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

ORDER PO-2037

Appeal PA-010381-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the Ministry) for access to

> . . . an up to date accounting of costs incurred as the result of bringing witnesses from [a foreign country] to Canada to testify at the 1999 preliminary hearing and murder trials in . . . 2000 and in 2001 of [named individual (the affected person)]. Expenditures to be broken down into total airfare, accommodations, meals, miscellaneous expenses.

In response, the Ministry advised the appellant that it was denying access to the responsive records in full. The Ministry stated that "the matter is before the courts" and that "the fair trial interests of the [affected person] outweigh any discretionary basis for granting access at this time." The Ministry cited the following exemptions as the basis for its decision: section 14(1)(a) (interference with a law enforcement matter), section 14(1)(f) (deprivation of the right to a fair trial), section 19 (solicitor-client privilege) and 21 (personal privacy). Finally, the Ministry stated that the appellant "may wish to submit a new request at the conclusion of the criminal trial at which point different considerations may apply."

The appellant then appealed the Ministry's decision to this office.

In her letter of appeal, the appellant stated:

> . . . I am not asking for information that has any bearing on [the affected person's] potential appeal and any future trial or proceeding. I am merely requesting costs incurred by the ministry for arranging for [witnesses] to travel to Canada and to be fed and accommodated here. I believe the decision to deny access to the information by [the Ministry] is unjustified for the following reasons:
>
> Regarding Sec. 14(1)(a). The information requested cannot interfere with law enforcement in this matter. In fact, [the] police have responded positively and have already provided me with a break down of their costs in travelling to [the foreign country] to investigate the case.
>
> Under Sec. 14(1)(f). The information I am seeking is not evidence in the case and could not conceivably become evidence in any future proceeding.
>
> Under Sec. 19. The information is also not a matter of legal advice, prepared or used by Crown counsel.
>
> 21(1). I am not seeking personal or private information. Any ministry document disclosed under the Act could have the names of individuals [blacked] out, or need not contain names at all. I am merely seeking a cost breakdown.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry and the affected person. Only the Ministry provided representations in response. I then sent the non-

confidential portions of the Ministry's representations to the appellant, together with a Notice of Inquiry, seeking representations in response. The appellant, in turn, submitted representations.

RECORDS:

The records at issue in this appeal consist of 288 pages of receipts, invoices, fee sheets and correspondence.

DISCUSSION:

LAW ENFORCEMENT

Introduction

The Ministry has claimed the application of sections 14(1)(a) and (f), which read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

In order to establish that the particular harm in question under section 14(1)(a) or (f) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Divisional Court has held that, under sections 14(1)(a) and (f), it is *not* sufficient for an institution to proceed as if the concerns are "self-evident from the record", or to take the position that a request for records relating to a continuing law enforcement matter constitutes a "*per se* fulfilment of the relevant exemptions" [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 at 201-202 (Div. Ct.), upholding Order P-534].

Representations

The Ministry submits:

The records at issue pertain to matters involving Crown witnesses and potential Crown witnesses in respect of litigation conducted by Crown counsel that is still ongoing. All of this material came into existence as a result of the prosecution of the criminal matter . . .

The accused was charged with 2 counts of first degree murder and his first trial ended in a mistrial . . . followed by a further ruling by the trial judge severing the two counts of first degree murder. The first of these trials was moved to [another venue] as a result of a change of venue application brought by defence counsel on the basis of the publicity attracted by the case before and during the previous trial. That publicity, as found by the trial judge, included accounts of matters that were ruled inadmissible at the new trials . . . Information being sought in this request is directly related to that inadmissible evidence. Significantly, the trial Judge ordered publication bans under s. 648(1) of the *Criminal Code* . . . in respect of all of the above-noted rulings.

The first trial . . . was conducted [in] 2001 and the accused was convicted of first degree murder. He is currently appealing his conviction. The trial in relation to the second count of murder is scheduled to commence in September, 2002 and is expected to last three months.

. . . . .

The Ontario Court of Appeal has ruled that the harms envisaged in the law enforcement exemption are satisfied where they "could" reasonably be expected to occur if disclosure is made. In *Ontario (Attorney General) v. Fineberg*, the Ontario Divisional Court held that the Commission must approach the exemptions under section 14 in a "sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context." [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 107 D.L.R. (4th) 454 (Ont. C.A.); leave to appeal to the S.C.C. refused 112 D.L.R. viii; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.); see also Orders P-902, P-948, P-991 and P-992].

. . . [T]he consequences that could flow from disclosure of the requested information are serious and potentially irreparable. The trial and related proceedings have been ongoing since 1997. Release of these records would allow for further widespread reporting in respect of matters that have already resulted in a mistrial ruling and a change of venue of one trial, currently under appeal, . . . due to the widespread reporting of evidence that was later ruled inadmissible. The information being sought in this request is directly related to that inadmissible evidence. [See *Ruling on Revisitation of Similar Fact Evidence and Application for Mistrial . . .* and *Ruling on Change of Venue . . .*]

In light of extensive media coverage, it is crucial that the Ministry be allowed to protect the privacy and safety of its witnesses in ongoing criminal matters . . . [F]urther media reporting on these issues may well jeopardize the safety of

> potential Crown witnesses as well as the ongoing criminal trial. The disclosure of these records will allow for further media reporting that will make the selection of a jury for the second trial . . . even more difficult. Release of the records will allow for further reporting on the issues that in turn may well cause speculation and prejudice amongst potential jurors. As stated by the trial Judge in allowing the application for a mistrial, "It is obviously important that a new jury not be tainted with knowledge of the similar fact evidence now ruled inadmissible." Accordingly, the trial Judge imposed a publication ban to be in effect until the jury retires to consider its verdict.
>
> . . .[T]he only prejudice suffered by the requester is that disclosure may be delayed until the criminal proceedings are concluded, that is, when all pending prosecutions presently before the courts are completed and all avenues of appeal have been exhausted. In the context of an ongoing trial, requiring the requester to wait until the conclusion of the criminal proceedings to obtain access to records related to the case is a limited and specific exception to the public's general right of access to government records.

The appellant submits:

> . . . I am not seeking disclosure of material evidence in an ongoing criminal matter or information of a private or personal nature. I merely ask how much it cost the [Ministry] to arrange for witnesses from [the foreign country] to come to Canada to testify at the preliminary hearing, first and second murder trials of [the affected person].
>
> In my letter of appeal, I requested a breakdown of the costs, for example, air travel, hotel accommodations, meals, clothing allowances, etc. Specifically, I now ask if there exists among the 288 pages of records at issue in this appeal any document, ledger or accounting record that breaks down these costs? In the alternative, I would be content with just one number – the total cost to the province in arranging for these witnesses to testify in Canada.
>
> The cost of air tickets, hotel bills and other miscellaneous expenses do not compromise anyone's identity, evidence or investigation. Therefore these costs – which are ultimately borne by the taxpayer – should be public information.
>
> . . . . .
>
> I would argue that the expectation that harm could result from the disclosure of the information I am seeking is in fact "fanciful, imaginary and contrived" and not "based on reason."
>
> Section 14(1)(a) Interference with a law enforcement matter.
>
> The . . . Police have responded positively to my request for the total cost incurred by the service's officers travelling to [the foreign country] to investigate this case.

> I can see no prospect of interference with law enforcement in the ministry providing the cost information requested.
>
> Section 14(1)(f) Deprivation of the right to a fair trial.
>
> I would argue the records do not form any part of the evidence in the ongoing criminal prosecution and this section is therefore not applicable.

Analysis

In Order P-948, the requester sought access to records pertaining to the overall cost of a police "joint-forces" team to investigate child pornography and exploitation in Ontario, as well as information pertaining to the province's financial contribution towards this project. The (then) Ministry of the Solicitor General and Correctional Services claimed that disclosure of the record would interfere with upcoming criminal trials, and therefore sections 14(1)(a) and (f) applied.

Former Adjudicator John Higgins began his analysis by setting out some principles to consider when an institution claims that disclosure could reasonably be expected to interfere with a pending criminal trial under section 14(1)(a) and (f):

> Section 14(1)(f) deals explicitly with the right to a fair trial and impartial adjudication, and as previously noted, the Ministry's argument under section 14(1)(a) also relates to this issue. In my view, the Supreme Court of Canada's decision in *Dagenais v. Canadian Broadcasting Corp.* [1994], 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.), relating to publication bans, provides useful guidance in this regard.
>
> The *Dagenais* case, which the Ministry cites in its representations, concerns a publication ban to prevent the television broadcast of a fictional dramatic program until the completion of four criminal charges, where there was a similarity between the subject matter of the television program and the charges faced by the accused individuals. The main issue addressed is whether the infringement of the *Charter* right to freedom of expression was justified in order to ensure that the accused individuals receive fair and impartial adjudication as contemplated in section 11(d) of the *Charter*. Speaking for the majority, Lamer C.J.C. said:
>
> > The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a **real and substantial risk** of interference with the right to a fair trial. (Adjudicator Higgins' emphasis) (page 875)
> >
> > [P]ublication bans are not available as protections against remote and speculative dangers. (page 880)

In separate reasons, McLachlin J. said:

> What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.
> ...
> Rational connection between a broadcast ban and the requirement of a fair and impartial trial require demonstration of the following. ... [I]t must be shown that publication might confuse or predispose potential jurors ... (page 950).

In the circumstances of this appeal, I consider these comments as guidelines in deciding whether the information and reasoning provided by the Ministry are sufficient to substantiate the application of the exemptions provided by sections 14(1)(a) and (f).

Applying these principles to the circumstances of that case, Adjudicator Higgins rejected the exemption claims, for the following reasons:

> The Ministry seeks to demonstrate the reasonable expectation of harm under both sections 14(1)(a) and (f) by advancing three arguments. I will summarize each of the Ministry's submissions in this regard, and deal with them in turn.
>
> **(1) The Ministry submits that the amount of money spent on this investigation would be irrelevant and inadmissible at the trial of any individual accused as a result of the investigation**.
>
> I do not view this submission as a basis for applying either of the exemptions claimed. The Ministry advances this argument to demonstrate the prejudicial impact of the information at issue on the trial of any person charged in connection with the investigation. However, the primary test for the admissibility of evidence is relevance. It is clear that, generally speaking, the cost of an investigation should have no bearing on the guilt or innocence of an accused individual. The exclusion of this information from evidence at trial on the basis that it is irrelevant would not, of itself, establish the prejudicial impact asserted by the Ministry. I am, therefore, not persuaded that the potential exclusion of this information from evidence at any trial supports the conclusion that its disclosure could reasonably be expected to interfere with a law enforcement matter, or deprive a person of the right to a fair trial or impartial adjudication.
>
> **(2) The Ministry submits that the release of information about the amount of money spent on the investigation could cause jurors to draw an adverse inference as to the guilt of individuals charged as a result of this investigation.**

(3) The Ministry submits that disclosure of the amount of money spent on this investigation could stir up anger and resentment against child pornographers which could prejudice the fairness of future investigations and trials.

Both of these arguments are unsupported by any evidence or example. The Ministry appears to view these statements as obvious conclusions, or, to put it slightly differently, as per se fulfilment of the standards required to qualify for exemption under section 14(1)(a) or (f). I do not agree. In my view, to accept these arguments in the form presented to me, in the absence of sufficient information or reasoning to support them, would be to make the sort of "facile assumption" cautioned against by McLachlin J. in the *Dagenais* case. In my opinion, neither of these arguments establishes any reasonable expectation of the harms contemplated in sections 14(1)(a) and (f).

The Ministry seeks to bolster these arguments by referring to Order P-534, in which Inquiry Officer Anita Fineberg ordered disclosure of funding information about Project 80 (a municipal corruption squad comprised of officers from several police forces). In that order, the Inquiry Officer rejected arguments that sections 14(1)(a) and (f), among others, applied to exempt this information from disclosure. The Ministry argues that Order P-534 was incorrectly decided because the Inquiry Officer failed to appreciate the fallibility of jurors.

The fact situation in Order P-534 is remarkably similar to the one under consideration here. There, as here, the project in question was a high profile investigation involving officers from several police forces. In Order P-534, the Inquiry Officer dealt with essentially the same argument presented by the Ministry in this case, to the effect that disclosure of funding information would interfere with accused persons obtaining a fair trial. Moreover, the representations in that case also consisted of bare assertions with little supporting information.

In my view, it is significant that Order P-534 was reviewed by the Divisional Court (*Ontario (Attorney General) v. Fineberg*, 19 O.R. (3d) 197). The Divisional Court upheld the Inquiry Officer's findings concerning the exemptions, including sections 14(1)(a) and (f). The Court stated that "... it is our view that the findings by the Inquiry Officer with respect to the application of sections 14(1)(a), (b), (d) and (f) were reasonable in light of the material before her ...". With respect to section 14(1)(f) and the question of interference with a fair trial, the Court stated that "[i]n the circumstances, the Officer also reasonably concluded that the concern with respect to section 14(1)(f) appeared quite unlikely".

The Divisional Court upheld Inquiry Officer Fineberg's conclusion that disclosure of funding information concerning Project 80 could not reasonably be expected to

> trigger the harms contemplated in either section 14(1)(a) or 14(1)(f) of the *Act*. In my view, this seriously undermines the Ministry's argument that Order P-534 was wrongly decided.
>
> With respect to the Ministry's concerns about jurors, I am not satisfied, on the basis of the information provided to me, that there is a reasonable expectation that disclosure (or publication) of the information at issue would lead to jurors being confused or predisposed with respect to matters at issue in any trial.
>
> I agree with the conclusions of the Inquiry Officer in Order P-534 concerning sections 14(1)(a) and (f), as affirmed by the Divisional Court, and in my view, they are also applicable in this case. The facts are similar, and the Ministry has failed to provide sufficient information and reasoning to support a conclusion that disclosure of the financial information at issue could reasonably be expected to result in any interference with a law enforcement matter, or to deprive a person of the right to a fair trial or adjudication.

Here, the Ministry submits that the information at issue is directly related to evidence found to be inadmissible at trial, but does not explain how. In my view, contrary to the Ministry's submission, the records at issue are, at best, only remotely related to the evidence ruled inadmissible, and to the published material that lead to the court's change of venue decision.

The Ministry also refers to publication bans issued under the *Criminal Code*. These bans do not cover the information at issue in the records, or even information that is reasonably related thereto.

The Ministry submits that disclosure "would allow for further widespread reporting in respect of matters that have already resulted in" mistrial and change of venue rulings, and that disclosure will allow for further media reporting that will make the selection of a jury for the second trial … even more difficult." It is also submitted that this further reporting "may well cause speculation and prejudice amongst potential jurors." The Ministry has failed to draw a logical connection between the disclosure of these particular records, and these particular harms. While it may be the case that disclosure of these records will lead to some additional publicity about the case in general and, in particular, expenses incurred in respect of witnesses, any harm that might result is highly speculative and based on a "facile assumption" referred to in *Dagenais*. In addition, given that the publication bans in question appear to remain in effect, it is difficult to see how disclosure of these records could reasonably be expected to result in reporting on matters of concern that led to the bans. The Ministry has simply failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" under section 14(1)(a) and (f). In my view, there are strong similarities between this case and the cases discussed above (Orders P-948 and P-534), to the extent that they deal with cost issues, which are too far removed from the central issues in the case to lead to the harms outlined in sections 14(1)(a) and (f).

The Ministry also expresses concerns for the "privacy and safety of its witnesses in ongoing criminal matters." These issues are more appropriately considered under the section 21 exemption, as discussed below.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry claims that the records are exempt under section 19, which 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.

Section 19 encompasses two heads of common law privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The Ministry submits that the records are subject to litigation privilege because they "were prepared for Crown counsel for existing litigation".

Litigation Privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

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.
> >
> > . . . . .
> >
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for [exemption] under the *Nickmar* test and should be tested under "dominant purpose".

The Ministry submits:

> The records came into existence as a result of litigation that is still ongoing. The Ministry claims privilege for any and all records relating in any manner to Crown witnesses in respect of ongoing litigation. The Ministry submits that Branch 2 of s. 19 is specifically designed to protect information prepared by or for Crown counsel in connection with proceedings being conducted by Crown counsel on behalf of the government. The Ministry submits that this affords exemption to a wide range of materials obtained and prepared in anticipation of existing or contemplated litigation, including communications to and from third parties and documents compiled in connection with litigation.
>
> See Orders M-52, M-685, MO-1241, P-126, P-368, P-467, P-613, P-988, P-1342
>
> *General Accident Assurance Co. v. Chrusz* [above] at 330-332

Ottawa-Carleton (Regional Municipality) v. Consumers Gas Co. (1990), 74 D.L.R. (4th) 742 (Ont. Div. Ct.) at 748

R. v. Campbell and Shirose (1999), 133 C.C.C. (3d) 257 (S.C.C.) at 288-291

The Ministry also submits that, although the original trial to which the records relate has been terminated, there currently exist a related appeal and a pending trial.

It may be the case that any litigation privilege arising from the original trial would continue in respect of the current, related proceedings. However, I am not persuaded that litigation privilege is applicable to the records at issue in any event. In my view, it cannot be said that the records were prepared for the dominant purpose of litigation. As explained in *Waugh*, to meet the dominant purpose test, the Ministry must establish that the purpose of creating the records was to use them or their contents to obtain legal advice or to conduct or aid in the conduct of litigation. The records at issue are administrative records relating to payments made to witnesses to cover certain living expenses. On the face of the records, it is difficult to see how these records would actually be *used* by Crown counsel in prosecuting the criminal charges, or specifically to obtain legal advice or to conduct or aid in the conduct of the litigation. The Ministry's representations, which consist of generalized assertions, offer no assistance in this regard. By itself, it is not sufficient that the records bear some relation to the litigation. Accordingly, I find that the records were not created for the dominant purpose of the litigation.

Applying the *Nickmar* test, I also find that the Ministry has failed to establish that the records have "found their way into the lawyer's brief", or that any "selective copying" or "exercise of skill and knowledge" were undertaken by counsel regarding these records. There is simply no evidence or argument in support of this aspect of litigation privilege.

To conclude, I find that the records do not fall within either category of litigation privilege under section 19. Since the Ministry did not claim solicitor-client communication privilege, I find that the section 19 exemption does not apply.

PERSONAL INFORMATION

Introduction

The Ministry claims that the records are exempt under the section 21 personal privacy exemption. That exemption applies only to information that qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an *identifiable* individual (my emphasis).

Representations

The Ministry submits:

> These documents were compiled during the course of an ongoing criminal matter that resulted in the laying of criminal charges that are still before the courts. As part of the trial process, information was compiled in respect of costs associated with bringing witnesses to testify at the criminal proceedings. Under the terms of s. 21(1) of the *Act*, the Ministry cannot disclose another person's personal information if such release would be an unjustified invasion of personal privacy. Thus, under the terms of s. 21(1) of the *Act*, the Ministry is required not to disclose the information.
>
> During mediation, the appellant advised the mediator that they were not interested in any names, addresses or any other identifying information of these parties. The Ministry submits that the entire record constitutes personal information. The records contain personal information belonging to the named accused and potential Crown witnesses. As a group, the records are by themselves identifiable to the named accused. It is impossible to sever "identifying information" when the records themselves have already been identified as being responsive to the request which is by its very nature identifiable to a particular individual or individuals; i.e. costs incurred as the result of bringing witnesses from [the foreign country] to Canada to testify at a named accused's trial.

The appellant submits: "I am not requesting information that directly pertains to or identifies any individual, but rather as total cost breakdown of expenses incurred by the ministry."

Analysis

The first issue to consider is whether the records, with the names and other personal identifiers removed, constitute "personal information" of the Crown witnesses.

In Order P-230, former Commissioner Tom Wright stated, with regard to the issue of "identifiability":

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

I agree with this approach and adopt it for the purpose of this appeal.

In Order P-644, former Adjudicator Anita Fineberg considered the Ministry of Health's policy that dealt with "small cell counts". In that order the information at issue was the classification of physicians practising certain specialities who also performed electrolysis. In this regard, the Ministry made the following submissions:

> Physicians refer their patients to specialists and the fact that certain [specialists] also performed electrolysis was widely known. In addition, this information would be known to patients the specialist has treated. Therefore, these specialists

> can be identified in the public domain. The fact that there are so few in each speciality performing electrolysis would reveal or infer financial information about the individual specialists and must be severed under section 21 of the *Act*.

Former Adjudicator Fineberg considered the comments made by former Commissioner Wright in Order P-230 and applied that approach in Order P-644. She concluded that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about *identifiable* individuals.

In another appeal (Order P-1137), however, which again dealt with the Ministry of Health's "small cell count" policy, she took a different approach to the issue. She stated:

> In Order P-230, Commissioner Tom Wright stated:
>
> > If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.
>
> Based on the submissions of the Ministry and adopting the test set out above, I concluded in Order P-644 that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. Accordingly, I concluded that the information at issue was personal information.
>
> In this appeal, the Ministry argues that the numbers constitute personal information solely on the basis that they are in groups of less than five. Unlike the information provided in Order P-644, the Ministry has not indicated how disclosure of the fact that there was one hemophiliac in a particular province who contracted HIV and who made a claim could possibly result in the identification of that individual. For example, for one of the provinces, the number of hemophiliac HIV infected individuals is the same as the number of such individuals who have filed a claim against the province. This number has been disclosed because it is greater than five.
>
> In my view, disclosure of the information in Record 135 could not lead to a reasonable expectation that the individuals could be identified. Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 has no application. Record 135 should be disclosed to the appellant in its entirety.

In Order P-1389, Adjudicator Donald Hale dealt with another appeal involving the Ministry of Health. In that appeal the information at issue consisted of the total billing amounts relating to the ten highest billing general practitioners in Toronto. In considering the Ministry of Health's

representations on the issue of whether the requested information was about "identifiable individuals", Adjudicator Hale stated:

> The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.
>
> . . . . .
>
> In my view, the Ministry's arguments rely on the unproven possibility that there **may** exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an **identifiable** individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the *Act* [original emphasis].

In a recent case dealing with the issue of "identifiability" and the definition of "personal information", the Divisional Court stated that an institution must provide submissions establishing a nexus connecting the record, or any other information, with an affected person, and that any connection between the record and an affected person, in the absence of evidence, is "merely speculative" [see *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), 154 O.A.C. 97 (Div. Ct.), upholding Order PO-1880, leave to appeal granted (April 12, 2002), Doc. M28120 (C.A.)].

Here, the Ministry provides no evidence to indicate how the individual witnesses might be identified based on a combination of information sought and what otherwise may be available. Based on my review of the records, there is nothing to indicate that, once the names and other personal identifiers are removed, it would be reasonably possible to link a particular receipt or expense record to a specific individual or a very small number of individuals, especially given the relatively large number of witnesses.

As a result, once the necessary severances are made, the records do not constitute the personal information of the witnesses as that term is defined in section 2(1) of the *Act*.

The next issue for me to decide is whether or not the records constitute the accused's personal information. I accept that the appellant is clearly aware of the identity of the accused. However, I am not persuaded that the records are "about" the accused as required by the section 2(1) definition of "personal information". In my view, it is not sufficient that the records have some remote connection to him. Disclosure of the records must reveal something that can be said to be "about" the accused personally. Here, the severed records would reveal that witnesses incurred certain living expenses, that the Ministry reimbursed the witnesses for these expenses and certain other details connected to the expenses. This information may be "about" the Ministry and/or

the witnesses as unidentifiable individuals or as a general group, but is not "about" the accused in these circumstances.

Based on the above, I conclude that the section 21 exemption cannot apply to the records at issue, in severed form.

As stated above, the Ministry also expresses concerns for the "privacy and safety of its witnesses in ongoing criminal matters." These concerns are addressed in the section 21 personal privacy exemption. Based on my finding that the records, if severed, do not constitute personal information, I am not satisfied that the records should be withheld on this basis.

Since I have found that none of the claimed exemptions under section 14, 19 and 21 applies, the records must be disclosed to the appellant, in severed form.

ORDER:

1. I do not uphold the Ministry's decision to withhold the records, except for the names and signatures of the witnesses.

2. I order the Ministry to disclose the records to the appellant, except for the names and signatures of the witnesses, no later than **October 4, 2002**, but not earlier than **September 30, 2002**.

3. I reserve the right to require the Ministry to provide me with copies of the material disclosed to the appellant pursuant to provision 2 above.

Original Signed By: August 30, 2002
David Goodis
Senior Adjudicator