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

ORDER PO-2733

Appeal PA07-62

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*) for access to the following records in relation to a fatal motor vehicle accident:

> …the Ministry's files and records, including in particular the police records, in connection with the investigation and trial of [a named individual].

The requester represents both the estate of an individual who died as a result of the accident and another individual who survived the accident and suffered injuries.

The Ministry denied access to the requested information pursuant to the exemptions found at sections 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*. The requester (now the appellant) appealed this denial of access.

The appeal was referred to a mediator, but mediation did not settle the issues in the appeal. Consequently, the appeal was transferred to the adjudication stage of the process, in which an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the Ministry and the individual named in the request (the affected person), outlining the background and issues in the appeal and inviting these parties to provide representations. The Ministry responded with representations. The affected party did not provide representations.

In its representations the Ministry raised the section 22(a) exemption (information published or available) for the first time, and the late raising of this exemption is therefore a preliminary issue to be decided in this order.

Following receipt of the Ministry's representations, I sent a Notice of Inquiry to the appellant, along with the complete representations of the Ministry, and invited his representations. The appellant did not provide representations by the date specified in the Notice of Inquiry sent to him, and in response to a telephone follow-up by this office, indicated that he would not be providing representations.

With its representations, the Ministry provided a copy of a letter to the appellant in which the Ministry advised that it had located additional records and had decided to disclose portions of the records, including some that had been previously withheld. The records and portions that were disclosed are no longer at issue.

RECORDS:

The records at issue are comprised of police reports, witness statements, vehicle information reports, notes of police officers, drawings, drawing instructions, photographs, an audio tape report, a list of exhibits, notes and correspondence prepared by counsel, "confidential instruction" sheets for counsel, and other records prepared by the Police and provided to the Crown. The records identified as responsive comprise a total of 284 pages.

As noted above, some of the records were disclosed in whole or in part when the Ministry provided its representations. In particular, pages 13-19, 36, 45, 65-97, 98-110, 117-118, 125-127, 128-135, 136-159, 176-194, 199, 200-266 and 285 were disclosed, either in whole or in part, to the appellant. Where a record has been partly disclosed, only the withheld portion or portions remain at issue.

PRELIMINARY ISSUES:

EXERCISE OF RIGHTS OF DECEASED INDIVIDUAL

In his request letter, the appellant states that he is the executor of the estate of the individual who was killed in the accident. This raises the possible application of section 66(a) of the *Act*, which states:

> Any right or power conferred on an individual by this Act may be exercised, … where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate.

I asked the parties to comment on the possible application of this section in the Notice of Inquiry. The Ministry did not address this section of the *Act* in its representations, and the appellant provided no representations at all.

In a related appeal (MA07-95), the appellant provided a copy of the will appointing him as executor. This demonstrates that he is the deceased individual's personal representative. However, I have not been provided with evidence in relation to the second requirement under section 66(a), that the exercise of the right of access "relates to the administration of the individual's estate."

In that regard, I note that section 38(1) of the *Trustee Act* precludes recovery by the estate of a deceased individual for damages for the loss of life expectation by a deceased person (see Order M-400). As well, surviving family members' claims under the *Family Law Act* are not payable to the estate but to the family members themselves (see Order MO-1256). Accordingly, actions of this nature are not brought by the estate, and do not relate to its administration.

Based on the information provided to me, I find that section 66(a) does not apply.

LATE RAISING OF DISCRETIONARY EXEMPTION

Section 11.01 of the *IPC Code of Procedure* states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the

> Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

As noted above, the Ministry's representations raise the possible application of the discretionary exemption found at section 22(a) of the *Act* for the first time. The Ministry seeks to apply this exemption to three separate portions of the records, namely pages 111-116, 119-124 and 160-175. The basis of this claim is the Ministry's statement that the records in question are available from the Peel Regional Police (the Police).

I invited the appellant to comment on this issue, and on whether he is prejudiced by the late raising of this exemption, in the Notice of Inquiry sent to him. As noted, he provided no representations in response.

Portions of the information for which section 22(a) is claimed were also identified as responsive records in Appeal MA07-95. The essential issue in that appeal was whether the appellant's request was subject to the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*). The Police had denied that this was the case. The appeal concluded when the Police acknowledged that the appellant had in fact made an access request under the municipal *Act*. They also issued a decision in response to the request.

The Police's decision relied on the equivalent of section 22(a) in the municipal *Act*, namely section 15(a) of that statute, for parts of the records in their decision. Other exemptions were also claimed. The appellant did not appeal the denial of access and the issue of further disclosure of those records was not pursued further at that time.

In this case, therefore, the Ministry is claiming an exemption whose equivalent was previously claimed by the Police. The appellant was given an opportunity to provide representations on the question of whether I should allow the late raising of this exemption, and whether the exemption applies. He chose not to do so.

Under all these circumstances, I am not satisfied that the appellant is prejudiced by the late raising of section 22(a) in this appeal. I will therefore allow the Ministry to claim section 22(a) in this appeal. I will decide, below, whether this exemption applies.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Subsection (c) has no application in the circumstances of this appeal.

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

Branch 1: common law privilege

Branch 1 of the section 19 exemption appears in section 19(a) and 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 of section 19 arises from sections 19(b) and (c). Under section 19(b), it is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The Ministry relies on branch 2, and in particular, appears to rely on the "litigation privilege" aspect of branch 2, which applies to a record "that was prepared by or for Crown counsel … in contemplation of or for use in litigation."

The Ministry states that pages 1 through 266 are the "Crown brief". Having reviewed the records, I agree with this submission.

Additional records, comprising pages 267-290, were located prior to the Ministry providing its representations in this appeal. These pages consist of notes of the Crown Attorney, a photograph (found at page 285, which was disclosed and is not at issue), and an additional statement. I have reviewed these records and am satisfied that they also form part of the Crown brief.

The Ministry states that it relies on section 19 for all of the withheld records except pages 111-116, 119-124 and 160-175, for which it claims section 22(a). I have taken this statement in the Ministry's representations as definitive, although it contradicts several notations on the Ministry's indices. In my view, in the circumstances of this appeal, these specific statements in the representations should be relied on in preference to notations on the indices.

A number of decisions of the Ontario courts have referred to the rationale for protecting the Crown brief under section 19. In *Ontario (Ministry of the Attorney General) v. Big Canoe*

(2002), 67 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.), ("*Big Canoe* 2002") Justice Carthy applied branch 2 of section 19 to Crown brief materials. In doing so, he observed as follows:

> In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the Freedom of Information Act and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request. [para. 14]

Earlier in the judgment, Justice Carthy rejected an interpretation of branch 2 that would end its application upon the termination of litigation, as would occur under common law litigation privilege. He found that "the intent was to give Crown counsel permanent exemption. … The error made by the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit." Thus, if branch 2 applies to a record, that record remains exempt even after the litigation concludes.

Subsequently, in *Ontario (Attorney General) v. Holly Big Canoe* (2006), 80 O.R. (3d) 761, [2006] O.J. No. 1812 (Div. Ct.), ("*Big Canoe* 2006") Justice Lane considered the application of section 19 to the Crown brief. He stated:

> The scheme of the Act clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth. … [para. 23]
>
> The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37]
>
> The Ministry submitted that there was no reason why a Stinchcombe disclosure should affect the second branch of section 19 exemption, which rests upon an entirely different basis than litigation privilege. Its language contains no reference to the material being privileged at common law as the basis for the exemption. On the contrary, the conditions for the exemption are explicitly related to the purpose

> for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the language of section 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. There should be no generalized public access to the Crown's work product even after the case has ended.
>
> For the reasons already set out, I agree with this position, for there is a clear need to protect the information in the Crown brief from dissemination to the public as a matter of course upon "simple request", which could lead to undesirable disclosure of police methods and the like. [paras. 44, 45]

Justice Lane also found that branch 2 did not apply to letters between the Crown and defence counsel, for which there was no "zone of privacy" (see para. 45 of the judgment). He rejected the view that branch 2 did not apply to records which were not originally privileged, stating that "in my view this is irrelevant. The issue is not common law privilege, but whether the records meet the description in the second branch of section 19."

As noted, the appellant did not file representations in this inquiry. However, I note that, in his letter of appeal, the appellant commented on the disclosure of Crown materials (pursuant to *R. v. Stinchcombe*, mentioned in Justice Lane's comments above) as follows:

> It is frustrating that [neither the Peel Regional Police nor the Ministry] will even provide the named or statements of witnesses to the accident…. Surely the victims have as much right to access to the witnesses to the accident and the fact findings as the accused. …
>
> If an application under *R. v. Wagg* [*P.(D.) v. Wagg* (2004), 71 O.R. (3d) 229, [2004] O.J. No. 2053] is necessary, the costs will be over $5,000.00 to my client, which I will of course seek paid [sic] by the Province of Ontario as the refusal to provide this information is completely unreasonable.

P(D.) v. Wagg sets out a screening process where a party seeks to use the Crown brief in a subsequent civil proceeding. In *Big Canoe* 2006 (cited above), Justice Lane expressly comments on *Wagg* and alternative access:

> The test is the definition in the section. It may be thought that this gives the head an overly broad discretion, but in my view that is what the statute says. Nor does the exercise of that discretion to withhold end the requester's opportunity to obtain the documents he seeks. An application under FIPPA is not the only route to

> obtain the Crown brief. Where relevant, the Crown brief will be available to parties to litigation via the court, subject only to the *Wagg* screening and without reference to FIPPA.

From these two judgments, it appears that the contents of the Crown brief are, generally speaking, exempt under branch 2. Based on a third judgment of the Divisional Court, *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289, however, it appears that there may be an exception to this view for some records copied for inclusion in the Crown brief.

At paragraphs 65 and 66 of the *Goodis* judgment, Swinton J. (writing for the Court) stated:

> *I need not determine whether the Ministry is correct in the submission that branch 2 protects any document simply copied for inclusion in the Crown brief*. The Adjudicator appropriately applied the test in *Nickmar* and concluded that *the records related to the fact-finding and investigation process of counsel in defending the Ministry in civil actions*. I see no basis to interfere with his conclusions.
>
> The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. *The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief*. [Emphasis added]

The Divisional Court's case reference in the above-quoted passage is to *Nickmar Pty Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) holding that *copies* of non-privileged documents might become privileged if they were the result of *selective* copying or the result of research or *the exercise of skill and knowledge on the part of the solicitor*. As Swinton J. observed, the Supreme Court of Canada suggested a preference for this approach in *Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39, where it stated:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that *assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect*. (at para. 64) [Emphasis added]

Two principles emerge from the Divisional Court's judgment in *Goodis* and the authorities to which it refers, as follows:

1. records related to the fact-finding and investigation process of counsel and resulting from selective copying, research or the exercise counsel's skill and knowledge *would* fall within branch 2 of the exemption; and

2. branch 2 does *not* reach back to original records in the hands of other parties solely on the basis that they have been copied for inclusion in the Crown brief.

In my view, the import of the two *Big Canoe* decisions I have cited, and the *Goodis* decision, is clear. The contents of the Crown brief in this case are exempt under branch 2 of section 19 as having been prepared by or for Crown counsel in contemplation of, or for use in, litigation. I find that branch 2 of the section 19 exemption applies to the records for which the Ministry has claimed it, all of which are properly viewed as part of the Crown brief. The following further two points are essential to explain this finding.

First, much of the Crown brief in this case consists of copied materials provided by the Police to assist with the prosecution. It is important to note that these copies of original Police records, selected and forwarded by the Police to assist the Crown, are the foundation of the Crown brief. On this basis, they qualify as records "prepared … for Crown counsel … in contemplation of or for use in litigation", and are exempt under branch 2. In this regard, they differ from records simply copied for inclusion in the Crown brief, and do not need to qualify as "resulting from selective copying, research or the exercise counsel's skill and knowledge" under the rule in *Nickmar* in order to be exempt under branch 2.

Second, other than the copies of records provided by the Police, the remaining records at issue were clearly prepared "by or for Crown counsel … for use in litigation" and qualify for exemption under branch 2 on that basis. Accordingly, it is not necessary to establish that they were copied using counsel's "skill and knowledge." My decision that the records at issue are exempt under branch 2 does not affect the exempt or non-exempt status of any original records in the hands of the Police.

In that regard, it is important to distinguish the records at issue here from those at issue in two other orders, both of which are the subject of pending applications for judicial review. In Order PO-2494 (reconsidered in Order PO-2532-R but unchanged on this point), Assistant Commissioner Brian Beamish found that section 19 did not apply to police records on the basis that copies might be found in the Crown brief. He stated:

> With respect to the remaining records, I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the "prepared for Crown counsel in contemplation of or for use in litigation" test on the basis that copies of them found their way into the Crown brief.
>
> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

There is no question that the *Act* contains provisions that protect the process where the police investigate potential violations of law and decide whether to lay criminal charges. This protection is found primarily in section 14 of the *Act*, the comprehensive "law enforcement" exemption.

However, in this case, the Ministry does not rely on section 14 of the *Act*.

If I were to accept that the branch 2 privilege applied in these circumstances, this arguably would extend section 19 to almost any investigative record created by the police, thereby undermining the purpose of the Act. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The broad rationale of public accountability underlying freedom of information schemes . . . requires some degree of openness with respect to the conduct of law enforcement activity . . . (p. 294)

Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to "protect" the Crown's privilege.

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to the law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records that the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario [see, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342].

On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (i.e., the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (i.e., investigation files held by the police). However, courts have made findings of this nature with

respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), the majority of the court stated:

> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>
> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. In some cases the copies may be privileged even though the originals are not. [emphasis added]

…

> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

This approach was also applied in Order PO-2498, which is, like Order PO-2494, subject to an application for judicial review. As noted above, it appears to be consistent with the approach taken by Swinton J. in *Goodis*.

Accordingly, based on the approach taken in *Big Canoe* 2002, *Big Canoe* 2006 and *Goodis*, I conclude that among other records capable of falling within its terms, branch 2 of the exemption exists to protect the Crown brief from being accessible to the public "upon simple request" and thus provides a form of blanket protection for prosecution records in the hands of Crown counsel, including copies of police records, without the need for showing interference with a particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context.

In the appeal before me, as I have noted previously, the request was submitted to the Ministry of the Attorney General and the responsive record is the Crown brief. I am not dealing with a request for original records in the hands of the Police. For the reasons stated above, I find that branch 2 of section 19 applies to the records for which the Ministry claims it.

I will now consider whether section 22(a) applies to the records for which the Ministry does not claim section 19.

INFORMATION PUBLISHED OR AVAILABLE

Section 22(a) of the *Act* states:

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

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

The Ministry claims this exemption for pages 111-116, 119-124 and 160-175. These records consist of a police officer's curriculum vitae, police officers' notes including measurements and drawings, additional drawings and instructions, measurements, and the WinCrash project report on the accident.

The Ministry claims that these records are available from the Police for a fee. The Ministry relies on its "understanding that the Peel Regional Police have refused a similar request for these

documents under section 15(a) of the *Municipal Freedom of Information and Protection of Privacy Act* [the equivalent of section 22(a) of the *Act*] on the basis that these records are currently available to the public." The Ministry provided no documentary or other evidence to support this assertion.

As noted, the appellant did not provide representations on this issue.

The application of this exemption to police accident reconstruction reports, sold for a fee, has previously been upheld in Order MO-1573.

As the position taken by the Police in the request leading to Appeal MA07-95 is the basis of the Ministry's section 22(a) claim, I have reviewed the exemption claims made by the Police in Appeal MA07-95 to determine whether section 15(a) of the municipal *Act* was claimed for the records which the Ministry now states are exempt under section 22(a). The following is a summary of the results of this review:

- pages 111-116 were not identified as responsive in Appeal MA07-95;
- the Police claimed section 15(a) for pages 119, 120, 121 and 122, but not for pages 123 and 124;
- pages 123 and 124 were disclosed by the Police with personal information removed;
- page 160 was not identified as responsive in Appeal MA07-95;
- the Police claimed section 15(a) for pages 161-166 and pages 169-170;
- pages 167 and 168 were not identified as responsive in Appeal MA07-95; and
- the Police claimed section 15(a) for pages 171-175.

Given the Ministry's reliance on the Police having denied access under section 15(a) of the municipal *Act* to substantiate its claim that the records in question are publicly available, I am only able to uphold section 22(a) where this is borne out by the exemption claims made by the Police in the request leading to Appeal MA07-95. Accordingly, I find that pages 119, 120, 121, 122, 161-166, 169-170 and 171-175 are exempt under section 22(a) of the *Act* on the basis that they are available through a regularized system of access, for a fee, from the Peel Regional Police.

However, the evidence does not establish the public availability of the other records for which section 22(a) is claimed, namely pages 111-116, 123, 124, 160, 167 and 168. Accordingly, I am not satisfied, on the evidence provided, that these records are exempt under section 22(a).

No other exemptions are claimed for pages 123, 124, 160, 167 and 168. I have reviewed these pages and find that no mandatory exemption applies. I will therefore order pages 123, 160, 167 and 168 disclosed.

I will discuss pages 111-116 and page 124 under the heading, "Personal Information/Personal Privacy, below.

PERSONAL INFORMATION/PERSONAL PRIVACY

"Personal information" 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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1). As the request in this appeal was filed before these amendments were made, they do not apply.

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.)].

I have reviewed the records remaining at issue. Pages 111-116 comprise the curriculum vitae of a police officer. I find that this sets out both the educational and employment history of the officer, and as such constitutes his personal information. Two passages on page 124 set out further identifiable information that relates to the officer in his personal capacity, again constituting his personal information. I will therefore consider whether the officer's personal information is exempt under the mandatory personal privacy exemption provided by section 21(1).

Section 21(1) prohibits the disclosure of personal information unless one of the exceptions listed at sections 21(1)(a)-(f) applies. In this appeal, the only exception that could apply is section 21(1)(f), which permits disclosure if it "… does not constitute an unjustified invasion of personal privacy." Sections 21(2)-(4) provide guidance in determining whether disclosure would constitute an unjustified invasion of personal privacy.

If section 21(4) applies, disclosure is not an unjustified invasion of personal privacy. Section 21(4)(d) applies to compassionate disclosure of information concerning deceased individuals to a spouse or close relative. The Ministry has applied this provision to disclose parts of the records. However, the personal information I am considering is that of a police officer, not the deceased individual. The information is in no way related to the accident. I find that section 21(4)(d) does not 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].

As noted, the officer's curriculum vitae (pages 111-116) sets out his educational and employment history. The presumed unjustified invasion of privacy at section 21(3)(d) applies to personal information that "relates to employment or educational history." I find that this presumption applies. As well, I have already found that section 21(4) does not apply. No party has relied on section 23, and I find that it also does not apply. Disclosure of pages 111-116 is therefore an unjustified invasion of personal privacy, and I find them exempt under section 21(1).

With respect to the remaining personal information of the officer (on page 124), to which 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]. In order to find that disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f), factors favouring disclosure must apply. In the absence of representations from the appellant, I am not aware of any factors favouring disclosure that would apply to the other information about the officer found on page 124.

Accordingly, I am unable to find that disclosure of this information is not an unjustified invasion of personal privacy. The section 21(1)(f) exception does not apply, and I therefore find that this information is exempt under section 21(1).

Because only part of page 124 consists of personal information, and only the personal information is exempt, I will provide a highlighted copy of this page to the Ministry with this order to show which information is exempt.

ORDER:

1. I uphold the Ministry's decision to deny access to all of the records except pages 123, 160, 167 and 168 and the part of page 124 that is not highlighted on the copy of this page that I am sending to the Ministry with a copy of this order.

2. I order the Ministry to disclose pages 123, 160, 167 and 168 and the part of page 124 that is not highlighted on the copy of this page that I am sending to the Ministry with a copy of this order, by sending a copy to the appellant on or before **November 21, 2008**.

3. I reserve the right to require the Ministry to provide me with a copy of the information disclosed pursuant to order provision 2.

Original signed by: October 31, 2008
John Higgins
Senior Adjudicator