COURT FILE NOS.: 519/00 and 520/2000
DATE: June 26, 2003

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BLAIR R.S.J., LANG J. AND C. CAMPBELL J.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Health and Long-Term Care of Ontario	)	*Leslie M. McIntosh*, for Applicant
Applicant	)	
- and -	)	
TOM MITCHINSON, Assistant Commissioner, Information and Privacy Commissioner/Ontario and JOHN DOE AND JANE DOE, Requesters	)	*Freya Kristjanson*, for the Respondent Tom Mitchinson
	)	No one appearing for Requesters
Respondents	)	
	)	**HEARD:** February 4, 2003

REASONS

R.A. BLAIR R.S.J. (C. CAMPBELL J., concurring):

Overview

[1] This judicial review arises out of a dispute between an individual and the Ministry of Health and Long Term Care over the level of funding and at-home care provided for the individual (the "affected person"). The dispute generated considerable public debate and interest in the media, the legislature and the affected person's local community. When he withdrew his appeals to the Health Services Board -- where the issue of public funding for home care services would have been aired -- the curiosity of at least two journalists was piqued.

[2] The two journalists (the "Requesters") -- who, ironically, seek themselves to hide behind their anonymous designations as Jane Doe and John Doe -- applied under the *Freedom of Information and*

Protection of Privacy Act (the "Act")[1] for access to any information and records that would explain the withdrawal of the appeals, including the details of any pre-hearing settlement. Disclosure of the information they sought, if it existed, would reveal (or, at least, could potentially reveal) private personal information about the affected person. The Ministry therefore refused to confirm or deny the existence of any responsive records in relation to both requests, relying on the ground that to do so would constitute an unjustified invasion of personal privacy within the meaning of subsection 21(5) of the Act.

[3] The Requesters appealed to the Information and Privacy Commissioner, and the Assistant Commissioner refused to uphold the Ministry's decisions. The Assistant Commissioner based his decisions upon what he interpreted to be a two-part test under subsection 21(5). The reasonableness of that interpretation is what is at issue on these applications for judicial review, as the Ministry seeks to set aside those decisions.

[4] At issue is the test to be employed on the application of subsection 21(5) of the Act, which states:

> 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.

[5] At the outset of the hearing, the court raised with counsel the issue of whether it is appropriate for the Office of the Information and Privacy Commissioner to make submissions on judicial review applications such as this on the merits of the case. This issue is currently pending before the Divisional Court in another matter involving the Commissioner. Counsel both indicated they wished to proceed with this application on the basis that they had both prepared to meet it, and we agreed to proceed on the understanding it would be without prejudice to any decision that might be reached in the case where the issue is pending, or in any other case.

Background

[6] The Requesters asked for access to "any information that would explain the withdrawal of . . . two matters from the Health Services Appeal Board" (the "HSAB"). More specifically, they sought "confirmation that a pre-hearing settlement was reached that would change the level of publicly-funded service the [affected person] would receive, the terms of that settlement and when the settlement was reached". At a mediation session the parties agreed to deal with the requests in two parts, namely (1) whether there was a final settlement agreement, and disclosure issues respecting such Minutes of Settlement if they existed, and (2) whether there were any other records that were responsive to the requests, and disclosure issues relating to such records, if they existed. The Ministry issued separate decision letters respecting each part, indicating in each case that it was exercising its s. 21(5) discretion to refuse to confirm or deny the existence of any responsive records.

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[1] R.S.O. 1990, c. F.31 as amended.

[7] On the appeal to the Assistant Commissioner, and before this court, there were public submissions and private submissions made with respect to each part. Reference will only be made in these reasons to matters referred to in the public record.

[8] The Ministry submitted to the Assistant Commissioner that subsection 21(5) of the Act applied because:

> . . . in the circumstances of this appeal, disclosure of the fact that a record exists would in itself convey personal information within the definition under section 2(1). Disclosure of the existence or non-existence of the record containing the requested information would reveal the fact that the named individual did or did not decide to settle his claims against the MOHLTC before the HSAB by entering into "Minutes of Settlement". The manner in which an individual party to litigation decides to proceed, or not to proceed, is the personal information of that individual, and such information is highly sensitive within the meaning of section 21(2)(f) of [the Act]".

[9] The Requesters, on the other hand, submitted to the Assistant Commissioner that "health care is currently one of the most important issues to residents of Ontario", and therefore "the public interest in disclosing the requested records is simple to see." That public interest, they argued, consists of the fact that "[i]t appears the Government of Ontario has agreed, through a settlement of the matter that was before the HSAB, to provide [the affected person] a level of service exceeding provincial or federal guidelines." The submission went on to state that the "records requested should be disclosed so the public can see how the provincial government has 'worked out' its set of options in this case". In short, the Requesters suggest that the public has a right to know whether the affected person in this case has succeeded in extracting a settlement from the Government that exceeds policy guidelines because, if that is so, others might be entitled to the same sort of treatment. As they put it, when the case was dropped it affected more than just the affected person's family; "it brought an end to a hope for change in the province's home care policies."

[10] It was against this background that the Assistant Commissioner had to consider the access to information request and the Ministry's response.

The Standard of Review

[11] The standard of review respecting decisions of the Information and Privacy Commissioner/Ontario concerning the interpretation and application of its statute, and in particular of s. 21, is "reasonableness *simpliciter*": *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 106 D.L.R. (4th) 140 (Div. Ct.); *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, 164 D.L.R. (4th) 129 (C.A.), at pp. 471-74 O.R., pp. 138-40 D.L.R. In *John Doe*, Archie Campbell J. made the following observations concerning the Commissioner's role and task under the legislation (at pp. 782-83 O.R.):

> 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. . . . [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.
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> . . . Central to [the Commission's] 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.

[12] The foregoing passage was cited with approval by the Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner), supra.*

[13] The reasonableness standard requires the court to give considerable weight to decisions of an administrative tribunal concerning matters within their special areas of expertise. Speaking of the standard of reasonableness in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, Iacobucci J. noted (at para. 56):

> I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. *An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.* Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference. (Emphasis added)

[14] Iacobucci J. went on in *Southam* to equate the reasonableness *simpliciter* standard with the "clearly wrong" standard that appellate courts apply when reviewing findings of fact by a trial judge. At para. 60 he said:

> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness *simpliciter* is obvious. It is true that many things are

> wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness *simpliciter*, falls on the *continuum* between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness *simpliciter*. (Underlining added)

[15] The Supreme Court of Canada has recently re-examined the standard of review question in two cases, *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, 223 D.L.R. (4th) 577 and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19. Both cases emphasized the importance of the functional and pragmatic approach espoused in earlier decisions of that court in *Bibeault*[2], *Pushpanathan*[3] and *Southam, supra*. Both also dealt with the standard of reasonableness *simpliciter*. In *Ryan*, at paras. 48 and 49, Iacobucci J. said:

> Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable.
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> . . . the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission to, those reasons.

[16] Here, both counsel agree that the standard of review on the question of the Assistant Commissioner's interpretation of subsection 21(5) of the Act is that of "reasonableness *simpliciter*".

The Scheme of the Act and the Test under Subsection 21(5)

[17] These applications raise the inevitable interplay that is the stuff of matters arising under the *Freedom of Information and Protection of Privacy Act*, that is, the tension between access to government information, on the one hand, and the protection of personal privacy, on the other. This dynamic was captured in the following question posed by the Commission on Freedom of Information and Individual Privacy/1980, which laid the groundwork for the passing of the Act:

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[2] *Union des Employés des services, Local 298 c. Bibeault*, [1988] 2 S.C.R. 1048

[3] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982

> How is the principle of the public right to know to be reconciled with the protection of privacy where access is sought to government documents containing personal information about persons other than the individual making the request?

[18] The drafters of the Act answered this question by creating a complex scheme providing for access to records in the custody or control of a provincial institution[4] unless the record falls within a convoluted series of exemptions set out in the legislation. One of those exemptions has to do with the personal information of an individual. An institution is prohibited from disclosing such information unless the personal information itself meets the requirements of various exceptions outlined in the legislation.

[19] Before entering into a more detailed analysis of the scheme of the legislation, however, I turn to the decision of the Assistant Commissioner and the test he applied, based upon his interpretation of subsection 21(5) of the Act.

[20] The Assistant Commissioner declined to uphold the decision of the Ministry under subsection 21(5) not to confirm or deny the existence of any records responsive to the requests[5]. The thrust of that determination is found in the following passage from his Decision (after citing the provisions of s. 21(5)):

> A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), an institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases (Order P-339).
>
> An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Orders P-339 and P-808 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.))

[21] In arriving at the foregoing determination, the Assistant Commissioner imported into subsection 21(5) a two-part test, which he articulated as follows:

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[4] An "institution" is defined in s. 2(1) of the Act as meaning
(a) a ministry of the Government of Ontario, and
(b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

[5] The decisions were contained in Orders PO-1809 and PO-1810, dated July 27, 2000. PO-1809 related to the request of the journalist named John Doe. PO-1810 related to the request of the journalist named Jane Doe.

> Therefore, in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that:
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> 1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and
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> 2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[22] In my opinion, the Assistant Commissioner misconstrued the purpose and meaning of subsection 21(5) and thus established, and applied, a test that is clearly wrong. Respectfully, his interpretation was both incorrect and unreasonable, and his decision not to uphold the Ministry's discretionary determination not to confirm or deny the existence of the records must therefore be set aside.

[23] For convenience, the language of subsection 21(5) bears repeating here. It states:

> 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. (Emphasis added)

[24] Clearly, the plain language of the subsection does not import a second-stage test, namely, whether *disclosure of the existence or non-existence of the record* would constitute an unjustified invasion of personal privacy. It is argued, however, that such a reading is an interpretation the language of the subsection can reasonably bear, having regard to the object and purpose of the Act and its provisions read as a whole.

[25] I do not agree.

[26] I recognize that in interpreting the wording of a statute the court must look beyond the actual wording in question, and look at the legislation as a whole, together with its purpose. The Supreme Court of Canada has very recently reaffirmed this principle in *Harvard College v. Canada (Commissioner of Patents)*, [2002] S.C.J. No. 77, 219 D.L.R. (4th) 577. At para. 154 of that decision, Bastarache J. (writing for the majority) said:

> This Court has on many occasions expressed the view that statutory interpretation cannot be based on the wording of the legislation alone (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). Rather, the Court has adopted E.A. Driedger's statement in his text, *Construction of Statutes* (2nd ed. 1983), at p. 87:
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> > "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo, supra*, at para. 21).

[27] However, I do not construe this statement as a licence to read in a significant addition to statutory language that is not mandated by an omission in the language itself or called for on a reading of the legislation as a whole, including a consideration of its purposes and the objects of the provision in question. The language in question cannot be ignored. It is to be read "*in [its] grammatical and ordinary sense*, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament". Here, the grammatical and ordinary sense of the wording of subsection 21(5) is that the head may refuse to confirm or deny the existence of a record *if the disclosure of the record* -- it does not say *disclosure of the "existence or non-existence"* of the record -- would constitute an unjustified invasion of personal privacy.

[28] I return, then, to a consideration of the scheme and object of the Act, and the intention of Parliament.

[29] The purposes of the Act are specifically defined in s. 1. They are two-fold, namely (a) "to provide a right of access to information under the control of [provincial government] institutions" in accordance with certain principles, 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". These two purposes are equal in importance, as they recognize two fundamental values in a democratic society. They have to be balanced. The first value is the role of access to information legislation in facilitating democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process and by ensuring that politicians and bureaucrats remain accountable to the citizenry. The second value is the protection of an individual's privacy. See *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, per La Forest J. at pp. 432-36.

[30] How does the Act accomplish its purposes and balance these two critical factors?

[31] Part II deals with freedom of information. Section 10 provides that every person has a right of access to a record or part of a record in the custody or control of a provincial institution unless the record or part of the record falls within one of the exemptions under ss. 12 to 22 in Part II.

[32] Part III deals with the protection of individual privacy. By virtue of s. 42 an institution is prohibited from disclosing personal information in its custody or under its control except in accordance with Part II[6]. Thus, to determine whether a record may be disclosed, it is necessary to consider the exemptions set out in ss. 12 through 22 of Part II of the Act. In this regard, it is s. 21 that is pertinent to the disclosure of personal information.

[33] Section 21(1) of the Act prohibits an institution from disclosing personal information -- "a head shall refuse to disclose personal information" -- unless one of the exceptions in paras. (a) through (f) applies. Here, it is argued that para. 21(1)(f) is relevant. It permits disclosure of personal information if the disclosure does not constitute an unjustified invasion of personal privacy.

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[6] And in certain other excepted circumstances that are listed but that do not apply to the subsection 21(5) argument.

[34] There does not seem to be much dispute that if records exist in the circumstances of this case, those records would contain "personal information" relating to the affected person, as that concept is defined in subsection 2(1) of the Act. At issue in this stage of the analysis, therefore, is whether the disclosure of that information would constitute an unjustified invasion of the personal privacy of that individual. The answer to this question calls for a further trip through the meanderings of s. 21.

[35] Subsection 21(3) sets out a number of circumstances that are presumed to constitute an unjustified invasion of personal privacy. Subsection (4) contains a list of exceptions to this presumption. Where the disclosure sought is neither presumed to be an unjustified invasion of personal privacy under subsection (3) nor caught as a statutory rebuttal of that presumption under subsection (4), then the head must consider whether the disclosure would amount to an unjustified invasion of personal privacy having regard to all the relevant circumstances, including those listed in paragraphs (a) through (i) of subsection 21(2) of the Act.

[36] The foregoing is a description of the statutory analysis to be followed in determining whether a record contains personal information that is exempted from disclosure to a third party. In addition, and finally, there is one further consideration in that regard, namely the "public interest override" provision in s. 23 of the Act. Section 23 stipulates that an exemption from disclosure of a record under s. 21 does not apply where there is a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the exemption.

[37] It is noteworthy that no mention has yet been made to subsection 21(5) in this analysis of the scheme of the Act. There is a reason for this. In my opinion, the purpose of subsection 21(5) is not related to the exercise of determining whether the personal information in question is or is not exempted from disclosure in accordance with the foregoing scheme. Rather the role of subsection 21(5) is to act as a protective mechanism to ensure that the objects of the Act are in fact carried out.

[38] Subsection 21(5) is in the Act to make certain that when a record containing personal information is protected from disclosure by operation of the foregoing provisions of the legislation, that protection is not undermined indirectly through disclosure in some other fashion. Not much imagination is required to envisage situations where merely disclosing the existence or non-existence of a record could have the same privacy-destroying effect as disclosure of the record itself. Thus, the protective mechanism encompassed in subsection 21(5) of the Act is a vital statutory shield without which the central concept of protection of privacy -- reflecting, I repeat, a fundamental Canadian value -- could not be safeguarded adequately.

[39] To the extent that protection from disclosure of personal information is afforded by the Act, that protection must be airtight in order to give effect to the privacy protection purpose of the legislation. It cannot be airtight if there is a danger of indirect disclosure of the same information. While I agree that the Ministry's interpretation means a head may refuse to disclose whether a record exists even if that minimal disclosure would not affect the person's privacy in an unjustified way, in the circumstances of the individual case, as I read the legislative provisions, the Legislature has sacrificed that possibility (although I note it is still in the discretion of the head) to the more

overriding ethic of making sure the protection of the information (when otherwise found to be warranted) is real.

[40] In short, the law prohibits the head of an institution -- in this case, the Ministry -- from releasing personal information at the request of a third party unless the circumstances fall within one of the exemptions set out in s. 21 of the Act or the privacy protection is trumped by the public interest override of s. 23. Subsection 21(5) is necessary to preclude the risk of indirect disclosure undermining that protection. It represents a decision by the legislature that the risk of indirect disclosure undercutting the privacy protection mandated by s. 21 outweighs the potentially minimal benefit of disclosing the mere existence (or non-existence) of the record, where disclosure of that existence (or non-existence) itself would not be an unjustified invasion of personal privacy. In my judgment, the general prohibition in s. 21(1)(f) against the disclosure of personal information except if the disclosure does not constitute an unjustified invasion of personal privacy is not, by itself, sufficient to guard against this mischief.

[41] Indeed, the present Assistant Commissioner himself appears to have recognized previously the importance of, and the rationale for, the "confirm or deny" provisions in the Act. In Order PO-1768 (Ministry of the Solicitor General)[7], a request was made for records relating to the movements of a named individual at Camp Ipperwash. The Ministry refused to confirm or deny the existence of responsive records. This decision was upheld by the Assistant Commissioner, albeit in applying the two-part test that is now the subject of this judicial review. At pp. 3-4 of his decision, however, the Assistant Commissioner cited the following submission from the Ministry and then proceeded to apply the principles enunciated:

> In the case at hand, the very nature of the request necessarily requires that the Ministry rely on the 'confirm or deny' sections. The request is framed in such a manner that no other response is possible. Whether or not there are any records, to do anything other than [refuse to] confirm or deny the existence of records would have the effect of potentially disclosing exempted information to the appellant.
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> *The importance of the ability of institutions to rely on the 'confirm or deny' sections cannot be underestimated. The ability to do so is crucial for the proper administration of the Act and to avoid disclosures that would otherwise be exempted.* It is not a question of being evasive with requesters. *If there was no provision for refusing to confirm or deny the existence of the records, the privacy protection and confidentiality principles of the legislation could easily be defeated.* (Emphasis added.)
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> . . .
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> In these unique situations where a request gives rise to the problem of indirect disclosures in responding to the request, institutions rely on the 'confirm or deny' provisions to avoid indirect disclosures. Institutions do so consistently and regularly in all cases where responding in a different manner to the request would indirectly

[7] March 21, 2000

disclose information to the requester. The IPC has repeatedly upheld such decisions in appropriate cases.

[42] On the basis of the foregoing analysis, I am satisfied that the two-part test interpretation given by the Assistant Commissioner to subsection 21(5) of the Act is neither the correct interpretation nor one that the language of the Act, read as a whole, can reasonably bear. The interpretation "is not supported by any reasons that can stand up to a somewhat probing examination": *Canada (Director of Investigation & Research) v. Southam, supra*, para. 154; *Law Society (New Brunswick) v. Ryan*, [2003] S.C.J. No. 17, 223 D.L.R. (4th) 577, para. 55.

[43] First, the Assistant Commissioner did not give any reasons for his adoption of the two-part test, except to note that subsection 21(5) gives institutions a significant discretionary power that should be exercised only in rare cases. This is not in dispute, but does not, in itself, form a rational basis for introducing a statutory test that is not found in the plain language of the section. Secondly, the decision of the Divisional Court relied upon by the Assistant Commissioner -- *Ontario Hydro v. Ontario (Information and Privacy Commissioner), supra* -- does not support the proposition that subsection 21(5) requires the institution to demonstrate disclosure of the existence or non-existence of the record would constitute an unjustified invasion of personal privacy. That proposition was not in issue in that case. Thirdly, the logical process by which the interpretation was arrived at is flawed, because it misconstrues the purpose and role of subsection 21(5). As noted above, its role is not to provide a means for further refining the search for disclosure of personal information that would or would not constitute an unjustified invasion of personal privacy. Rather, its role is as a protective mechanism to ensure that such information, when it cannot be disclosed directly, is not inadvertently disclosed indirectly.

[44] The effect of the Assistant Commissioner's two-stage interpretation is to elevate what is in substance a factor for a head to consider when exercising the subsection 21(5) discretion (i.e., whether revelation of the mere existence or non-existence of a record be an unjustified invasion of personal privacy) to the level of a statutory test. In my opinion, that is not what the legislature intended.

[45] I would accordingly allow the applications for judicial review on this ground, set aside Order PO-1809 and Order PO-1810 made by Assistant Commissioner Mitchinson on July 27, 2000, and order that the decisions of the Applicant to refuse to confirm or deny the existence of any responsive records in relation to both requests be confirmed.

Other Issues

[46] Ms. McIntosh raised two alternative arguments on behalf of the Ministry. First, she submitted that even though the Assistant Commissioner stated the test was whether the disclosure of the existence (or non-existence) of the record would in itself constitute an unjustified invasion of personal privacy, he did not in fact apply that test. Instead, he applied a test of whether the existence of the records could be deduced from the fact that the circumstances were "publicly known". Secondly, she argued that even if the Assistant Commissioner stated and applied the proper test, he erred in applying the test to the facts of this case.

[47] In view of my conclusion that the applications for judicial review must be allowed on the primary ground raised, it is not necessary to deal at length with these alternative arguments. Suffice it to say that I would not have been inclined to allow the applications on either alternative basis.

[48] First, I do not think the Assistant Commissioner applied a "publicly known" test in arriving at his decisions. He applied the two-stage test dealt with in the earlier portion of these Reasons. In considering the second stage, i.e., whether disclosure of the existence or non-existence of the record would constitute an unjustified invasion of personal privacy, he took into account that "the existence of the affected person's appeals with the HSAB on issues relating to funding levels provided by the Ministry for his care is a publicly known fact". He then went on to consider some of the indicia of that public knowledge. However, he did so in the context of applying the second stage test. In my opinion he did not do so in the context of applying a completely different "publicly known" test. I would not give effect to this ground of the application.

[49] Similarly, I would not give effect to the second alternative argument. On the premise that he applied the proper test, the application of the facts of a given situation to that test is a matter that falls squarely within the expertise of the Assistant Commissioner. It is entitled to a great deal of deference. Had he applied the proper test, therefore, I would not interfere with his determination on the merits of the case.

[50] There is one more matter to be dealt with. It arises out of the private record before the Court and the private submissions of counsel in that regard. Given my determination that the discretionary decision of the Ministry not to confirm or deny the existence of responsive records must be restored, para. 2 of the Assistant Commissioner's order, which forms part of the private record, cannot stand. It is therefore set aside as well.

R.A. BLAIR R.S.J.
I agree. — C. CAMPBELL J.

DATE: June 26, 2003

LANG J. (Dissenting):

REASONS FOR JUDGMENT

[1] I have had the opportunity to read the reasons of my colleague, Blair R.S.J. Although I agree with most of his analysis, I differ with his conclusion that the Assistant Privacy Commissioner's decision should be set aside. I would dismiss the application for judicial review.

[2] The journalists (requesters) requested:

> All records relating to the agreement reached between [the affected person] and the Minister of Health and the Ministry of Long Term Care regarding [the affected person's] appeal to the Health Services Appeal Board.

[3] The reason given for the request was that:

> . . . because the pre-hearing settlement in this case could have an effect on the level of service people in similar circumstances could expect, the amount of money involved, and the timing of the settlement, I believe that it is in the public interest not to suppress the details of a settlement.

[4] The Ministry responded:

> The decision . . . is to refuse to confirm or deny the existence of any records responsive to your request, since to do otherwise would constitute an unjustified invasion of personal privacy of [the affected person] and his family.

[5] The requesters appealed. The Assistant Privacy Commissioner (the Commissioner) decided to "not uphold the Ministry's decision to refuse to confirm or deny the existence of the records." If the Commissioner's decision is upheld, the Ministry would be required only to disclose whether documents exist that are responsive to the request; it would not be required to produce the documents themselves (if they exist).

[6] In these reasons I will use the term "private information" to refer to information that the Ministry, under a s. 21 analysis, must refuse to disclose on the basis that its disclosure would constitute an unjustified invasion of personal privacy. I will refer to the issue as to the confirmation or denial of the existence of a record as the "existence issue".

[7] The disclosure question turns on the interpretation of the following provision of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*):

> s. 21(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.

Section 21(5) thus gives the Ministry the discretion to refuse to provide information on whether a record exists, as opposed to s. 21(1), which prohibits disclosure of the private information itself.

[8] The Commissioner is said to have interpreted this section to include the italicized words as follows:

> s. 21(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record *or disclosure of the existence of the record* would constitute an unjustified invasion of personal privacy.

[9] The Commissioner held that s. 21(5) required the government to satisfy a two-pronged test. It is worth extracting the Commissioner's rationale on the existence issue from his reasons:

> Section 21(5) only applies if it is determined that the records at issue contain personal information. Section 2(1) defines "personal information", in part, as recorded information about an identifiable individual.
>
> A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking s. 21(5), an institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases (Order P-339).
>
> An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Orders P-339 and P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)).
>
> Therefore, in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that:
>
> 1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and
>
> 2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.
>
> I will begin with the second requirement, since if it has not been established, the Ministry is precluded from claiming section 21(5) whether or not it can establish that disclosure of any existing records would constitute an unjustified invasion of personal privacy.
>
> To satisfy the second requirement, the Ministry must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the conveyed information would itself constitute an unjustified invasion of personal privacy.

[10] The Commissioner refers to Order P-339, where he considered the same issue. The Commissioner's reasons in that case were similar to those before this court, with the addition of the following paragraph:

> In my view, the head has confused the exercise of discretion under 21(5) with the analysis of the exemption claim under section 21. By simply confirming that records associated with an investigation exist, the head is not confirming that any identifiable individual was investigated. Rather, the head is merely confirming that records associated with such a process exist, without indicating the parties involved. In my view, there is no unjustified invasion of personal privacy in these circumstances.

[11] In Order P-808, another Commissioner gave similar reasons with respect to the interpretation of s. 21(5) and held that, to suppress information about the existence of documents, a ministry must apply the same two-pronged test. Order P-808 was reviewed by this court in *Ontario Hydro v. Ontario (Information and Privacy Commissioner), supra*. This court, in that review, held that:

> The requirement that Hydro must establish the disclosure of the records would constitute an unjustified invasion of personal privacy, before it could refuse to confirm or deny the existence of the records . . . was not unreasonable in our judgment.

[12] The existence issue was not at issue before the Divisional Court and, hence, I agree with Blair R.S.J. that it has not been previously considered by this court.

The Commissioner's Interpretation

[13] The case law, reviewed by Blair R.S.J., establishes that reasonableness is an appropriate standard for this court to apply in reviewing a commissioner's decision with respect to s. 21. The Supreme Court of Canada recently revisited the parameters of reasonableness in *Law Society (New Brunswick) v. Ryan*, [2003] S.C.J. No. 17, 223 D.L.R. (4th) 577 at paras. 53 and 55:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at paras. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.
> . . .
>
> 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. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam, supra*, at paras. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even

> if this explanation is not one that the reviewing court finds compelling (see *Southam, supra*, at paras. 79).

[14] As Blair R.S.J. succinctly points out, the Commissioner brings to bear a body of experience and special expertise in the interpretation of his home statute. This statute is a comprehensive and critically important one that balances the twin objectives of access to government information with the right to personal privacy. The Commissioner has developed a body of precedent on the interpretation of the statute reflective of his expertise in considering the *FIPPA's* application: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, 164 D.L.R. (4th) 129 (C.A.). As Archie Campbell J. said in *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 106 D.L.R. (4th) 140 (Div. Ct.); at p. 783 O.R.:

> ... Central to [the Commission's] 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.

[15] The case before us, which rests on an interpretation of s. 21(5), engages the very core of the commissioner's expertise. In the hypothetical situation before the Commissioner, the disclosure of a record would disclose private information, but disclosure of the record's existence would not. The Commissioner held that the Ministry improperly exercised its discretion when it refused to confirm or deny the existence of a document. This is because the Commissioner found that discretion to suppress information about the mere existence of a document could only be exercised where the disclosure of the document's very existence could reveal private information. If disclosing the existence or non-existence of a record would not in and of itself convey private information, the document must be disclosed. The fact that disclosure of a record would disclose private information was not enough to allow the Ministry to refuse to provide information as to a record's existence where such disclosure would not convey private information.

[16] The Ministry's initial position supported the Commissioner's finding. Before the Commissioner, the Ministry accepted that for the s. 21(5) analysis, a ministry must establish both that the disclosure of the document and whether the document existed would constitute an unjustified invasion of personal privacy. The Ministry's submissions focused on the argument that the records (if they existed), and disclosure of whether they did or did not exist, would both disclose private information. This is an argument the Commissioner did not accept.

[17] The Commissioner was clearly concerned that an untrammelled discretion would permit suppression of the existence of a document even where personal privacy was not at stake. Section 21(5), if subject to only one interpretation, as the Ministry now argues, would give a ministry, an interested party in the issue, the opportunity to suppress very basic information on the existence issue -- and hence to override one of the two major objectives of the legislation -- even where the other objective was not engaged.

[18] No other provision in the legislation specifically addresses the question of what to do if disclosure of the record's existence would not convey private information. If the interpretation now proposed by the Ministry is correct, there is a gap in the legislation. In his reasons, the Commissioner takes a pragmatic and functional approach to interpreting the provision. Read together with the Commission's earlier decisions, this interpretation is consistent with legislative intent and avoids the alternative of leaving the legislation with an unfilled gap. The Commissioner's reasons do not write words into the subsection, but rather, in the Commissioner's view, place reasonable restrictions on the words already there: he puts parameters on the Ministry's discretion to prevent it from suppressing basic information when there is no reason to do so.

[19] When reviewing the Commissioner's reasoning it is important to bear in mind his position as an independent body. The Commissioner objectively assesses the issues at stake quite differently than would a requester, an affected person, or a ministry. The requester -- in this case the media -- has an obvious interest in obtaining the information, or an affected person, or a ministry, which may also have its own interest either in releasing or suppressing certain information.

[20] It is important to review the Commissioner's reasons in the context of *FIPPA's* structure. As Blair R.S.J. notes in para. 30 of his reasons, Part II of *FIPPA* provides for freedom of information. It does so with the following language:

> s. 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; . . .

[21] Section 21 provides mandatory exemptions from access to information to protect an affected person's privacy. It does so by giving a ministry an extra mechanism to protect that privacy. The section supplies that protection by giving the ministry official (subject to an appeal to the Commissioner) a discretion to refuse to even confirm or deny the existence of a record where to do so would convey private information about an affected person. The Commissioner held that this ministry discretion is limited and should only be exercised "in rare circumstances". He held that, to exercise this discretion, the ministry must be able to establish not only that the record itself would disclose private information, but so too would disclosure of its very existence or non-existence.

[22] Such an interpretation conforms to the objectives of the legislation: it allows access to information where the information does not impinge on personal privacy. This is in contrast to the interpretation urged by the ministry, which would deny access to information even where privacy was not at issue. Such an interpretation, in the Commissioner's view, would not advance the "right to know" objective of government accountability and transparency.

[23] The Commissioner is alive to the profound denial of basic information that can occur when a ministry can suppress information as to whether or not a document even exists. The Commissioner said that this puts the requester in "a different position than other requesters who have been told there are records but are denied access to them". While the Commissioner does not elaborate, he appears to be of the view that a refusal to confirm or deny the existence of a record is more restrictive of

access to information than is a refusal to produce the requested records at issue. This is also evident in his comment that s. 21(5) gives government institutions a "significant discretionary power which should be exercised only in rare cases." In other words, a ministry's discretion on the existence issue should be limited; discretion is never completely unfettered.

[24] Without discussing the broad objectives of *FIPPA*, the Commissioner's decision limits the Ministry's discretion by requiring, as a first step to its exercise, that disclosure of whether the record exists would convey private information. While his reasons do not elaborate, this "first step" requirement reflects the Commissioner's opinion that there would be no justification in restricting the public's knowledge about the mere existence of documents where the fact of their existence or non-existence would convey no personal information.

[25] The Commissioner then considered, and rejected, the Ministry's position that disclosure of the facts that any records exist, if they did exist, would convey personal information. He set out the affected person's representations and the requester's position that, in essence, some records obviously existed. The Commissioner concluded that "section 21(5) has no application in the context of this appeal." The remainder of the Commissioner's reasons, which deal with the application of other *FIPPA* provisions, demonstrate his appreciation of the need to balance rights of access to information with rights to personal privacy.

[26] The Commissioner was thus concerned with the parameters of a ministry's discretion. He was not reading additional words into the legislation, but rather holding that a ministry's discretion was circumscribed. It can be taken from his reasons, when read as a whole, that he interpreted a ministry's discretion in a manner consistent with a requester's "right to know", balanced by an affected person's right to personal privacy. He decided that government officials charged with making such decisions, in exercising their discretion, should consider whether disclosure of the existence or non-existence of the document would itself convey private information.

[27] This interpretation is consistent with the purpose of encouraging and facilitating access to information provided that doing so does not infringe one's right to personal privacy. The legislature has assigned the Commissioner the delicate task of balancing these objectives. No one single interpretation of s. 21(5) can be said to be right.

[28] In these circumstances I am not prepared to find that the Commissioner's decision is either unreasonable or irrational. I am mindful that it is not my task to ask if the Commissioner's interpretation was correct. The legislature chose the Commissioner to develop an expertise in this legislation and he has done so. In my view, his reasons, in the circumstances of this particular case, are reasonable, logical and are supported by a tenable explanation. I would not interfere with his decision.

Issue Not Raised Before the Commissioner

[29] Even though I am not satisfied that the Commissioner's decision is unreasonable, it is clear from para. 9 of these reasons that the Commissioner did not give the existence issue an extensive analysis. This is because his decision to invoke a two-pronged s. 21(5) analysis, as had been done

in Orders P-808 and P-339, was not challenged. The absence of contention on the issue may explain the brevity of the Commissioner's reasons for its application.

[30] If this court were reviewing the decision of a tribunal with no significant expertise in the area, the standard of review would be correctness. The court could hear full argument on the interpretation issue and draw its own conclusion as to whether the tribunal was correct. If the standard of review was that of patent unreasonableness, the court would be very wary to overturn the decision unless it was "clearly irrational" or "not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673, at pp. 963-64 S.C.R., per Cory J. It is different, however, when the standard of review is reasonableness. This standard requires a "probing examination" of the tribunal's reasoning and, before setting aside the decision, a finding that the tribunal could not reasonably have reached the decision it did.

[31] The Supreme Court of Canada, in *Law Society (New Brunswick) v. Ryan*, supra at paras. 50 and 51, explored the process of determining "correctness" and "reasonableness":

> ... When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. . . .
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

[32] The Commissioner's reasons did give indications of the principles he applied but do not provide a detailed analysis of the context of s. 21(5), or balance the purposes of the legislation, although they do reflect a concern about the broad discretionary power given to the Ministry to suppress information as to the "mere existence" of records.

[33] This case presents a classic example of balancing "objectives that exist in tension with each other": the right to access to information and the right to protection of privacy. The Commissioner has acknowledged experience and expertise in that balancing process in interpreting his home statute, an expertise not shared by this court. The tribunal is one created by the legislature to provide independent review of government decisions to release or refuse information.

[34] As a general rule, an appellate court will not consider new grounds that are raised for the first time on an appeal. The reason for this rests on the inherent unfairness of requiring a respondent to respond to new grounds of appeal, the foundation for which was not established at trial. If the ground

had been raised in the first instance, the respondent may well have called different evidence and made different submissions. This general rule does not apply where the respondent is not so prejudiced and where the evidentiary foundation has been laid. The appellate court can then decide the issue on the basis of the material before it. In such a situation, however, the appellate court is considering a trial judge's legal interpretation on the correctness standard.

[35] It is different when the standard is reasonableness. In that situation, a reviewing court would considerably benefit from the tribunal's full analysis, particularly where that tribunal has an acknowledged expertise in the area under review, such as s. 21 of *FIPPA*.

[36] I would be reluctant, therefore, to set aside the Commissioner's decision on the basis that his reasons do not stand up to scrutiny on an interpretive point that was not argued before him. Without the benefit of full reasons from the Commissioner, particularly in a situation where his interpretation was neither novel nor challenged, I hesitate to accede to the Ministry's request to come to a contrary interpretation. This s. 21(5) interpretation argument should not have been raised for the first time on a judicial review application.

[37] The Commissioner, however, was represented by counsel and made submissions to this court on the reasonableness of his reasoning. He had an opportunity, in making those submissions, to set out the statutory scheme, address the purpose of the legislation, describe its importance, and submit that his approach was responsive to *FIPPA's* purposes. In that sense, he has had the opportunity to support his position. (I note, as did Blair R.S.J., that the issue of the Commissioner's appearance on such applications is under consideration by another Divisional Court panel and this panel makes no comment on the Commissioner's standing.)

[38] In addition, the Commissioner did not object to the applicant raising this issue for the first time on this review. In light of this and the Commissioner's further submissions, I have considered the question of the reasonableness of the Commissioner's decision and am not persuaded that, in the circumstances of this case, that they are unreasonable.

Other Grounds of Review

[39] I agree with the reasons of Blair R.S.J. and would not give effect to the Ministry's remaining ground of review that argues that the Commissioner correctly stated the correct test but then applied a different and erroneous test of whether the information was "publicly known". The Commissioner was simply applying the second part of his two-pronged test to determine that information as to any existence of a record did not constitute an unjustified invasion of personal privacy. He determined that there could be no such unjustified invasion where an affected person, as opposed to a third party, had already publicly disclosed the information.

Remaining Issue

[40] A separate argument was advanced in the private record about a decision unrelated to s. 21(5). On that issue, the Commissioner balanced the factors both for and against disclosure, matters

at the core of his expertise, and his decision is entitled to considerable deference. I would not set aside the Commissioner's decision on the private record.

LANG J.

Released: June 26, 2003

COURT FILE NOS.: 519/00 and 520/2000
DATE: June 26, 2003

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BLAIR R.S.J., LANG J. AND C. CAMPBELL J.

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by the Minister of Health and Long-Term Care of Ontario

Applicant

- and -

TOM MITCHINSON, Assistant Commissioner, Information and Privacy Commissioner/Ontario and JOHN DOE AND JANE DOE, Requesters

Respondents

REASONS

R.A. BLAIR, R.S.J.
LANG J. (Dissenting)

DATE: June 26, 2003