COURT FILE NO.: 458/98
DATE: 20060718

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CARNWATH, EPSTEIN AND SWINTON JJ.

B E T W E E N:	)	
	)	
JOHN DOE	)	
	)	Howard J. Wolch, for the Applicant
Applicant	)	
- and -	)	
	)	
	)	
DONALD HALE, ADJUDICATOR (FORMERLY INQUIRY OFFICER), LAUREL CROPLEY, ADJUDICATOR (FORMERLY INQUIRY OFFICER), THE SUDBURY REGIONAL POLICE SERVICES BOARD, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF THE SOLICITOR GENERAL AND CORRECTIONAL SERVICES AND THE ATTORNEY GENERAL OF ONTARIO	)	William S. Challis, for the Respondent Information and Privacy Commissioner
	)	Robert Ratcliffe, for the Respondent Attorney General of Ontario
	)	
Respondents	)	
	)	**HEARD at Toronto:** April 26, 2006

Epstein J.:

[1] John Doe asked three government agencies for documentation relating to his prosecution for fraud in 1982. He received some of the requested documents and was denied access to others. Mr. Doe appealed the denied portions of his requests to the Information and Privacy Commissioner ("IPC"). The Assistant Commissioners who heard the appeals upheld the government institutions' denial of access to certain documents. Mr. Doe applies for judicial review quashing all three of the Assistant Commissioners' Orders. At issue is the applicability of the statutory exemptions relied upon by the Assistant Commissioners in denying Mr. Doe access to the requested documents.

[2] The three Orders originally in question are as follows:

(a) Order P-1582 made by Assistant Commissioner Cropley, dated June 11, 1998, denying access to copies of documents in the possession of the Attorney General of Ontario (the "Attorney General").

(b) Order P-1579 made by Assistant Commissioner Hale, dated June 9, 1998, denying access to documents in the possession of the Solicitor General and Correctional Services (the "Solicitor General").

(c) Order M-1124 made by Assistant Commissioner Hale, dated June 17, 1998, denying access to documents in the possession of the Sudbury Regional Police Services Board (the "Sudbury Police").

[3] Counsel for Mr. Doe withdrew the application with respect to Order P-1579.

The Background

[4] In 1982, Mr. Doe, a lawyer then practising in Sudbury, was charged with fraud. The charges were subsequently dismissed. Mr. Doe maintains that his career was ruined by the charges. He sued for damages for malicious prosecution against the RCMP officer who was primarily involved in the investigation and laying of the fraud charges.

[5] In the malicious prosecution action, the Ontario Court of Appeal ordered the RCMP to produce all documents in its possession relating to the criminal charges. The RCMP has failed to comply with this order. As a result, Mr. Doe sought to obtain documents relating to the criminal prosecution from other government agencies. It is these efforts that engaged the provisions of two legislative schemes relating to access to information, namely, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (FIPPA) and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (MFIPPA).

The Statutory Framework

[6] The purpose of both the MFIPPA and the FIPPA is to provide a statutory right to access to information under the control of institutions where no such general right existed previously - subject to specific exemptions - and to protect personal privacy. "Institution" is broadly defined in each statute to include a police services board in the MFIPPA and a ministry of the government in the FIPPA.

[7] Section 4 in the MFIPPA and s. 10 in the FIPPA provide a general right of access to a government record unless the record falls within one of the exemptions set out in the relevant legislation or unless the head of the institution believes that the request for access is frivolous or vexatious.

[8] The following excerpts from sections in the FIPPA and the MFIPPA are relevant to this judicial review:

The FIPPA

Advice to government

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Solicitor-client privilege

19. 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.

Personal privacy

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

...

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure...

Criteria re invasion of privacy

(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,

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request ...

Presumed invasion of privacy

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

...

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation ...

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution; or

(c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario.

Exemptions not to apply

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

Notice to affected person

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

Exemptions

49. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy ...

The MFIPPA

Law enforcement

8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;
...

Idem
(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
...

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or ...

Personal privacy

14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
...

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure...

Criteria re invasion of privacy
(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,

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request ...

Presumed invasion of privacy
(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

...

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation ...

Limitation
(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution; or

(b) discloses financial or other details of a contract for personal services between an individual and an institution.

Exemptions not to apply

16. An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Exemptions

38. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;

(b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy ...

The Assistant Commissioners' Decisions

Order P-1582 - three letters and four witness statements in the possession of the Attorney General

[9] In 1996, in Order P-1342, the IPC had ordered the Attorney General to disclose to Mr. Doe, copies of records it had sent to the Law Society of Upper Canada ("LSUC") relating to the fraud prosecution. The Divisional Court, in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495, upheld that decision, holding that the solicitor-client privilege exemption in s. 19 of the FIPPA did not apply because the Ministry had waived its privilege by sharing the records with the LSUC.

[10] Mr. Doe then sought access to additional documents in the possession of the Attorney General, pursuant to the provisions of the FIPPA. Partial access was granted. However, the Attorney General refused to disclose three letters between a District Crown Attorney and the Director of Crown Attorneys, and four witness statements.

[11] Mr. Doe appealed to the IPC. He argued that the records responsive to this second request were ordered disclosed as a result of Order P-1342. However, the Assistant Commissioner found that these records had not been disposed of in the earlier decision as the letter had not been sent to the LSUC and the witness statements had not been located at the time of the inquiry.

[12] The Assistant Commissioner went on to determine that none of the three letters were protected by the s. 19 solicitor-client privilege exemption under the FIPPA, as they did not relate to the preparing, giving or seeking legal advice. This aspect of the decision is not in issue in this application.

[13] The Assistant Commissioner concluded that one of the letters Mr. Doe requested was exempt from disclosure because it qualified as advice or recommendations within the meaning of s. 13(1) and was therefore exempt under s. 49(a). This conclusion was based on the Assistant Commissioner's assessment that the letter concerned a request by the Crown Attorney for authorization to proceed with a certain activity and therefore related to a suggested course of action that would ultimately be accepted or rejected.

[14] With respect to the four witness statements, the Assistant Commissioner found that the requested disclosure was presumed to constitute an unjustified invasion of privacy pursuant to s. 21(3). Citing the decision in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.), he observed that the factors Mr. Doe raised under s. 21(2) cannot rebut the presumption; the only way the presumption can be rebutted is if the information is one of the types described in s. 21(4) or if the public interest override in s. 23 applies. The Assistant Commissioner found that because neither s. 21(4) nor s. 23 applied in the circumstances, the witness statements were exempt under s. 49(b) as an unjustified invasion of another individual's personal privacy.

[15] The Assistant Commissioner therefore ordered the Attorney General to disclose two of the three letters and upheld the Attorney General's decision to withhold the third letter and the four witness statements.

Order M-1124 - occurrence reports and witness statements in the possession of the Sudbury Police

[16] Under the MFIPPA, Mr. Doe sought access to records and documents in the possession of the Sudbury Police, who had undertaken a police investigation into his conduct in 1981. The Sudbury Police confirmed the existence of 18 pages of occurrence reports, supplementary reports and witness statements. Six of the pages contain personal information about Mr. Doe and others. The remaining pages contain only the personal information of others.

[17] The Sudbury Police refused to permit access to the documents pursuant to the law enforcement exemptions in ss. 8(2)(a) and (c), and the general exemptions in ss. 38(a) and (b) of the MFIPPA. The Sudbury Police also maintained that all of the information in the records was compiled as part of an investigation into a possible violation of law and thus claimed the presumption of an unjustified invasion of personal privacy found in s. 14(3)(b) of the MFIPPA.

[18] Assistant Commissioner Hale agreed. In his decision he determined that all of the records and documents in the possession of the Sudbury Police were part of a law enforcement investigation and that disclosure of information contained in those records would constitute a presumed unjustified invasion of privacy under s. 14(3)(b). Citing the reasoning in John Doe, supra, he observed that the factors in s. 14(2) cannot rebut this presumption and went on to find that neither s. 14(4) nor the public interest override in s. 16 applied. The Assistant Commissioner concluded that all of the information was exempt under the personal privacy exemptions in either s. 14(1) or s. 38(b) and upheld the decision of the Sudbury Police to deny access.

[19] Mr. Doe's request for reconsideration of this order was denied on the basis that the request did not fit within the grounds for reconsideration as set out in policy statements developed by the IPC. Assistant Commissioner Hale also concluded that the decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 did not apply to an inquiry reviewing an institution's refusal to disclose under the MFIPPA.

[20] Mr. Doe seeks to set aside these decisions.

The Standard of Review

[21] Counsel agree that determinations of the Assistant Commissioners regarding the interpretation and application of the provisions of either the MFIPPA or the FIPPA, falling within their area of expertise, are reviewed on a standard of reasonableness. Applying the pragmatic and functional analysis, the Court of Appeal has applied this standard to decisions involving various exemptions under these Acts including those relating to exemptions for the advice of a public servant, law enforcement, personal information and privacy, and the public interest override. See: *Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 134; *Ontario (Ministry of Labour) v. Ontario*

(Information and Privacy Commissioner) (1999), 46 O.R. (3d) 395 (C.A.); *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.); *Ontario (Minister of Health and Long Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 95.

[22] Where the standard of review is reasonableness, the reviewing court may not substitute its view of the interpretation and application of the statute for the tribunal's reasonably held view. It must give considerable weight to views expressed by a tribunal that fall within its expertise. The decision of the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan* (2003), 223 D.L.R. (4th) 577 makes it clear: a decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

Analysis

(i) Order P-1582 - Was the Assistant Commissioner's decision to exempt the letter and the witness statements reasonable?

[23] With respect to the letter, counsel for Mr. Doe submits that the Assistant Commissioner misinterpreted the words "advice" and "recommendations" in s. 13(1) of the FIPPA because the letter does not tell someone what to do.

[24] In *Ontario Ministry of Transportation v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), the Court of Appeal upheld as reasonable the same interpretations of the words "advice" and "recommendations" as those employed by Assistant Commissioner Cropley in this case. To qualify as advice or recommendation, the information must relate to a suggested course of action that will be accepted or rejected after deliberation.

[25] In the letter in issue, Crown Counsel provided information supporting his request for authorization from the Director of Crown Operations to proceed with certain activity. The Assistant Commissioner found that this record related to a suggested course of action that would ultimately be accepted or rejected. It thus qualified for exemption under ss. 13(1) and 49(a). This finding is reasonable.

[26] With respect to the witness statements, Mr. Doe does not dispute that they qualify under the s. 21(3)(b) presumption of an invasion of privacy, since the statements were compiled and are identifiable as part of an investigation into a possible violation of law. He argues that this presumption is rebutted by ss. 21(1)(d) and 21(2)(d).

[27] In *John Doe, supra*, this Court held that a presumption in s. 21(3) may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. This principle has been consistently followed in other decisions of this Court.

[28] Counsel for Mr. Doe argues that we should not follow the majority decision in John Doe on the basis that requiring rebuttal of the presumption by way of either s. 21(4) or s. 23 is not in keeping

with the purpose of the FIPPA as stated in s. 1(a)(ii), which provides that access should be granted in accordance with the principle that "necessary exemptions from the right of access should be limited and specific". This principle, however, must be balanced against the purpose of protecting the personal privacy of individuals. Furthermore, the general rule is that a decision of a court of co-ordinate jurisdiction ought to be followed in the absence of a strong reason to the contrary. A strong reason requires more than mere disagreement. It requires a fundamental error such as the court failing to consider a governing statute or authority. See: Re Ward (1975), 9 O.R. (2d) 35 (Ont. Div. Ct.).

[29] We see no reason not to follow this Court's decision in John Doe.

[30] Mr. Doe further relies on the Crown's disclosure obligations under the *Charter of Rights and Freedoms* as set out in *Stinchcombe, supra*. He argues that these obligations inform those set out in s. 21(1)(d) of the FIPPA, which allows for disclosure where an Act of Canada or Ontario offers express authorization.

[31] I agree with the respondents' submissions that the Crown's Stinchcombe obligations arise only in the context of a criminal prosecution to permit an accused to make full answer and defence. In fact, in *Blank v. Canada (Minister of Environment)*, [2001] F.C.J. No. 1844 (F.C.A.), the Federal Court of Appeal specifically rejected the application of *Stinchcombe* obligations in the access to information context. The MFIPPA and the FIPPA each provide a complete code for access to information held by government agencies.

[32] Mr. Doe also further argues that s. 23 should apply as there is a compelling public interest in assisting him with his civil action.

[33] The Commissioner has consistently held that an individual's interest in gaining access to information for use in prosecuting a civil action or defending against criminal charges constitutes a private interest, not a public interest within the meaning of access to information legislative schemes.

[34] This Court and the Ontario Court of Appeal have upheld the Commissioner's interpretation of the words "compelling public interest" as meaning "strong interest or attention by the public". See: *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner), supra*, and *Duncanson v. Ontario (Information and Privacy Commissioner)* (1999), 175 D.L.R. (4th) 340 (Ont. Div. Ct.).

[35] Mr. Doe's sole interest in the documents is to advance his civil action. This action is unquestionably important to Mr. Doe. However, he has failed to demonstrate that disclosure of the documents would result in the public being better informed about the actions of the police. Moreover, he has failed to establish that any such interest would outweigh the purpose of the exemption.

[36] In light of the interpretation that has been given to "compelling public interest", and Mr. Doe's failure to indicate how the public interest in disclosure outweighs the need to protect others

from the possible consequences to them of disclosure of their personal information, the Assistant Commissioner's decision in this respect is reasonable.

[37] Finally, with respect to these documents, Mr. Doe asserts that the Ministry waived any expectation of privacy in the witness statements by voluntarily disclosing them to the LSUC. He further submits that the earlier decision concerning waiver applies equally to witness statements the Ministry located after the decision was issued.

[38] First, since the witness statements were not discovered until after the earlier inquiry into Mr. Doe's entitlement to access the LSUC documents, the Assistant Commissioner was correct in concluding that issues pertaining to Mr. Doe's access to the witness statements were not covered by Order P-1342.

[39] The protection afforded to personal information exists for the benefit of the individual to whom it relates. This is not something that an institution can unilaterally waive on the individual's behalf, outside of the processes set out in the statute. Furthermore, waiver would remove the institution's discretion by requiring disclosure in every case where a prior disclosure under s. 42 has occurred. This would defeat the purpose of the requirement that notice be provided to an affected third party under s. 28(1)(b) and effectively nullify the third party's privacy rights. This could not have been the Legislature's intention.

[40] The common law doctrine of waiver does not apply to any of the statutory exemptions other than that contained in s. 19, the section relating to solicitor-client privilege. If any other exemption applies, it makes no difference that the government has previously disclosed the same information to another party in another context. For example, s. 22(a) is a discretionary exemption that permits an institution to refuse to disclose a record "where the record or the information contained in the record has been published or is currently available to the public."

[41] Here, the Ministry did not claim solicitor-client privilege in denying access to the witness statements. It claimed only the exemption for an unjustified invasion of another individual's privacy in s. 49(b).

[42] Accordingly, the concept of waiver has no application.

[43] The Assistant Commissioner's decision to uphold the Ministry's decision to deny access to the records in issue in this application was reasonable.

(ii) Order M-1124 - Was the Assistant Commissioner's decision to exempt the records of the Sudbury Police reasonable?

[44] Mr. Doe submits that since s. 14(3)(b) of the MFIPPA is identical to s. 21(3)(b) of FIPPA, these documents ought to be made available to him for the same reasons as he argued in respect of the witness statements held by the Attorney General, namely, that we ought not follow the previous decision of this Court in *John Doe*, that the principles in *Stinchcombe* apply and that there is a

compelling public interest in the disclosure of the documents that outweighs the purpose of the exemption.

[45] Once again, Mr. Doe does not appear to take issue with the fact that the documents in issue would constitute a presumed unjustified invasion of privacy under s. 14(3)(b) of the Act. A presumed unjustified invasion of privacy can only be overcome if s. 14(4) or the "public interest override" in s. 16 applies.

[46] Based on the reasoning in the previous section of this decision dealing with the documents in the possession of the Attorney General, the Assistant Commissioner's decision not to order disclosure of the Sudbury Police records was reasonable.

Conclusion

[47] The Assistant Commissioners' decisions are reasonable and stand up to a probing examination. The application for judicial review is dismissed. If the parties cannot agree on costs, they may make brief written submissions within 30 days of the release of this decision.

EPSTEIN J.
CARNWATH J.
SWINTON J.

Released: July 18, 2006