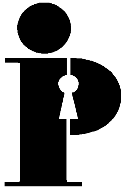

ORDER PO-2715

Appeal PA07-217

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a 13-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for information relating to the death of a named individual. The requester, who is a representative of the media, sought access to the following information about the specified person's disappearance and death and indicated that the records were in the possession of the Office of the Chief Coroner:

> 1. Copies of all photos taken by the Kingston Police at the scene where [a named individual]'s body was recovered from the water on [a specified date].
>
> 2. A copy of the draft autopsy report on [a named individual] written by [an identified pathologist] on [a specified date].
>
> 3. A copy of the final autopsy report on [a named individual] written by [above-named pathologist] on [a second specified date].
>
> 4. All autopsy photos of [the named individual] from the autopsy conducted by [the identified pathologist] on [a specified date].
>
> 5. All communications between [the pathologist] and third parties between [two specified dates] related to the [named individual]'s autopsy including, but not limited to, emails, memos, telephone call records and recordings.
>
> 6. A copy of the autopsy report on [the named individual] written by [a named physician] following the exhumation and second autopsy of [a specified date].
>
> 7. Copies of all Canadian Forces' investigation reports provided to the Coroner, through the Ontario Provincial Police (OPP), by the National Investigation Service (NIS).
>
> 8. Copies of all interviews conducted by the Kingston Police Service, the NIS and the OPP as part of the investigation into the disappearance and death of [the named individual].
>
> 9. Copies of reports relating to searches for [the named individual] including but not limited to, those conducted by K9 unit, cadaver dog, sonar scan and divers between [two specified dates].

10. Copies of all polygraph tests - including all questions, answers and results - that were taken by [a named individual].

11. A copy of the full video surveillance tape of the La Salle Causeway from Fort Frontenac, Kingston on [a specified date], obtained by the Coroner's investigation.

12. Copies of all other video surveillance tapes obtained by the Coroner's investigation relating to the investigation into the disappearance and death of [the named individual].

13. Copies of all investigation reports into the disappearance and death of [the named individual] provided to the Coroner by the OPP.

I am requesting that these documents be released in electronic form.

The Ministry located a very large number of responsive records, comprising some 25 boxes of paper documents which were copied onto five CD ROMs, and issued a decision denying access in accordance with the discretionary exemptions in sections 14(1)(a),(c),(i) and (l), 14(2)(a) (law enforcement), 15(a) and (b) (relations with other governments), 19 (solicitor-client privilege) and the mandatory exemption in section 21(1), with reference to the factor listed in section 21(2)(f) (highly sensitive information) and the presumptions in sections 21(3)(a) (medical information) and (b) (information compiled as part of a law enforcement investigation) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the appellant raised the possible application of the "public interest override" provision in section 23 of the *Act* to the responsive records, since an inquest into the death of the individual was held by the Chief Coroner of Ontario. In response, the Ministry took the position that the "public interest override" does not apply in the circumstances of this appeal. As no further mediation was possible, the file was moved to the adjudication stage of the appeals process.

I sought and received the representations of the Ministry initially, in response to my Notice of Inquiry. In its representations, the Ministry indicated that it was no longer relying on the exemption in sections 14(1)(a) and (i), 14(2)(a) and 19. A complete copy of the Ministry's representations was then shared with the appellant, along with the Notice of Inquiry and a one-page Index outlining in a general way the nature of the responsive records. The appellant also provided representations, which were shared, in their entirety, with the Ministry. I invited the Ministry to submit further representations by way of reply, and it did so.

RECORDS

The records at issue in this appeal consist mainly of documents relating to the investigation undertaken by the NIS, the OPP and the Kingston Police into the named individual's death. In addition, records prepared by the Office of the Chief Coroner are also included in the responsive documents. Copies of all of the records were provided to and are now located in the Office of the Chief Coroner. These records comprise some 25 boxes of paper documents and have been converted onto 5 CD ROMS.

The records include various photographs taken at the scene of the recovery of the deceased's body and the subsequent autopsy (responsive to Items 1 and 4 of the request), the transcript of a polygraph test (responsive to Item 10), post-mortem reports (responsive to Items 2 and 3), a second autopsy report (responsive to Item 6), 229 interview statements (responsive to Item 8), records relating to the searches for the deceased person (responsive to Item 9), surveillance videos taken at a particular location (responsive to Items 10 and 11) and various investigation records submitted to the Office of the Chief Coroner by the Ontario Provincial Police. The OPP files consist of electronic file folders entitled MCM 1 through 52 containing information responsive to Item 13 and are found on a CD numbered 11. The NIS records consist of some 17,653 pages of documents responsive to Item 7 which are broken down and numbered TIP 1 through 454 and are found on another CD numbered 10.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "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].

The meaning of "about" the individual

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].

The meaning of "identifiable"

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 parties

The Ministry submits that the responsive records contain the personal information of the deceased individual whose death was the subject of the investigation, as well as a large number of other individuals who provided evidence or information as part of that investigation. It takes the position that this information qualifies as the personal information of these individuals within the meaning of the definition of that term in section 2(1) of the *Act*.

The Ministry goes on to argue that severing the names or other personal identifiers of the individuals whose personal information is included in the records will not serve to render the information anonymous owing to the publicity surrounding the investigation. The Ministry acknowledges that the surveillance tapes responsive to Items 11 and 12 of the request do not contain personal information relating to any individuals, as the images of people which were captured are not sufficiently distinct to make these individuals identifiable.

The appellant's representations indicate that he appears to accept that the records contain personal information as contemplated by the definition of that term in section 2(1).

Finding

I have carefully reviewed the contents of the records. In my view, the vast majority of them contain primarily the personal information of the deceased individual, along with that of a large number of other identifiable individuals who provided the officers conducting the investigation with evidence or other information. The investigations examined in great detail the personal life of the deceased person and those around him in an effort to assist in answering questions surrounding his disappearance and death. Accordingly, the vast majority of the records relate directly to inquiries by the investigating agencies into all possible aspects of the deceased person's life.

I agree with the position of the Ministry that the surveillance tapes which are responsive to Items 11 and 12 of the request (which also appear in the NIS reports delineated at TIP #27) do not contain personal information as that term is defined in section 2(1), as they do not relate to any identifiable individuals.

I further find that the photographs which are responsive to Item 1 of the request contain the personal information of the deceased individual whose image was captured therein. Records responsive to Items 2, 3, 4, 5 and 6 which relate to the autopsy reports prepared by two medical practitioners following the discovery of the deceased person's body and his later exhumation also contain exclusively the personal information of the deceased person under paragraph (b) of the definition in section 2(1).

Records responsive to Item 8, notes of interviews with various witnesses and other individuals in the course of the investigations, similarly contain the personal information of these individuals, as well as that of the deceased person. Likewise, the polygraph test results which are responsive

to Item 10 of the request contain the personal information of the subject of the tests, as well as that of the deceased individual. Much of this information relates to the educational history of these individuals, many of whom were students at the same institution as the deceased, and also falls within the ambit of paragraph (b) of the definition in section 2(1).

Further, I find that certain information that pertains only to the searches undertaken by the NIS and the Kingston Police at the onset of the investigation, which is contained in a large number of the documents responsive to Item 7 of the request, does not include personal information. Specifically, records designated by the NIS as TIP 11, 12, 14, 16, 27, 29, 30, 32, 33, 34, 35, 60, 70, 75, 76, 89, 91, 102, 103, 105, 106, 117, 143, 151, 152, 158, 164, 166, 167, 174, 178, 188, 192, 204, 205, 228 and 229 do not contain the personal information of any identifiable individuals. While names of people appear in these records, I find that they do so in their professional, rather than in their personal capacities, and that these references do not, accordingly, qualify as the personal information of these individuals.

The remaining records which are responsive to Item 7 of the request contain the personal information of the deceased individual and a large number of other identifiable individuals who provided information or other evidence to the police in the course of their investigations into the disappearance of the deceased. The information consists of various details about the personal lives of these individuals.

In addition, with one exception, records responsive to Item 9 of the request also only relate to the searches undertaken by various police agencies for the deceased individual prior to the discovery of his body. The exception relates to certain investigations performed on this individual's personal computer, which I find contain personal information relating to him and other identifiable individuals within the meaning of the definition of that term in section 2(1). The remaining information in the records responsive to Item 9 of the request that relate solely to searches do not contain information that qualifies as personal information as that term is defined in section 2(1).

Finally, certain electronic records responsive to Item 13 of the request also do not contain personal information. Specifically, the information in files MCM2 (an apparently empty folder obtained from the Kingston Police), MCM8 (statements from Police officers regarding the maintenance of continuity of custody of certain evidence), MCM26 (news releases) and MCM 30 (search information such as maps) does not relate to an identifiable individual and cannot, therefore, qualify as personal information. In addition, a large number of the files contained in the CD ROM relating to Item 13 of the request do not contain any information whatsoever as the electronic file folders are blank. I have reviewed all of the MCM-designated files and conclude that files 1, 6, 7, 11, 18, 20, 21, 23, 28, 29, 32, 34, 35, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 51 and 52 do not contain any information.

However, based on my examination of their contents, I find that MCM-designated files 3, 4, 5, 9, 10, 12, 13, 14, 15, 16, 17, 19, 22, 24, 25, 27, 31, 33, 36, 44 and 50 all contain personal

information relating to either the deceased individual or other identifiable individuals, consisting of:

- information relating to the age, sex, sexual orientation, marital or family status of the individual - paragraph (a) of the definition;
- information relating to the education or the medical, psychiatric, psychological, criminal or employment history of a large number of the individuals whose personal information found its way into the records – paragraph (b) of the definition;
- the address, telephone number, fingerprints or blood type of various individuals – paragraph (d) of the definition;
- the personal opinions or views of the individual – paragraph (e) of the definition;
- the views or opinions of another individual about the individual – paragraph (g) of the definition; and
- the individual's name appearing with other personal information relating to him or her – paragraph (h) of the definition

In conclusion, I find that the majority of the records, with the exception of those delineated above, contain personal information within the meaning of the definition of that term in section 2(1). Further, I find that none of the personal information relates to the appellant.

PERSONAL PRIVACY

General principles

I will now consider whether the personal information identified in my discussion above is exempt from disclosure under the mandatory personal privacy exemption in section 21(1), which reads, in part, as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates . . .

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. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In the circumstances, it appears that the only exception that could apply is paragraph (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 section 21(1)(f).

If any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. I have reviewed the personal information in the records and conclude that none of the exceptions in section 21(4) apply.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can 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].

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The parties' representations on section 21(1)

The Ministry submits that the presumption in section 21(3)(a) (medical information) applies to much of the personal information contained in the records, including the coroner's reports. It argues that such information was found to fall within the ambit of the presumption in Order P-519.

The Ministry also relies on the presumption in section 21(3)(b) relating to information that is compiled and forms part of a law enforcement investigation. It submits that the information is identifiable as part of a criminal investigation into whether the deceased person was the victim of a criminal offence. For this reason, it posits that the information relating to the investigation, including photographs of the recovery scene (Item 1), interview statements (Item 8), polygraph tests (Item 10) and police officer notes and reports (Items 7 and 13), along with the evidence the Police compiled such as the post-mortem report prepared by a pathologist (Items 2 and 3) and the autopsy report and related correspondence (Items 3 and 5) all fall within the ambit of the presumption in section 21(3)(b).

Finally, the Ministry also relies on the presumption in section 21(3)(d), as some of the information contained in records responsive to Items 1, 2, 3, 8, 9 and 13 refer to the fact that the deceased person, and a number of the other individuals who were interviewed as part of the investigation, were students at a post-secondary institution.

The appellant seeks to refute the arguments of the Ministry regarding the application of the presumption in section 21(3)(a) by suggesting that an individual's privacy interests are somewhat diminished after their death.

The appellant also relies on Order P-945 for the proposition that records prepared in the course of a Coroner's investigation do not fall within the ambit of the presumption in section 21(3)(b). As a result, he argues that records responsive to Items 3, 4 and 5 cannot fall under the operation of this presumption. He goes on to suggest that because no charges were laid as a result of the

various investigations which have taken place, information provided by individuals who were not suspects cannot fall under the section 21(3)(b) presumption.

The appellant also indicates that the fact of the deceased person's enrolment in a post-secondary institution was well-known, the disclosure of information relating to his enrolment would not give rise to a presumed unjustified invasion of personal privacy under section 21(3)(d).

Both parties also provided me with submissions regarding the possible application of the considerations listed in section 21(2). Because of the nature of my findings under section 21(3), it is not necessary for me to consider whether these factors are applicable in the circumstances of this appeal.

Findings

I find that much of the personal information relating to the deceased individual which is contained in the records responsive to Items 2, 3, 4, 5, 6, 7, 8 and 13 falls within the ambit of the presumption in section 21(3)(a). This includes the information found in the post mortem reports and photographs (Items 2, 3 and 4), the report prepared following exhumation (Items 5 and 6), and some discrete portions of the interview reports in the records responsive to Items 7, 8 and 13. The information relates to the medical, psychiatric and psychological condition, evaluation and history of this individual, both before and after his death. In addition, I find that discrete parts of the polygraph tests responsive to Item 10 and the interview statements responsive to Items 7, 8 and 13 also contain personal information relating to another identifiable individual's medical condition. As such, this information also falls within the ambit of the presumption in section 21(3)(a).

In my view, the remaining personal information contained in the records is subject to the presumption in section 21(3)(b). The investigations into the death of the deceased were conducted by law enforcement agencies with a view to determining whether criminal proceedings or charges ought to be brought in relation to this individual's death. I find that all of these records, with the exception of the surveillance tapes and other documents described in my discussion above which do not contain any personal information, and which have been identified as responsive, were compiled and are identifiable as part of various law enforcement investigations. I find that the Coroners Reports also found their way into the record-holdings of the investigation and were instrumental in assisting the law enforcement officials involved in the investigation in deciding how to proceed with it. As a result, I find that these records were "compiled and are identifiable as part of an investigation into a possible violation of law: under section 21(3)(b), unlike the situation in Order P-945 where such records were not relied upon in the course of the investigation.

Finally, I find that many of the records responsive to Items 7, 8, 9, 10 and 13 also contain personal information of the deceased person, as well as others who provided evidence or other information to the investigators that falls within the ambit of the presumption in section 21(3)(d), as it relates to their educational history.

As all of the personal information contained in the records falls within the ambit of one or more of the presumptions in sections 21(3)(a), (b) or (d), I find that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of those individuals to whom the information relates. The only way in which the application of one of the presumptions in section 21(3) can be overcome is if section 21(4) or the "public interest override" at section 23 applies to the personal information in the records. In this case, I find that the exceptions in section 21(4) have no application. I will address the application of section 23 to the information in my discussion below. Subject to any finding I may make regarding the application of section 23 to the personal information contained in the records, I find that this information qualifies for exemption under the mandatory personal privacy exemption in section 21(1).

LAW ENFORCEMENT

The Ministry has claimed the application of the discretionary exemption in section 14(1)(c) of the *Act* for the information contained in the records that are responsive to Items 7, 9, 10, 11, 12 and 13 of the request. The representations made by the Ministry respecting section 14(1)(l) relate solely to information in records that I have found to be exempt under section 21(1). Accordingly, since I have already found them to be exempt, it is not necessary for me to address the possible application of section 14(1)(l) to this information. Section 14(1)(c) reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

General principles

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
>
> the conduct of proceedings referred to in clause (b).

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.)].

Except in the case of section 14(1)(e), 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.)].

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*].

Section 14(1)(c)

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

The Ministry argues that the disclosure of the information contained in those records responsive to Items 7, 9, 10, 11, 12 and 13 of the request would reveal investigative techniques and procedures that were used in the course of this law enforcement investigation to determine if a criminal offence had been committed. It argues that the investigative technique, which is evident in these records, relates to the collecting of information through the administration of polygraph tests, the collection of surveillance tapes, interviewing individuals and making assessments about that evidence. According to the Ministry, the disclosure of the records "could interfere with police operations". The Ministry relies on the reasoning in Order PO-2470 which upheld the application of the exemption to certain records whose disclosure would reveal police investigative techniques that are not well known to the public.

The appellant submits that the investigative procedures and techniques identified by the Ministry are already well-known to the public. He argues that:

> Police interviews, surveillance and the administration of polygraph tests are obvious and predictable elements of police work, the use of which would come as no surprise to a member of the general public.

The appellant also distinguishes the facts of Order PO-2470 where the record at issue consisted of a detailed "action plan" for the conduct of law enforcement activities aimed at preventing tobacco smuggling. He argues that the record in that case represented a "how-to manual for the

future investigation of a relatively esoteric and specialized crime, tobacco smuggling". He contrasts those records with the responsive information in the current appeal which represent "merely an account of past use of common investigative techniques".

In the present case, I find that the disclosure of the records which are not subject to exemption under section 21(1) and that are responsive to Items 7, 9, 10, 11, 12 and 13 of the request cannot reasonably be expected to reveal investigative techniques or procedures which are not well known to the public. In my view, it is not reasonable to find that the disclosure of these remaining documents would in any way undermine the effectiveness of the use of these investigative techniques or procedures. As a result, I find that section 14(1)(c) has no application to the information contained in the remaining records at issue that are responsive to Items 7, 9, 10, 11, 12 and 13 of the request.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry has claimed the application of section 15(a) and (b) to all of the remaining records at issue, including the surveillance tapes that are responsive to Items 11 and 12 of the request. These sections state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers'*

Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) cited above].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

The Ministry submits that all of the records identified as responsive to the request, including the surveillance tapes, were received by the Office of the Chief Coroner (the OCC) "largely" from the NIS, a federal police service, which investigated the disappearance and death of the deceased person. It goes on to indicate that:

> The federal police service worked collaboratively with a provincial and a municipal police service in its law enforcement investigation.
>
> . . .
>
> This collaborative approach can happen when there is more than one police jurisdiction that potentially has responsibility over an investigation, or where a complicated investigation requires the sharing of police resources and expertise.
>
> The Ministry submits, as a result, that it is not feasible to distinguish between the records that were generated by one police service or another for the purpose of this exemption. In other words, given that the police services were working together and assisting one another in a collaborative investigation, all of the police records, not just the ones that pertain to the federal police service, should be subject to the same treatment, which means being exempt pursuant to section 15. Otherwise, it would lead to an absurd result for records to be subject to the section 15 exemptions simply because the records were generated by one police service and not the other. The other concern is that it might discourage the police to call on other police services from other jurisdictions for assistance in the future, if they knew that sharing records with these other police services might make it more likely for the records to be released.

The Ministry adds that the disclosure of the records, including the surveillance tapes, would prejudice the conduct of intergovernmental relations because:

- none of the police services have consented to the disclosure of the information;
- they were provided in confidence to the OCC to assist with the Coroner's inquest only; and
- police services will be reluctant to share such information with the OCC in future

I have reviewed portions of the surveillance videos that are responsive to Items 11 and 12 of the request and the other records relating to the searches conducted at the onset of the investigation

into the disappearance of the deceased. I am unable to determine, based on my examination of the surveillance tapes and their packaging, their place of origin. However, in my view, it is reasonable to assume that since they represent surveillance tapes which record a municipal thoroughfare, they originated with the local police service and not the federal police agency referred to by the Ministry. Similarly, it is clear that many of the search records originated with the Kingston Police, particularly those describing the involvement of its canine and diving units.

The appellant points out in his representations that information produced by or relating to either a provincial or a municipal police agency does not engage the application of the exemptions in section 15 of the *Act*. He relies on the findings in Order 69 to support this contention.

Findings

Previous orders of this office have consistently found that municipal entities do not constitute "another government or its agencies" for the purpose of section 15(b) of the *Act*. Adjudicator John Swaigen recently issued Order PO-2456, in which he addressed the issue of whether a municipal police force could be regarded as a "government agency" for the purpose of section 15(b). Adjudicator Swaigen reviewed a previous order of this office (Order 69) in some detail, and then stated:

> I agree with Commissioner Linden's conclusion [set out in Order 69] that the intent of the Legislature, as evidenced by the Williams Report and the statements of the Attorney General during legislative debates on the *Act*, was that municipalities are not "governments" for the purpose of section 15 of the *Act*. In particular, the statements of the Attorney General make it clear that the Legislature turned its mind to the question of whether municipalities are governments for the purpose of section 15.
>
> When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act*. Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:
>
> > (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
> >
> > > (a) the Government of Canada;
> > >
> > > (b) the Government of Ontario or the government of a province or territory in Canada;
> > >
> > > (c) the government of a foreign country or state;

> (d) an agency of a government referred to in clause (a), (b) or (c); or
>
> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.
>
> Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal board. That is, section 9 does not apply to information received from another municipality.
>
> It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.
>
> Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.
>
> Accordingly, I find that the municipal police service that provided these records to the Ministry is not an agency of another government for the purposes of section 15 of the *Act*. Therefore, I find that the exemption claimed under section 49(a) in conjunction with section 15(b) does not apply to these records.

I adopt the approach to this issue taken by Adjudicator Swaigen in Order PO-2456 and applied by Adjudicator Frank DeVries in Order PO-2474. I have determined above that the surveillance tapes and some other investigative records originated with a municipal police service, rather than a federal law enforcement agency. I specifically find that the Kingston Police Service, which is the source of the surveillance tapes and other investigation reports, is not "an agency of another government" for the purpose of section 15 of the *Act*. Accordingly, the exemption claimed under section 15 does not apply to the surveillance tapes and other investigative records which originated with the Kingston Police and are responsive to Items 7, 9, 11, 12 and 13 of the request. The files listed in the Index provided to me respecting Item 7 of the request that originated with the Kingston Police are TIP 11 and 33.

Furthermore, I do not agree with the position taken by the Ministry that an absurd result would flow from such a decision. In my view, it is possible to distinguish between the different types of records at issue in this appeal, depending on their origin. In the present case, I am satisfied that the surveillance tapes and some of the other investigative records were obtained from the Kingston Police and that section 15 cannot, therefore, apply to them.

As no other mandatory exemptions apply to the surveillance tapes and other investigation records that originated with the Kingston Police, and no other discretionary exemptions have been claimed for them, I will order that they be disclosed to the appellant.

With regard to the information contained in the records that originated with the NIS investigators, I cannot agree with the Ministry's position that their disclosure could reasonably be expected to give rise to prejudice to the conduct of intergovernmental relations by the Government of Ontario or reveal information received in confidence from an agency of the federal government, as contemplated by sections 15(a) and (b). In my view, the disclosure of the information contained in NIS's TIP files 12, 14, 16, 27, 29, 30, 32, 34, 35, 60, 70, 75, 76, 79, 89, 91, 102, 103, 105, 106, 117, 143, 151, 152, 158, 164, 167, 174, 178, 188, 192, 228 and 229 of Item 7 and the records responsive to Item 9 could not be reasonably expected to prejudice the conduct of intergovernmental relations, nor would it reveal information received in confidence by the Ministry from the NIS. The information described in these records is concerned with the conduct of searches by a variety of agencies, police and otherwise, for the deceased person prior to the discovery of his body. The nature of the information shared is simply not confidential and is in fact often aimed at obtaining the assistance of the community at large in discovering the deceased's whereabouts. I find that section 15(b) has no application to the information in these records.

Finally, some of the records contained in the Item 7 records and described as TIP Files 166, 204 and 205 involve contact between the NIS investigation team and units of the Ontario Provincial Police (the OPP). Clearly, information obtained by the Ministry from the NIS which originated with the OPP cannot be said to have been provided to the Ministry in confidence. Accordingly, I find that section 15(b) cannot apply to these records as well.

By way of summary, I find that the exemption in section 15 has no application to the surveillance tapes responsive to Items 11 and 12, the NIS's TIP files 11, 12, 14, 16, 27, 29, 30, 32, 33, 34, 35, 60, 70, 75, 76, 79, 89, 91, 102, 103, 105, 106, 117, 143, 151, 152, 158, 164, 166, 167, 174, 178, 188, 192, 204, 205, 228 and 229 of Item 7 and the search records responsive to Item 9 (with the exception of the computer information found to be exempt under section 21(1)). As no other exemptions have been claimed to apply to these records and they are not subject to any mandatory exemptions, I will order that they be disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

The appellant submits that there exists a compelling public interest under section 23 of the *Act* in the disclosure of the information contained in the records which I have found to be exempt under section 21(1). Section 23 provides:

> 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.

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.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [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]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations of the parties

In its initial representations, the Ministry argued that "any compelling public interest in scrutinizing the actions of [public] officials occurred at the Coroner's Inquest" when interested parties, including the media, "had the opportunity to attend the inquest, to hear the evidence that was adduced at it, and to report on it." The Ministry relies on the reasoning contained in order

M-693 to support its contention that the public interest override has no application to the personal information contained in the records, as the Coroner's Inquest served this purpose.

The appellant disagrees, arguing that in the present case, "the Coroner's Inquest was wholly insufficient to ally public concerns because [the Coroner] improperly restricted the scope of the inquiry to such a degree that nothing of substance was discovered." The appellant provided me with extensive submissions on the role of the Coroner's Inquest, including its mandate to "provide a means for corrective measures and allaying public suspicions" through the hearing of evidence and calling of witnesses. The appellant indicates that because of certain decisions made by the presiding Coroner regarding the scope of the evidence to be adduced at the Inquest, the public scrutiny function over the investigation into the death was not adequately provided for. In particular, the appellant argues that the actions of the investigators into the death could not be adequately scrutinized as a result of the limitations which the Coroner placed on the evidence to be tendered at the Inquest. He goes on to submit that the "ultimate failure [of the Inquest] and concerns about procedure followed add to the public interest in transparency."

The appellant then provided me with extensive submissions in support of his arguments that the public interest in disclosure is sufficiently compelling to trigger the application of section 23 in this case. He argues that:

> The risk for speculation of a cover-up in this case is great. On a factual level, there are questions about the safety of a major federal institution. On an investigative level, there are questions about the efficacy of federal, provincial and municipal police services. The Coroner's Office is also in the public spotlight in situations where a death occurs in the context of a public institution. The potential for speculation and conspiracy theories, particularly when no significant answers result from numerous investigations, is greatly increased in circumstances such as the Deceased's death. This suspicion creates a distrust of our public institutions.

The appellant goes on to refer to recent media coverage of problems arising in the Coroner's Office with respect to certain "questionable conclusions regarding infant deaths", giving rise to "an acute interest in knowing whether the administration of the [Coroner's Office] is sufficient and an interest in correcting any problems if they are found to exist." The appellant concludes this portion of his submissions with the following:

> Only with the disclosure of the records subject to this appeal will the public interest in [the deceased's] disappearance and death, the investigation surrounding it and the failed Coroner's Inquest be satisfied.

The appellant addressed the second part of the test under section 23, which requires a finding that the public interest must also clearly outweigh the purpose of the section 21(1) exemption, in the following manner:

> The purpose behind the section 21 exemption is to protect an individual's legitimate privacy interests. This is a crucial concern, however in the present case the public interests supporting disclosure vastly outweigh the minimal privacy interests at stake. The information requested relating to [the deceased] is being sought in order to find answers about his untimely death where police and coroner's investigations could not. The Deceased's interests taken as a whole, and the public's interests, are significantly better served by disclosure than by non-disclosure. The information relating to other individuals involved in the investigation is necessary in order for the public to understand the breadth and scope of the investigation and allay concerns or even distrust regarding the governmental agencies involved. The Ministry has not provided evidence that harm will come to these individuals should the information be disclosed, and the public's confidence in the military, the police and the coroner's office is so pressing a concern that even if there were harm, the public interest would outweigh the private.
>
> Moreover, much of the information requested should have been heard as evidence at the public Coroner's Inquiry and was only excluded because of an error by [the presiding Coroner]. Allowing the Ministry and the OCC [the Office of the Chief Coroner] to continue to suppress this information not only permits this error to continue, but it forestalls the resolution of questions that could have been answered at a properly conducted Coroner's Inquiry.
>
> Finally, much of the information sought to be disclosed has already been publicized through the extensive media coverage surrounding the Deceased's disappearance and death. To the extent that only part of the story is being told through these fragments of information, there is a pressing public interest in comprehensive disclosure in order to prevent conjecture. As long as there remains obvious selective disclosure, there is a great risk of public conjecture and suspicion.
>
> The IPC's decisions relating to the Ontario Provincial Police videos taken at Ipperwash Provincial Park at which Dudley George was killed, including a videotape of a witness interview (see e.g. Orders PO-2033-I and 2063-I) are instructive. In those decisions, Assistant Commissioner Mitchinson concluded that despite the privacy interests involved, the public interest override applied and required disclosure of the vast majority of the records in issue, including the majority of the audio portion of the witness statement. Similarly, here, the public interest in the untimely death of a young student in mysterious circumstances that have not been resolved by either police investigations or a Coroner's Inquest outweighs any privacy interests at stake.

In reply, the Ministry maintains its position that the public interest in the disclosure of the personal information in the records is not sufficiently compelling to override the significant

privacy interests at stake. The Ministry also points out that the Royal Canadian Mounted Police and the educational institution where the deceased was enrolled have indicated their intention to conduct additional reviews of the military investigation into the deceased's death, and a Board of Inquiry to further attempt to answer some of the questions that have arisen concerning the circumstances surrounding the death of the deceased is to be convened. In this way, the Ministry submits that the public interest in this investigation will continue to be addressed and the circumstances around the deceased's death will be subject to further scrutiny. The Ministry also questions the apparent assumption on the part of the appellant that the disclosure of the information in the records will somehow lead to answers to the questions surrounding the death, when neither the police services nor the coroner's office was able to come to such a conclusion after their examination of the same evidence.

The Ministry also points out that any alleged deficiencies in the evidentiary rulings by the Coroner could have been the subject of an application for judicial review by any of the parties granted standing at the Inquest. No such application was brought by any of the parties. The Ministry further submits that the lead investigators from the federal and municipal police agencies who investigated the disappearance and death of the deceased were called and gave evidence at the Coroner's Inquest. It also stresses that not all investigations or inquests arrive at solutions to questions regarding the circumstances surrounding a sudden death. The Ministry argues that in some cases, as in the present situation, definitive answers to these questions simply cannot be arrived at with the investigative tools available.

Findings with respect to section 23

As noted above, the first question to be asked is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. In this case, the records are extensive and extremely detailed, setting out all of the steps taken by all of the police agencies involved in the investigation of the deceased's disappearance and death. The records contain personal information which is often graphic and intimate in nature, relating to the personal lives of the deceased and a number of other individuals who participated in the investigations in some way. The records document the entire investigation process that took place from the time the deceased disappeared to the date of the request, including information about the conduct of the Coroner's Inquest. In my view, the disclosure of the information in the records would shed light on the manner in which the police investigation and the Coroner's Inquest were conducted.

The appellant has been instrumental in bringing this matter to the attention of the public and keeping it there. Questions surrounding the deceased's death remain unanswered, giving rise to speculation and conjecture about the circumstances around his disappearance. I find that there exists a public interest in the disclosure of the personal information in the records that relates to these issues. The circumstances surrounding the deceased's disappearance and death were unexplained and involved a national educational institution. In my view, the interest present is not simply of a prurient nature, but also raises concerns about the safety of individuals enrolled at the institution. The story has received widespread media coverage, particularly in the

hometown of the deceased individual, where interest in the circumstances around his death is particularly strong. I conclude, therefore, that the public interest that exists in the disclosure of the records is compelling in nature.

However, I do not agree that the public interest which exists in the disclosure of the personal information in the records is sufficiently compelling to outweigh the purpose of the personal privacy exemption in section 21(1). As noted above, the records include extremely intimate details about the lives of the deceased person and a number of other identifiable individuals. This information qualifies as personal information of the most sensitive nature. I have found that it also qualifies under the mandatory exemption in section 21(1), as its disclosure is presumed to constitute an unjustified invasion of the personal privacy of these individuals. In my view, the public interest in the disclosure of the personal information is not sufficiently compelling to override the privacy interests of the deceased and many other individuals whose personal information is contained in the records.

In addition, I am of the view that there exists a significant public interest in the non-disclosure of much of the personal information that relates directly to the investigative work undertaken by the police agencies involved. The deceased's disappearance and death remain unexplained and continue to be the subject of further police investigation. I am unable to describe the nature of this information in any detail except to note that much of the information contained in the records relates to the steps taken during the investigation, some of which have not been made public.

Privacy protection is one of the enumerated purposes set out in section 1(b) of the *Act*. I cannot agree that the compelling public interest that exists in the disclosure of the information relating to the manner in which the investigations and Inquest were performed sufficiently outweighs the privacy protection purpose extant in the section 21(1) exemption. Further, I find that there exists a strong public interest in the non-disclosure of the personal information in the records which address some aspects of the police investigation. This is a significant factor weighing against the application of section 23 to this information.

For these reasons, I find that the public interest override provision in section 23 has no application to the personal information contained in the records.

ORDER:

1. I order the Ministry to disclose to the appellant those records which do not contain personal information, specifically, those records designated by the NIS as TIP 11, 12, 14, 16, 27, 29, 30, 32, 33, 34, 35, 60, 70, 75, 76, 89, 91, 102, 103, 105, 106, 117, 143, 151, 152, 158, 164, 166, 167, 174, 178, 188, 192, 204, 205, 228 and 229 and OPP records designated as MCM 2, 8, 26 and 30 by providing him with a copy by **October 16, 2008** but not before **October 10, 2008.**

2. In order to verify compliance with order provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

3. I uphold the Ministry's decision to deny access to the remaining records.

______________________________ September 11, 2008

Donald Hale
Adjudicator