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

ORDER PO-2598

Appeal PA-060057-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to the resignation of a now deceased officer with the Ontario Provincial Police (the OPP). The request specifically stated:

> [I] request a copy of any agreement entered into involving [named individual] and the Ontario Provincial Police or any other government ministry or institution during the period prior to the anticipated OCCPS [Ontario Civilian Commission on Police Services] hearing.

The Ministry located one record responsive to the request which comprised Minutes of Settlement, a Release, and a Resignation, and denied access to it in accordance with sections 17(1) (third party information), 19 (solicitor-client privilege), and 21(1) (invasion of privacy), taking into consideration the presumptions at sections 21(3)(d) and (f) and the factors at sections 21(2)(h) and (i).

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant raised the possible application of section 23 of the *Act* (the public interest override) to the records as he feels that there is a compelling public interest in the disclosure of the record. Accordingly, section 23 was added as an issue in the appeal.

As no issues were resolved through mediation, the file was transferred to the adjudication stage of the appeal process.

I decided to begin my inquiry by sending a Notice of Inquiry to the Ministry. The Ministry provided representations in return.

Prior to the receipt of the Ministry's representations, I received notice from a lawyer who acts on behalf of two parties who have an interest in the disclosure of the record. By that notice, I was asked to consider those parties as affected parties for the purposes of the appeal, as contemplated by section 28 of the *Act*. I agreed to do so. I then sent a Notice of Inquiry to the affected parties inviting representations on the disclosure of the memorandum of settlement. The affected parties provided representations in response.

In its representations, the Ministry advised that it would not be providing representations on the application of section 17(1), but that it would instead be relying on the discretionary exemptions at sections 18(1)(c), (d) and (e) (economic and other interests). Accordingly, I added the preliminary issue of the late raising of discretionary exemptions and the issue of the possible application of section 18(1)(c), (d) and (e) to the scope of this appeal.

I then sent a copy of the Notice of Inquiry to the appellant along with the non-confidential representations of both the Ministry and the affected parties. The appellant responded with representations.

The appellant's representations raised issues related to the application of section 23, the public interest override, to which I felt the Ministry and the affected parties should have an opportunity to reply. I sought further representations from them. Both the Ministry and the affected parties provided reply representations.

RECORDS:

The record at issue in this appeal is comprised of the Minutes of Settlement between the OPP and the officer named in the request, a Release and a Resignation.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Previous orders have held that the Commissioner has the power to control the manner in which the inquiry process under the *Act* is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject to a consideration of the particular circumstances of each case. This approach was upheld by the Divisional Court in the judicial review of Order P-883 (*Ontario (Ministry of Consumer and Commercial Relations)* v. *Fineberg* (21 December, 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838).

The Code of Procedure established by the Commissioner's Office indicates in Part IV, section 11.01, that in an appeal from an access decision, an institution has thirty-five days from the date of the confirmation of appeal to raise any new discretionary exemptions not originally claimed in its decision letter. In the circumstances of this appeal, no additional exemptions were raised by the Ministry during the thirty-five day period.

The Ministry also did not raise the possibility of any new discretionary exemption during the mediation stage of this appeal. However, in its representations submitted during the adjudication stage, the Ministry states that the record "ought not to be disclosed pursuant to subsections 18(1)(c), (d) and (e) of the *Act*". It had not previously claimed the application of these discretionary exemptions for the responsive records.

The objective of the policy stipulating that institutions are required to claim discretionary exemptions no later than 35 days after the Confirmation of Appeal, is to provide institutions with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant would not be prejudiced. The 35 day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35 day period.

In adjudicating the issue of whether to allow the Ministry to claim these discretionary exemptions at this time, I must weigh the balance between maintaining the integrity of the

appeals process against any evidence of extenuating circumstances advanced by the Ministry [Order P-658]. I must also balance the relative prejudice to the Ministry and the appellant in the outcome of my ruling.

Although the appellant was provided access to the Ministry's representations in which it made sections 18(1)(c), (d) and (e) exemption claims and was given the opportunity to reply, the introduction of a new exemption at a late stage only gives the appellant the time allowed for providing representations to consider it. Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

The Ministry has provided no evidence of extenuating circumstances to explain why it was unable to raise the discretionary exemptions earlier in the process. In my view, the Ministry had ample time to review the records and consult with counsel to confirm the discretionary exemptions on which it wished to rely as the appeal proceeded through the mediation stage of the process. However, the Ministry did indicate in its representations that it was not opposed to the requester being provided with additional time to respond to the new exemptions claims, if required.

That being said, in the particular circumstances of this appeal, I have decided to permit the Ministry to claim sections 18(1)(c), (d) and (e) for the record at issue. The Ministry's basis for the application of these exemption claims is similar in nature to their original claim that the exemption at section 17(1) applies. As noted above, section 17(1) is no longer being claimed by the Ministry. Most importantly, I have also concluded that the appellant will not be prejudiced in any way by the late raising of sections 18(1)(c), (d) and (e). The appellant has been given an opportunity to address the new exemption claims and no delay has resulted from the additional claims. Finally, because of the manner in which I have addressed the application of these exemptions to the record below, I have decided to consider them.

Accordingly, I will allow the Ministry's claim that the discretionary exemptions at section 18(1)(c),(d) and (e) apply, and include section 18(1) as an issue in this appeal.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Sections 18(1)(c), (d) and (e) of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the Government's ability to protect its legitimate economic interests [Order P-441].

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario [Orders p-219, P-641, and P-1114].

For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the

institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The Ministry submits that the record at issue should not be disclosed pursuant to sections 18(1)(c), (d) and (e) of the *Act*. It submits:

> The Ministry alleges that subsection 18(1)(c) of the *Act* allows the Minutes not to be disclosed on the basis that to do so could prejudice the economic interests of the Ministry if a third party obtained details as to the settlement arrangements between the Ministry and the former officer.
>
> The Ministry further alleges that subsection 18(1)(d) of the *Act* allows the Minutes not be disclosed due to the fact that it could be injurious to the financial interests of the Government if a third party obtained the results of the Minutes, which reflect the outcome of settlement negotiations.
>
> The Ministry alleges as well that subsection 18(1)(e) of the *Act* allows the Minutes not to be disclosed due to the fact that it would reveal the position the Ministry took with respect to negotiations that resulted in the Minutes being executed.
>
> The Ministry contends in respect of both clauses (c), (d) and (e) that revealing the settlement negotiations resulting in the Minutes could have negative implications for other settlement negotiations to which the Crown is a party. Once the Minutes are disclosed, there is no limit as to who may access them, and for what purpose. The disclosure of the Minutes could promote litigation, as disclosure could encourage other parties involved in proceedings against the Crown to adopt similar positions based on those taken in the Minutes, regardless of whether the facts or legal positions are similar to those reflected in the Minutes. Disclosure might therefore act as a disincentive to early settlement, and to parties making concessions they would otherwise be willing to entertain. Finally, parties might be unwilling to execute written documents such as the Minutes if they knew that they would be disclosed, notwithstanding the confidentiality clauses that purport to protect the Minutes from disclosure.

The appellant does not make any specific representations on whether the exemptions at sections 18(1)(c),(d) and/or (e) apply in the circumstances of this appeal.

Analysis and finding

Sections 18(1)(c) and (d): prejudice to economic interests and injury to financial interests

Although there is clearly a difference in wording between "prejudice the economic interest" and "be injurious to the financial interests" in section 18(1)(c) and (d), in my view, in the circumstances of this appeal any such difference is irrelevant to the consideration of these two exemptions. Accordingly, I will address their potential application together.

Previous orders have rejected arguments that disclosure of the details of contracts between senior employees and institutions, including settlement agreements, could reasonably be expected to harm the economic or competitive interests of those organizations, within the meaning of section 18(1)(c) and/or (d) [see Orders P-1545, P-380, MO-1184 and PO-1885]. In Order MO-1184, former Assistant Commissioner Tom Mitchinson found that sections 11(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal equivalents of sections 18(1)(c) and (d)) did not apply to exempt a settlement agreement between the City of Hamilton and a former employee. He stated:

> In the present case, I am not persuaded that disclosure of the record could reasonably be expected to result in either of the types of harm outlined in section 11(c), or the harm envisioned by section 11(d). A confidentiality clause is common to agreements of this nature which settle civil lawsuits, and indicates the sensitivity of arrangements regarding the termination or separation of employment relationships between and institution such as the City and its employees. However, in my view, the presence of a confidentiality clause in and of itself is not sufficient to bring the record within the scope of sections 11(c) or (d); this or any other term of settlement agreement, such as the one at issue in this appeal, cannot take precedence over the statutory right of access provided in the *Act*. Any increased costs to the City which would result from disclosure are speculative at best, and the evidence provided by the City is insufficient to establish a reasonable expectation of **prejudice** to the City's economic interest or **injury** to its financial interest. [emphasis in original]
>
> Similarly, I am not persuaded that disclosure could reasonably be expected to prejudice the City's competitive position. It is widely recognized that government institutions are held to a high standard of accountability for the use of public funds, and that records in the custody or control of these organizations are governed by legislation which is based on a public right of access. I do not accept the City's position that disclosure of a record through this statutory scheme could reasonably be expected to impact on the level of trust that current and future employees would have in the City's ability to negotiated future agreements. Agreements of this nature are negotiated on the basis of individual circumstances, and in an atmosphere where all parties have an interest in settlement. In my view, the potential harm envisioned by the City is simply too remote to satisfy the requirements of a reasonable expectation of prejudice to the City's competitive position.

> Finally, it is also important to state that the circumstances of this appeal bear little or no relationship to the purpose of sections 11(c) and (d) exemption claims described earlier in this order.

I agree with the reasoning taken by Assistant Commissioner Mitchinson and adopt it for the purposes of this appeal.

Having reviewed the record at issue, the representations submitted by the Ministry and having considered previous decisions that have examined the application of section 18(1)(c) and (d) to settlement agreements, I do not accept that disclosure of the Minutes of Settlement, Release and Resignation could reasonably be expected to result in the harms contemplated in section 18(c) and (d). As noted above, the purpose of section 18(1)(c) is to protect the ability of institutions to compete for business and earn money in the marketplace. In my view, the negotiation of a settlement agreement respecting one OPP officer bears no relationship to the purpose of this exemption. I also do not accept that disclosure of employee settlement agreements have an impact on the broader economic interests of the Ontario government or cause "injury to the ability of the Government of Ontario to manage the economy of Ontario", as contemplated by section 18(1)(d).

Moreover, sections 18(1)(c) and (d) are harms based exemptions that require the Ministry to provide "detailed and convincing" evidence to demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. As noted above, evidence amounting to speculation of possible harm is not sufficient to establish that these exemptions apply. In the circumstances of this appeal, the Ministry has simply argued generally that the exemptions apply but, in my view, has not provided me with sufficiently detailed and convincing evidence to establish that disclosure of the Minutes of Settlement, Release and Resignation could reasonable be expected to prejudice the economic interests of the Ministry (section 18(1)(c)) or be injurious to its financial interests (section 18(1)(d)).

Additionally, following the reasoning in Order MO-1184, I do not accept that simply by inserting a standard confidentiality clause in its settlement agreements, the Ministry, or any other institution governed by the *Act*, can evade the legislative scheme which vests the public with a statutory right of access to records in its custody or control. I also do not accept that, as alleged by the Ministry, disclosure of this record under the *Act* would impact its ability to negotiate such agreements in the future, act as a disincentive to early settlement, encourage parties to not make concessions they would otherwise be willing to entertain or cause parties to be unwilling to execute written documents. As will be discussed in greater detail in my analysis of section 18(1)(e), agreements of this nature are negotiated based on the unique circumstances of the particular parties to them. In my view, parties to these types of agreements have an interest in reaching a negotiated agreement. Accordingly, I do not accept that the mere presence of a confidentiality agreement brings the record within the scope of the exemptions at section 18(1)(c) and/or (d).

Finally, most of the previous orders that have found that section 18(1)(c) and/or (d) do not apply involve settlement agreements between institutions and senior employees. In the current appeal,

the OPP officer to whom the settlement agreement in this appeal relates is not a "senior" officer. This fact does not alter my determination that section 18(1)(c) and (d) do not apply. In fact, in my view, if the disclosure of a settlement agreement involving a senior employee and an institution is not generally found to reasonably be expected to prejudice the economic interests or be injurious to the financial interests of an institution, then a settlement agreement involving a less senior employee, with less financial significance to the institution, also does not.

Accordingly, I find that section 18(1)(c) and (d) do not apply to exempt the record from disclosure.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

I have carefully examined the record at issue and the representations of the parties and have determined that section 18(1)(e) is not applicable to the Minutes of Settlement, Release and Resignation.

It is well established that for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

In Order PO-2034, Adjudicator Laurel Cropley stated the following with respect to section 11(e), the municipal equivalent of section 18(1)(e):

> Previous orders of the Commissioner's office have defined "plan" as "…a formulated and especially detailed method by which a thing is to be done; a design or scheme"
>
> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

In Order PO-2034, Adjudicator Cropley also quotes from page 323 of the Williams Commission Report as it is helpful in understanding the Legislature's intent in including this section of the *Act*:

> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy

> in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

In the circumstances of this appeal, it is clear that the negotiations which led to the Minutes of Settlement, Release and Resignation have concluded and that the record is in fact a final agreement. As such, I am satisfied that it cannot be characterized as a pre-determined course of action or way of proceeding. In addition, in my view, disclosure of the final agreement cannot be said to disclose the Ministry's bargaining strategy or the instructions given to those individuals who carried out the negotiations. As with most negotiated agreements, the Minutes of Settlement in this case represents an agreement, the culmination of the negotiation between the OPP and the particular officer to whom the agreement relates. Therefore, the Minutes of Settlement, Release and Resignation reflect the give and take of the negotiation process that existed between those two particular parties. I am satisfied that the Minutes of Settlement do not contain positions, plans, procedures, criteria or instructions. Therefore, I find that the first two parts of the test under section 18(1)(e) have not been met.

Even if I were to accept that the record at issue contains a pre-determined course of action or way of proceeding, I do not find that parts 3 and 4 of the section 18(1)(e) test are met in the circumstances of this appeal. Although I acknowledge that the Ministry will most certainly enter into similar agreements with other OPP officers in the future, I do not accept that disclosure of these particular Minutes of Settlement would reveal positions, plans or procedures intended to be applied by the Ministry in the negotiation of those future agreements.

In Order 87, Former Commissioner Sidney B. Linden reviewed the application of section 18(1)(e) to completed negotiations and stated that:

> Turning to the exemption claim under subsection 18(1)(e), this subsection refers to "positions, plans, procedures, criteria or instructions *to be applied* to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario" (emphasis added). In my view, the exemption is not available to prevent the release of these types of records in situations where they *have been applied* to negotiations between the government and third parties (emphasis added). Furthermore, to interpret the phrase "or to be carried on by or on behalf of an institution of the Government of Ontario" to mean any possible future negotiations including those that have not been presently commenced or even contemplated, is in my view, too wide. My conclusion is therefore that in the circumstances of this appeal, negotiations between the institution and Toyota have been completed and any positions, plans, procedures, criteria or instructions applied to these negotiations are no longer exempt from disclosure under subsection 18(1)(e).

Following the reasoning applied by Commissioner Linden in Order 87, if the Settlement Agreement could be said to reveal a pre-determined course of action, in my view, it *has already been applied* to those negotiations as the Minutes of Settlement, Release and Resignation represent a final agreement and, as noted above, the negations have clearly concluded. I

understand the Ministry, as does any employer, contemplates entering into future settlement agreements with OPP officers. However, the Ministry has not provided me with any evidence of particular settlement agreements that are either currently ongoing or contemplated that would specifically be affected by disclosure of the records at issue.

I am also not satisfied that disclosure of the Minutes of Settlement, even if they were to reveal a pre-determined course of action, could have an adverse affect on other similar negotiations. Any future agreements, and any preceding negotiations, will not only involve different parties but also will entail different considerations and circumstances from those existing at the time of the negotiation of the record at issue in this appeal. Any future settlement negotiations will, therefore, result from separate and distinct negotiations and culminate in separate and distinct agreements. For that reason, in my view, the record at issue in this appeal does not contain any information relating to the conduct of either current or future negotiations and any speculation of harm to the Ministry's negotiating position as a result of its disclosure is purely speculative. Accordingly, I also find that the Ministry has also failed to satisfy parts 3 and 4 of the test under section 18(1)(e).

In any event, I have concluded that the Ministry has failed to demonstrate that the Minutes of Settlement, Release and Resignation contain "positions, plans, procedures, criteria or instructions", and that therefore, parts 1 and 2 of the test under section 18(1)(e) have not been met. As all parts of the section 18(1)(e) test must be met for the exemption to apply, I find that section 18(1)(e) does not apply to exempt the record at issue from disclosure.

In summary, I find that the record at issue does not qualify for exemption under any of the discretionary exemptions at sections 18(1)(c), (d) or (e) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that section 19 of the *Act* applies to exempt the record at issue in this appeal. When the request in this matter was filed, section 19 stated as follows:

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

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal. At any rate, the amendment would not impact the outcome of this appeal.

Section 19 contains two branches. Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39].

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

Representations

The Ministry takes the position that the common law solicitor-client communication privilege applies to exempt the Minutes of Settlement, Release and Resignation from disclosure. Specifically, it submits that the record is privileged because it was made in pursuance of settlement. The Ministry submits:

> Prior IPC orders have found that settlement related documents can form the basis of a section 19 claim. In Order 49, former Commissioner Sidney Linden stated:
>
> > …it is possible for letters or communications passing between opposing lawyers to obtain the status of a privilege communication if they are made "without prejudice" and in pursuance of settlement…
>
> The Minutes are communications that were made in pursuance of settlement, and therefore, the Ministry contends that Order 49 should be applied to the fact situation in this appeal (Order 49 has been followed in subsequent IPC orders, including M-477 and P-1278).
>
> The Ministry notes that although the disclosure of privileged records to a party adverse in interest would normally constitute waiver of privilege, IPC orders have recognized that this is not the case with respect to records pertaining to settlement negotiations: [Orders M-477, M-712]. The Ministry therefore submits that these orders should be applied to the facts of this appeal to find that solicitor-client privilege has not been waived in the Minutes.

The Ministry also takes the position that that statutory litigation privilege at branch 2 applies to exempt the Minutes of Settlement, Release and Resignation from disclosure. It submits:

> The Ministry also submits that the Minutes, which were prepared for the purpose of avoiding litigation, falls within the second branch of the section 19 exemption (i.e. a record created by or for Crown counsel in contemplation of litigation). IPC Orders have recognized that records prepared for the purpose of pursuing or implementing a settlement of pending litigation fit within this branch of the section 19 exemption: [Orders P-952, P-1278].
>
> The Ministry submits that the Minutes were prepared for the purpose of resolving a dispute that was being appealed to the Ontario Civilian Commission on Police Services, and that hearings before tribunals have been characterized as litigation for the purpose of this exemption: [Order P-952].

The appellant did not make any specific submissions on the application of section 19.

Analysis and finding

The Ministry's representations raise the question of whether the common law principle of settlement privilege falls within the scope of either branch 1 or branch 2 of the exemption in section 19.

If settlement privilege does not fall within the scope of either branch 1 or branch 2 then it must be determined whether the record is subject to common law solicitor-client communication privilege or litigation privilege under branch 1 or whether it was "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation" within the meaning of branch 2.

I have carefully considered the Ministry's representations and reviewed the record at issue. I find that the common law principle of settlement privilege does not fall within the scope of the exemption in section 19 and that neither branch of that exemption applies to exempt the Minutes of Settlement, Release and Resignation from disclosure. My analysis follows.

Settlement Privilege

In Order PO-2405 and its reconsideration in Order PO-2538-R (both subject to an application for judicial review – see Tor. Doc. 64/07 (Div. Ct.)), Senior Adjudicator John Higgins examined, in considerable depth, whether the modern principle of statutory interpretation favoured the inclusion of the settlement privilege within the scope of section 19. He found that it did not.

In Order PO-2405 the affected party argued that disclosing Minutes of Settlement would, among other things, undermine the public policy goal of encouraging settlement, interfere with an entrenched principle that provides procedural protection to the adversarial system of justice, and compel the breach of a private confidentiality agreement. Senior Adjudicator Higgins stated:

> Settlement privilege is an important public policy principle in the broad context of the resolution of disputes. Nevertheless, the question of whether, or how, this interest is protected under the *Act* is a manner of statutory interpretation.
>
> In its argument that section 19 should be interpreted as encompassing settlement privilege, the affected party relies on the "modern rule" of statutory interpretation. The rule was stated in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 (S.C.C.) ("Régie") per L'Heureux-Dubé J. at pp. 1005-6, as follows:
>
> > … the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: Driedger on the Construction of Statutes (3rd ed. 1994), at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

In *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) ("Big Canoe"), this formulation was adopted by the Ontario Court of Appeal (at pp. 172-3) in assessing the impact of common law privilege on the application of the litigation privilege aspect of section 19. The particular issue in that case was whether the common law rule that litigation privilege usually terminates at the end of litigation means that records formerly subject to litigation privilege lose their exempt status under section 19. From this use of the principle by the Court of Appeal, it is evident that the modern rule may provide guidance in assessing the extent to which common law privileges (e.g. litigation privilege, as in Big Canoe, or settlement privilege, as in this case), are encompassed within a statutory provision such as section 19. This assessment requires the determination of the meaning of the common law solicitor-client and litigation privileges (branch 1) in a statutory context, as well as the meaning of the statutory privilege in branch 2.

Section 1 provides important context for interpreting the *Act*. It states (in part):

> The purposes of this *Act* are:
>
> > (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > (i) information should be available to the public,
> > (ii) necessary exemptions from the right of access should be limited and specific, …

The basic mechanism of the *Act* for allowing access to information subject to specific legislated exemptions is further addressed at section [10]:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (the "*Williams Commission Report"*), which led to the enactment of the *Act*, various heads of government secrecy are canvassed, including Crown privilege or "public interest" privilege (at pp. 160-161):

> At common law … the Crown possessed the prerogative right to refuse to produce documentary or testimonial information to the court. … Although the Crown's common-law immunity from discovery has been modified by The Proceedings against the Crown *Act*, this statute expressly preserves the right of the Crown to refuse to disclose where it would be "injurious to the public interest".
>
> …
>
> Under the rubric of Crown privilege, then, a wide variety of government-held information may be withheld from the court, and therefore from the public domain.

The *Williams Commission Report* proceeds to consider the most appropriate mechanism for addressing this and other forms of government secrecy in the context of a freedom of information scheme, and concludes that legislation provides the best solution (at p. 231). Following this model, the *Act*'s legislated right of access, subject only to specifically identified exemptions, means that any kind of privilege or confidentiality that may exist at common law only applies to a request under the *Act* if it is embodied in an exemption.

In analyzing the types of exemptions to be included in the *Act*, the *Williams Commission Report* considers the problem of "Information Creating Unfair Advantage or Harm to Negotiations" (pp. 321-324), and proposes and exemption to protect "documents containing instructions for public officials who are to conduct the process of negotiation" (p. 323). This led to enactment of section

18(1)(e), which protects "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario." Section 18(1)(e) is not at issue in this case. Section 17(1)(a) also addresses the question of negotiations, and protects certain types of records whose disclosure could reasonably be expected to "interfere significantly with the contractual or other negotiations of a person, group of persons, or organization".

In discussing the section 19 exemption, the *Williams Commission Report* (at v. 2, p. 340) mentions the need to incorporate protection for records that would otherwise be subject to litigation privilege:

> To grant access to this material would permit opposing parties to disrupt the preparation of the government's case and to obtain an advantage in preparing for adversarial proceedings. This premature disclosure of the government's case could unreasonably handicap the government in its conduct of the litigation.

The *Williams Commission Report* does not propose that this exemption should be extended to cover settlement documents, and there is no specific reference to settlement privilege or settlement negotiations in section 19.

As I noted at the outset, the affected party argues that settlement privilege plays an important role in the administration of justice. In applying the modern rule, however, it is also important to consider that the *Act* exists to provide a right of access to government-held information, subject to clearly enumerated exemptions, and in so doing, to promote democracy and an informed citizenry (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403), a purpose that is consistent with the description of the exemptions, in section 1(a)(ii) of the *Act*, as "limited and specific".

Accordingly, in my view, the modern rule of interpretation, and in particular the overall legislative context and history of the *Act*, cannot be said to favour a finding that section 19 encompasses settlement privilege.

In Order PO-2405, Senior Adjudicator Higgins also specifically addressed whether the common law litigation privilege component of branch 1 encompassed settlement privilege. He found that it did not. His reasoning was based on that presented in Order PO-2112 where Adjudicator Donald Hale found that settlement privilege and litigation privilege exist for very different purposes and operate in different ways. Senior Adjudicator Higgins stated:

> In summary, I agree with Adjudicator Hale's determination in Order PO-2112 to the effect that settlement privilege and litigation privilege exist for very different purposes. Their operation is also totally different. In addition, I accept Adjudicator Hale's view that there is a sound policy rationale for including litigation privilege within "solicitor-client privilege" for the purposes of branch 1

> of the exemption. Both common law solicitor-client privilege *and* common law litigation privilege seek to *prevent* disclosure to a party outside the solicitor-client relationship. This stands in marked contrast to the purpose of settlement privilege, which is entirely concerned with protecting a totally different relationship, namely that between the parties to a dispute, and seeks to *foster* disclosure outside the solicitor-client relationship. In my view, it is also a significant distinction that settlement privilege does not even require the involvement of a lawyer.
>
> I have reviewed the detailed submissions and related authorities provided by the appellant and the affected party. I am not persuaded that they provide a rationale for including settlement privilege in the scope of litigation privilege under branch 1 of section 19. This line of argument therefore provides no basis for finding the records exempt under section 19.

Senior Adjudicator Higgins addressed the issue of whether settlement privilege is encompassed within the section 19 exemption for a second time in Order PO-2538-R, which resulted from a reconsideration request in relation to Order PO-2405. In Order PO-2538-R, the Senior Adjudicator stated:

> Both the LCBO [Liquor Control Board of Ontario] and the affected party urge an interpretation that would add a third type of privilege to the meaning of "solicitor-client privilege" in branch 1, namely settlement privilege. In my view, it is to be noted that the Supreme court of Canada does not mention settlement privilege in its description of the common law privileges encompassed within the phrase "solicitor-client privilege in the context of the *Act* (*Goodis*) [*Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31] or the federal *Access to Information Act (Blank)* [*Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. 94th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)], nor is there any indication that it was considered to be part of solicitor-client privilege when the *Act* came into force in 1988.
>
> …
>
> As extensively canvassed in Order PO-2405, I appreciate the public policy importance of encouraging negotiated settlements, but I am nevertheless of the view that the modern view of statutory interpretation, which encompasses policy-based consideration, does not favour the inclusion of settlement privilege in branch 1 of section 19 of the *Act*.
>
> In effect, absent any compelling case law to support the conclusion that settlement privilege is part of common law litigation privilege, the policy-based argument put forth by the LCBO and the affected party asks me to read settlement privilege into branch 1. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507, the Court of Appeal reversed an interpretation

> of section 65(6)3 of the *Act that purportedly "imported"* the word 'legal' into the subclause when it does not appear, introduces a concept there is no indication the legislature intended." In my view, reading in "settlement privilege" into branch 1 would be similarly inappropriate. The legislature could have included this phrase in the exemption, but chose not to. …

Senior Adjudicator Higgins then quoted from his earlier analysis of the *Williams Commission Report* in Order PO-2405 (also reproduced extensively above), including the observation that "[t]he *Williams Commission Report* does not propose that this exemption should be extended to cover settlement documents, and there is no specific reference to settlement privilege or settlement negotiations in section 19." He went on to discuss Order 01-06, issued by British Columbia Information and Privacy Commissioner David Loukidelis:

> In Order 01-06, British Columbia Information and Privacy Commissioner David Loukidelis addressed a similar policy-based argument to the effect that settlement privilege should be seen as included in section 14 of that province's *Freedom of Information and Protection of Privacy Act*, which creates an exemption for information that is subject to solicitor-client privilege. He stated:
>
> > …My authority to authorize or require a public body to refuse access is statutory. It is not open to me to read an exception to the right of access into a section of the *Act* or to create an exception. As Assistant Commissioner Mitchinson put it, in Order PO-1732-F, […], at para. 61, the *Act* "contains an exhaustive list of exemption which are available to an institution should it wish to deny access to a particular record." It would, in my view, be an error for me to interpret s. 14 as incorporating 'settlement privilege'.

Senior Adjudicator Higgins concluded his discussion of settlement privilege and litigation privilege in Order PO-2538-R as follows:

> In my view, the issue of negotiations was canvassed by the Williams Commission and addressed in sections 17(1)(a) and 18(1)(e), and if the Legislature had intended to include settlement privilege in branch 1 of section 19, it would have said so.

I agree with Senior Adjudication Higgins' approach and adopt it for the purpose of the present case.

In my view, in the current appeal, the Ministry has not provided me with representations that present any arguments that were not considered in PO-2405 and/or PO-2538-R or any new and compelling case law that might support a conclusion that settlement privilege is part of the exemption at section 19. Accordingly, I find that the record at issue is not exempt from disclosure pursuant to section 19 by virtue of the common law principle of settlement privilege.

As I have found that common law settlement privilege does not fall within the scope of section 19, I will now determine whether the record at issue is subject to common law solicitor-client privilege or litigation privilege under branch 1 or whether it was "prepared by or for Crown counsel for use in giving legal advice" within the meaning of branch 2.

Branch 1 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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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

In order for a record to be subject to the common law solicitor-client communication privilege in branch 1, the institution must provide evidence that the records satisfy the following test:

1. there is a written or oral communication, and

2. the communication is of a confidential nature, and

3. the communication must be between a client and a legal advisor, and

4. the communication must be directly related to the seeking, formulating or giving of legal advice.

[Orders 49, M-2, M-19]

I find that common law solicitor-client communication privilege does not apply to the Minutes of Settlement, Release and Resignation. While the record is clearly a written communication,

thereby satisfying part 1 of the test, I do not accept that it is a confidential communication between a client and a legal advisor; nor do I accept that it is directly related to the seeking, formulating or giving of legal advice. The record at issue was shared by all parties to the settlement negotiations and was, therefore, not a confidential communication passing either between the Ministry and its solicitor, or the OPP officer and his solicitor. Additionally, in my view, the record was prepared for the purpose of settlement and not for the purpose of the seeking, formulating or giving of legal advice. Therefore, none of parts 2, 3, or 4 are satisfied. Accordingly, I find that the requirements of solicitor-client communication privilege are not present.

The Ministry argues that even though the Minutes of Settlement, Release and Resignation were shared with an adverse party (a circumstance that would normally result in waiver of privilege), the Commissioner's office has recognised that waiver does not normally apply with respect to records pertaining to settlement negotiations. The Ministry relies on previous orders of this office (specifically Orders 49, M-477 and M-712), which dealt with settlement negotiation correspondence and draft settlement agreements, and argues that the reasoning in those orders is equally applicable in the current appeal.

In Order P-1348, Adjudicator Laurel Cropley specifically addressed this issue and found that branch 1 privilege did not apply to an agreement that concluded the employment relationship of Deputy Ministers and Assistant Deputy Ministers of the provincial government. She stated:

> I do not agree that the executed agreement is privileged within the meaning of this section.
>
> A severance agreement is a contract, executed by the parties, to conclude the employment relationship in an orderly fashion and to determine the rights of the parties. It is perhaps arguable that settlement privilege might exist with respect to discussions leading up to the agreement. However, in my view, once an agreement has been reached and executed by the parties, the privilege would not attach to this agreement.

In Order P-1348, Adjudicator Cropley distinguished Orders M-477 and M-712 from the circumstances in the appeal before her. She stated:

> I noted that in Order M-477, the records at issue would otherwise have qualified for litigation privilege. The issue in that appeal concerned the waiver of privilege. In Order M-712, the records consisted of correspondence containing settlement discussions from the institution's solicitors to the solicitors for a developer. Adjudicator Anita Fineberg found that it was apparent from the content of the letters that litigation was contemplated and that the correspondence was made in furtherance of the solicitor's instructions to implement a settlement. Following the reasoning in Order M-477, she upheld the exemption in section 12 of the municipal *Act*, the equivalent of section 19 in the provincial *Act*.

> In my view, the circumstances in these two orders are distinguishable from the current appeal. **In both cases above, the decisions concerned the issue of waiver with respect to records which would otherwise qualify for exemption** [my emphasis].

I agree with the reasoning taken by Adjudicator Cropley and find that the circumstances in the appeal before me are sufficiently similar for it to apply in this case. Following Order P-1348, I find that given the Minutes of Settlement, Release and Resignation consist of an agreement that has been reached and executed by the parties, settlement privilege does not apply. Additionally, similar to the record at issue in P-1348, and unlike the records in Orders M-477 and M-712, I find the record at issue in this appeal would not otherwise qualify for exemption under solicitor-client communication privilege, as outlined above, litigation privilege as outlined below, or the statutory privilege, as outlined further below.

Accordingly, I find that the record does not qualify for exemption under the common law solicitor-client communication privilege at branch 1 of section 19.

Branch 1 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, former 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 the circumstances of this appeal I find that the Minutes of Settlement, Release and Resignation are not subject to the common law litigation privilege in branch 1. In my view, the record was not created especially in order to obtain legal advice or to conduct or aid in the conduct of litigation. I also do not find that it was created for the lawyer's brief for existing or contemplated litigation. Rather, I find that the record was created for the primary purpose of reaching a negotiated settlement that would bring the litigation between the parties to an end. In fact, this finding has support in the Ministry's representations themselves where they submit that the Minutes of Settlement were made in pursuance of settlement. In my view, where a record was prepared for settlement negotiations, it cannot also be the case that exactly the same record was prepared for the dominant purpose of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation. This analysis bears common features with the difference between settlement privilege and litigation privilege, as canvassed above, since it is based, in part, on the fact that the processes of litigation and settlement, like the respective privileges that go with both, are markedly different in both purpose and operation.

I find that the common law litigation privilege does not apply to the Minutes of Settlement, Release and Resignation and that type of privilege therefore provides no basis for finding them exempt under section 19.

Branch 2 "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation"

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to branch 1, this branch encompasses two types of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether either of the statutory privileges apply.

The statutory litigation privilege applies to a record that was prepared (1) by or for Crown counsel, and (2) "in contemplation of or for use in litigation." The second requirement is similar to litigation privilege at common law, which protects records created for the dominant purpose of

existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident v. Chrusz* (*supra*), see also *Blank* (*supra*)].

The Ministry does not specifically submit that the Minutes of Settlement, Release and Resignation were prepared by or for Crown counsel. Additionally, on its face, the record does not make it clear that it was prepared by Crown counsel. However, given the nature of the agreement, and the circumstances surrounding its creation, I am prepared to accept that it was indeed prepared by or for Ministry Crown counsel within the meaning of the requirement of the statutory privilege at branch 2.

While I accept that proceedings before tribunals, including the Ontario Civilian Commission on Police Services, are considered to be litigation for the purpose of section 19, I am not satisfied that the record was prepared "in contemplation of or for use in litigation". The OPP officer had filed an appeal before the Ontario Civilian Commission on Police Services, appealing a decision that ordered him to resign; litigation was more than contemplated. However, the Minutes of Settlement, Release and Resignation were prepared with a view of reach a settlement agreement, not in contemplation of or for use in the litigation itself. As discussed above, in my view, where a record was prepared for settlement negotiations, it cannot also be the case that exactly the same record was prepared for the dominant purpose of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation.

Additionally, I do not find that the record was prepared "for use in giving legal advice". As outlined above in my analysis of the application of solicitor-client communication privilege in branch 1, in my view, the terms of the Minutes of Settlement, Release and Resignation were not prepared for the purpose of providing legal advice on the matter to the Ministry but rather for the purpose of settlement.

Accordingly, I find that the record does not qualify for exemption under the statutory solicitor-client privilege at branch 2 of section 19.

In summary, I find that none of the components of branch 1 or branch 2 of the exemption at section 19 apply to exempt the Minutes of Settlement, Release and Resignation from disclosure.

SETTLEMENT PRIVILEGE AND ABSURD RESULT

In its representations on the application of the exemption at section 18(1), the Ministry also submits that to disclose a record that is subject to settlement privilege is contrary to the *Act* and would lead to an absurd result even if it is found that no exemption claims apply to withhold it. Later, in its representations on section 19 (solicitor-client privilege), the Ministry requests that I consider the same arguments on settlement privilege and absurd result to apply in the context of the application of the section 19 exemption claim. The Ministry's claim with respect to settlement privilege and absurd result is contingent on me finding that sections 18(1) and/or 19 do not apply. As I have found that neither of those exemptions apply to exempt the record from disclosure I will now address this claim as a separate issue.

Representations

The Ministry first makes general submissions on how the record at issue is "privileged" at law:

> The Ministry submits that the Minutes, as a record created in furtherance of settlement negotiations, is recognized at law as being privileged and is protected from disclosure in order to prevent the unfortunate outcomes described in the previous paragraph from happening [J. Sopinka, S. N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada,* 2nd ed. (Toronto: Butterworths, 1999) at paragraph 14.223-14.224. See also J. Sopinka, S. N. Lederman & A.W. Bryant, *The Law of Evidence in Canada,* 2nd ed. Supplement (Toronto: LexisNexis Canada Inc., 2004) at paragraph 14.204.1.] The courts have held that without such a privilege, "the public interest in encouraging settlements will not be served". [*Middlekamp v. Fraser Valley Real Estate Board,* 1992 CarswellBC (BCCA) 267 at paragraph 18.
>
> The purpose of privileged communications, in general is to recognize that:
>
> > [T]here may be social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based on confidential communications. Normally, these communications are not disclosed to anyone outside that relationship. [Sopinka, *supra* note 2 at para. 14.2]
>
> The Ministry submits that the privilege that applies to settlement negotiations and the principle in support of privileged communications, as quoted above, would be breached if the Minutes were to be disclosed pursuant to this appeal. Therefore, the Ministry requests that the important policy purpose behind protecting privileged communications should be recognized in this appeal, as should the fact that the privilege does not distinguish between communications that are potentially subject to the *Act,* and those that are not.

The Ministry then argues that because of the application of settlement privilege, the absurd result principle applies to exempt the record from disclosure. It submits:

> The Ministry alleges that it was never the intent of the *Act* to override settlement privilege, and that to do so would be manifestly absurd. The Ministry submits that for this reason, the Absurd Result principle must be considered in any determination as to whether the Minutes ought to be disclosed. The Absurd Result principle was first recognized in Order M-444. In that order, Senior Adjudicator John Higgins stated:
>
> > It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the statute in which it is found, is not a proper implementation of the legislature's intention.

> The Ministry submits that if the Legislature intended that the *Act* were to override communications recognized at law as being privileged, then the Ministry contends that the *Act* would explicitly state so, and would contain a provision similar to subsection 67(1) or (2) which specifically indicates which confidentiality provisions the *Act* does not prevail over.

The appellant does not respond to this claim in his representations.

Analysis and finding

The Ministry argues that the Minutes of Settlement, Release and Resignation are subject to settlement privilege at common law and should not be disclosed. It argues that because of the application of settlement privilege, to find that the exemptions at sections 18(1) and/or 19 *do not* apply to the record would lead to an absurd result because the legislature would never have intended for the provisions of the *Act* to override a common law principle without explicitly stating so in its provisions.

I disagree with the Ministry's analysis and conclusions in this regard.

As noted in Order M-444 (in the passage quoted by the Ministry and reproduced above) and in its argument on this point, the absurd result principle is closely tied to legislative intention. The legislative history and purpose of the *Act*, in relation to settlement privilege and section 19, have already been extensively canvassed in the portions of Orders PO-2405 and PO-2538-R that are reproduced earlier in this decision. That analysis is sufficient to negate the Ministry's absurd result argument, which is, in my view, at odds with the purpose and structure of the *Act*.

Sections 1 and 10(1) of the *Act* are particularly relevant. These sections state, in part:

> 1. The purposes of this *Act* are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, …
>
> 10(1). Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 1 makes it clear that access to information under the control of institutions is a fundamental purpose. Section 10(1) embodies this purpose by providing a right of access to records unless they fall under an exemption. Order PO-2405 analyses the consequences of this structure in relation to settlement privilege, and although this analysis is included in the passage from this order quoted above, it bears repeating here:

> In *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (the "*Williams Commission Report")*, which lead to the enactment of the *Act*, various heads of government secrecy are canvassed, including Crown privilege or "public interest" privilege (at pp. 160-161):
>
> > At common law … the Crown possessed the prerogative right to refuse to produce documentary or testimonial information to the court. ….Although the Crown's common-law immunity from discovery has been modified by *The Proceedings against the Crown Act*, this statute expressly preserves the right of the Crown to refuse to disclose where it would be "injurious to the public interest".
> >
> > …
> >
> > Under the rubric of Crown privilege, then, a wide variety of government-held information may be withheld from the court, and therefore from the public domain.
>
> The *Williams Commission Report* proceeds to consider the most appropriate mechanism for addressing this and other forms of government secrecy in the context of a freedom of information scheme, and concludes that legislation provides the best solution (at p. 231). **Following this model, the *Act*'s legislated right of access, subject only to specifically identified exemptions, means that any kind of privilege or confidentiality that may exist at common law only applies to a request under the *Act* if it is embodied in an exemption.**
> [my emphasis]

In my view, this analysis provides a compelling basis for concluding that, if common law settlement privilege is not encompassed by section 19, and no other exemption applies, it is not an "absurd result" to conclude that the *Act* requires this information to be disclosed in response to an access request. As well, more generally, this same analysis contradicts the more general argument that, regardless of whether any exemption applies, the common law settlement privilege should apply to prevent disclosure of information subject to the *Act*. Given the legislative history and structure of the *Act*, and the express provisions of sections 1 and 10(1), it is simply untenable to argue that the Legislature intended any form of privilege not expressly preserved in an exemption to apply in the context of an access request. Accordingly, I reject the Ministry's "absurd result" arguments.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, the term "personal information" is defined as recorded information about an identifiable individual, including information relating to the employment history of the individual or information relating to financial transactions in which the individual has been involved (paragraph (b) of the definition), and the individual's name if 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 (paragraph (h) of the definition).

Previous orders of this office have considered the contents of various types of agreements, such as employment contracts or settlement and/or employment severance agreements [Orders MO-1184, MO-1332, MO-1405, MO-1749, MO-1941 and P-1348]. These orders have consistently held that information about the individual who is named in such agreements (which includes, amongst other things, the employee's name and address, date of termination and terms of settlement) relate to these individuals in their personal capacity, and thereby qualifies as personal information. I am satisfied that the same considerations apply in the circumstances of this appeal. As a result, I conclude that the Minutes of Settlement, the Release and the Resignation contain the personal information of the affected person who was a former officer with the OPP.

INVASION OF PRIVACY

Where the appellant seeks the 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) apply. The Ministry and the affected parties oppose the release of any of the minutes of settlement on the grounds that disclosure would amount to an unjustified invasion of the OPP officer's personal privacy. Accordingly, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal 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.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of the affected party's personal privacy.

In applying section 21(1)(f), sections 21(2), (3), and (4) 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 a determination as to whether disclosure of the personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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 whose disclosure does not constitute an unjustified invasion of personal privacy.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as all other relevant circumstances.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In the circumstances of this appeal, none of the parties submit that any of the exceptions listed in section 21(4) apply to the information contained in the record at issue. Having reviewed the Minutes of Settlement, Release and Resignation carefully, I concur that none of the exceptions listed in section 21(4) are relevant in the circumstances of this appeal. However, later in this order I will examine whether the "compelling public interest" override at section 23 applies.

Section 21(3)(d): Presumption for employment information

Both the Ministry and the affected parties take the position that because the information in the records relates directly to the OPP officer's employment history with the OPP, disclosure of the information contained in the Minutes of Settlement would amount to a presumed unjustified invasion of his privacy as contemplated by section 21(3)(d) of the *Act*. Although the Ministry also put forward the presumption at section 21(3)(f) in its decision letter, it does not make reference to it in its representations. As section 21(1) is a mandatory exemption I will also refer to section 21(3)(f) in my discussion below. Sections 21(3)(d) and (f) provide:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment of education history;
>
> (f) describes and individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Both the Ministry and the affected parties submit that disclosure of the Minutes of Settlement is presumed to be an unjustified invasion of personal privacy under section 21(3)(d), because it relates to the named individual's employment history.

The appellant does not make specific submissions on the application of the presumption of section 21(3)(d) or any of the other presumptions in section 21(3).

Previous orders have reviewed the approach this office has taken to applying the presumptions in section 21(3) of the *Act* to information similar to that contained in the Minutes of Settlement and Release. In Order PO-2050, Adjudicator Laurel Cropley examined the application of the presumptions of section 21(3)(d) and (f) to similar information as that which is before me in this appeal. She stated:

> Record 3 is entitled "Agreement and Release" between the Commission and the affected person. It contains specifics relating to the affected person's termination from employment with the Commission, such as termination date, termination payments, general terms and some standard contract terms.
>
> …
>
> Generally, previous orders have found that although one-time or lump sum payments or entitlements do not fall under the presumption found at sections 21(3)(f) or (d) (Orders M-173, MO-1184 and MO-1469), information such as start and finish dates of a salary continuation agreement fall within the presumption in section 21(3)(d) and references to the specific salary to be paid to an individual over that period of time fall within the presumption in section 21(3)(f) (Order P-1348).
>
> In addition, information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption (Order M-173, P-1348, MO-1332, and PO-1885). Contributions to a pension plan have been found to fall within the presumption in section 21(3)(f) (Orders M-173 and P-1348).
>
> Previous orders have found, however, that the address of an affected party, releases, agreements about the potential availability of early retirement, payment of independent legal fees and continued use of equipment, for example, do not all within any of the presumptions in section 21(3) (Orders MO-1184 and MO-1332). In order M-173, former Assistant Commissioner Irwin Glasberg found that much of the information in these types of agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) (of the municipal *Act*), but could more accurately be described as relating to arrangements put in place to end the employment connection.
>
> I agree with the reasoning in these orders and find that the termination date in clause 1(i), references to the benefits the affected person was entitled to as an

> employee and which were to be continued or not upon termination in clause 2(iii) and clause 3(iii) which makes references to the affected person's obligations arising from his previous employment fall within the presumption in section 21(3)(d). In addition, a portion of clause 2(iii) also makes reference to the affected person's actual salary and thus describing his income, falls within the presumption in section 21(3)(f).
>
> [Adjudicator Cropley finds later in her order that despite the application of the presumption in section 21(3), the benefits in clause 2(iii) fall under the exception in section 21(4)(a) and accordingly, that disclosure of that information did not constitute and unjustified invasion of privacy.]
>
> I find that none of the presumptions in section 21(3) apply to the remaining information in this records, including information describing lump sum or one time payments relating to the affected person's termination and in relation to legal fees (in clauses 2(i), (ii) and (viii)).

This approach was subsequently followed by Adjudicator Frank DeVries in Order MO-1749. I agree with this approach and the principles Adjudicator Cropley set out in Order PO-2050, and adopt them for the purposes of this appeal.

This office has also found that language contained in Minutes of Settlement that relate to the following information *do not* qualify under any of the section 21(3) presumptions:

- Releases
- Out-placement counselling.

[Orders MO-1184 and MO-1405]

Applying the principles outlined above, I find that none of the information contained in the Minutes of Settlement, Release and Resignation falls within the presumption at section 21(3)(d).

The Minutes of Settlement include a reference to a sum of money. This lump sum is said to represent a potion of the amount required by law to be paid to the OPP officer in salary for an indeterminate amount of time. Despite the fact that this amount represents a portion of the OPP officer's salary, I find that it does not reflect, nor does it reveal his actual annual salary. As noted above, references to specific salary (the exact dollar figure) have been found to fall within the presumption at section 21(3)(f). However, in my view, the amount listed in the Minutes of Settlement is best characterized as a one-time or lump sum payment which does not fall under the presumption found at section 21(3)(d) (or any other presumption in section 21(3), including section 21(3)(f)) [Orders M-173, MO-1184 and MO-1469].

The remainder of the information in the Minutes of Settlement essentially describes, in the most general terms and without specific figures, what other monetary amounts the OPP officer is entitled to, as well as other general provisions relating to the terms of the agreement between the

OPP officer and the OPP. In my view, none of the remaining information in the Minutes of Settlement falls within any of the presumptions found at section 21(3).

As noted in Order PO-2050, releases have been found not to fall within any of the presumptions at section 21(3) [Orders M-173, MO-1184 and MO-1332] because the information in a release does not pertain to the "employment history" of the individual for the purposes of section 21(3)(d). Rather it has been found that this information can be more accurately described as relating to arrangements put in place to end the employment connection. I adopt this approach and find that it also applies to the Resignation portion of the record which similarly does not pertain to the OPP officer's "employment history".

Accordingly, in the current appeal I find that both the Release and Resignation portion of the record do not contain information about the OPP officer's "employment history" and, therefore, does not fall under the presumption at section 21(3)(d). I further find that the Release and Resignation do not contain any information that qualifies under any of the other presumptions in section 21(3).

Section 21(2): Relevant factors and considerations

I have found that none of the information at issue meets the presumptions in section 21(3). Therefore, I must now review the records to determine whether any of the factors listed in section 21(2), as well as all other considerations favouring disclosure or non-disclosure that are relevant in the circumstances of this appeal, apply to that information.

Both the Ministry and the affected parties submit that if the presumption at section 21(3)(d) does not apply to exempt the record from disclosure, a number of factors weighing against disclosure apply. Specifically, they submit that the individual to whom the information relates will be exposed unfairly to pecuniary or other harm (section 21(2)(e)), that the Minutes of Settlement are highly sensitive (section 21(2)(f)), that the personal information contained in the records was supplied in confidence (section 21(2)(h)). They also submit that certain unlisted factors weighing against disclosure apply. Specifically, they suggest that the OPP officer to whom the information relates is deceased and the protection of his privacy is paramount.

Although not specifically raised by the appellant, his representations suggest that he takes the position that one of the factors weighing in favour of disclosure applies to the information at issue. Specifically, he appears to suggest that the disclosure is desirable for the purpose of subjecting the activities of the OPP to public scrutiny (section 21(2)(a)).

The relevant sections that are listed in the *Act* provide, as follows:

> (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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

…

(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 for any personal referred to in the record.

I will review the application of both the listed and unlisted factors below.

Factors weighing in favour of disclosure

Section 21(2)(a): public scrutiny

Section 21(2)(a) sets out a factor favouring disclosure where it would be "desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny". In my view, the submissions of the appellant in relation to the "public interest override" in section 23 are also relevant to section 21(2)(a). He states:

> What is the ultimate public interest in the release of documents stemming from government action? Plainly and simply put, to ensure that the government acts responsibility in the manner it conducts business. If the government was a silent voice behind the resignation, that would be a matter of public interest.

The appellant further submits that given the nature and the circumstances of the OPP officer's resignation that gave rise to the Minutes of Settlement, Release and Resignation, there has been public speculation as to the appropriateness of the conduct of the OPP with respect to this matter.

The Ministry and the affected parties argue in their submissions on the application of section 23 that the public interest in relation to the disclosure of the record at issue has already been satisfied due to conclusion of a public inquiry into a matter tangentially related to the record. They further submit that the specific record at issue was not disclosed during that inquiry and therefore, that it should not be disclosed now.

In my view, the public scrutiny consideration relates directly to issues of public accountability with respect to the way in which government institutions conduct business. Disclosure of agreements that terminate an individual's employment with a government institution are, in some circumstances, able to shed some light on the institution's conduct with respect to the particular matter and also demonstrate whether the institution is following its obligation to ensure that tax dollars are being wisely spent [Orders MO-1184, MO-1332 and MO-1405]. In fact, for this reason many previous orders have found that the contents of agreements entered into between institutions and senior employees represent the sort of records for which a high degree of public

scrutiny is warranted, as identified in section 21(2)(a) of the *Act* [See for example Orders M-173, MO-1184, MO-1469].

The events that ultimately gave rise to this particular officer's resignation were highly controversial and publicized. In fact, government conduct into those events was so much a matter of public interest that a public inquiry was conducted. However, the mandate of that public inquiry did not specifically include an examination of the issues surrounding the resignation of the OPP officer to whom the record relates. Based on a transcript of the inquiry, the record was not disclosed in the inquiry because the Commissioner found that it was not relevant to the precise issue that he was mandated to inquire into.

I acknowledge that the OPP officer to whom the settlement agreement relates would not necessarily be characterized as a "senior employee". Despite this fact, I find that there exist extenuating circumstances which lead to this particular OPP officer's resignation, coupled with the fact that the Ministry should be accountable for any expenditure of public funds with respect to matters of this kind that generate such a significant degree of public interest. In my view the Minutes of Settlement, Release and Resignation contain the type of information that warrants a high degree of public scrutiny.

Therefore, in my view, disclosure of the Minutes of Settlement, Release, and Resignation is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny. Accordingly, I find that section 21(2)(a) is a relevant factor that carries significant weight in balancing the public's right to know against the officer's privacy rights.

Factors weighing against disclosure

Section 21(2)(e): Unfair harm

The Ministry submits that disclosure of the information at issue would result in subjecting the family of the individual to whom the information relates to unfair exposure of harm, as contemplated by the factor at section 21(2)(e). It submits:

> The officer has since passed away, but it is reasonable to expect that his family will be exposed to harm through the disclosure of the Minutes, which could be used, or even further disclosed, as the requester sees fit. In Order P-1167, the former Adjudicator found that subsection 21(2)(e) was relevant to prevent the disclosure of the settlement of a human rights complaint. The Ministry submits that this finding should be applied to the Minutes.

Neither the affected parties nor the appellant make any submissions regarding the application of the factor at section 21(2)(e).

I find that I have not been provided with sufficient evidence to demonstrate that the disclosure of the Minutes of Settlement, Release and Resignation would result in the officer's family being unfairly exposed to harm as contemplated by the factor at section 21(2)(e). The Ministry's representations are general in nature and do not provide explanation or examples of how this

harm could reasonably be expected to result from the disclosure of the information. Although the Ministry refers to Order P-1167 in which section 21(2)(e) was found to be a relevant consideration in part because disclosure of the information would perpetuate publicity attendant on the matter, in that case there were also concerns that disclosure would jeopardize the settlement agreement. Such concerns are not present in the current appeal.

Additionally, had the affected parties considered themselves at risk of being exposed unfairly to harm, in my view, they would provided representations on this factor. I note, however, that although they provided representations on other factors listed at section 21(2), they chose not to address the factor at section 21(2)(e). As a result, I find that this section is not a relevant factor in this appeal.

Section 21(2)(f): highly sensitive

The Ministry submits that the information at issue, including the Minutes of Settlement, is highly sensitive because it contains personal information about a former OPP officer who is now deceased. It submits:

> In Order MO-1617, it was found that subsection 21(2)(f) was relevant to a record that would disclose the details of an out of court settlement. The Ministry submits that the finding in this Order should be applied to bar the disclosure of the minutes.

The affected parties submit:

> The Minutes contain personal information and private details about the named individual's former employment, in particular, to the conclusion of the named individual's employment. Therefore, the information contained in the minutes is, prima facie, highly sensitive information. The affected parties do not want any such intrusion into the named individual's personal life and, therefore, object to the release of the record.

Prior orders have established that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518]. It is not sufficient that release might cause some level of embarrassment to those affected [Order P-1117].

I agree that given the circumstances surrounding the resignation of the former OPP officer and the fact that he is deceased might cause the affected parties to oppose the release of the record. I also accept that disclosure of the information, despite the existence of a confidentiality clause which indicates that this information should be kept in confidence, would lead the affected parties to believe that disclosure would amount to an intrusion of the former OPP officer's personal life. However, having reviewed and considered the specific information contained in the Minutes of Settlement, Release and Resignation, I am not satisfied that it would be reasonable to expect that, disclosure of the information that appears in the record would cause *significant* personal distress to the affected parties. The information is a standard settlement

agreement, albeit personalized to the OPP's unique circumstances, but it does not reveal any background or reasons as to why the specific terms and conditions of the settlement were reached.

Accordingly, I conclude that the factor at section 21(2)(f) is not relevant in the circumstances of this appeal.

Section 21(2)(h): Supplied in confidence

The Ministry submits that the Minutes contain a confidentiality clause that exempts them from disclosure. It submits:

> Both the Ministry and the former OPP officer entered into the Minutes with the expectation that the Minutes would always remain private and confidential. The confidentiality clause protects the privacy of the former OPP officer and his family, and the Ministry submits it should be respected, particularly as once the Minutes are disclosed, they may be used for any purpose.

The affected parties submit:

> One of the fundamental terms of the Minutes was a guarantee of confidentiality. The Minutes, which were agreed to and signed by both parties, featured a clear and comprehensive confidentiality clause. So important was confidentiality to the agreement that, without such an assurance, the named individual may not have participated in the settlement.
>
> The affected parties submit that the named individual's express desire for confidentiality, and the contractual assurances he was given, should be respected. There are untold uses to which this confidential information might be put. To ignore the confidential nature of the agreement would be to unjustly invade the named individual's personal privacy.

The appellant takes the position that it is standard practice for the government to include confidentiality agreements in their legal agreements and that therefore, this factor should not be attributed much weight.

Having reviewed the record, I find that the information in the Minutes of Settlement, Release and Resignation was negotiated and not "supplied" to the Ministry by another party to the agreement as required by section 21(2)(h) [Order M-173]. This provision, is therefore, not relevant in the circumstances.

However, despite the fact that section 21(2)(h) does not apply to the facts, I am satisfied that based on the confidentiality clause in the agreement it would not be unreasonable for the former OPP officer to have an expectation that the terms of the agreement would not be released to the public. This expectation is a relevant, though unlisted, factor which weighs in favour of privacy protection [Order M-173 and M-278].

Unlisted factor: the OPP officer is deceased

The Ministry submits that the fact that the OPP officer is now unable to make his views known, with respect to the access request, or to defend his interest, should be a factor that weighs against the disclosure of the record at issue.

The affected parties make similar submissions requesting that the OPP officer's privacy interests not be considered diminished given that he is deceased:

> Where personal information in a record relates to a deceased person, considerations of privacy are typically diminished. The relevant factor used to determine the extent to which a privacy right will be diminished is the length of time that the affected individual has been deceased.
>
> In Order PO-1936, [former] Assistant Commissioner Mitchinson concluded that the privacy right of the individual in question should only be "moderately reduced" since the individual had been deceased for just two years. In the present case, the named individual has been dead for only […] months. Consequently, he is entitled to a robust respect for his privacy, only marginally less than if her were alive.

Section 2(2) of the *Act* makes it clear that information about an individual remains his or her personal information until thirty years after death, signaling a strong intention to protect the privacy rights of deceased persons. For individuals who have been deceased for less than thirty years, previous orders have considered whether the fact that an individual is deceased might operate as an unlisted factor under section 21(2) requiring consideration in the determination of whether disclosure of the information would result in an unjustified invasion of privacy.

In Order PO-1936, the individual had been deceased for only two years and the Assistant Commissioner followed the reasoning applied by Senior Adjudicator David Goodis in Order PO-1736 where he addressed the "diminished privacy interest after death" factor with respect to individuals who were dead for a relatively short period of time and found that their privacy interests were only moderately reduced. This finding is in contrast with findings made in Orders PO-1717 and PO-1923 that the privacy interests of individuals who had been deceased for more than 20 years were significantly decreased.

In circumstances of the current appeal, the death of the OPP officer to whom the information relates is very recent. In fact, his death occurred after the request for the information at issue in this appeal was submitted to the Ministry. Taking that fact into account, as well as all other relevant circumstances of this appeal, I have not considered the privacy interests of the OPP officer to have been diminished in any way but rather have treated them in the same way in which I would have treated them were he still alive. I have, however, taken into account the fact that he is unable to put forward his own interests and positions with respect to the disclosure of the Minutes of Settlement, Release and Resignation. In addition, I have also considered that his interests were put forward by the affected parties, to the best of their ability.

Although I have not considered the OPP officers privacy interests to have been diminished after death and have treated this appeal as I would have, had he still been alive, and as the affected parties have, to the best of their ability, represented the OPP officer's privacy interests by submitting representations, I find the fact that the OPP officer is deceased to be a relevant factor in the balancing of the privacy interests of this appeal but that it doesn't carry significant weight.

Unlisted factor: Privacy is paramount

The Ministry submits that one of the two primary purposes of the *Act*, as set out in section 1(b), is to protect the privacy of individuals. It submits that disclosing the Minutes would be contrary to this purpose.

I find this submission of the Ministry to be misleading. Section 1, in its entirety, reads:

> The purposes of this *Act* are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In its submissions, the Ministry neglects to mention that the other one of the two primary purposes of the *Act* as set out in section 1 is to provide the public with a right of access to information under the control of institutions. If one were to accept that disclosure of the record at issue would be contrary to the privacy interests referenced in section 1(b), it would be equally tenable to argue that to withhold it would be contrary to the access interests referenced in section 1(a). The legislative scheme outlined by the *Act* is designed to balance the competing interests of these two purposes, both of which are of equal importance and value.

Accordingly, not only do I find that the Ministry's statement that privacy is paramount is patently wrong, I find that it is not a relevant factor to consider in the determination of whether disclosure of the Minutes of Settlement, Release and Resignation would give rise to an unjustified invasion of personal privacy.

Balancing the factors

I have found that the factor at section 21(2)(a), which weighs in favour of disclosure, and the unlisted factors of the presence of a confidentiality clause and the fact that the OPP officer is deceased, which weigh against disclosure, are relevant considerations which must be balanced against one another in order to determine whether disclosure of the Minutes of Settlement, Release and Resignation would amount to an unjustified invasion of personal privacy of the OPP officer. I have found that the factors against disclosure at sections 21(2)(e), (f) and (h) as well as the unlisted factors submitted by the Ministry that the individual to whom the information relates is deceased and that privacy is paramount are not relevant in the circumstances of this appeal.

After balancing the competing interests of public scrutiny in section 21(2)(a) and the OPP officer's expectation of confidentiality based on the unlisted factor that the record contained a confidentiality clause, I find that the consideration favouring disclosure outweighs that which would protect the privacy interests of the OPP officer. On this basis, I find that disclosure of the personal information contained in the record would not constitute an unjustified invasion of the personal privacy of the OPP officer within the meaning of the exception in section 21(1)(f).

CONCLUSION

In conclusion, as I have found that none of the exemptions at sections 18(1)(c), (d), (e), 19 or 21(1) apply to the Settlement Agreement, Resignation and Release. I will order it be disclosed to the appellant.

As I have found that none of the exemptions apply, it is not necessary for me to address section 23, the public interest override provision.

ORDER:

1. I order the Ministry to disclose the Minutes of Settlement, Release and Resignation to the appellant by **September 5, 2007,** but not earlier than **August 31, 2007**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: July 30, 2007
Catherine Corban
Adjudicator