP investigations fall within the ambit of section 49(b) and are properly exempt under the *Act*. I have provided the Ministry with a highlighted copy of the records, and parts of records, remaining at issue. I have highlighted in yellow those portions of the records which are subject to the presumption in section 21(3)(b) and which are exempt from disclosure under section 49(b). The highlighted portions of the records are *not* to be disclosed to the appellant.

Other records, or parts of records, were compiled by the OPP or the Crown Attorney's office following the completion of the investigations. It cannot be said that these records were compiled or form part of the investigation and as such, cannot be subject to the presumption in section 21(3)(b). The Ministry argues that these records, or parts of records, contain information which is highly sensitive within the meaning of section 21(2)(f) as their disclosure would cause the individuals who are named therein excessive "personal distress".

These records contain information relating to a number of disturbing and often bizarre incidents involving the appellant, her husband and their neighbours which took place over a period of several years. The records themselves speak to the distress and upset caused to the neighbours by their unfortunate encounters with the appellant and, more particularly, her husband. The events described in the records and the poisoned relationships between the appellant and her husband and their elderly neighbours clearly indicate that these conflicts remain unresolved and that their reopening would only serve to further inflame an already volatile situation. I find that the disclosure of the information contained in those records which were created following the conclusion of the OPP investigations could reasonably be expected to cause the identifiable individuals who are referred to in them excessive personal distress. The consideration listed in section 21(2)(f) weighs heavily in favour of the non-disclosure of this information.

The appellant submits that the disclosure of this information is relevant to a fair determination of her rights in proceedings which she is contemplating before the OCCPS and the Ontario Court of Appeal for "financial compensation and other relief". This submission refers to the consideration listed in section 21(2)(d) of the *Act*. In my view, the disclosure of the information contained in the post-investigation

records would not be of any assistance to the appellant in pursuing her remedies in the forum described above. Information relating to the nature of the complaints made by the neighbours, as opposed to the manner in which those complaints were investigated by the OPP, is not relevant to a fair determination of the appellant's rights by either the OCCPS or the courts. Accordingly, I find that I cannot attach any significant weight to the consideration listed in section 21(2)(d) when determining whether the disclosure of this information would constitute an unjustified invasion of the personal privacy of the individuals named in these particular records.

I find, therefore, that the only relevant consideration in the balancing of the appellant's access rights against the privacy interests of the other identifiable individuals contained in these records favour the protection of privacy. The undisclosed portions of the post-investigation records are, accordingly, also exempt from disclosure under section 49(b). I have highlighted in blue those portions of the records which are exempt from disclosure under this portion of my analysis. The highlighted portions are *not* to be disclosed to the appellant.

A number of previous orders (Orders M-384, M-444, M-1093, M-1109, P-1457 and P-1618, for example) have held that the withholding of personal information relating to an individual other than the requester, in circumstances where the person requesting the information originally supplied the information, would lead to an absurd result, and disclosure of this information would not result in an unjustified invasion of personal privacy. I find that the rationale for this conclusion is applicable to certain portions of the withheld information in the records which describe information received by the OPP directly from the appellant. I find, accordingly, that this information is not exempt under section 49(b).

My findings with respect to the application of the exemption in section 49(b) to the records are in accordance with those of Assistant Commissioner Mitchinson in Order P-1618. While that appeal was concerned with records relating to a set of different complaints involving the appellant and her husband from an earlier time period, it was held that the disclosure of much of the information was presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b) and was highly sensitive within the meaning of section 21(2)(f).

REASONABLENESS OF SEARCH

The appellant has raised six grounds in support of her view that the Ministry has failed to conduct a reasonable search for records which are responsive to her request. These are outlined in detail in her representations. I requested that the Ministry make submissions by way of reply specifically addressing each of the areas identified by the appellant, and they have done so. I will, accordingly, address the concerns raised by the appellant and, in turn, the responses provided by the Ministry to each.

Probation Records and Related OPP Records

The appellant is of the view that the Ministry has failed to locate any reference which may be contained in police officers' notes on or about May 27, 1998 relating to a conversation between an OPP officer and a named probation officer. The appellant explains her reasons for believing that notes should exist which document this telephone conversation. The appellant also expressed concerns that, following the

decision of the Crown Attorney not to relay charges against her husband after the Court of Appeal overturned his conviction, any probation records maintained by the OPP ought to be destroyed.

The Ministry indicates that, as previously communicated to the appellant in its decision letter of October 13, 2000, the officer who notified the probation officer that the appellant's husband's conviction has been quashed by the Court of Appeal was serving that day as the Court Officer and, as such, did not keep day-to-day notes of activities on that date. It further states that staff at the Probation and Parole office advised that case notes in the appellant's husband's file do not indicate any other contact with OPP staff during the time period in question. In addition, the Ministry states that as a result of its inquiries in February 2001 with the Ministry of Correctional Services Probation and Parole Office in Kingston, it was advised that the husband's probation records are maintained at that location in accordance with that Ministry's records retention schedule.

Based on the submissions of the Ministry, I am satisfied that it has conducted a reasonable search for records relating to the May 27, 1998 telephone conversation between the OPP Court Officer and the named probation officer. I am also satisfied that the OPP no longer maintain any records relating to the appellant's husband's probation status and that these records are now held by the Ministry of Correctional Services Probation and Parole Office in Kingston.

Records Relating to the Sale of the Appellant's Home

The appellant refers to a portion of the Court transcript of September 18, 1998 in which the Crown Attorney indicates that he has received information from the OPP that the appellant and her husband were in the process of selling their home. The appellant believes that if this information was communicated by the OPP to the Crown there should be some record of this communication or some indication that the OPP was "monitoring the sale of our home."

Again, the Police indicate that, as communicated in its decision letter of October 13, 1998, a search for such records was undertaken by a named officer and that no responsive information was located.

I am satisfied, based on the information provided by the Ministry, that a reasonable search for records responsive to this part of the appellant's request was made.

Copy of an Information Sworn Before a Named Justice of the Peace

The appellant submits that reference is made in Pages 207 and 208 of the records disclosed to her of the retention by a named officer of a copy of an Information which has been completed by the appellant and signed by a named Justice of the Peace.

The Ministry takes issue with the appellant's reading of the contents of Pages 207 and 208. It submits that the Information referred to in those pages is one which the appellant brought to a meeting with the officer on July 27, 1997, which had not been signed by the Justice of the Peace. The Ministry states that the unsigned Information was disclosed to the appellant as "Appeal #26" on October 13, 2000. The Ministry submits that the notes referred to in Pages 207 and 208 do not substantiate the appellant's view that the officer retained a copy of the signed Information following his meeting with the appellant on July 27, 1997.

I note that "Appeal #26", an Information signed only by the appellant's husband, was disclosed to the appellant on October 13, 2000. I am satisfied with the Ministry's explanation as to the reason why a signed copy of the Information does not exist in its record-holdings. As such, I dismiss this part of the appellant's appeal.

Notes Maintained on a Laptop Computer by a Named Police Officer

The Ministry advised the appellant that certain notes responsive to the request which were maintained by an OPP officer on a laptop computer could not be accessed because of a computer system failure. The appellant is of the view that the OPP should have made an effort to recover the notes lost by the malfunction of the officer's computer or to conduct a search to determine if copies of the notes had been forwarded to anyone else.

Included in the Ministry's submissions is a detailed explanation by the officer involved describing the efforts made to retrieve the lost information by the OPP's computer technicians. These efforts were in vain as the "hard drive" of the computer had become corrupted and the information stored on it could not be recovered.

I am satisfied based on the submissions of the Ministry contained in their October 13, 1999 and October 13, 2000 decision letters, as well as their Reply submissions, that a thorough search of OPP record-holdings was undertaken to locate the records responsive to this part of the request.

Transcript of Proceedings at Brockville OPP on June 7, 1998

The appellant indicates that a "proceeding" took place at the Brockville OPP detachment on June 7, 1998 (which was a Sunday) and that a transcript of that "proceeding" should exist. She also produced a letter from a court reporter indicating that court reporters have no access to OPP records and that she is unable to produce the requested transcript.

Without additional information as to the nature of the "proceeding" referred to in the appellant's representations, I am unable to determine what this part of her request refers to. The Ministry indicates that a search of the OPP Brockville detachment's record-holdings did not reveal the existence of any records of a "proceeding" held on that day and the Leeds County Court office also indicated to the OPP that no record of any proceedings on that date exists. Accordingly, I also dismiss this part of the appellant's request.

Appellant's Statements Left at the Gananoque OPP Detachment on September 3, 1996

The appellant is of the view that four statements which she left with a named OPP officer on September 3, 1996 have not been located and disclosed to her. As a result of the submission of these statements, the OPP commenced a criminal investigation into certain allegations made by the appellant against one or more of her neighbours.

The Ministry indicates that it conducted a search of its record-holdings at the Gananoque and Leeds detachments and that the statements delivered by the appellant on that date could not be located. The officers involved in the investigation into the appellant's allegations were also contacted by the detachment's Commander and asked to conduct a search of their records. None of these searches resulted in the retrieval of the records in question.

Based on the submissions of the Ministry, I am satisfied that it conducted a reasonable search of its record-holding for documents responsive to this portion of the appellant's request.

By way of summary, I dismiss this portion of the appellant's appeal, having found that the Ministry's search for records responsive to the request was reasonable.

ORDER:

1. I uphold the Ministry's decision to deny access to the highlighted portions of the records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose to the appellant those portions of the records which are **not** highlighted by delivering a copy to her by April 20, 2001 but no later than April 25, 2001.

3. The search for responsive records conducted by the Ministry was reasonable and I dismiss this part of the appeal.

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 disclosed to the appellant pursuant to Provision 2.

Original Signed By: March 21, 2001
Donald Hale
Adjudicator