Court File No. 525/91

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

SOUTHEY, CAMPBELL and DUNNETT JJ.

IN THE MATTER OF the Order P-237 of the Information and Privacy Commissioner, dated August 6, 1991
AND IN THE MATTER OF Freedom of Information and Protection Act, 1987, as amended
AND IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1980, c. 224, as amended

B E T W E E N:	
JOHN DOE, JAMES DOE, JACK DOE AND GEORGE DOE	Ian Roland, for the applicants
Applicants	
- and -	
INFORMATION AND PRIVACY COMMISSIONER, SOLICITOR GENERAL OF ONTARIO, and THEODORE MATLOW	Donald J.M. Brown, Q.C. and S.N. Manji, for the respondent the Information and Privacy Commissioner
Respondents	Leah Price for the Attorney General of Ontario
	HEARD: March 17, 18, 1993

CAMPBELL and DUNNET JJ.:

[1] This is an application for judicial review of an order of the Information and Privacy Commissioner (the "Commissioner"), dated August 6, 1991, directing disclosure by the Solicitor General of Ontario of a report of the Ontario Provincial Police (the "O.P.P.") concerning an investigation that found no evidence of fabrication of evidence or perjury in a trial before Judge P.T. Matlow in April 1989. The commissioner excepted from disclosure a small portion thereof relating to the privacy interests of an independent witness. The applicants seek to quash his order and to prohibit the respondent Solicitor General from releasing any part of the O.P.P. report.

NARRATIVE HISTORY

[2] On April 24, 1989, Judge Matlow, in the course of oral reasons dismissing criminal charges of assaulting police, escaping custody and dangerous driving, rejected evidence given by four Metropolitan Toronto police officers and urged that the case be further investigated with a view to considering the commencement of criminal charges against the officers for fabricating evidence and committing perjury.

[3] On April 27, 1989, the Chief of the Metropolitan Toronto Police Force asked the O.P.P. to investigate the matter. On May 1, 1989, the accused, who had been acquitted by the judge, lodged a complaint with the Police Complaints Commissioner, alleging that officers of the Metropolitan Toronto Police Force harassed him by laying criminal charges against him over a number of years. He also alleged that certain of those officers had fabricated evidence against him in the matter complained of by the judge.

[4] On September 13, 1989, the O.P.P. announced that it had concluded its investigation and found no grounds for charges against the officers. The O.P.P. news release reads in part:

> A three month Ontario Provincial Police investigation has found no evidence that four Metropolitan Toronto Police officers fabricated evidence or committed perjury during the April 1989 trial of . . . . .

[5] The news release stated that the Crown Attorney in Newmarket had been consulted and concurred with the investigation findings.

[6] On November 14, 1989, the judge asked the O.P.P. for a copy of the investigation report. On December 22, 1989, the Ministry of the Solicitor General informed the judge that his request might affect the interests of third parties and they were being given an opportunity to make representations concerning disclosure of the report, in accordance with s. 28 of the Freedom of Information and Protection of Privacy Act, 1987, S.O. 1987, c. 25 (now Freedom of Information and Protection of

Privacy Act, R.S.O. 1990, c. F.31). After hearing from the affected parties the Ministry decided to grant partial access to the report and so informed the judge on January 16, 1990.

[7] On February 1, 1990, The Toronto Star newspaper, in an article under the headline, "Judge Protests as O.P.P. Hide Report Clearing Police", reported that the judge was protesting against the decision to withhold part of the report. The article, which reviewed the background of the case and quoted the judge's allegations, read in part:

> "There's no reason why they shouldn't give me this," Matlow said. "It's very awkward, very unusual for a judge to take such an active role. But I decided that if no one else was prepared to do it, then I would."

[8] On February 19, 1990, the judge asked the ministry when it would grant partial access. On the same day, he gave notice that he wished to appeal the ministry's decision to disclose only part of the report.

[9] On February 22, 1990, The Star, in an article under the headline, " `Crazy' Stonewalling Angers Judge", reported allegations by the judge that the O.P.P. and other agencies were stonewalling him. The article read in part:

> District Court Judge Ted Matlow has hit a new barrier in his fight to see an OPP report clearing four Metro police officers of misconduct.
>
> Matlow has accused the Ontario Provincial Police and the Freedom of Information office in the Solicitor-General's Ministry of stonewalling him. And he says the Privacy Commissioner's office has now joined in.
>
> "There's some kind of intentional screw-around going on," the judge said yesterday. "But I'm not going to let this thing drop."
>
> The controversy began last April when Matlow acquitted. . . of seven charges, including assaulting police, and said the four Metro officers in the case should be charged with fabricating evidence.
>
> His tirade against them led Metro Deputy Chief Peter Scott to ask for an independent inquiry headed by the OPP into the officers' conduct. In September, the OPP reported there were no grounds for charges against the four.

[10] On March 8, 1990, the ministry informed the judge that it had reconsidered its position and decided to deny access to the report in its entirety pursuant to ss. 13(1), 14(2)(a), 19, 21(1)(f), (3)(b) and (d) of the Act. The same day, the judge appealed the ministry's decision to deny access to the entire record.

[11] On June 20, 1990, The Star reported that the judge had "lashed out" at the O.P.P. The article under the headline, "Denied Report, Judge Calls OPP `Repressive' ", read in part:

> District Court Judge Ted Matlow has lashed out at Solicitor-General Steven Offer and Ontario Provincial Police for blocking his efforts to see a report clearing four Metro police officers of misconduct.
>
> Their attitude "is more typical of authoritarian and repressive regimes than it is of those who govern in free and democratic societies," Matlow said in a written submission to the information and privacy commissioner's office.
>
> He told the Star yesterday: "The amazing thing is that police investigating police is such a topical issue right now, particularly in how it applies to the black community."
>
> "This case involves a black defendant but no one seems to have an interest in it. Strangely, they don't seem to think it's terribly important."

[12] On June 25, 1990, the ministry stated as its reason for denying access that it had learned, since its original decision to release part of the report, that the Police Complaints Commissioner was investigating the accused's complaint and the ministry was concerned that release of the report might compromise that investigation.

[13] On January 9, 1991, the ministry told the commissioner that the Public Complaints Commissioner had made a decision to take no action against the officers and that the complainant, the acquitted accused, had not appealed from that decision. As a consequence, the ministry said it would revisit the decision to withhold the entire report.

[14] On March 11, 1991, the ministry said that it had concluded there was no longer any "law enforcement" concern about the release of most of the report. It denied access to a small part of the

report to protect the interests of an independent witness, relying on s. 21(3)(b) of the Act. The ministry was prepared to release the balance of the report, subject to the protection of the privacy interests of the Metro Toronto Police officers and the accused.

[15] On August 6, 1991, after receiving submissions from the judge, the affected persons and from the ministry, the commissioner ordered the report to be disclosed except for that part identifying the name of the independent witness.

[16] On September 18, 1991, this application for judicial review was launched by the four affected persons referred to in the order who did not consent to the release of the report.

[17] On December 2, 1991, the Police Complaints Commissioner released his decision that no further action was warranted concerning the complaint by the acquitted accused against the officers. In reviewing the results of his investigation, he concluded that although the judge found there was no disturbance at the hospital as alleged by the police, another judge had convicted the complainant of causing a disturbance in relation to the same incident. Furthermore, witnesses who were not called before the judge, including nurses and a security guard, would testify that there was in fact a disturbance. The Police Complaints Commissioner stated that, on the basis of evidence not led before the judge, it could not be proven on clear and convincing evidence that the police officers involved in the police chase had lied, as found by the judge. In so far as harassment was concerned, he found that the recent conviction of the complainant for drug trafficking and his seven-year sentence placed the attention given to him by the officers in a more understandable light than may have appeared to the judge. On the basis of his investigation, the Police Complaints Commissioner said he was unable to conclude it could be proven, on clear and convincing evidence, that one or more officers were guilty of misconduct in the laying of charges against the complainant. He found it would not be in the public interest to order a hearing before a board of inquiry.

THE RECORD

[18] The record of the commissioner was filed in two volumes. One volume marked "Confidential" was sealed pursuant to the order of Anderson J. on April 13, 1992. It contains the

O.P.P. report, internal memoranda in the commissioner's office and correspondence between the commissioner, the judge, the ministry and the affected persons. The other volume marked "Public" contains formal documents, including notices of appeal to the commissioner, correspondence between the commissioner and others and the order of the commissioner.

[19] The record filed by the applicants contains the notice of application for judicial review and the affidavit of a lawyer exhibiting the judge's reasons for acquitting the accused, the three Toronto Star newspaper articles referred to above, and the reasons for decision of the Police Complaints Commissioner. Counsel for the commissioner did not accept that the exhibits were properly admissible pursuant to Keeprite Workers' Independent Union v. Keeprite Products Ltd. (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (C.A.), which stands for the proposition that new evidence can only be adduced on judicial review to demonstrate an absence of evidence on a particular point or a denial of natural justice.

[20] The newspaper articles are admissible under the Keeprite principle as the foundation for the applicants' argument that there is no evidence of public concern. They are admissible to show that the public record, as opposed to the judge's personal accusation, shows no evidence of perjury or fabrication by the police officers. The reasons of the Police Complaints Commissioner are admissible as the foundation for the applicants' argument that the Information and Privacy Commissioner declined jurisdiction by refusing to consider the important fact that the officers had been exonerated, such information having apparently been disclosed privately to the commissioner on January 9, 1991, although not released by the Police Complaints Commissioner until December 2, 1991. There was no suggestion by counsel that any confidentiality attached to the reasons of the Police Complaints Commissioner.

THE HEARING OF THE APPLICATION

[21] At the opening of argument, counsel for the applicants asked the court to consider hearing the application in camera and counsel for the commissioner did not object. The court ruled that nothing in this case displaced the general presumption that judicial proceedings should be open to

the public. The application continued to open court. Wherever possible, reference to the sealed portion of the record has been avoided both in argument and in these reasons for judgment.

THE COMMISSIONER'S ORDER

[22] The commissioner, in his reasons, set out the background facts and noted that extensive mediation and negotiation throughout the course of the appeal had narrowed the issues to the following:

(1) Whether the head's powers under the Act were properly delegated to the identified decision-makers.

(2) Whether the record contains any information that qualifies as "personal information", as defined in s. 2(1) of the Act.

(3) Whether disclosure of the "personal information" would constitute an unjustified invasion of the personal privacy of the persons to whom the personal information relates.

(4) Whether there is, under s. 23 of the Act, a compelling public interest in the disclosure of the record or part of the record that clearly outweighs the purpose of the exemption provided by s. 21 of the Act.

The commissioner found:

(1) that the delegation was proper;

(2) that the record contained "personal information" within the meaning of s. 2(1) about four affected persons who had not given their consent to such disclosure;

(3) that the statute gave the commissioner jurisdiction to engage in a balancing exercise to determine whether the criteria in s. 21(2), including the unenumerated criteria, outweighed the presumption in s. 21(3)(b) that the

disclosure of the personal information constituted an unjustified invasion of personal privacy.

(4) that the exercise of his statutory discretion led him to the conclusion that disclosure was not an unjustified invasion of personal privacy.

(5) that it was therefore unnecessary to consider the "compelling public interest" override under s. 23.

[23] No challenge is made to the commissioner's disposition of the first two issues. The commissioner's reasoning on the third issue, particularly the view that the statute gave him a discretion not governed by the provisions of s. 23, and his approach to the statutory machinery, is central to this application. It is set out fully in Appendix "A" attached to these reasons [see p. 785 et seq., post].

[24] To summarize, the commissioner concluded that the O.P.P. report contained personal information about the four affected parties who did not consent to its disclosure, that the information therein fell within s. 21(3)(b) and it was therefore presumed to constitute an unjustified invasion of personal privacy. Section 21(4) did not affect the report and the presumption remained. He then concluded that his next task was to look at the criteria in s. 21(2) and other unenumerated criteria and to engage in a balancing exercise to determine whether the presumption in s. 21(3) could be rebutted. He found that under s. 21(2)(a) and an unenumerated circumstance, the presumption contained in s. 21(3) was rebutted and it was, therefore, unnecessary to apply the stricter test for disclosure in s. 23.

POSITION OF THE PARTIES

[25] The applicants rely on the absence of a privative clause. They take the position that the standard of review is correctness and the order is not entitled to judicial deference. They submit that the commissioner erred in law in finding that the statutory presumption under s. 21(3)(b) of an unjustified invasion of personal privacy was subject to rebuttal by the application of a discretionary balancing process under s. 21. They further submit that the commissioner erred by failing to consider

the dismissal without an appeal of the complaint by the accused to the Public Complaints Commissioner, and by considering the profession of the applicants, the degree of media attention, and the fact that the allegations concerned the professional lives rather than the private lives of the applicants.

[26] The applicants further argue that there was no evidence to support the grounds on which disclosure was ordered. Alternatively they say that the commissioner's interpretation was patently unreasonable.

[27] The Attorney General also took the position that the standard of review is correctness. She submits that the commissioner's decision should be set aside because he failed to consider the factors that would militate against disclosure, including those enumerated in cls. (e), (f), (g) and (i) of s. 21(2) of the Act.

[28] Counsel for the commissioner took the position that the standard of review is "patent unreasonability", that the commissioner did not interpret the act in a patently unreasonable manner and did not err by failing to consider the proceeding before the Police Complaints Commissioner or by taking into account the matters of which the applicants complain. Alternatively, counsel for the commissioner argues the decision was correct.

STATUTORY SCHEME

[29] The relevant portions of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, are set out in Appendix "B" to these reasons [see p. 789 et seq., post].

THE STANDARD OF REVIEW

[30] The Act contains no right of appeal, no privative clause, and no finality clause. The applicants submit that nothing in the Act limits the power of the court to review the commissioner's order for error of law on the face of the record, pursuant to the Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(2), and to the general supervisory jurisdiction of courts over tribunals. In taking the position that absent a privative clause, the standard of review is correctness, they submit

that the judgment of this court in Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Council (1991), 86 D.L.R. (4th) 441 (Callaghan C.J.O.C., O'Brien and Rosenberg JJ.), is no longer good law because the Supreme Court of Canada in Canada (Attorney General) v. Mossop, released February 25, 1993 [now reported [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658], rejected the proposition that courts should exercise curial deference when reviewing the decisions of statutory tribunals such as the one in question.

[31] The Attorney General, having urged this court in Right to Life to exercise curial deference, now takes the opposite position and urges that the test for review is correctness.

[32] The commissioner's position is that as a matter of stare decisis or judicial comity, we are bound to follow Right to Life, which dismissed an application for judicial review of the Information and Privacy Commissioner's order refusing access to the names of sponsors of a women's health centre. The applicant there took the position that the commissioner erred in law in interpreting "personal information" within the meaning of the Act and, in so doing, exceeded his jurisdiction.

[33] In Right to Life, Callaghan C.J.O.C. expressed the classic unwillingness of this court to interfere, by way of judicial review, in the work of a statutory tribunal from which the legislature had provided no right of appeal. He held at p. 444:

> When approaching the decision of a statutory tribunal such as the Commissioner in this case, this court must be mindful of the limitation of its own jurisdiction. That was probably best stated by Mr. Justice Dickson in S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn. [infra], where he observed:
>
> > There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. **But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.**

> We are all of the view that the requested names of the individuals listed in the proposal are "personal information". This is an interpretation of the statute which can be rationally supported.
> (Emphasis in original)

After briefly reviewing the statute and the commissioner's application of the statute to the facts of the case, the chief justice continued at pp. 445-46:

> That interpretation of the Act, in our view, is a construction and interpretation which it may reasonably be considered to bear. The construction is such that we should not intervene.
> . . . . .
>
> In our view, the Commissioner's finding that the release of those names would be an unjustified invasion of personal privacy, is one that should be sustained under the Act.

The court then dealt with the argument that the commissioner erred in his application of s. 23 of the Act, which subjects exempted personal information to disclosure where a compelling public interest clearly outweighs the purpose of the exemption. It held (at p. 446):

> The Commissioner in dealing with this stated at p. 185 of the Commissioner's record:
>
> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question.
>
> The Commissioner had specifically addressed the fact that the record in question was a proposal which consists of an application of public funding and found:
>
> . . . that the appellant has failed to demonstrate such a compelling public interest in disclosure of the personal information in the severed portions of the record which clearly outweighs the purpose of protecting personal privacy under section 21 of the Act.
>
> He exercised his authority appropriately. He gave to the section the meaning that was intended thereby and we see no error in his application of the Act.
> (Emphasis in original)

The Divisional Court will ordinarily follow its previous judgments, unless they have been overruled by a higher authority. We are of the view that Right to Life has not been overruled.

[34] A similar conclusion was reached by another panel of this court in reasons for judgment released on May 6, 1993, after argument in this case in Ontario (Solicitor General) v. Ontario (Assistant Information & Privacy Commissioner) (Hartt, Montgomery and Carruthers JJ.). After referring to the decision in Right to Life and Canada (Attorney General) v. Mossop, supra, this court held, at p. 10:

> We conclude that the proper test is curial deference to those decisions which lie within the Commissioner's area of expertise. Thus, a distinction can be made between decisions of the Commissioner relating to such matters as constitutional interpretation, to which no deference would be appropriate, and decisions interpreting the exemptions provided for by the Act which are squarely within his specialized area of expertise, to which curial deference is appropriate.

The rationale for this kind of curial deference to specialized tribunals was expressed by Wilson J. in National Corn Growers Assn. v. Canada (Canadian Import Tribunal), [1990] 2 S.C.R. 1324 at p. 1336, 45 Admin. L.R. 161, where she referred to:

> . . . a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that makes sense given the broad policy context within which that agency must work.

This passage was quoted with approval by Cory J. speaking for the majority in Canada (Attorney General) v. Public Service Alliance of Canada, released March 25, 1993 [now reported (1993), 150 N.R. 161, 93 C.L.L.C. 14,022] at p. 19 [p. 182].

[35] Many of the judgments which take a "hands off" approach to judicial review of administrative decisions involve a statute with a privative or finality clause, as in the line of authorities culminating in New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, which includes Service Employees International Union, Local 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, 41 D.L.R. (3d) 6, relied upon by the Chief Justice in Right to Life, supra.

[36] Curial deference to the work of specialized administrative tribunals does not, however, depend entirely on the existence of a privative clause by which the legislature has expressly directed the court to apply a non-discretionary form of deference: Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, released May 7, 1993 [now reported 93 C.L.L.C. 14,032, 152 N.R. 1 (S.C.C.)]; Canada (Attorney General) v. Mossop, supra.

[37] Even where the legislature has provided a right of appeal to the courts, curial deference should be given to the opinion of an administrative tribunal which enjoys the requisite quality of specialized expertise on issues which fall squarely within its area of expertise: Bell Canada v. Canada (Canadian Radio- Television & Telecommunications Commission), [1989] 1 S.C.R. 1722 at p. 1746, 60 D.L.R. (4th) 682.

[38] In such cases the court should not interfere unless the tribunal's decision is not reasonable or is clearly wrong: Canadian Pacific Ltd. v. Canada (Canadian Transport Commission) (1987), 79 N.R. 13 (F.C.A.) at pp. 16-17, quoted in Bell Canada v. Canada (C.R.T.C.).

[39] Absent a privative clause, therefore, the courts will show curial deference towards certain specialized tribunals when engaged in tasks which lie at the heart of their specialized expertise. Tribunals under the Canadian Human Rights Act, R.S.C. 1985, c. H-6, for example, lack the kind of expertise that attracts curial deference on matters other than findings of fact: Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 at pp. 336-38, 93 D.L.R. (4th) 346.

[40] In Canada (Attorney General) v. Mossop, supra, La Forest J. expanded on the reasons why CHRA tribunals lack particular expertise. The temporary ad hoc adjudicative work of the tribunal is functionally separate from the ongoing management by the permanent tribunal of human rights information, education, and advice. While the tribunal exercises a direct influence on society at large in relation to basic social values, it lacks the consensual quality and specialized expertise of a labour arbitrator acting in a narrowly restricted field. La Forest J. held at p. 4 [p. 585]:

> The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

That case is not this case. The Information and Privacy Commissioner, unlike the ad hoc tribunal established by the CHRA to decide a single dispute, is appointed as an officer of the legislature by the Lieutenant Governor in Council on the address of the Assembly for a five-year term, and is prohibited from holding any other offices during that term. The commissioner has staff, including assistant commissioners, mediators and other officers who assist the commissioner in performing his functions and duties under the Act (ss. 4(3), (4), 5(1), and 8(1)).

[41] Although the commissioner deals to some extent with basic social values, they are not as basic as the values at stake in human rights legislation where the statutory questions are often the same Canadian Charter of Rights and Freedoms questions in which courts have developed expertise and need not defer to other tribunals.

[42] Under the Act, unlike the CHRA, the adjudicative function is performed by the same person who administers the specialized area of regulatory activity. Such adjudicative function, again unlike the CHRA, is integral to the supervision of its specialized area of regulatory activity. The commissioner exercises a supervisory function in respect of compliance by government institutions

with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4 and 50).

[43] A person who requests access to a record, or any affected party, may appeal a head's decision and is given an opportunity to make representations to the commissioner. After receiving evidence for an inquiry and representations from the person who requested access, the head of the institution as well as any affected party, the commissioner is required to make an order disposing of the issues raised by the appeal, containing any terms and conditions the commissioner considers appropriate (ss. 52(13) and 54). Unlike the tribunal under the CHRA, the commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision-making under the Act reaches a final administrative focus in such appeals.

[44] The commissioner not only has responsibility for all refusals of requests for access and corrections of personal information, but also manages a unique process mandated by s. 52 of the Act, having administrative authority over the pre-decision-making process of mediation under s. 51.

[45] The inquiry process is specialized and unique. It may be conducted in private. The commissioner is given inquisitorial or investigatory powers as well as the power to examine under oath. The procedure for participation by affected persons is governed by s. 52(13) which states:

> 52(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

These unusual powers and procedure may attract judicial scrutiny on natural justice grounds; however, the uniqueness of this adjudicative process indicates that the legislature intended to confer upon the commissioner a distinctive and unusual mixture of adjudicative and administrative functions, unlike the functions performed by bodies such as CHRA tribunals.

[46] The commissioner is also given administrative and adjudicative responsibility for access to government information on the one hand, and the protection of individual privacy on the other. Under the scheme of the Act, the commissioner is responsible for five overlapping and integrated activities: reviewing government decisions concerning the dissemination of information; investigating public complaints with respect to government practices in relation to the use and disclosure of personal information; reviewing government administrative and records management practices; conducting research and giving advice on issues related to access and privacy; and educating the public concerning privacy and access issues.

[47] The operation of this comprehensive statutory scheme has been documented in annual reports provided by the commissioner to the Legislative Assembly pursuant to s. 58.

[48] The 1991 Annual Report states:

> It is evident, even to the casual observer, that information, including government information, is increasingly taking on the characteristics of a commodity. After all, this is the information age, and information has significant economic and social value. Possessing the right kind of information at the right time can make a difference in how business is conducted, decisions are made and, ultimately, how we manage our political and social obligations.
>
> For a variety of reasons, governments are perhaps the single largest repositories of information. In the past, the approach of governments toward information has been largely to create, collect, and warehouse it. With the introduction of the Acts, we have moved further toward the ideal of sharing, though still mainly on the initiative of the public.

[49] The report reflects requests for information in the hands of over 180 ministries, boards, commissions, and agencies. The diversity of the commission's responsibilities in relation to the release of government documents is reflected in the various bodies whose information practices it supervises including: the Assessment Review Board, Criminal Injuries Compensation Board, Ontario Municipal Board, Office of the Public Complaints Commissioner, Public Trustee, Ontario Human Rights Commission, the Ontario Council on University Affairs, Child and Family Service Review Board, Liquor Licence Board, Ontario Film Review Board, Ontario Parole Board, Ontario Science Centre and the Royal Ontario Museum.

[50] To the extent that information has become a commodity, the management of information by the commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.

[51] Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra, the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.

[52] The commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.

[53] Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.

[54] We therefore conclude the commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause.

STATUTORY INTERPRETATION

[55] Having found an unjustified invasion of personal privacy pursuant to s. 21(3)(b), and having concluded that none of the circumstances set out in s. 21(4) existed so as to rebut that presumption, the commissioner considered both enumerated and unenumerated factors under s. 21(2) in order to rebut the presumption created by s. 21(3).

[56] The words of the statute are clear. There is nothing in the section to confuse the presumption in s. 21(3) with the balancing process in s. 21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s. 21. Once the presumption has been established pursuant to s. 21(3), it may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation. The commissioner fundamentally misconstrued the scheme of the Act. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

SIGNIFICANCE OF THE JUDGE'S PERSONAL INTEREST

[57] In his order, the commissioner concluded that full disclosure was necessary to dispel public concerns and speculation regarding the apparent contradiction between the judge's comments and the O.P.P. investigation. His order reads in part:

> Media reports have continued to comment on the discrepancy between the judge's comments on the conduct of the Metro Police officers and the conclusion of the O.P.P. that their actions did not warrant the laying of any criminal charges.

He said that disclosure was necessary to ensure public confidence in the integrity of the institution. The only evidence in this record is that it was only the requester's status as a judge and his continued personal endeavours against the commissioner, the officers and the O.P.P. that kept the matter before the public. There was no evidence of any public concern. The commissioner erred in attaching any public significance to the personal comments made by the judge after the case and to his personal interest in the witnesses who testified before him.

[58] In Commentaries on Judicial Conduct, Canadian Judicial Council (Cowansville: Yvon Blais Inc., 1991), it states (at pp. 86 and 7):

> Long-standing tradition in Canada and in Great Britain is that a judge speaks but once on a given case and that is in the Reasons for Judgment.

And:

> The judge must avoid public controversy or any activity which might reasonably be thought to show bias or partiality.

[59] A demonstration of personal interest by a judge after the conclusion of a case does not constitute any evidence of public concern or public interest in the subject matter of the judge's private interest. The commissioner erred fundamentally, in the absence of any evidence of public concern, in holding that the judge's personal interest in the witnesses constituted any evidence of public concern.

SIGNIFICANCE OF THE POLICE COMPLAINTS PROCESS

[60] Pursuant to the Metropolitan Toronto Police Force Complaints Act, 1984, S.O. 1984, c. 63, the Public Complaints Commissioner deals with complaints from citizens regarding the conduct of members of the Metropolitan Toronto Police Force and presides over the investigation of those complaints, in order to assess whether there is sufficient evidence of misconduct to order a hearing in the public interest by a board of inquiry.

[61] The investigation of the complaint of the accused was ongoing at the time of the proceedings before the Privacy Commissioner and was known to him at the time of his deliberations. That

investigation was crucially relevant to the issues which formed the underlying basis for the Privacy Commissioner's order. The Complaints Commissioner addressed the judge's conclusions that the officers engaged in a fabrication of evidence and harassment of the accused. His conclusion in fact exonerated the officers, thereby undermining the entire evidentiary basis for the request for access and the commissioner's rationale for ordering disclosure. The commissioner, however, makes no reference to the investigation. The police complaints process was a relevant factor which should have been considered by the commissioner. By failing to do so, he declined jurisdiction.

CONCLUSION

[62] Counsel for the commissioner observed that the two-day judicial review involving three judges and four lawyers might be described as "a mighty oak growing from a small acorn". This matter has consumed both public time and expense. The names of the officers are available in public documents. It may be asked whether there is any justification for continuing to protect their personal privacy in view of the fact that they have been cleared of criminal wrong-doing by the O.P.P. The statute, however, gives each citizen the right to be protected from an unjustified invasion of personal privacy. Those rights must be determined according to law.

[63] For these reasons, the application is allowed and the order of the commissioner is quashed. There is no reason to remit the matter to the commissioner because there is in the record no evidence capable of triggering the "compelling public interest" override in s. 23. As a result, the Solicitor General is prohibited from releasing the record.

[64] Costs of the hearing to the applicants are payable by the commissioner, fixed in the amount of $5,000.

RELEASED: June 30, 1993

CAMPBELL J.
DUNNET J.

APPENDIX "A"

[65] I found under Issue B that the record contains some "personal information" as defined in the Act. Once it has been determined that a record or part of a record contains personal information, s. 21(1) of the Act prohibits, except in certain circumstances, the disclosure of this personal information to any person other than the individual to whom the information relates. One such circumstance is contained in s. 21(1)(f) of the Act which states:

> 21(1)(f) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> . . . . .
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

The considerations outlined in s. 21(2) and (3) of the Act assist in the determination of whether disclosure of personal information would constitute an unjustified invasion of privacy. Section 21(2) provides some criteria to consider in making this determination. Section 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

One of the affected parties submits that the presumption of an unjustified invasion of personal privacy contained in s. 21(3)(b) applies. Section 21(3)(b) states:

> 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.

Considering the circumstances under which this record was created, the steps taken during the course of the investigation and the materials reviewed by the O.P.P. officers, it is my view that the s. 21(3)(b) presumption applies. The record describes an investigation into allegations of certain criminal offences having been committed by the individuals whose personal information is at issue.

In my view, the fact that no criminal proceedings were commenced against these individuals does not negate the applicability of s. 21(3)(b). The presumption in s. 21(3)(b) only requires that there be an investigation into a possible violation of law. Thus, there is a presumption raised that disclosure of the personal information would result in an unjustified invasion of the personal privacy of the four affected parties who have not given their consent to the disclosure of their personal information.

Once it has been determined that the requirements for a presumed invasion of personal privacy under s. 21(3) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under s. 21(3). In my view, the record does not contain any information that pertains to s. 21(4). Consequently, none of the circumstances listed in s. 21(4) operate to rebut the presumed unjustified invasion of privacy under s. 21(3).

In Order 20, dated October 7, 1988, former commissioner Sidney B. Linden stated that "a combination of the circumstances set out in s. 21(2) might be so compelling as to outweigh a presumption under s. 21(3). However, in my view such a case would be extremely unusual."

In Order 99, dated October 3, 1989, Commissioner Linden discussed whether the list of criteria under s. 21(2) was exhaustive. At pp. 20-21 he stated:

> The subsection lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria.
>
> I agree with Commissioner Linden that the circumstances of each case should be examined to identify any factors under s. 21(2), listed or unlisted, that might be relevant in the determination of whether disclosure of personal information constitutes an unjustified invasion of personal privacy.
>
> While the appellant has not specifically raised the issue of the application of s. 21(2)(a) in his written representations, it is clear that he is referring to the substance of that subsection in his most recent representations. Section 21(2)(a) reads as follows:

> 21(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 Government of Ontario and its agencies to public scrutiny;

The appellant claims that what is really at issue in this case is the conduct of the O.P.P. in reviewing the actions of the Metropolitan Toronto Police. It is his position that, because there is a conflict between the court's findings on the matter and those of the O.P.P., the public has a real interest in scrutinizing the investigation conducted by the O.P.P. In addition, he claims that because the press release issued by the O.P.P. upon the completion of the investigation indicated that the report exonerated the officers, it is inappropriate that the entire report not be released to the public. He claims that the disclosure of the evidence upon which the report was based is necessary to protect the integrity of both police forces involved and to advance confidence in the judicial system.

In addition, his position is that the widespread public interest in this case is reflected in the considerable media attention which it continues to attract. He states:

> If the report is not ultimately produced, public confidence in the administration of police activities in Ontario will suffer greatly and the entire criminal justice system will be seriously adversely affected.

One of the affected parties maintains that there is no public interest involved in the release of this information. He maintains that the appellant has a personal interest in having this information released.

The other affected party who submitted written representations on this issue claimed that his rights to privacy far outweighed any public interest in disclosure. His position is that the public interest has already been satisfied in that the public has already been informed of the allegations and the fact that the investigation exonerated the individuals involved.

In my view, the facts of this case are unusual. The O.P.P. investigation which culminated in the creation of the record was prompted by the public statements of a judge adversely commenting

on the conduct of certain Metropolitan Toronto Police officers. These comments were made in open court at the conclusion of the trial of a named individual. Not only are these statements publicly available in the form of a transcript of the oral judgment, they were given wide coverage in the media. While any notoriety associated with the judge's statements does not change the character of the information contained in the O.P.P. report (i.e., it is still personal information), nonetheless the public nature of the statements has relevance to the issue of whether the disclosure of the information is an unjustified invasion of personal privacy.

At the conclusion of the O.P.P. investigation, the then Attorney General made a public statement describing only the conclusion of the investigation. In addition, the news release issued by the O.P.P. on September 12, 1989, identified only the conclusion of the investigation. The statements of the Attorney General and those contained in the news release which only described the conclusion of the investigation have led to speculation about the manner in which this conclusion was reached. Media reports have continued to comment on the discrepancy between the judge's comments on the conduct of the Metro Police officers and the conclusion of the O.P.P. that their actions did not warrant the laying of any criminal charges.

At present, the four affected parties do not wish to be the subject of further public attention. They believe that the matter has attracted enough media attention and that, since it was reported that they were exonerated, any disclosure of their personal information would constitute an unjustified invasion of their personal privacy. While I appreciate these concerns, the fact of the matter is that, at least in the short term, the matter will most probably continue to be reported in the press.

As the institution has now exercised its discretion and withdrawn its claim for exemption under s. 14(2)(a) (law enforcement), much of the report will be disclosed in any event. In addition, most of the personal information still at issue is already available to the public. In my view, until the public has had the opportunity to assess the matter in full, there will continue to be concerns and speculation about this investigation, the O.P.P., the judge who made the initial statements and the affected parties. Disclosure of all of the facts may well serve to dispel the speculation that has surrounded this matter.

In my opinion, having regard to the circumstances outlined above, s. 21(2)(a) applies in this case.

In addition to the criterion identified in s. 21(2), in very unusual circumstances, disclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution. This could be considered as an additional unlisted circumstance to be taken into consideration under s. 21(2).

In my view, the release of the record with the personal information severed would only lead to conjecture as to what was being withheld and therefore would not assist in ensuring public confidence in the integrity of the institution. To accomplish that goal I feel that it is necessary to release the record in its entirety.

In reaching my conclusion I have also reflected upon the very special position that the police occupy in the community. Police officers have been entrusted by society to enforce the law. In order to properly perform their duties, police officers are given significant powers which other members of the public do not possess, e.g., powers of detention and arrest. In my view, in return for society granting police officers such a special position the public has certain expectations. One of these expectations is that within reasonable limits, the public should be aware of how the police are carrying out their duties.

I have also considered the nature of the personal information itself. Although I have found that the information in issue is personal information as defined in the Act, I do note that the information does not relate to the "private lives" of the four affected parties. The information specifically relates to events that transpired during the course of the four affected parties' performance of their professional duties.

Having carefully considered all of the circumstances of this appeal I find that the presumption contained in s. 21(3)(b) has been rebutted. In my view, any invasion of the privacy of the four affected parties is outweighed by the desirability of subjecting the institution to public scrutiny and

ensuring public confidence in the integrity of the institution. Although the disclosure of the information is, to a degree, an invasion of the four affected parties' privacy, in the unusual circumstances of this case I find that it is a justified, rather than an unjustified invasion. It is always a difficult task to balance the right of access with the right to privacy. In the circumstances of this appeal, I believe that the appropriate balance is in favour of access.

As I have decided that the disclosure of the personal information would not be an unjustified invasion of personal privacy, it is unnecessary for me to address Issue D.

APPENDIX "B"

The Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, provides 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, 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.

2(1) In this Act, ...

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner appointed under subsection 4(1); ("commissaire à l'information et à la protection de la vie privée", "commissaire")

. . . . .

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to the financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

. . . . .

PART I
ADMINISTRATION

. . . . .

4(1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this or any other Act.

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly.

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any time for cause by the Lieutenant governor in Council on the address of the Assembly.

(4) The Commissioner shall appoint one or two officers of his or her staff to be Assistant Commissioners.

. . . . .

PART II
FREEDOM OF INFORMATION

ACCESS TO RECORDS

. . . . .

14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(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;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where 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

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

. . . . .

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

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

. . . . .

(e) for a research purpose if,

. . . . .

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal 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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

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

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

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

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

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

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

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

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

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

(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;

. . . . .

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

. . . . .

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

ACCESS PROCEDURE

24(1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

. . . . .

PART IV
APPEAL

50(1) A person who has made a request for,

(a) access to a record under subsection 24(1);

. . . . .

or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.

. . . . .

(4) The Ombudsman Act does not apply in respect of a complaint for which an appeal is provided under this Act or the Municipal Freedom of Information and Protection of Privacy Act or to the Commissioner or the Commissioner's delegate acting under this Act or the Municipal Freedom of Information and Protection of Privacy Act.

51. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

52(1) Where a settlement is not effected under section 51, the Commissioner shall conduct an inquiry to review the head's decision.

(2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1).

(3) The inquiry may be conducted in private.

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

. . . . .

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath.

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings,

and no evidence in respect of proceedings before the Commissioner shall be given against any person.

. . . . .

(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by counsel or an agent.

53. Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

54(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

(3) The Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50(3) written notice of the order.

. . . . .

56(1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation.

. . . . .

PART V
GENERAL

. . . . .

58(1) The Commissioner shall make an annual report, in accordance with subsection (2), to the Speaker of the Assembly who shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session.

(2) A report made under subsection (1) shall provide a comprehensive review of the effectiveness of this Act and the Municipal Freedom of Information and Protection of Privacy Act in providing access to information and protection of personal privacy including,

(a) a summary of the nature and ultimate resolutions of appeals carried out under subsection 50(1) of this Act and under subsection 39(1) of the Municipal Freedom of Information and Protection of Privacy Act:

(b) an assessment of the extent to which institutions are complying with this Act and the Municipal Freedom of Information and Protection of Privacy Act; and

(c) the Commissioner's recommendations with respect to the practices of particular institutions and with respect to proposed revisions to this Act, the Municipal Freedom of Information and Protection of Privacy Act and the regulations under them.

59. The Commissioner may,

(a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;

(b) after hearing the head, order an institution to,

(i) cease collection practices, and

(ii) destroy collections of personal information,

that contravene this Act;

(c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;

(d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and

(f) receive representations from the public concerning the operation of this Act.

Court File No. 525/91

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

SOUTHEY, CAMPBELL and DUNNETT JJ.

IN THE MATTER OF the Order P-237 of the Information and Privacy Commissioner, dated August 6, 1991
AND IN THE MATTER OF Freedom of Information and Protection Act, 1987, as amended
AND IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1980, c. 224, as amended

B E T W E E N:	
JOHN DOE, JAMES DOE, JACK DOE AND GEORGE DOE	Ian Roland, for the applicants
Applicants	
- and -	
INFORMATION AND PRIVACY COMMISSIONER, SOLICITOR GENERAL OF ONTARIO, and THEODORE MATLOW	Donald J.M. Brown, Q.C. and S.N. Manji, for the respondent the Information and Privacy Commissioner
Respondents	Leah Price for the Attorney General of Ontario
	HEARD: March 17, 18, 1993

SOUTHEY J. (dissenting):

I regret that I am unable to concur in the decision of my colleagues.

In my opinion, it is not clear whether the presumption raised under s. 21(3) of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (the "Act"), is rebuttable, or whether it can only be overridden by the application of s. 21(4) or some other express provision in

the Act. I am satisfied that the interpretation given to s. 21 by the Information and Privacy Commissioner (the "Commissioner") in the order under review is one that the words of the section can reasonably bear, although I am not certain that it is the correct interpretation. The order should not be interfered with because of that interpretation.

I am in agreement with the statements by my colleagues under the heading, "Significance of the Judge's Personal Interest".

As to the failure to refer to the pending investigation before the Public Complaints Commissioner, dealt with by my colleagues under the heading "Significance of the Police Complaints Process", the record discloses that the Office of the Commissioner had been informed on January 9, 1991, that the Public Complaints Commissioner's Office had made a final decision on the complaint of the accused person. The decision was that no disciplinary proceedings would be taken against the police officers involved and the accused person had not appealed that decision. These developments were powerful evidence that the complaints by Judge Matlow against the police officers were ill-founded, but the decision of the Public Complaints Officer was not made public until December 2, 1991. The Information and Privacy Commissioner might well have considered that it would have been improper for him to refer to a decision of the Public Complaints Commissioner that had not yet been published. The reason for the delay in publishing the decision of the Public Complaints Commissioner does not appear in the record.

Furthermore, the Information and Privacy Commissioner might have been justified in thinking that the decision of the Public Complaints Commissioner was not a complete answer to the questions raised by Judge Matlow respecting the O.P.P. investigation and report.

As to the second point raised by counsel for the Attorney General, I do not think that the commissioner is required to make a specific finding with respect to all the matters enumerated in s. 21(2), although he is required to consider all those matters as well as any other relevant circumstances. The commissioner stated that he had carefully considered all of the circumstances of the appeal to him. On the facts of this case, the failure of the commissioner to refer specifically

to the matters enumerated in cls. (e), (f), (g) and (i) of s. 21(2) does not lead me to believe that he failed to consider such matters.

I would dismiss the application.

RELEASED: June 30, 1993 SOUTHEY J.