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

ORDER PO-2799-I

Appeal PA07-17

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media. The request focuses on the resolution of regulatory charges in connection with the operation of treatment centres for individuals whose drug addictions are being treated with methadone.

The requester sought access to records relating to the Ministry's negotiations and discussions regarding the treatment centres and two named physicians. The requester specified that the documents in the Ministry's possession would be written by the Ministry or its representatives and lawyers, the Ministry of Health and Long-term Care, the treatment centres, or a named corporation associated with the treatment centres. In this order, "the company" is a reference to this named corporation.

The requester also states that the company has pleaded guilty to a charge under the Ontario *Health Insurance Act*, and he provides the date when this occurred. He also states that there was considerable negotiation leading up to this guilty plea, and that it involved issues beyond the scope of the eventual charge. He goes on to explain that the responsive records would relate to other issues not reflected in the eventual charge.

The requester then states he is looking for:

> ALL documents that relate to the Ministry's numerous issues with [the treatment Centres] and the documents leading up to the guilty pleas by [the Company]. These will include urine testing and the billing to OHIP; operation of a laboratory, etc.

As to the time frame to be covered, the requester states:

> I am unclear as to when the negotiations started and finished. However, I am making my request for the time period of July 1, 2006 to November 1, 2006.

The Ministry identified 278 pages of records responsive to the request and issued a decision letter denying access to the information in full pursuant to sections 13 (advice or recommendations), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*.

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

A mediator was appointed by this office to try to resolve the issues between the parties. During mediation, the Ministry provided an index of records to this office and to the appellant. The Ministry also issued a supplementary decision, within the time allotted for doing so pursuant to section 11.01 of this office's *Code of Procedure*, advising the appellant that it was now claiming the application of the discretionary law enforcement exemption at section 14(2)(a) to pages 237 to 254 of the records. As well, during mediation the appellant removed certain records from the scope of his appeal, specifically those to which he already had access through other avenues and

those which contained information non-responsive to the request. The appellant also indicated that he intends to raise the application of the public interest override at section 23 of the *Act*.

No further mediation of the issues was possible, and this appeal was transferred to the inquiry stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

SCOPE OF THIS INTERIM ORDER

In this interim order, I will deal with only part of the records at issue. As noted in the history of the inquiry that follows, related judicial review litigation is likely to provide guidance on a number of issues that could have a bearing on the outcome of this appeal, and those aspects of the appeal will therefore be the subject of a later order or orders. This judicial review litigation relates to:

(1) whether settlement-privileged records can be exempt under section 19 (*Liquor Control Board of Ontario v. Magnotta et al.*, June 12, 2009, Tor. Doc. 64/07 (Div. Ct.)) (leave to appeal pending); and

(2) whether the guarantee of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms* requires that sections 14 and 19 be "read in" as exemptions that can be overridden under the "public interest override" found in section 23 of the *Act* (*Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security),* (2007), 86 O.R. (3d) 259 (C.A.) (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)).

The Divisional Court recently issued its judgment concerning item (1). This office is applying to the Court of Appeal for leave to appeal that judgment.

The Supreme Court of Canada heard argument concerning item (2) on December 11, 2008, and judgment remains under reserve. I will invite representations on the impact of that judgment once it has been issued.

Accordingly, in this interim order, I will not render a decision concerning disclosure of any records to which either of these cases could relate.

In view of the Ministry's claim that some of the information in these records may be exempt pursuant to section 21(1), it may also be necessary to notify affected parties who may have an interest in this appeal. I will notify the Ministry and the appellant of any decisions that I make regarding the process of this appeal. My final order or orders disposing of the issues in relation to the remaining records will follow.

THE HISTORY OF THIS INQUIRY

This office began the inquiry process by sending a Notice of Inquiry to the Ministry, initially, outlining the relevant facts and issues and inviting representations. The Ministry then submitted representations in response to the Notice of Inquiry.

This office later sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the Ministry, inviting the appellant to provide representations. The appellant was invited to comment on all of the issues in the appeal including the potential application of section 23. The appellant submitted two sets of representations.

The Ministry then filed applications for judicial review in relation to Orders PO-2494 and PO-2532-R, which addressed the application of section 19 to original police records that found their way into the Crown brief. This office then placed this appeal on hold pending the outcome of those judicial review applications

Subsequently, I issued Order PO-2733, which specifically addresses the application of section 19 to the contents of the Crown brief itself in the hands of prosecuting authorities (in that case, the Ministry), rather than the police. Crown brief records in the hands of the Ministry were found to be exempt under section 19. As the Crown brief records at issue in this case are in the hands of the Ministry, as prosecutor, rather than the investigating police force, Order PO-2733 appeared to be relevant to the issues here. This appeal was therefore removed from hold and this office invited supplementary representations from both the appellant and the Ministry on the potential impact of Order PO-2733. Both parties provided supplementary representations.

RECORDS:

There are 229 pages of records at issue – in full and in part – in this appeal. They are comprised of various briefing notes, handwritten notes, memos, emails, correspondence, Crown evidence documents, investigative summaries, facsimiles and attachments. Attached as Appendix A is an Index of Records in which I have grouped the records into document sets. In this order, I will make a final determination *only* with respect to documents 11, 19, 23, 25, 27, 32, 37, 43, 44, and 52.

DISCUSSION:

PRELIMINARY MATTER

Having carefully reviewed the records that the Ministry has identified as responsive to the request, I note that a number of the records refer to attachments. It is not clear whether or not all of these attachments have been provided to me. In my view, this raises the issue whether the Ministry has conducted a reasonable search for records as required by section 24. As a result, I have decided to order the Ministry to review the records that I have determined refer to attachments and to advise the appellant whether, after the completion of its review, all of the records responsive to the request have been identified and produced in this appeal. If all of the responsive records have not been produced, the Ministry should conduct a further search for the additional records as set out in my order provisions below.

The records that include a reference to attachments are identified in the Appendix A as documents 3, 4, 5, 14, 15, 16, 17, 19, 22, 24, 27, 28, 31, 33, 34, 36, 40, 41, 44, 59 and 60.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed that section 19 applies to the records at issue in this interim order, as listed above (and to all other responsive records). 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.

Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies. The Ministry claims that branch 2 applies to all the records at issue, and in this case, that raises the possible application of section 19(b).

Branch 2: statutory privileges

The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice" and to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Records that form part of the Crown brief, including copies of materials provided to prosecutors by police and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2 [Order PO-2733]. Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, (cited in previous bullet point)).

Representations and Analysis

The Ministry claims that section 19(b) (branch 2) applies to all the records because they were "prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or use in litigation," and, therefore, form part of the Crown's litigation brief. It argues that the records meet the test for the application of section 19(b) because the records include those that were originally produced as part of the police investigation, others were produced by and for Crown counsel relating to how the prosecution should proceed, and others relate to the resolution of the matter by way of a guilty plea.

The Ministry cites *Ontario (Attorney General) v. Big Canoe*, (2006) (cited above), and *Ontario (Attorney General v. Ontario (Big Canoe)* (2002), 62 O.R. (3d) 167 (C.A.), at para. 14 and argues that these authorities support the proposition that the section 19 exemption has no "temporal limit" and continues to apply after the litigation has concluded. The Ministry states further that the application of the exemption to the Crown brief is crucial to the Crown's ability to prosecute cases fairly and knowledgeably as it facilitates the exchange of information, opinions and advice about a case without being inhibited by the prospect of disclosure of such records to the public at large. It claims further that disclosure would undermine discussions relating to the possible resolution of litigation. The Ministry also states that no actions have been taken that would amount to a waiver of the privilege.

The appellant submitted representations in which he explained the purpose of his access request. He states:

> In this case, I am seeking an explanation for the deal that was struck between the Ministry of the Attorney General (the Newmarket Crown Attorney's office) and the [Centres] run by [named individuals]. They were investigated by the Ontario Provincial Police. I have spoken to investigators and they are flabbergasted that their case was plea bargained down to a provincial offences conviction….At the same time, the Ministry, which alleged that it was out of $2.3 million, did not seek recovery of money allegedly owed to the people of Ontario. How did this happen? Why did this happen? These questions will be answered in the documents at issue.

The appellant also states that the exemption should not apply to "deputations made by [individuals under investigation] (including lawyers) to the Ministry." He argues that the individuals under investigation were lobbying the Ministry to make a change to the Crown's plan to prosecute and that their letters and "briefs" to the Ministry are not exempt.

From this passage and the appellant's representations generally, it is apparent that the plea bargain struck between the Ministry and the defence, and any negotiations or communications

that may have preceded it, are a primary focus of the appellant's representations and of his interest in the records.

As explained above, however, I am not addressing records that deal with any "plea bargain" or settlement of litigation in this interim order because of the judicial review litigation pertaining to Orders PO-2405 and PO-2538-R. In so doing, I am not making a finding that the settlement of civil matters, and any privilege that arises in that regard, necessarily impacts plea bargaining in circumstances where criminal or regulatory charges may be involved. That would be a potential area in which to invite future submissions, but this cannot be done until the settlement privilege judicial review litigation is complete.

The appellant also disputes the Ministry claim that disclosure of the records will reveal information in relation to prosecutorial tactics or how one might avoid a prosecution because the litigation in this matter was settled in a manner that is already known to the public. In this regard, the Ministry's representations are an explanation of the public policy rationale underlying the statutory litigation privilege provided by branch 2. However, unless one of the exceptions to the branch 2 privilege exists, if any of the records were in fact "prepared by or for Crown counsel in contemplation of or for use in litigation," they would qualify for exemption under section 19(b). For records that may raise a public interest in disclosure of the nature identified by the appellant, the outstanding judgment of the Supreme Court of Canada in *Criminal Lawyers' Association* on the question of whether section 23 can override section 19 takes on potential relevance. As explained above, I am not adjudicating any record that could be affected by the outcome of that case in this interim order. Instead, after receiving that decision, I will invite representations on its impact on the records that remain at issue following this interim order.

The appellant also argues that the right to claim the exemption in section 19 ended when the litigation ended in 2006 and he cites Order P-1551 in support of that position. The appellant's interpretation of Order P-1551 is correct to the extent that it applies to the common law rules, embodied in branch 1 (section 19(a)), only. At common law, and, therefore, under branch 1 of the exemption, the termination of litigation ends the application of litigation privilege.

In this case, however, the Ministry relies only on branch 2 (section 19(b)). Unlike litigation privilege at common law, several decisions of the Ontario courts have made it clear that branch 2 litigation privilege has no "temporal limit." In Order P-1551, cited by the appellant, former Adjudicator Holly Big Canoe also took the position that branch 2 litigation privilege (now encompassed under sections 19(b) and (c)) could not be claimed once the relevant litigation had come to an end. However, that aspect of her decision was reversed in *Ontario (Attorney General v. Ontario (Big Canoe)* (2002), 62 O.R. (3d) 167 (C.A.). Writing for the Court in that decision, Justice Carthy stated that the intent of the words of branch 2 was to "give Crown counsel permanent exemption."

The Divisional Court recently considered the issue in *Ontario (Attorney General) v. Big Canoe*, (cited above). Justice Lane, writing for the majority stated:

> 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, 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*. [Emphasis added.]

This approach to the treatment of branch 2 of section 19 has been adopted by this office in a number of orders [See Orders MO-2221, PO-2502 and PO-2538-R] and I intend to follow it here.

Accordingly, consistent with the findings of the Divisional Court in *Ontario (Attorney General) v. Big Canoe* (cited above), I find that the right to claim that records are exempt pursuant to the statutory litigation privilege in branch 2 of section 19 does not end with the termination of the litigation.

The appellant also provided supplementary representations in relation to the implications of Order PO-2733. Order PO-2733 affirms that, in the hands of the Ministry of the Attorney General (that is, in the hands of the prosecutor), the Crown brief is exempt under branch 2. The order also reaffirms the position taken in Orders PO-2494 and PO-2532-R, to the effect that originals of these records in the hands of a police force are not exempt under branch 2. The appellant refers to that aspect of the decision in quoting a passage from Order PO-2733 which states that "… 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."

The appellant interprets this passage as meaning that the mere inclusion of a document in the Crown brief does not make it exempt, but this is only true for original copies of police records that remain in the hands of the police. In this case, however, the appellant has requested records in the hands of the prosecutor, not the police. Order PO-2733 clearly distinguishes between records in the Crown brief, which are exempt under branch 2, and original police records, which are not. This distinction is explained in the following extracts from Order PO-2733:

> 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. …
>
> … [M]uch 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.

To further explain the difference between records that are actually part of the Crown brief and in the hands of the prosecutor, where they are exempt under branch 2, and original records in the hands of the police, I quoted the following passage from Assistant Commissioner Brian Beamish's decision in Order PO-2494, which dealt with the latter type of records:

> 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.
>
> [Order PO-2494, upheld on judicial review in *Ontario (Attorney General) v. Ontario (information and Privacy Commissioner)*, [2009] O.J. No. 952 (Div. Ct.), leave to appeal dismissed, Doc. M37397 (C.A.).]

In affirming Order PO-2494, the Divisional Court stated (in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, cited above) that "[b]y its terms, branch 2 of s. 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later became part of the Crown brief."

This distinction does not assist the appellant because the records he has requested are in the hands of the Ministry, whose role is to prosecute, rather than in the hands of the police.

Order PO-2733 stands for the proposition that copies of records in the hands of the prosecuting authority (in this case the Ministry) that originated with the police and form part of the Crown brief are exempt under branch 2 of section 19, and this position is not contradicted by Order PO-2494 or the subsequent decision of the Divisional Court.

Conclusion

I have carefully reviewed the representations and all of the records at issue in this interim order, that is, documents 11, 19, 23, 25, 27, 32, 37, 43, 44, and 52. As noted above, branch 2 of section 19 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. It arises from section 19(b), which refers to records "prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or use in litigation."

The records include communications between various Crown counsel, between several Crown counsel and the Police, and the Crown's working documents. I agree with the position of the Ministry that these records were produced by or for Crown counsel in contemplation of or use in litigation because they concern the conduct of the litigation that is at the heart of the appellant's request. I agree that they are all part of the Crown brief and are exempt under section 19(b) for that reason. Having carefully reviewed all the records and the representations, I also find that there is insufficient evidence to support a finding that there has been a waiver of the privilege in the circumstances of this appeal.

As noted previously, this interim order does not address records that pertain to the plea bargain, or records that might give rise to a public interest in disclosure, as the resolution of those issues must await the final determination of the judicial review litigation in *Liquor Control Board of Ontario v. Magnotta et al.*, (cited above) and in *Criminal Lawyers' Association* (also cited above).

Based on the foregoing, I find that branch 2 of section 19 applies to all of the records that are being considered in this interim order.

EXERCISE OF DISCRETION

The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

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

Representations

The Ministry states that it took into account a number of factors in exercising its discretion under section 19 including the nature of the records and the fact that they were prepared as part of an investigation into a possible violation of the law from which a conviction ultimately resulted. It also took into account what it viewed as the chilling effect that disclosure would have on the Crown's relationship with the police and the defence counsel, the need to preserve the confidentiality of witnesses and informants, and the impact that disclosure would have on its ability to exchange frank advice about any aspect of the case.

The appellant states that the Ministry did not exercise its discretion in this appeal and that its decision to refuse access was a routine exercise. He adds that during the prosecution of the case, two of the Crown attorneys refused to speak to the press.

Analysis and Findings

Having reviewed the records and the representations, I am satisfied that, with respect to the limited number of records that are at issue in this interim order, the Ministry has exercised its discretion in an appropriate manner. It has considered the context in which the records were prepared, the impact that disclosure would have on its relationship with the police and the need for various Crown counsel to communicate frankly with each other and with the police on a confidential basis. Even if I accept the evidence of the appellant regarding the Crown's conduct during the prosecution of the related criminal proceeding, in my opinion that is not sufficient evidence upon which to base a finding of failure to exercise discretion in a proper manner in the circumstances of this appeal and in relation to the records dealt with in this order. Accordingly, I uphold the Ministry's exercise of discretion in relation to the records at issue in this interim order.

PUBLIC INTEREST OVERRIDE

The appellant has raised the possible application of the public interest override in section 23. That section states:

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

As noted above, in *Criminal Lawyers' Association*, the Ontario Court of Appeal concluded that the guarantee of freedom of expression in section 2(b) of the *Charter* requires that the exemptions in sections 14 and 19 be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

As already noted, leave to appeal to the Supreme Court of Canada was granted. Argument was heard on December 11, 2008 and judgment remains under reserve. In this interim order, I am not ruling on any records in which there could be a compelling public interest in disclosure. To be clear, I am also not making a finding that there *is* a compelling public interest in the disclosure of such records, only that there might be. If necessary, further representations on that point will be invited once the Supreme Court of Canada issues its decision.

In this section of my reasons, therefore, I am explaining why section 23 does not apply to the records that are being dealt with in this interim order.

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.

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 [Orders P-984 and PO-2607]. A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074].

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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556]. 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.)].

The Ministry makes a submission that raises this principle established by the Court in *Ontario Hydro*. It argues that the public interest requires that the records *not* be disclosed because of the need to protect the ability of the Crown and the police to effectively investigate and prosecute potential offences and to exchange frank advice and discuss relevant issues without being inhibited by the possibility that those communications will one day be made public. In addition, it argues that there is also a strong public interest in protecting the privacy of informers and witnesses. The Ministry submits that in view of the public interest in non-disclosure, the "compelling" threshold has not been met.

The appellant submits that there is a compelling public interest in disclosure of the records at issue. He makes a number of arguments including the following:

- One-third of drug addicts in the province of Ontario are treated by the individuals that were the subject of the investigation to which the records at issue relate.

- A provincial methadone task force has recently found that doctors have been exploiting addicts by administering urine tests for profit.

- The appeals board that oversees the College of Physicians and Surgeons has ordered the College to re-investigate similar allegations against the individuals identified in the records at issue.

- The Ontario College of Pharmacists has recently disciplined a pharmacist who was involved in the scheme.

- The Ministry of Health did not seek to recover the sum of 2.3 million dollars that was allegedly owed by the individuals investigated.

- The records at issue will shed light on the Ministry's decision not to proceed with the charges against the individuals and to agree to a resolution of the matter in the manner that it did.

The appellant claims that there is a public interest in this issue as it relates to the expenditure of health care dollars. He further argues that the public interest is compelling because of the large number of patients involved, and because information in the records may relate to the quality of the care received. He states that other public bodies have concerns about the operations of the methadone clinics and the penalty imposed was disproportionate to the offence. The appellant also argues that the individuals may have received favourable treatment because of their status in the community as doctors and that the work of the Crown and the Ministry in protecting the public interest should be scrutinized.

I have concluded that for documents 11, 19, 23, 25, 27, 32, 37, 43, 44, and 52, there is no compelling public interest in disclosure. Having carefully reviewed them, I find that these records do not include any information relating to the issues identified by the appellant. In my view, any interest that may exist in the content of these records is neither compelling nor public.

The issue of whether the remaining records at issue raise a compelling public interest in disclosure that may outweigh the purpose of an applicable exemption will only be decided once the Supreme Court of Canada issues its decision in *Criminal Lawyers' Association* (cited above).

Therefore, with respect to the records under consideration in this interim order, I find that section 23 does not apply and I uphold the Ministry's decision not to disclose them.

As noted above, adjudication of the issue of access to the remaining records must await the final determination of the applications for judicial review in *Liquor Control Board of Ontario v. Magnotta et al.*, (cited above) and the Supreme Court of Canada's decision in *Criminal Lawyers' Association* (also cited above), and any exchange of representations that may be necessary following the conclusion of those judicial reviews.

INTERIM ORDER:

1. I uphold the decision of the Ministry to deny access to documents 11, 19, 23, 25, 27, 32, 37, 43, 44, and 52.

2. I order the Ministry to locate and review the attachments referred to in documents 3, 4, 5, 14, 15, 16, 17, 19, 22, 24, 27, 28, 31, 33, 34, 36, 40, 41, 44, 59 and 60, to determine whether all of the records responsive to the request have been identified and produced in this appeal. If necessary to locate the attachments, I order the Ministry to conduct a further search for these additional records.

3. After conducting the searches referred to in provision 2 of this Order, if additional records are found that have not previously been provided to this office as responsive records, then I order the Ministry to provide a decision letter to the appellant in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request. If no further records are found as a result of the Ministry's searches, then it should provide the appellant with correspondence confirming that no additional records have been found.

4. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the decision letter and the records disclosed to the appellant pursuant to order provision 2,

5. To be clear, the documents that remain to be considered in this appeal are documents 1-6, 7-10, 12-18, 20-22, 24, 26, 28-31, 33-36, 38-42, 45-51 and 53-61.

Original signed by: June 30, 2009
John Higgins
Senior Adjudicator

APPENDIX A

Document Number	Page Number	Description	Interim Order	Exemptions
1	1-5	Briefing Note		19, 21(1)
2	6-7	Internal Memo		13(1), 19
3	8-9	Emails		19
4	10-15	Emails		19, 21(1)
5	16-20	Emails		19, 21(1)
6	21-25	Emails		13(1), 19, 21(1)
7	26	Correspondence		19
8	27-33	Facsimile Cover sheet, Correspondence and Attachment		19, 21(1)
9	34-35	Facsimile Cover sheet, Correspondence		19, 21(1)
10	36-45	Crown's Working Documents, Notes		13(1), 19, 21(1)
11	46-49, 53	Information	Y	19
12	67-70	Facsimile Cover sheet, Correspondence and Attachment		19, 21(1)
13	73-76	Crown Evidence/Facts		19
14	77-79	Email and Memo		13(1), 19
15	80-81	Email and Correspondence		19
16	82-86	Email and Attachment		19, 21(1)
17	87-89	Email and Correspondence		19, 21(1)
18	92-97	Email and Briefing Note		19, 21(1)
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20	109-110	Facsimile Cover sheet, Correspondence		19, 21(1)
21	111-129	Facsimile Cover sheet, Correspondence and Attachment		19, 21(1)
22	130-131	Email		13(1), 19
23	132-136	Information	Y	19
24	137-138	Email		19
25	139-142	Information	Y	19
26	143-145	Email and Attachments		19
27	146	Emails	Y	19, 21(1)
28	147-150	Emails		19
29	151-155	Counsel Notes		13(1), 19, 21(1)
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31	169-171	Emails		19, 21(1)
32	172-173	Emails	Y	19
33	174-176	Emails		19, 21(1)

34	177	Emails		19, 21(1)
35	178-180	Emails		19, 21(1)
36	181-182	Emails		19, 21(1)
37	183-184	Emails	Y	19, 21(1)
38	185-188	Emails		19, 21(1)
39	189-191	Emails		19, 21(1)
40	192-193	Emails		19, 21(1)
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43	197-200	Emails	Y	19
44	201	Emails	Y	19, 21(1)
45	202	Emails		19
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47	207-209	Briefing Note		13(1), 19, 21(1)
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