



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2633

Appeal PA06-196

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the parents (the requesters) of an individual who died after being shot by a member of a named Police Service (the Police). The requesters sought disclosure of all information gathered by the Ministry's Special Investigations Unit (SIU), including, but not limited to, day-to-day reports, witness statements, laboratory reports, etc.

The Ministry located a large number of responsive records and issued a decision granting partial access to them. Access was denied to many of the responsive records pursuant to sections 19 (solicitor-client privilege) and 14(2)(a) (law enforcement report), and section 21(1) (personal privacy) in conjunction with the presumption in section 21(3)(b) of the *Act*.

The requesters (now the appellants) appealed the decision of the Ministry to this office. Mediation did not resolve the appeal and the file was moved to adjudication. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry initially, seeking its representations. I received representations from the Ministry. I then sent a Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellants seeking their representations. I did not receive representations from the appellants in response.

On further review of the records, I noticed that certain records appeared to contain the personal information of the appellants. Therefore, section 49(b) (personal privacy) became an issue in this appeal. I sought and received representations on this issue from the Ministry. I shared these representations with the appellants, and sought their representations on section 49(b). The appellants did not provide representations in response.

RECORDS:

The records at issue are listed in the attached Appendix to this Order.

The Ministry claimed the application of sections 14(2)(a) and 21(1) for all but two of the records. It applied only section 14(2)(a) for Record 2 and section 19 for Record 41. The Ministry also relies on section 19 for Record 43.

As noted previously, I also added section 49(b) as an issue because it appeared that some of the records may contain the appellants' personal information. These records are as follows:

Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78.

DISCUSSION:

BACKGROUND

The SIU is described on the Ministry's website, as follows:

The SIU is a civilian law enforcement agency, independent of the police, that investigates circumstances involving police and civilians which have resulted in serious injury, including sexual assault, or death. Part VII of the *Police Services Act* creates the SIU and defines its powers.

The SIU is independent of any police service. The Unit reports to the Attorney General, however the SIU's investigations and decisions are also independent of the government. The Director of the SIU is empowered under the *Police Services Act* with causing criminal charges to be laid against police officers where warranted on the basis of the evidence gathered during an investigation.

The Ministry describes the creation and composition of the records as follows:

The records at issue, except for Records 2 (form on which is recorded information pertaining to the notification of interested parties of the Director's decision at the conclusion of the SIU investigation), 3 (Director's Report to the Attorney General) and 41 (correspondence between SIU and Crown counsel), are part of the SIU investigative brief of the incident investigated. The investigative brief is essentially a compilation of the information obtained during the course of the investigation of an incident that falls within the SIU's statutory jurisdiction and the steps taken in the discharge of that investigative jurisdiction. The information includes all documentary materials obtained by the SIU from third parties or generated by the SIU (including administrative and other internal forms used to track the progress of the investigation, and working notes/emails/internal memos of internal deliberations and advice relating to such things as investigation plans, legal advice, privacy considerations, investigative working theories and the Director's analysis of the criminal liability issues), as well as records in the form of audiotapes, videotapes and CDs.

The investigative brief in this matter, as in all incidents investigated by the SIU, was reviewed by the Director of the SIU with a view to determining whether there were reasonable grounds to believe that the subject officer had committed a criminal offence in connection with the death in question and, consequently, whether a criminal charge or charges should be laid. Based upon a review of the investigative brief and the information contained therein, the Director decided that criminal charges were not warranted in this case.

PERSONAL INFORMATION

The Ministry has claimed that all of the records remaining at issue, except Records 2 and 41, contain the "personal information" of identifiable individuals. In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

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.)].

Representations of the Ministry

The Ministry submits that:

The records ...contain personal information that relates to persons other than the appellants. These persons include the deceased individual (the circumstances surrounding whose death was the focus of the SIU investigation), various police officers involved in the incident and subsequent investigation (including the subject officer), a significant number of civilian witnesses who were interviewed during the course of the investigation, and other persons involved in the investigation...

[S]ome of the records at issue also contain information that may constitute personal information related to the appellants...

[T]he Ministry submits that the information in question is not associated with individuals in their "professional or official government capacity" ... (Reconsideration Order R-980015).

The records in question consist substantially of information provided by witnesses during the course of a law enforcement investigation of a particular incident. The objective of that investigation was to ascertain whether there were reasonable grounds to believe that the officer that was the focus of the investigation had committed any criminal offences in connection with the matter investigated. As information collected and/or produced for purposes of a criminal investigation, the Ministry submits that the information in question was inherently of a personal nature. For example, the officers were not giving voice to their organization when they provided statements to the SIU. Rather, they were expressing their personal recollections, views and opinions with respect to the incident in question. In the language of the reasoning cited above, this information does not represent the views or opinions of an organization, be it public or private. It is not associated with these witnesses in their employment or professional capacity. Rather, this information is more appropriately characterized as being associated with individuals in their personal capacity and, accordingly, constitutes personal information within the meaning of that term in section 2(1) of the *Act*.

Analysis/Findings

I have reviewed the contents of the records remaining at issue and I agree with the Ministry that Records 2 and 41 do not contain personal information. I also find that Record 37, which provides a chronology of the 911 and dispatch calls, does not contain personal information. Since only personal information can be exempt under section 21(1) or 49(b), neither of these sections applies to Records 2, 37 and 41 [Order PO-2095].

I find that the other records remaining at issue contain the personal information of the deceased and other identifiable individuals, including witness and non-witness police officers and/or individuals (other than police officers) who were involved in or who witnessed the shooting of the deceased. I also find that Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78 contain the personal information of the appellants, along with the personal information of other identifiable individuals.

The personal information contained in these records includes information relating to such things as: race, national or ethnic origin, age, sex, colour and marital or family status (paragraph (a) of the definition of personal information in section 2(1) of the *Act*); educational, criminal, medical and employment histories (paragraph (b)); identifying numbers (paragraph (c)); addresses, fingerprints and telephone numbers (paragraph (d)); the personal opinions or views of witnesses other than the appellants which were not opinions about the appellants (paragraphs (e) and (g)); correspondence between individuals and the SIU that is of a confidential nature (paragraph (f)); and, names of individuals together with other personal information about them or in circumstances where the disclosure of the names would reveal other personal information about the individuals (paragraph (h)).

With respect to the information concerning the police officers who were the subject of the SIU investigation or who were witnesses to the incident, in determining that their information is personal as opposed to professional or official information, I agree with the reasoning in Order PO-2524. In that Order, Adjudicator Steven Faughnan found that information pertaining to an examination of the conduct of the police officers falls within the ambit of the definition of personal information as it relates to these officers in their personal, rather than their professional, capacities. Adjudicator Faughnan stated:

[S]ome records contain the personal information of witness and non-witness police officers and/or individuals (other than police officers) who were involved with the appellant or who witnessed events relating to the appellant. This information qualifies as the personal information of these individuals because it includes information about their age (paragraph (a)), medical, criminal and employment history (paragraph (b)), their addresses and telephone numbers (paragraph (c)) or their names along with other personal information about them (paragraph (h))...

Although the information in certain records relates to an examination into the conduct of the subject officers while at their work, in my view, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, it has taken on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the individual officers. I find, therefore, that those records which include an examination of the manner in which the subject officers conducted themselves also contain the personal information of those officers under paragraph (h) of section 2(1).

Therefore, as the records at issue contain the personal information of witness and non-witness police officers and/or individuals (other than police officers) who were involved in, or who witnessed, the events relating to the death of the deceased in circumstances analogous to Order PO-2524, I find that all of the records remaining at issue, except for Records 2, 37 and 41 contain personal information of identifiable individuals. In addition, I find that Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78, also contain the personal information of the appellants and other identifiable individuals.

I will consider whether the records that contain both the appellants' and other identifiable individuals' personal information, namely Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78, are exempt by reason of section 49(b). I will also consider whether the remaining records at issue that contain the personal information of identifiable individuals other than the appellants are exempt by reason of section 21(1).

Records 2, 37 and 41 do not contain personal information. I will only consider whether Records 2 and 37 are exempt by reason of the exemption in section 14(2)(a), which has also been claimed for them. I will also only consider whether Record 41 is exempt by reason of the exemption in section 19, which has been claimed for that record.

PERSONAL PRIVACY

There are two types of records that contain personal information; the records that contain the personal information of the appellants and other identifiable individuals and records that only contain the information of identifiable individuals other than the appellants.

Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78 contain the personal information of the appellants and other identifiable individuals.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion"

of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

In the remaining records at issue containing personal information, the personal information is that of identifiable individuals other than the appellants. They do not contain the appellants' personal information. Under section 21(1), where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information, in the circumstances of this appeal, unless disclosure would not constitute an "unjustified invasion of personal privacy" under section 21(1)(f).

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 under sections 21(1) or 49(b).

Section 21 of the *Act* was recently amended (S.O. 2006, c. 19, Sched. N). These amendments postdate the appellants' request and are not retroactive. Therefore, the original version of section 21 applies in this appeal.

Representations

For all of the records that contain personal information, the Ministry relies upon the presumption in section 21(3)(b), which reads:

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;

The Ministry submits that:

The statute which gives rise to the SIU, outlining its jurisdiction and responsibilities, is the *Police Services Act (PSA)* and, more particularly, section 113 of the *PSA* (the sole governing statutory provision relating to the SIU). ...SIU is a law enforcement agency which conducts (as in this case) criminal investigations surrounding the circumstances of incidents which fall within its jurisdiction in order to determine whether there are reasonable grounds to believe

a criminal offence has been committed by the involved officers and to lay criminal charges in cases where such evidence is found to exist...

It is also the case that records provided to the SIU by the police service, for use in the SIU's investigation, are provided in the expectation that they will be used exclusively for purposes of the SIU's investigation.

Analysis/Findings

Upon review of the records, I find that the personal information was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code* by the Police. Even though no criminal proceedings were commenced against any of the individuals identified in the records, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

In the circumstances, therefore, I find that the presumption in section 21(3)(b) applies, disclosure of the records or portions of records that contain the personal information of individuals other than the appellants is presumed to be an unjustified invasion of personal privacy. This presumed unjustified invasion of personal privacy only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 21(4), as it read at the time of the appellants' request, is inapplicable. The appellants have not raised the application of the public interest override in section 23, and I find that it does not apply. Accordingly, disclosure would be an unjustified invasion of personal privacy.

Therefore, the records, or portions of records, that contain only the personal information of identifiable individuals other than the appellants are exempt from disclosure pursuant to the mandatory exemption in section 21(1). These records comprise all of the records remaining at issue except for Records 2, 3, 27, 29, 37, 41, 42, 51, 58, 69, 76, 77 and 78.

The records or portions of records that contain the personal information of the appellants and other identifiable individuals, namely, Records 3, 27, 29, 37, 42, 51, 58, 69, 76, 77 and 78, are also exempt from disclosure by reason of section 49(b) in conjunction with section 21(3)(b), as the personal information in those records was compiled and is identifiable as part of an investigation into a possible violation of law, as stated above, and disclosure would be an unjustified invasion of personal privacy. I will, however, consider below whether the Ministry exercised its discretion in a proper manner pursuant to section 49(b) and also whether the absurd result principle applies to the records or portions of records that contain both the personal information of the appellants and other identifiable individuals.

Absurd Result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would

be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The Ministry submits that the absurd result principle does not operate in respect of the records in question as the personal information of identifiable individuals other than the appellants is so intertwined with the personal information of the appellants that severance is not reasonably feasible. The appellants did not provide representations on this issue despite being specifically asked to do so.

Analysis/Findings

The records that contain the information of the appellants' and other identifiable individuals are Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78. I find that the absurd result principle is inapplicable to most of these records, as well as to the records that do not contain the appellants' personal information. In particular, the appellants did not originally supply this information, or the appellants are not otherwise aware of the information in these records.

Although there are records that contain information that the appellants are otherwise aware of, I find that the absurd result principle is inapplicable to these records or portions of records due to the sensitivity of the information in these records. A compelling reason exists for not applying the "absurd result" principle, since the disclosure would be "inconsistent with the purpose of the exemption", which must include the protection of individuals in the law enforcement context.

I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-I, where she stated that:

The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is

made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

I find, however, that the absurd result principle applies to certain information in the records that contains both the appellants' and other identifiable individuals' personal information. These records or portions of records can be described as follows:

<u>Record #</u>	<u>Description of Record</u>
<i>Record 42</i>	
(page 000542)	email with newspaper article
(page 000666)	letter from appellants to Lead Investigator, SIU
<i>Record 58</i>	
(page 000799, except for chart)	News Conference summary

Therefore, subject to my discussion below as to whether these records or portions of records are exempt from disclosure by reason of the law enforcement exception in section 14(2)(a), I find that Record 42 pages 000542 and 000666 and Record 58 page 000799 (except for the chart) are not exempt from disclosure.

I find that the remaining records or portions of records, including the records that contain the personal information of the appellants and other identifiable individuals, namely all or portions

of Records 3, 27, 29, 42, 51, 58, 69, 76, 77 and 78, are not subject to disclosure by reason of the absurd result principle. I will consider below whether the Ministry properly exercised its discretion under section 49(b) with respect to the records that contain the personal information of the appellants and other identifiable individuals.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that Record 41 is subject to exemption by reason of solicitor-client privilege (section 19 of the *Act*). When the request in this matter was filed, section 19 stated as follows:

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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

Representations

The Ministry submits that:

It is respectfully submitted that the records withheld pursuant to section 19 of the *Act* are properly the subject of the common law and statutory privileges. Record 41 is a written communication between the SIU (the client) and counsel from the Crown Law Office - Civil, Ministry of the Attorney General (the solicitor), which counsel had been retained to represent the SIU in respect of litigation relating to the records in question. The correspondence related to the litigation in question and is implicitly of a confidential nature... It is submitted that [this record] relate[s] to communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice, thereby attracting the protection of the common law solicitor-client privilege. It is further submitted that [this record was] “prepared by or for Crown counsel for use in giving legal advice”, thereby attracting the protection of the statutory solicitor-client privilege set out in the second branch of section 19.

The Ministry submits that neither the common law privilege nor the statutory privileges that attach to Record 41... have been waived or otherwise lost.

Analysis/Findings

Record 41 is a letter from the SIU counsel to the Ministry’s counsel at the Crown Law Office – Civil. I will begin by considering whether this record is exempt under branch 1 of section 19, in particular, the solicitor-client privilege aspect of branch 1. In doing so, I must determine first whether the SIU counsel and counsel retained by the SIU from the Crown Law Office in the case of Record 41 are in a solicitor-client relationship. The question of whether a communication between Crown counsel and a member of a police force can be protected by solicitor-client communication privilege has been addressed in several previous orders. In Order MO-1663-F, Adjudicator Sherry Liang summarized these decisions, stating:

In *R. v. Campbell* [reported at [1999] 1 S.C.R. 565 (S.C.C.)], the Supreme Court of Canada adopted what it described as the “functional” definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed “reverse sting” operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that:

[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

R. v. Campbell has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the [municipal] *Act*, or section 19 of the provincial *Act*.

Based on the mandate of the SIU and its relationship to the Ministry, described above, I agree with this approach and adopt it with respect to the relationship between counsel from the Ministry’s Crown Law Office – Civil and the SIU.

The Ministry claims that Record 41 relates to litigation concerning the other records at issue. The litigation arose as a result of the Ministry’s initial response to the appellants’ request. The Ministry had initially responded to the request by indicating that:

The SIU file in this matter contains information related to “young persons” protected under the *Youth Criminal Justice Act*. In these circumstances the records compiled as part of the SIU investigation fall outside of the scope of the *Freedom of Information and Protection of Privacy Act*.

As a result, the appellants brought an application before Justice B.M. Scully of the Ontario Court of Justice pursuant to section 123 of the *Youth Criminal Justice Act*, for access to the records. Justice Scully held that:

Investigations conducted by the [SIU] pertain to the conduct of police officers to allow for consideration whether the officers ought to be prosecuted under the Criminal Code of Canada. Any such records are not created or kept for the purpose of the *Youth Criminal Justice Act* [YCJA] or for the investigation of an offence that is or could be prosecuted under the [YCJA].

It is my ruling then, that I have no jurisdiction under the [YCJA] to direct what access, if any, ought to be granted to the records accumulated by the [SIU] in the course of the investigation of the police conduct as it pertains to the circumstances relating to the death of the [deceased].

Subsequently the Ministry issued the decision letter denying the appellants access under the *Act* to the SIU records that are the subject matter of this appeal.

I find that the solicitor-client communication privilege in branch 1 of section 19 applies to Record 41. Branch 1 protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Record 41 contains direct communications of a confidential nature between a Crown counsel as the solicitor and the SIU as the client made for the purpose of obtaining or giving professional legal advice concerning the *YCJA* litigation. I, therefore, find that Record 41 is subject to the common law solicitor-client privilege under branch 1. This privilege has not been waived. Therefore, subject to my discussion below concerning the Ministry’s exercise of discretion, Record 41 is exempt by reason of section 19.

LAW ENFORCEMENT

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the institution relies on section 49(a) in conjunction with section 14(2)(a) with respect to the records that contain the appellants' personal information. Therefore, I will consider whether section 49(a) in conjunction with the law enforcement exemption in section 14(2)(a) applies to the records that I have found not to be exempt from disclosure by reason of the absurd result principle, namely, Record 42 (pages 000542 and 000666) and Record 58 (page 000799, except for chart). I will also consider whether the exemption in section 14(2)(a) applies to Records 2 and 37, as these records do not contain personal information and were not, therefore, exempt by reason of the personal privacy exemption.

Sections 14(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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 term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term “law enforcement” has been found not to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner’s investigation under the *Coroner’s Act* [Order P-1117]
- a Fire Marshal’s investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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.)].

The word “report” means “a formal statement or account of the results of the collation and consideration of information”. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law. (Order 200 and Order P-324).

The Ministry submits that:

Part 1:

The record must be a report

...the SIU Director's Report to the Attorney General and the records that comprise the investigative brief constitute a "formal statement or account of the results of the collation and consideration of information" in that they provide an overview of the incident and a description of the events prior to, during and subsequent to the incident that was investigated. As described above, the records that comprise the investigative brief, in this and other SIU investigations, form an integral part of the Director's Report in that they are considered by the Director in arriving at an ultimate disposition of the case, which disposition is then formally articulated in the Director's Report. The Ministry submits that the materials that comprise the investigative brief are indeed more than "mere observations or recordings of fact."...

It should also be noted that section 113(8) of the *PSA* requires the Director of the SIU to provide the Attorney General with a report of the results of investigations. The Director's Report satisfies this reporting requirement. It reports the results of the investigation based upon the Director's review of the investigative brief. Within this framework, the Ministry submits that the Director's Report and investigative brief considered together comprise a formal statement of the results of the collation and consideration of information and that, consequently, the information contained in these records constitutes a "report" for purposes of part 1 of the section 14(2)(a) test.

Parts 2 and 3:

The report must have been prepared in the course of law enforcement, inspections or investigation and the report must have been prepared by an agency which has the function of enforcing and regulating compliance with the law.

Section 113 of the *PSA* ...charges the SIU with the investigation of "...the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (see section 113(5) of the *PSA*). In the event of these occurrences, an independent investigation into the incident is conducted by SIU investigators with a view to determining whether any police officer may have committed a criminal offence in the circumstances. Once all reasonable steps have been taken to gather all of the relevant information surrounding the incident, the information obtained is compiled in final form into an investigative brief, which, in turn, is reviewed by the Director in determining whether there exists reasonable grounds to believe that a police officer has committed a criminal offence (see section 113(7) of the *PSA*). In the event that the Director finds that reasonable grounds exist, he or she causes an information

to be laid against the officer or officers and refers the matter to the Crown Attorney for prosecution (see section 113(7) of the *PSA*). Pursuant to section 113(8) of the *PSA*, the results of the investigation are reported to the Attorney General in the form of the Director's Report to the Attorney General.

The Ministry submits that the SIU's enabling statutory regime summarized above, and the creation of the investigative brief and Director's Report in the discharge of the SIU mandate, establish that the records that comprise the investigative brief and the Director's Report are prepared, as in the instant case, in the course of law enforcement investigations by an agency which has the function of enforcing and regulating compliance with the law, namely, the criminal law. For these reasons, the Ministry submits that the investigative brief and the Director's Report meet all three parts of the section 14(2)(a) test and are properly the subject matter for an exemption under that section...

In the event that some of these records are found to contain information that constitutes personal information related to the appellants, the Ministry submits that the reasons articulated above in respect of the application of section 14(2)(a), including those going towards the exercise of the Ministry's discretion, apply with equal force to justify exemption of these records from disclosure pursuant to section 49(a) of the *Act*.

Analysis/Findings

I disagree with the Ministry that all of the records at issue, except for Record 2 which the Ministry has excluded from the investigative brief, form part of the investigative brief and should qualify as a report under section 14(2)(a). I agree with and adopt the reasoning in Order PO-1959, where Adjudicator Sherry Liang considered the Ministry's position in that appeal that the entire SIU file should be considered to qualify as a "report" for the purposes of section 14(2)(a). Adjudicator Liang found that section 14(2)(a) requires consideration of whether each record at issue falls within that exemption. She stated:

[I]t does not follow that all the material which may have been gathered together, placed before and considered by the [SIU] Director before arriving at his conclusions is also exempt, without further analysis. In this respect, ...section 14(2)(a) does not provide a 'blanket exemption' covering all records which the Ministry views as constituting part of the SIU's 'investigative brief.'

In the case before me, the SIU investigation file consists of numerous different records from diverse sources. As the representations of the Ministry describe, they are essentially a compilation of information obtained during the course of the SIU's investigation and the steps taken by SIU staff in the discharge of that investigative jurisdiction, and include documentary materials obtained by the SIU or generated by the SIU. The Director's decision is based upon a review of all the

records, but his analysis and decision is contained in ...(the Director's Report) alone.

I accept, and it is not seriously disputed by the appellant, that [the Director's Report] qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that ...the cover letter to [the Director's Report], qualifies for exemption, as the two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director...

I find that none of the remaining records at issue meet the definition of a "report"... Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

On my review of the incident reports, supplementary reports and police officers' notes at issue in this appeal, I am satisfied that they also do not meet the definition of a "report" under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature

I have already found, above, that the Director's Report (Record 3), which Adjudicator Liang found to be a "report" under section 14(2)(a), is exempt by reason of section 49(b). I will deal separately with each record that I have not found to be exempt by reason of sections 21 or 49(b) and for which the Ministry has claimed section 14(2)(a).

Record 2

This record is not part of the investigative brief. It is described by the Ministry as a form on which is recorded information pertaining to the notification of interested parties of the Director's decision at the conclusion of the SIU investigation. The form is titled "Circulation of Director's Reports". It is not a report within the meaning of section 14(2)(a); but is a partially completed form confirming the circulation of the Director's Report. Therefore, this record is not exempt under section 14(2)(a) and I will order it disclosed.

Record 37

This record contains a chronology of the 911 and dispatch calls. It is not a report within the meaning of section 14(2)(a); rather, it is a listing of the times and types of various calls the police and or the 911 operator. Therefore, this record is not exempt under section 14(2)(a) and I will order it disclosed.

Record 42 (pages 000542 and 000666)

As described above, the portions of Record 42 that I have found subject to disclosure by reason of the absurd result principle are an email with a newspaper article (page 000542) and a letter from the appellants to the Lead Investigator, SIU, (page 000666). None of these items can be said to be a report, nor is Record 42, taken as a whole a “report”. Therefore, the applicable pages of this record are not exempt under section 14(2)(a) and I will order them disclosed.

Record 58 (page 000799, except for chart)

The applicable portion of this record consists of a news conference summary. This information does not comprise a report prepared in the course of law enforcement within the meaning of section 14(2)(a) and is therefore not exempt from disclosure under this section.

Conclusion

I find that section 14(2)(a) does not apply to any of the records which are not exempt by reason of sections 21 or 49(b); namely, Records 2, 37, 42 (pages 000542 and 000666) and Record 58 (page 000799, except for chart). These records are not “formal statements or accounts of the results of the collation and consideration of information”. Therefore, these records are not exempt by reason of section 14(2)(a) of the *Act* and, as I have found that they are not otherwise exempt, I will order them to be disclosed to the appellants.

EXERCISE OF DISCRETION

The sections 19 and 49(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry submits that:

...strong policy reasons militate for the protection of the personal information contained in the records in issue. It is necessary that an investigative law enforcement agency be able to protect personal information compiled as a component of an investigation into potentially criminal conduct. Central in any such investigation is the willingness of witnesses to come forward and provide information that they might have which is relevant to an investigation. This type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is frequently of a sensitive nature whose provision is often only forthcoming where confidentiality can be assured. The concern for confidentiality is shared between police officers and civilians. In respect of the former, it should be noted that pursuant to section 113(9) of the *PSA*, all members of police forces are required to cooperate fully with the SIU in the conduct of an SIU investigation. In order to facilitate that cooperation in the course of SIU investigations, it is necessary that police officers retain a measure of confidence that their cooperation with the SIU, in the form of information they provide, will remain confidential and will not be disclosed to third parties. With respect to civilian witnesses, it has been the experience of the SIU that there are many occasions when they will only provide the SIU with information if they believe that all communications will be kept in confidence. Many express fear of possible police reprisal, whereas others are worried that what they say may at some point be used against them in a legal proceeding. Accordingly, it has historically been the policy of the SIU to retain information provided by witnesses in strict confidence and not to disclose such information to third parties in the absence of consent on the part of the witness who provided the information, except where such disclosure is compelled by legal process. This policy is formalized in internal SIU Operations Orders and has proven critical in continuing to ensure that SIU investigations benefit from the best available evidence...

[T]he discretion of the head has been exercised properly in that the records are replete with references to the personal information of various individuals other than the appellants, together with a collation and consideration of that and other information collected in the course of the investigation upon which a final determination regarding the potential criminal liability of the involved officer was based... The Ministry also submits that severance of parts of the records in question is not practically feasible given the intermingling and collation of personal information throughout the body of the report. In addition, the Ministry submits that the disclosure of portions of the records could ultimately enable identification of other personal information and of the identities of the persons involved.

Analysis/Findings

Concerning the records to which I have found sections 19 and 49(b) to apply, I find that the Ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. The records contain information that was gathered in the context of an investigation involving potential criminal liability on the part of a police officer. This information is of a sensitive nature. Often this information is only forthcoming where confidentiality can be assured to both civilian and police witnesses. I uphold the Ministry's exercise of discretion

CONCLUSION

I find all of the records, except for Records 2, 37, 42 (pages 000542 and 000666) and 58 (page 000799, except for chart), are exempt from disclosure.

ORDER:

1. I order the Ministry to disclose Records 2, 37, 42 (pages 000542 and 000666) and 58 (page 000799, except for chart) **by February 4, 2008.**
2. I uphold the Ministry's decision to deny access to the remainder of the records.
3. In order to verify compliance with provision 1 of this Order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellants.

Original signed by: _____
Diane Smith
Adjudicator

January 4, 2008