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

ORDER PO-2518

Appeal PA-030365-2, PA-040280-1 and PA-030407-3

Ministry of Community Safety and Correctional Services

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BACKGROUND:

In response to a coroner's jury recommendation that the Ontario government create a registry for sex offenders, *Christopher's Law* came into force on April 23, 2001. It creates a Sex Offender Registry (the Registry). The Registry is a provincial registration system for sex offenders who have been released into the community, requiring them to report annually to the local police service. During the registration process, police enter information about these individuals into a database. The database is intended to provide police services with information that will improve their ability to investigate sex-related crimes as well as monitor and locate sex offenders within the community.

The Registry includes the following information about the individuals listed in it:

- name and aliases
- date of birth
- current address and telephone numbers
- photographs and physical description
- description of sex offence(s) and sentencing information for which the offender has been convicted.

Christopher's Law provides sex offenders with the right to access information about themselves that is contained in the Registry, but does not provide a right of access to members of the public.

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received three similar requests under the *Freedom of Information and Protection of Privacy Act* (*Act*) from a member of the media.

Request 1 seeks access to "copies of records listing the postal code contained in the address of each sex offender registered in Ontario's Sex Offender Registry database" in bulk electronic form and hard copy.

Request 2 seeks access to "copies of records indicating the total number of convicted registered sex offenders residing in each police division in Ontario."

Request 3 seeks access to "a breakdown of the total number of sex offenders registered in Ontario's Sex Offender Registry by type of sex offence conviction as defined by the criminal code" in electronic bulk form and hard copy.

In response to Request 1 and 2, the Ministry directed the appellant to submit these requests to individual police services on the basis that they had a greater interest in the responsive information. In response to Request 3, the Ministry claimed a time extension for issuing its access decision. The requester (now the appellant) appealed the Ministry's decision with respect to Requests 1 and 2, and filed a deemed refusal appeal regarding Request 3.

The Ministry subsequently issued revised decision letters concerning Request 1 and 2 and issued a decision on Request 3. The Ministry took the position that *Christopher's Law* applied to all three requests and, as a result, the information requested fell outside of the scope of the *Act* pursuant to section 67(1). All three of those decisions were dealt with in Order PO-2312, in which former Assistant Commissioner Tom Mitchinson found that the *Act* applied and ordered the Ministry to provide the appellant with decisions on access under the *Act* for all three requests.

The Ministry subsequently issued decision letters to the appellant pursuant to Order PO-2312. In all three requests, the Ministry denied access to the requested records pursuant to the law enforcement provisions of the *Act* as set out in sections 14(1)(a), 14(1)(d) and 14(1)(l). The Ministry also claimed that disclosure of the requested information would constitute an unjustified invasion of other individual's privacy, relying on sections 21(2)(f), 21(2)(h) and 21(3)(b).

The appellant appealed all three decisions to this office, and as a result, Appeals PA-030365-2 (Request 1), PA-040280-1 (Request 2) and PA-030407-3 (Request 3) were opened.

During mediation of the three appeals, the appellant argued that there is a compelling public interest in the disclosure of the records, thus raising the issue of the "public interest override" in section 23 of the *Act*.

Mediation did not resolve the appeals, and the files were transferred to adjudication. To begin the adjudication process, I sent a Notice of Inquiry to the Ministry outlining the issues and inviting its representations. The Ministry provided representations in return. A copy of the Notice of Inquiry and the Ministry's complete representations were provided to the appellant, inviting representations. The appellant provided representations in response. In turn, the appellant's representations were provided to the Ministry in their entirety, and the Ministry was invited to provide reply representations. In response, the Ministry indicated that it did not intend to provide reply representations.

RECORDS:

The records at issue are as follows:

- Request 1 (Appeal PA-030365-2) – a list of the postal codes contained in the address of each sex offender registered in the Ontario Sex Offender Registry database, in electronic form and hard copy. The Ministry has provided me with a hard copy of this record.

- Request 2 (Appeal PA-040280-1) – a list of the total number of convicted sex offenders residing in each police jurisdiction, taken from the Ontario Sex Registry database. The Ministry has provided me with a hard copy of this record.

- Request 3 (Appeal PA-030407-3) – a list of the total number of convicted sex offenders in the Ontario Sex Offender Registry database broken down by offence, in electronic form and hard copy. The Ministry has provided me with a hard copy of this record.

DISCUSSION:

PERSONAL INFORMATION

In order to evaluate the application of the personal privacy exemption claimed by the Ministry, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Personal information is defined in section 2(1) of the *Act*. This definition states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.) ("*Pascoe*")].

The information contained in the records at issue in this appeal do not refer to any individual by name. Accordingly, I must determine whether it is reasonable to expect that an offender listed in the Registry may be identified if the information is disclosed.

Representations of the Parties

The Ministry's position is that "[r]elease of the requested information in conjunction with other publicly available information sources may lead to the identification of individual sex offenders." In support of its position, the Ministry refers to former Commissioner Tom Wright's comments in P-230, in which he stated:

> I believe that provisions of the Act relating to protection of personal privacy should not be read in a restrictive manner. 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.

The Ministry submits that the list of examples contained in the definition of "personal information" is "not exhaustive," relying on Order 11. Further, the Ministry states that "seemingly non-identifiable information about sex offenders should not necessarily be considered anonymous information" because "[r]elease of the requested information in

conjunction with other publicly available information sources may lead to the identification of individual sex offenders."

The Ministry argues that postal code information responsive to Request 1 is a "personal identifier" as "it could allow a person to pinpoint the location of an individual sex offender within 5 or 6 residence locations of his or her actual address in some circumstances." Elsewhere in its representations, the Ministry refers to the dangers of vigilantism and harassment against sex offenders, as well as the possibility of false identification of individuals as sex offenders.

The Ministry also submits that records responsive to Request 2, containing information regarding the total number of sex offenders residing in each police division in Ontario, is a personal identifier taking into consideration "the significant variations in the size of particular police divisions and the number of criteria sex offenders residing in each police division."

Finally, the Ministry submits that information as to the breakdown of the total number of sex offenders responsive to Request 3, containing information by type of sex offence conviction, "can be viewed as a potential personal identifier" on the basis that the information is derived from the offence information required to be submitted by the police and other information sources. The Ministry also notes that there are variations in the number of individuals listed in relation to particular offences, with some offences being quite uncommon.

The appellant submits that the Ministry's representations fail to demonstrate that the information at issue is recorded information about an identifiable individual. In particular, the appellant states that:

- the ability to pinpoint the location of an individual sex offender to within 5 or 6 residence locations with postal code information is not sufficient to trigger the personal privacy provisions of the *Act*;

- the release of the number of sex offenders residing in a particular police division, even in cases where only one sex offender resides in the jurisdiction, does not identify an individual; and

- the release of information indicating that one sex offender, residing in Ontario, was convicted of a particular offence does not assist in the identification of the sex offender.

Analysis and Findings

I agree with the Ministry that the list of examples in the definition of "personal information" is not exhaustive, as noted in Order 11. I also agree that it is necessary to bear in mind that seemingly non-identifiable information may not be anonymous where other information may be combined with it to render it identifiable.

As well, in my view, the comments quoted by the Ministry from Order P-230 provide valuable guidance in assessing this issue. As former Assistant Commissioner Tom Mitchinson states in Order PO-2240:

> [t]he comments of former Commissioner Tom Wright in Order P-230 are the starting point for any discussion of "personal information" where no individual is named or otherwise specifically identified on the face of a record. In order to satisfy the definition of "personal information" in these circumstances, there must be a reasonable expectation that an individual can be identified from the information in the record.

Essentially this same approach was upheld by the Court of Appeal in the judicial review of Order P-1880 (*Pascoe*, cited above). The information at issue in that case was the top ten items that the top billing general practitioner in Toronto billed for, the number of times the doctor billed those ten items and a brief explanation of those items. In making her decision, former Adjudicator Pascoe reviewed a number of previous orders considering the Ministry of Health's policy and procedures regarding "small cell counts" (i.e. situations where only a small number of identifiable individuals could be the individual whose information has been requested). The Ministry of Health's "small cell count" policy states that there is a possibility of an individual being identified "when the processing of anonymized personal health information yields tabulations of less than five." Adjudicator Pascoe stated:

> In Order P-644, former Adjudicator Anita Fineberg considered the Ministry's policy which dealt with "small cell counts". In that order the information at issue was the classification of physicians practising certain specialities who also performed electrolysis.
>
> …
>
> 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's "small cell count" policy, she took a different approach to the issue. She stated:
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> …
>
> > 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.
>
> …
>
> Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 has no application.

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

Former Adjudicator Pascoe concluded that the billing information at issue did not fall within the definition of "personal information" and stated that:

> [w]ith respect to the current appeal, although the Ministry refers to a number of previous orders and correctly identifies the conclusions reached in those cases, the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, although the Ministry refers to Order P-316 and states that "the reasonable expectation of identification is based on a combination of information sought and otherwise available", it does not provide any evidence as to what the "otherwise available" information might be. Similarly, in referring to Orders P-651, P-1208 and 27, the Ministry does not provide any specific information as to how it would be possible to identify the affected person given the circumstances of this particular case.
>
> Although the Ministry takes the position that the record at issue discloses a "medical practice profile" that can identify the affected person, the Ministry does not provide any further information or explanations in this regard.
>
> …
>
> Also, although the Ministry is relying on its "small cell count" policy, it is not clear from the Ministry's representations as to how this policy is applicable in the circumstances of this case. The only information provided by the Ministry is that "there may be less than five providers of abortion services in a geographical area". The Ministry does not, however, provide any evidence to show that this is in fact the case in the Toronto area, which is the subject of the request. Moreover, neither the Ministry nor the affected person has provided any evidence as to the likelihood of there being a small number of physicians in the Toronto area performing the types of services and/or the number of services that are identified in the record at issue.
>
> Unlike in Order P-644, where former Adjudicator Fineberg concluded that, given the small number of physicians that performed certain types of services 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, the Ministry and the affected person have not provided me with a sufficient basis on which to reach this conclusion in the present appeal. [original emphasis]

As noted, Adjudicator Pascoe's decision was upheld on judicial review by the Court of Appeal in *Pascoe* (cited above). It had previously been upheld by the Divisional Court (reported at [2001] O.J. No. 4987). The Divisional Court stated that in order to establish that information is identifiable, an institution must provide submissions establishing a nexus connecting the record, or any other information, with an individual. In the Court's view, any connection between a record and an individual, in the absence of evidence, is "merely speculative."

The Divisional Court elaborated:

> The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records. [See Order P-316; and Order P-651].

In this appeal, the Ministry states that the release of the information at issue in conjunction with other publicly available information may lead to the identification of individual sex offenders. The Ministry submits that the postal code information responsive to Request 1 qualifies as personal information because it is reasonable to expect that an individual could identify the residence of a sex offender within 5 or 6 residence locations. The Ministry also submits that the release of the information responsive to Requests 2 and 3 (respectively, the total number of registered sex offenders by police division and the number of sex offenders listed in the Registry by offence) could also identify individuals.

In my view, however, the Ministry's representations do not explain how disclosure of the total number of registered sex offenders by police division or number of sex offenders by offence could possibly result in the identification of any individual. I agree with the appellant that, even if there is only one offender in one of these categories, that information does not identify any individual, nor does the Ministry explain what other publicly available information might establish a nexus connecting the information in these two categories with any individual. In that regard, I have also considered that Request 3 seeks the information in electronic form as well as hard copy. In my view, however, there is nothing about electronic format that affects this conclusion.

I am therefore not satisfied that the information responsive to requests 2 and 3 is about "identifiable" individuals and on that basis, I find that it does not qualify as "personal information". It therefore cannot be exempt under section 21. Later in this order, I will consider whether it is exempt under the other provisions claimed by the Ministry.

I have reached a different conclusion about the postal code listing responsive to Request 1. In my view, the circumstances of each case must be considered in deciding what constitutes a "small cell count". As well, the Ministry's comments about the dangers of vigilantism, and well-documented public concern about the place of residence of released sex offenders are pertinent considerations in the circumstances of this appeal. Given the possibility of ongoing observation and/or surveillance in the context of vigilantism, I am satisfied that the ability to pinpoint the location of an offender's residence within five or six houses is small enough to make the identity and/or the residence location of an individual reasonably identifiable.

The appellant submits that if I am persuaded that the postal code information qualifies as personal information, severance of the last character could be considered as a way of

"substantially increasing" the area covered, and presumably reducing the chance that an offender could be identified. Unfortunately, I am not in possession of evidence relating to the impact of removing the final character, and under the circumstances, I am not prepared to find that this would mean that individuals are not "reasonably identifiable."

I therefore find that the postal code information responsive to Request 1 qualifies as personal information. Accordingly, I will go on to consider whether this information is exempt under section 21(1) of the *Act*.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. In the circumstances of this appeal, it appears that the only exception that could apply is paragraph (f), which provides an exception to the section 21(1) exemption "if the disclosure does not constitute an unjustified invasion of personal privacy."

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of personal privacy". Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some criteria for the Ministry to consider in making this determination and section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. As well, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. Section 21(4) does not apply in this case.

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

Section 21(3)(b): presumed unjustified invasion of privacy

The Ministry takes the position that disclosure of the information at issue would constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the *Act*, which provides:

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

In support of its position, the Ministry states:

> The Ministry is of the view that some of the requested information consists of personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. As noted earlier, approximately 94 percent of sex offenders who are required to report for the purposes of *Christopher's Law* are complying with the legislation. The requested information contains information that was compiled and is identifiable to these individuals, as well as the approximately 6 percent of sex offenders who are not complying with the legislation.
>
> The Ministry submits that the information at issue includes personal information that was compiled and is identifiable as part of police investigations into possible violations of *Christopher's Law*.

The appellant submits that section 21(3)(b) does not apply to the requested information as the information at issue was not compiled as part of an investigation into a possible violation of law.

Christopher's Law requires sex offenders to be added to the Registry after they are convicted or found not criminally responsible and the information in it is therefore "compiled" long after the conclusion of any investigation (see Orders M-734, M-841 and M-1086). In the circumstances, I therefore find that section 21(3)(b) of the *Act* does not apply. The Ministry does not refer to the other presumptions in section 21(3), and I find that none of them applies.

Section 21(2): factors weighing in favour of or against disclosure

Section 21(2) sets out the criteria to be considered when deciding whether the disclosure of personal information constitutes an unjustified invasion of personal privacy. The list of criteria in section 21(2) is not exhaustive and it is necessary to consider all the relevant circumstances in reaching a conclusion [Order 99]. This section states, in part:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;
> …

With regard to the factors favouring non-disclosure in sections 21(2)(f) and (h), the Ministry's representations state:

> The Ministry submits that in the circumstances of the appellant's requests the requested information from the [Registry] may be considered highly sensitive personal information supplied in confidence by sex offenders and other information sources.

Although the appellant's representations do not refer to any of the factors listed in section 21(2) specifically, he appears to rely on the factor favouring disclosure in section 21(2)(a) based on the following statement contained in his representations:

> The Ministry invites you to conclude that the privacy rights of convicted sex offenders and its interest in controlling the information and giving police an exclusive right to disclose specific and statistical information taken from the [Registry] overrides the public interest in scrutinizing the way the [Registry] is used to inform the public about the risk posed by sex offenders. We submit that we have carefully requested information that will allow us to analyze the distribution of the sex offenders by location and criminal offense without requesting obviously personal identification such as names, addresses or telephone numbers.
>
> …
>
> Our intent is explicitly to subject a government organization to public scrutiny where it has previously been shielded. We explicitly plan to use this information to inform the public about the workings and uses of the [Registry].

Section 21(2)(a): public scrutiny

In order for section 21(2)(a) to apply, it must be established that disclosure of the information at issue is desirable for the purpose of subjecting the activities of the institution to public scrutiny (see Order P-828). Having reviewed the representations of the parties, I am satisfied that disclosure of some information about sex offenders could inform citizenry of the activities of the Ministry's administration of the Registry. Given the ongoing public discourse about sex offenders, this could apply, for example, to information about the number of offenders residing in a police district, or the number of offenders broken down by offence, but I have already found that this is not personal information. On the other hand, I do not believe that disclosing postal code information would serve this objective. A list of postal codes reveals little, if anything, about the administration of the Registry, nor does it reveal anything else that has been identified as a valid target of public scrutiny. I find that section 21(2)(a) is not a relevant factor relating to postal code information.

Section 21(2)(f): highly sensitive

Throughout the Ministry's representations, it argues that the information at issue is highly sensitive. Previous orders have stated that, in order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause "excessive" personal distress to the subject individual [Orders M- 1053, PO-1681, PO-1736]. In my view, this interpretation is difficult to apply and a reasonable expectation of "significant" personal distress is a more appropriate threshold in assessing whether information qualifies as "highly sensitive."

Information about an individual's involvement with the criminal justice system, or even the fact of such involvement, in and of itself, will usually be highly sensitive because disclosure can be expected to cause significant personal distress to such individuals. Because societal intolerance of sex offenders is well documented and commonplace, it is even more likely that disclosure of the fact that someone is listed in the Registry would cause significant personal distress. As a result, I accept that section 21(2)(f) is a relevant factor in favour of the protection of privacy of individuals who may be identified by disclosure and I accord it significant weight.

Section 21(2)(h): supplied in confidence

The Ministry takes the position that sex offenders and other information sources supplied the information at issue in confidence to the Ministry. Based on the limitations on the contemplated use and disclosure of Registry information as set out in *Christopher's Law*, I am satisfied that the personal information was supplied with an expectation of confidentiality, and the factor in section 21(1)(h) applies. Given that the nature of the information, I also accord this factor significant weight.

Weighing relevant factors

I have found that the factors favouring non-disclosure in sections 21(2)(f) and (h) apply, and that the factor favouring disclosure in section 21(2)(a) does not. The result is that, in my view, disclosure of the postal code information would be an unjustified invasion of personal privacy and the section 21(1)(f) exception to the section 21(1) exemption is therefore not established. The information is exempt under section 21(1).

Even if I had found that section 21(2)(a) applied, I would have concluded that the factors favouring non-disclosure in sections 21(2)(f) and (h) are more compelling because of the possibility of individuals being exposed as listed in the Registry, outside the circumstances contemplated in *Christopher's Law*. As well, the Ministry's comments about vigilantism against sex offenders are relevant in this regard. In addition, the postal code information contained in the record could be inaccurate or outdated, which could lead to the incorrect identification of individuals as being included in the Registry. In my view, these factors are more significant than any possible public scrutiny resulting from disclosure of the postal codes, and disclosure of this information is therefore an unjustified invasion of personal privacy.

Accordingly, subject to the discussion of section 23, below, the postal code information responsive to Request 1, in both electronic and hard copy form, is exempt under section 21(1).

PUBLIC INTEREST IN DISCLOSURE:

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records exempt under sections 12, 14, 14.1, 14.2, 16, 19 or 22.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 4636 (Div. Ct.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

Though the Ministry concedes that there is a public interest in regard to the public safety issues relating to the management of sex offenders in Ontario, its position is that the circumstances of this appeal do not present a compelling public interest. The Ministry's representations warn that a "public notification component could give residents of Ontario a false sense of security of their communities." With regard to the second requirement, the Ministry states that its decision to withhold the requested information is consistent with the purpose of the mandatory personal privacy exemption.

The appellant's representations state:

> Whenever a high-profile sex offense occurs in Ontario, police are quick to supply the media with statistics derived from the database. These statistics are often quite alarming, but there has been no way to independently verify what has been said.

> …
>
> We submit that there is a compelling public interest in verifying the police public statements made about the sex offender population in Ontario.
>
> We also submit that this interest clearly outweighs any privacy interest the Ministry could argue.

For the reasons already outlined in my decision that disclosure of the postal code information is not desirable for the purpose of subjecting the Ministry's activities to public scrutiny, I am not satisfied that there is a compelling public interest in its disclosure. I am simply not persuaded that any meaningful analysis of the Ministry's handling of the Registry is possible on the basis of this kind of information. On that basis, I find that it would *not* shed light on the operations of the government.

Even if I found that there were a compelling public interest in the disclosure of the postal code information, I would not find that it outweighed the purpose of the section 21(1) exemption. The authors of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the *Act* must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive. In the latter case, the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature . . . the effect of the proposed exemption is to tip the scale in favour of non-disclosure" [see Order MO-1254].

As noted above, disclosure of the fact that an individual is registered in the Registry is highly sensitive personal information that was supplied in confidence by the offenders. In my view, in the particular circumstances of this case, there is a compelling interest in protecting the privacy of these individuals, which is more compelling than the public interest in disclosure of the postal code information, whose relationship to public scrutiny or to the "operations of government" is not, in my view, established. Accordingly, any public interest that may exist in disclosure does not *clearly outweigh* the purpose of the exemption, and section 23 therefore does not apply to the postal code information responsive to Request 1.

This information is therefore exempt under section 21(1), and it is not necessary to consider whether the law enforcement exemptions claimed by the Ministry apply to it. I will now turn to the question of whether the claimed law enforcement exemptions apply to the information responsive to Requests 2 and 3.

LAW ENFORCEMENT

The Ministry claims that sections 14(1)(a), 14(1)(d) and 14(1)(l) of the *Act* apply to the remaining numeric information at issue (*i.e.*, the number of offenders listed in the Registry by police district and the number of offenders listed by offence). These sections state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. The Ministry refers to the standard of proof established for sections 14(1)(e) and 20 in *Big Canoe v. Ontario (Ministry of Labour)* (1999), 46 O.R. (3d) 395, which required that the "reason for refusing disclosure is not a frivolous or exaggerated expectation of endangerment to safety". This standard has not been established for sections 14(1)(a), (d) and (l). In my view, these sections continue to require "detailed and convincing" evidence to establish a "reasonable expectation of harm".

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

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

The Ministry submits that the requested information falls within part (a) of the definition of "law enforcement". The Ministry submits that sections 1 and 42 of the *Police Services Act* demonstrate the wide ambit of what is included in "policing" and how maintaining the Registry falls within it. I note that section 42(1)(b) of the *Polices Services Act* provides that the duties of a police officer include preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention.

The preamble of *Christopher's Law* reads:

> The people of Ontario believe that there is a need to ensure the safety and security of all persons in Ontario and that police forces require access to information about the whereabouts of sex offenders in order to assist them in the important work of maintaining community safety. The people of Ontario further believe that a registry of sex offenders will provide the information and investigative tools that their police forces require in order to prevent and solve crimes of a sexual nature.

Taking into consideration the reason for creating the Registry and its use by police agencies, I find that it falls within the "policing" component of the law enforcement definition cited above, and therefore pertains to "law enforcement".

Section 14(1)(a): interference with a law enforcement matter

The Ministry's representations state that the "release of the requested information has the potential to interfere with a law enforcement matter." The Ministry states:

> As noted earlier, the [Registry] database provides police services with critical information that improves their ability to investigate sex-related crimes, as well as monitor and locate sex offenders in the community.

The Ministry goes on to express particular concern that, if "… registered sex offenders become concerned that information that may ultimately result in their identification is being released for non-public safety or law enforcement purposes, they may go 'underground' and no longer comply with reporting requirements," and may go on to re-offend.

The appellant submits that:

> [t]he [Registry] is not a specific, ongoing law enforcement matter. It is a registry compiled from information compelled by law from people who have been convicted of a crime – which means the law enforcement work has ended. It is an investigative resource, not an investigation in its own right, and therefore not a "law enforcement matter" to which this exemption applies. The alleged interference is with "potential" law enforcement matters – crimes which may happen in the future. Orders PO-2085 and MO-1578 say this exemption does not apply in this situation.
>
> The [Registry] would continue to be of use to the police if the information we seek were released, therefore it cannot be reasonably be expected to interfere with [a] law enforcement matter. …

For the exemption set out in section 14(1)(a) to apply, the law enforcement matter in question must be a specific, ongoing matter. As established by Orders PO-2085 and MO-1578, cited by the appellant, the exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters. While I am satisfied that the Registry relates generally to law enforcement and aids police agencies in the investigation of law enforcement matters, the Ministry has not provided evidence to establish that it relates to any identified ongoing law enforcement matter, nor that it could reasonably be expected to "interfere" with any identified law enforcement matter.

In my view, the Ministry's comments about potential non-compliance with *Christopher's Law* or the potential for sex offenders to re-offend relates more to section 14(1)(l) than this section, but in any event, I am not persuaded, based on the evidence before me, that the disclosure of the number of offenders residing in a particular police district or convicted of particular offences could reasonably be expected to have this result. This conclusion is explained in further detail in my analysis of section 14(1)(l), below.

For all these reasons, I find that section 14(1)(a) does not apply.

Section 14(1)(d): confidential source

The Ministry's position is that the numeric information at issue is directly derived from information submitted by confidential sources including sex offenders, the police and other information sources. The Ministry states that disclosure of the information at issue could reasonably be expected to disclose the identity of its confidential sources. In support of its position, the Ministry refers to the confidentiality provisions found in section 10 of *Christopher's Law* and the following comment in *R v. Dyck* (2004), 187 C.C.C. (3d) 73 (O.C.J.) (also reported at [2004] O.J. No. 2842), reversed on other grounds at [2005] O.J. No. 5313 (S.C.J.):

> Important to note as well is the fact that disclosure of the information on the registry is restricted for police purposes and it is an offence for that information to be disclosed otherwise than provided in the Act. The Act sets out that the information on the registry is confidential and accessible only by the police….

The appellant's representations state that the Ministry has confused the concept of a "confidential source" with "confidential information" and refers to Order PO-2312 where former Assistant Commissioner Tom Mitchinson found that the confidentiality provisions of *Christopher's Law* do not prevail over the *Act*. The appellant also submits that "the information we are requesting could not reasonably be expected to lead us to anyone's identity, confidential source or not."

Like the appellant, I am not satisfied with the Ministry's explanation. The information sought in Requests 2 and 3 does not identify individuals or informants who may have provided the information; rather, it provides information regarding the number of sex offenders residing in particular police jurisdictions and the type of sex crimes registered individuals committed or for which they were found not criminally responsible. In my view, this discloses neither the identity of confidential informants, nor the information they provided about particular sex offenders. Accordingly, section 14(1)(d) does not apply.

Section 14(1)(l): commission of an unlawful act or control of crime

The Ministry's position is that disclosure of the numeric information at issue could reasonably be expected to facilitate the commission of an unlawful act and hamper the control of crime. The Ministry states:

> Release of the requested information from the [Registry] may reasonably be expected to lead to the public identification of some sex offenders in circumstances where there is no public safety need to do so. Concerns have been identified in jurisdictions where sex offender information is available through public notification. The Ministry is aware that in some jurisdictions there have been incidents of citizen vigilantism involving publicly identified sex offenders being threatened and harassed. In some instances, the harassment extended to families. Another concern arising from the public notification is that individuals residing in residences vacated by sex offenders may be mistakenly identified as sex offenders. It has been reported that in some instances these individuals have been subject to harassment.
>
> As noted earlier, should a need for community notification arise, the *Police Services Act* as amended by the *Community Safety Act*, empowers local police chiefs and the Commissioner of the Ontario Provincial Police to publicly disclose information about offenders considered to be a significant risk to the community. Such disclosure must be done in accordance with the *Police Service Act* and its

> regulations. The Ministry submits that it is both reasonable and appropriate for the police to make such public safety decisions.

The appellant submits that the Ministry has failed to provide credible examples to demonstrate that the release of the requested information could be reasonably expected to facilitate the commission of an unlawful act or hamper the control of crime. In particular, the appellant submits that the Ministry failed to provide evidence that a reduction of compliance would occur as a result of the requested information being provided. Further, the appellant states that the Ministry's position that the release of requested information would encourage vigilantism incorrectly presumes that the requested information contains identifiable personal information.

For section 14(1)(l) to apply, the Ministry must establish a reasonable expectation that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime. The remaining information at issue is numeric information responsive to Requests 2 and 3. Having reviewed the representations of the parties and the records themselves, I find that section 14(1)(l) does not apply to the information at issue.

Though current events have demonstrated that the public identification of sex offenders could potentially lead to the commission of an unlawful act or control of crime, the Ministry has failed to establish a connection between the alleged harm and disclosure of the numeric information at issue. As noted above in the discussion of whether the information responsive to Requests 2 and 3 qualifies as personal information, the evidence does not establish that any individuals are "identifiable" from the requested information. I have also found, in the discussion of section 14(1)(a) above, that the evidence is not sufficient to establish a reasonable expectation of reduced compliance or vigilantism. In my view, such consequences could only be "reasonably expected" to flow from the disclosure of information about identifiable individuals.

To conclude, I find that none of the exemptions claimed by the Ministry applies to the information responsive to Requests 2 and 3. In this regard, I note that Request 3 seeks the information in electronic form and in hard copy, and in my view, disclosing this information in electronic format does not affect this outcome. I will therefore order that the information responsive to Requests 2 and 3 be disclosed.

ORDER:

1. I uphold the decision of the Ministry to deny access to the records responsive to Request 1.

2. I order the Ministry to disclose to the appellant the records responsive to Requests 2 and 3 by **November 21, 2006.**

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2, upon request.

October 31, 2006

John Higgins
Senior Adjudicator