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

ORDER PO-1999

Appeal PA-000046-2

Ministry of Correctional Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Correctional Services (the Ministry) received four requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to certain named and unnamed individuals. All the requests sought access to records relating to allegations of sexual abuse in Cornwall, Ontario and were made by a representative of the media.

The Ministry located and identified a number of responsive records and denied access to them on the basis that section 65(6) of the *Act* applied. The requester appealed the decisions to deny access. These appeals were resolved through the issuance of Order PO-1905 in which Senior Adjudicator David Goodis held that section 65(6) did not apply to the records at issue. As a result, the Ministry was ordered to provide the appellant with an access decision. The Ministry initiated an application for the judicial review of the decision in Order PO-1905 on the basis that the records are excluded from the scope of the *Act* as a result of the application of section 65(6).

In accordance with the order provisions of Order PO-1905, the Ministry issued a decision and applied the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), along with the mandatory exemption in section 21(1) (invasion of privacy) to the records. In support of its contention that the records are exempt under sections 21(1), the Ministry relies on a number of presumptions in section 21(3) of the *Act*, as well as certain considerations listed in section 21(2) of the *Act*.

The appellant appealed the Ministry's decision and also made reference to the possible application of the "public interest override" provision in section 23 of the *Act*. Mediation of the appeal was not possible and the matter was referred to the adjudication stage of the process. I decided to seek the representations of the Ministry, initially. The Ministry made submissions in response to the Notice, which were shared with the appellant, in their entirety. The Ministry withdrew its reliance on the advice or recommendations exemption in section 13(1) of the *Act*. As this is a discretionary exemption, it will not be necessary to address its application to the records further. The appellant was then invited to make submissions in response to a revised Notice of Inquiry and did so. The representations of the appellant were then shared with the Ministry, who declined to make additional reply submissions.

RECORDS AT ISSUE:

The records at issue in this appeal consist of notes, correspondence, newspaper articles, pleadings, investigation reports, facsimiles, e-mails and various other documents. The records have been grouped by the Ministry on the basis of their place of origin in its record-holdings. Record Groups A and B, consisting of 50 and 28 pages of documents respectively, were located in the Ministry's Community and Young Offender Services Division. Record Group C, consisting of 381 pages of documents originated in a litigation file compiled by the Ministry's Legal Services Branch.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that all of the records at issue in this appeal are exempt from disclosure under the solicitor-client privilege exemption in section 19 of the *Act*. It argues that the records qualify for the privilege as they represent confidential communications between a solicitor and client or they are subject to "litigation privilege". Section 19 states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in living legal advice or in contemplation of or for use in litigation.

Section 19 encompasses two heads of privilege: (1) solicitor client communication privilege; and (2) litigation privilege.

The Submissions of the Parties with Respect to Section 19

The Ministry submits that:

> The exempt records reflect confidential communications between the Ministry and Crown counsel responsible for responding to civil actions on behalf of the Ministry. Several of the responsive records also reflect confidential communications with a Crown Attorney. The exempt information also consists in part of communications which directly relate to the seeking of legal advice by the Ministry and the provision of legal advice by Crown counsel.
>
> . . .
>
> The Ministry has also applied section 19 to confidential communications between Legal Counsel representing other parties and the Ministry. Release of this information would reveal legal advice. The Ministry submits that the content of the records exempted under section 19 is supportive of this position.
>
> The exempt information was also prepared by or for Crown counsel for use in giving legal advice, in contemplation of litigation and for use in past, current and potential future litigation relating to allegations of misconduct involving Ministry employees.
>
> . . .
>
> It should be noted that three civil actions have been brought against the Ministry in relation to allegations of sexual abuse in Cornwall, Ontario involving former Ministry employees. Two of the civil actions, involving a number of plaintiffs, are currently before the courts. In one of the outstanding cases, the Court has

> ordered a publication ban and as such, more detailed comment in this submission would be inappropriate.
>
> The Ministry submits that it is not aware of any circumstances which would suggest that solicitor-client privilege has been waived with respect to any of the records exempted in accordance with section 19.

The appellant makes the following representations on the application of section 19 to the records. She states:

> Since the request in this case was made before the institution of civil litigation, there must exist records which were prepared before litigation was contemplated. Even if these records are now concerned in the litigation, it cannot be said that they were prepared to assist litigation.

Solicitor-Client Communication Privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The Supreme Court of Canada has described this privilege as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words

> as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has also been found to apply to the legal advisor=s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Litigation Privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become

privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation [privilege] under the *Nickmar* test and should be tested under "dominant purpose".

Findings

Communications between Opposing Counsel

As noted above, the Ministry takes the position that communications between "Legal counsel representing other parties and the Ministry" are exempt from disclosure under section 19 as their release "would reveal legal advice". Specifically, I find that the records comprising Records 13 to 17 of Record Group B and Records 3-4, 29-33, 149-155 and 221-222 (which is duplicated at 233-234) of Record Group C represent communications between the Ministry (and its in-house and outside counsel) and counsel representing the plaintiffs or potential plaintiffs in the actions referred to in the Ministry's representations.

At common law, communications between opposing parties, even in contemplation of litigation, are not considered privileged unless made with a view to settlement [see, for example, *Flack v. Pacific Press Ltd.* (1971), 14 D.L.R. (3d) 334 (B.C. C.A.); *Strass v. Goldsack* (1975), 58 D.L.R. (3d) 397 at 426-427 (Alta. C.A.)]. In *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993), R.D. Manes *et al.* explain the rationale for not extending privilege to cover this circumstance (at page 148):

> The key to holding that privilege cannot possibly attach to communications between opposing parties is that in the making of such a communication, there cannot have been an intention of confidentiality, and that the production ... cannot violate a confidential relationship between the defendants and their solicitors. Thus, there is no room for privilege to attach. The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the other side, the communicating party could be said to have waived privilege with respect to that communication.

In my view, this common law principle also applies to Records 13 to 17 of Record Group B and Records 3-4, 29-33, 149-155 and 221-222 (which is duplicated at 233-234) of Record Group C, and accordingly, no privilege attaches to them.

Records Subject to Solicitor-Client Communication Privilege

As noted in the Ministry's representations, the Ministry and a number of its employees were named as defendants in three separate actions brought by former young offenders who were supervised by the Ministry's probation office based in Cornwall. In defending these actions, the Ministry, retained the services of an outside law firm and also relied upon its own in-house legal counsel to provide advice. In doing so, counsel prepared or responded to various correspondence with the Ministry and generally advised the Ministry as to how to conduct the defence of the actions. The records at issue in this appeal include these communications between counsel, both inside and outside the Ministry, and various Ministry officials and formed part of the "continuum of communications between a solicitor and client".

I have reviewed the contents of the records and find that Records 5-6 from Record Group A, Records 11, 12-17 and 18-20 of Record Group B and Records 1-2, 7, 10-13, 14, 19, 25-27, 28, 44-45, 51-52, 61, 62, 63-66, 67-68, 81-84, 85-90, 95, 100, 101-102, 103, 117-122, 134, 148, 156-163, 166, 168-169, 170-171, 172-173, 174, 176, 179, 180-181, 186, 187, 191-193, 194-196, 197, 199-201, 219-220, 223-224, 225-228, 230-232, 236-240, 261-262, 263, 264, 339, 340, 360, 365, 374-376, 377 and 378 from Record Group C qualify for exemption under the solicitor-client privilege component of section 19. Each of these records represents a confidential communication between a solicitor, either employed by the Ministry or retained externally, and a client, a Ministry lawyer or employee. In addition, these communications pertain to a legal issue relating to the Ministry's defence of the three actions brought against it. They contain either legal advice to, or a request for, the provision of such advice from the client. Accordingly, I find that all of the records enumerated above are exempt from disclosure under the solicitor-client communication privilege component of section 19.

In addition, I find that certain of the records meet the criteria set out in *Susan Hosiery*, cited above, as they represent the legal advisor=s working papers directly related to seeking, formulating or giving legal advice. Specifically, I find that Records 1-2 from Record Group A, Records 1-7 and 8-10 from Record Group B and Records 5-6, 8, 8a, 9, 15-18, 20-23, 34-43, 46-49, 50, 164, 165, 167, 175, 178, 188-189, 190, 198, 215, 216-217, 235, 241-248, 249-260, 343, 353-356, 357-359, 361-364 and 379 to 381 from Record Group C are various newspaper articles,

Ministry Issue Notes, handwritten notes by counsel and copies of court decisions which were compiled by Ministry solicitors to assist in the formulation and giving of legal advice.

Records Subject to Litigation Privilege

During the progress of the Ministry's defence of the actions, its solicitors, both in-house and external, requested and were provided with a number of documents generated by the Ministry which may bear some relation to the facts alleged in the plaintiffs' Statements of Claim. As a result, Ministry staff made a number of inquiries and finally located a large number of records, some dating back many years, which pertain to the events which gave rise to the litigation. These records were not prepared in contemplation of litigation and do not, accordingly, qualify under the "dominant purpose" test for litigation privilege. Rather, I am obliged to determine whether they qualify under the test enunciated in *Nickmar* and Order MO-1337-I, which are referred to in my discussion above. The question to be answered is whether these records qualify as "others which were not created with the litigation in mind" within the meaning of Assistant Commissioner Mitchinson's discussion in MO-1337-I.

I find that Records 3-4, 7, 8, 9-10, 11-12, 14-19 (which is duplicated at 37-42 and 265-270 of Record Group C), 20-27 (which is duplicated at 43-50), 28-35 (which is duplicated at 366-373 of Record Group C) and 36 of Record Group A, Records 21 and 22-28 of Record Group B and Records 70-80, 124-125, 135-147 (which is duplicated at 202-214), 328 and 329-338 of Record Group C are documents which were not created with litigation in mind but which were gathered by the solicitor for inclusion in the litigation brief. These records relate to the fact-finding and investigation process undertaken by counsel in formulating the Ministry's response to the actions brought against it. The inclusion of these records in the litigation brief served to inform the solicitor of the Ministry's evidence in order to assist in the preparation of its defence. Accordingly, I find that these records qualify under the litigation privilege component of section 19 using the criteria described in *Nickmar* and reiterated in Assistant Commissioner Mitchinson's reasoning in Order MO-1337-I.

Further records at issue in the appeal were created directly in response to the litigation as part of the Ministry's attempts to gather information for the preparation of a defence and in order to meet its obligations with respect to undertakings which it entered into in the course of Examinations for Discovery. These records must be examined with a view to determining whether the "dominant purpose" for their creation was to assist the Ministry in its defence of the legal proceedings brought against it.

I find that Record 13 of Record Group A and Records 24, 69, 91-94, 96, 97, 98-99, 114-116 (which is duplicated at 350-352), 123, 126-133, 177, 182-184, 185, 218 and 229 were created for the dominant purpose of assisting the Ministry in its defence of the litigation then underway. The records primarily describe the Ministry's efforts to locate in its record-holdings any information which would assist the Ministry in its defence or to respond to its undertakings entered into at the Examinations for discovery stage of the litigation. As such, I find that they qualify for exemption under the litigation privilege component of section 19.

By way of summary, I find that all of the records which are at issue in this appeal, with the exception of those documents which were sent to or received from opposing counsel, are exempt under either the solicitor-client communication or the litigation privilege head of section 19. I will now address whether the records which are not exempt under section 19, Records 13 to 17 of Record Group B and Records 3-4, 29-33, 104 (duplicated at Record 341), 105 (duplicated at Record 342), 106 (duplicated at Record 344), 107-110 (duplicated in part at Record 345 and 346), 111-113 (duplicated at Record 347-349), 149-155 and 221-222 (which is duplicated at 233-234) of Record Group C may qualify for exemption, in whole or in part, under the mandatory invasion of privacy exemption in section 21(1) of the *Act*.

PERSONAL INFORMATION

Section 2(1) of the *Act* defines the term "personal information" to include, in part, recorded information about an identifiable individual.

The Ministry takes the position that each of the records contain information which pertains to identifiable individuals, including Ministry employees, young offenders, members of the public and others. The Ministry recognizes that some of the information relating to Ministry employees does not qualify as their personal information, but rather, is more properly characterized as relating to them in their professional capacity. Relying on the decision of former Assistant Commissioner Irwin Glasberg in Order P-721, the Ministry submits that because some of the records involve an evaluation of a Ministry employee's conduct or performance, these records are considered to contain the employee's personal information.

The appellant points out that in many previous orders of the Commissioner's office, it has been held that "information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibility or position."

I have reviewed the contents of Records 13 to 17 of Record Group B and Records 3-4, 29-33, 104 (duplicated at Record 341), 105 (duplicated at Record 342), 106 (duplicated at Record 344), 107-110 (duplicated in part at Record 345 and 346), 111-113 (duplicated at Record 347-349), 149-155 and 221-222 (which is duplicated at 233-234) of Record Group C and make the following findings:

- Records 13-17 of Record Group B (duplicated at Records 29-33 of Record Group C), along with Record 3-4, 149-155 and 221-222 (duplicated at Record 233-234) of Record Group C contain the personal information of two former Ministry employees who are now deceased. In the context of the creation of these records, the information does not refer to these individuals in their professional or employment capacity. Rather, it describes the involvement of these individuals in alleged improper conduct. As a result, I find that the references to these individuals contained in these records to be their personal information within the meaning of the definition of that term in section 2(1)(h).

- Record 13-17 of Record Group B (duplicated at Records 29-33 of Record Group C), Records 3-4, 105 (and 342), 111-113 (and 347-349), 149-155 and 221-222 (and 233-234) of Record Group C contain information relating to individuals who were under orders of probation and were supervised by the Ministry. I find that this information qualifies as "personal information" within the meaning of section 2(1)(b) as it relates to the criminal history of these individuals. In addition, Records 13-17 of Record Group B and 221-222 and 233-234 of Record Group C also make reference to the psychological, medical and employment history of the Ministry clients (section 2(1)(b)).

- Record 13-17 of Record Group B (and 29-33 of C), along with Records 104, 105, 106, 107-110 and 111-113 of Record Group C contain references to Ministry employees, past and present. In the circumstances, I find that the involvement of these individuals was not "personal" in nature. These persons are named in the records in their employment or professional capacities as Ministry staff and are not referred to in their private or personal capacities. As a result, I find that these records do not contain their personal information.

- None of the records contain the personal information of the appellant.

In summary, I find that only Records 13-17 of Record Group B (and its duplicate, Records 29-33 of Record Group C), along with Records 3-4, 105 (and 342), 111-113 (and 347-349), 149-155 and 221-222 (duplicated at Record 233-234) of Record Group C contain information which qualifies as personal information as that term is defined in section 2(1). Records 104 (and its duplicate at 341), 106 (which is duplicated at 344), 107-110 (duplicated in part at 345 and 346), 112 and 113 from Record Group C contain no personal information within the meaning of section 2(1). As only personal information can be exempt from disclosure under section 21(1), and no other mandatory exemptions apply to these records, they will be ordered disclosed to the appellant.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In my view, the only possible exception which may apply in the present circumstances is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified

invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [Order PO-1764]

If none of the presumptions in section 21(3) applies, the Ministry must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The Ministry relies on the "presumed unjustified invasion of personal privacy" in sections 21(3)(a), (b), (d), (f) and (g) of the *Act* and the factors listed under sections 21(2)(e), (f), (h) and (i) of the *Act*.

These sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(d) relates to employment or educational history;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

The appellant submits that neither of the presumptions in section 21(3)(b) or (f) apply to the information at issue as the police investigations into these matters have long since been completed. The appellant also suggests that any reference to payments received by Ministry employees as retirement packages cannot be described as information about that individual's "finances, income, assets, net worth, financial history or financial activities", as is required by section 21(3)(f). The appellant adds that the disclosure of the personal information of a deceased individual would not result in an unjustified invasion of that person's personal information as a deceased individual would not be exposed unfairly to pecuniary or other harm (section 21(2)(e)), nor would disclosure damage a deceased person's reputation (section 21(2)(i)).

Application of the Presumptions in Section 21(3)

In my view, the presumptions in section 21(3) apply in a limited fashion to the remaining information. Specifically, I find that Records 3-4 and 221-222 (and 233-234) of Record Group C contain information which relates to the medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of several former Ministry clients under section 21(3)(a). As such, I find that these records are subject to the presumption in section 21(3)(a). In addition, I find that Record 221-222 (and 233-234) contain information relating to the employment history as of a former Ministry client. This information is subject to the presumption in section 21(3)(d).

However, I find that the other records remaining at issue were not compiled, nor are they identifiable, as part of a law enforcement investigation within the meaning of section 21(3)(b). The records were created long after the involvement of the police in the matter had concluded. Rather, the records were created as part of the Ministry's response to the civil proceedings initiated by several former Ministry clients. As such, I find that section 21(3)(b) has no application to these documents. In addition, I find that none of the remaining records contain information which falls within the presumptions in sections 21(3)(f) or (g).

Factors Favouring Privacy Protection Under Section 21(2)

Section 21(2)(e)

I find that the disclosure of the personal information remaining at issue would not result in an individual being unfairly exposed to pecuniary or other harm under section 21(2)(e). The Ministry simply states that it is relying on the content of the records in support of this contention. Based on my review of the information in these particular records, however, I cannot agree. In

my view, the disclosure of the information, other than that which is subject to the presumptions in sections 21(3)(a) or (d), could not reasonably be expected to result in harm, pecuniary or otherwise, to any individual.

Section 21(2)(f)

I accept the Ministry's characterization of the information remaining at issue as being "highly sensitive", as contemplated by section 21(2)(f). The records contain references to civil proceedings which were instituted by young offenders who made allegations of abuse by staff employed by the Ministry. In my view, the records are by their very nature, highly sensitive within the meaning of section 21(2)(f). I find that the references to the young offenders and the Ministry staff accused of harming them contained in Records 13-17 of Record Group B (duplicated at Record 29-33 of Record Group C), Records 3-4, 105, 111, 150-155 and 221-222 (duplicated at Record 233-234) of Record Group C is "highly sensitive" information.

Section 21(2)(h)

Records 3-4 and 221-222 (and 233-234) of Record Group C are letters from counsel for a group of former Ministry clients to the Ministry advising that legal action on their behalf was being contemplated. These letters give no explicit indication that they were submitted with an expectation of confidentiality or on a "without prejudice" basis, under section 21(2)(h). In the case of Record 3-4, however, counsel for the individual Ministry clients indicated his intention to seek an order banning the publication of their names. In my view, this fact points to an expectation on the part of the writer of the letter that at least the names of the individuals were being provided in confidence. I am satisfied, accordingly, that the names of the former Ministry clients included in the claim was supplied to the Ministry in confidence and that the consideration listed in section 21(2)(h) applies to this information.

Section 21(2)(i)

I further find that the disclosure of the contents of Records 3-4 and 221-222 (and 233-234) could reasonably be expected to result in unfair damage to the reputations of the former Ministry clients whose names appear therein, within the meaning of section 21(2)(i). The claims set out the nature of the allegations made against Ministry staff and the involvement of the former clients in exploitative relationships. I find that the factor listed in section 21(2)(i) is a relevant consideration weighing against the disclosure of Records 3-4 and 221-222 (along with 233-234) from Record Group C.

Factors Weighing in Favour of Disclosure Under Section 21(2)

The appellant has not made any specific reference to the application of the considerations listed in section 21(2) to the information in the records. Her arguments in favour of a public interest in the disclosure of the records under section 23 are, however, equally applicable to the factor described in section 21(2)(a) as:

> the disclosure is desirable for the purposes of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

I find that this is a consideration which merits significant weight in favour of the disclosure of the information in those records which relate to the Ministry's response to the allegations made concerning its employees' conduct. However, the information in the records which are under consideration in this discussion does not relate to the actual activities or the conduct of the Ministry in response to the allegations. Rather, it is more narrowly focussed on the allegations themselves and the Ministry's fulfillment of its legal responsibilities in responding to the clients' lawsuits. As such, I find that the consideration in section 21(2)(a) is of little relevance to the personal information contained in these particular documents.

Balancing the Considerations Under Section 21(2)

In my view, the considerations weighing in favour of the non-disclosure of the information contained in Records 3-4 and 221-222 (along with 233-234) from Record Group C are more cogent than the factors favouring disclosure. I find, therefore, that the disclosure of the personal information in these records would result in an unjustified invasion of the personal privacy of the former Ministry clients. The personal information contained in these records is, accordingly, exempt under section 21(1).

Similarly, I find that the references to the Ministry's former clients, including their names and other identifying information, along with that of the persons who were accused of abuse, found in Records 13-17 of Record Group B and in Records 105, 111 and 149-155 of Record Group C would constitute an unjustified invasion of the personal privacy of these individuals. Accordingly, the personal information contained in these records should not be disclosed as it is exempt under section 21(1).

I find, however, that the disclosure of the remainder of the information in Records 13-17 of Record Group B and in Records 105, 111 and 149-155 of Record Group C (those portions which do not contain personal information) would not constitute an unjustified invasion of personal privacy. As the section 21(1) exemption does not apply to these portions of the records, and no other mandatory exemptions apply to them, they ought to be disclosed.

I have provided the Ministry with highlighted copies of Records 13-17 of Record Group B and in Records 105, 111 and 149-155 of Record Group C. The highlighted portions of these records are **not** to be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that, in the circumstances of this appeal, there exists a compelling public interest in the disclosure of the information contained in the records at issue under section 23 of the *Act*, which reads:

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

The "public interest override" provision in section 23 does not apply to records which are subject to the section 19 solicitor-client privilege exemption. As the vast majority of the records at issue in this appeal have been found to be exempt under that section, I will only address the application of section 23 to those records and parts of records which I have found to be exempt under section 21(1).

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

Is There a Compelling Public Interest?

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as Arousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a 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.

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

In support of her contention that there exists a public interest in the disclosure of the records, the appellant submits that:

> . . . there has been a significant, if not overwhelming public concern about the allegation of abuse of authority by Ministry officials with respect to sexual abuse of minors. At risk is the safety of the children of Canadian communities. The conduct of not only the employees of the ministry, but other people in authority in Cornwall is a matter of public concern, not only to discover the truth of the situation, but to allow communities to take measures to prevent any such untoward events repeating themselves. The Ministry can only have an interest in

> protecting itself from the revelation of the potentially abusive activities of its employees. If the information sought does not reveal improper conduct, then the public should be aware of this in order to exonerate the individuals concerned. It is the submission of the [appellant] that section 23 should apply in this case to negate exemptions sought by the Ministry of Corrections. Two of the individuals about whom information is sought are deceased and therefore cannot be harmed by the revelation of information. Given the substantial and justified public interest in the question of the conduct of public officials in Cornwall, it is the submission of the [appellant] that the public interest outweighs the purpose of the exemption.

There can be no dispute that the subject matter of the records at issue has been the subject of a great deal of public interest over the past number of years. I have no difficulty in agreeing with the position taken by the appellant that there exists a compelling public interest in the disclosure of the information contained in the records at issue in this appeal, taken as a whole. It should be noted, however, that section 23 has potential application only to those records which I have found, in whole or in part, to be exempt under section 21(1).

Does the Public Interest Outweigh the Purpose of the Section 21(1) Exemption?

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that [a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure".[Order MO-1254]

In my discussion of section 21(1) above, I found that the contents of Records 3-4 and 221-222 (and 233-234) in their entirety, and the undisclosed portions of Records 13-17 of Record Group B and in Records 105, 111 and 149-155 of Record Group C are highly sensitive as they identify both the victims and the alleged perpetrators, of sexual abuse. I find this information to be of the most sensitive type. As a result, in balancing the public's right to have access to the information contained in these records against the privacy of the victims and the alleged perpetrators, the privacy interests must prevail. I find that the public interest in the disclosure of the information contained in these records, however compelling, does not outweigh the principles of privacy protection enshrined in section 21(1). Section 23, does not, therefore, have any application in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose to the appellant those portions of Records 13-17 of Record Group B and Records 105, 111 and 149-155 of Record Group C which are **not** highlighted, along with Records 104 (and its duplicate at 341), 106 (which is duplicated at 344), 107-110 (duplicated in part at 345 and 346), 112 and 113 from Record Group C, in their entirety.

2. I uphold the Ministry's decision to deny access to the remaining records at issue in this appeal.

3. My order for disclosure of records under Provision 1 of this order is stayed pending the disposition by the Supreme Court of Canada of the current judicial review of Orders PO-1618, PO-1627 and PO-1658.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1.

Original Signed By: March 13, 2002
Donald Hale
Adjudicator