OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

BY FAX

March 28, 2003

To the parties:

Inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") – Robert Matas, *The Globe and Mail* ("applicant") – Ministry of Attorney General ("Ministry") – OIPC File No. 15884

This ruling sets out my decision respecting the Ministry's objection that, because s. 3(1)(h) of the Act excludes the responsive records from the Act's right of access, I have no jurisdiction to proceed with this inquiry. After careful consideration of the material before me, I have decided, for the reasons given below, that the Ministry's objection, though well-founded in part, cannot be sustained in respect of the requested records that are specific to Inderjit Singh Reyat because of the completion of the proceedings against him.

1.0 BACKGROUND

By an indictment filed June 5, 2001, Ripudaman Singh Malik, Ajaib Singh Bagri and Inderjit Singh Reyat were jointly charged by an indictment ("joint indictment") with first-degree murder and other offences under the *Criminal Code* of Canada. The charges arose out of the June 23, 1985 deaths of 329 passengers and crew aboard Air India Flight 182, which exploded off the coast of Ireland. Because the accused could not afford to pay for their own defence, the Province (as represented by the Ministry) agreed to fund defence counsel for all three. Two of the accused have yet to be tried. As discussed below, Reyat recently pleaded guilty to manslaughter by, to quote the indictment against him, "aiding and abetting in the construction of an explosive device placed on board" Air India Flight 182, "which exploded and caused its destruction, contrary to Section 217 of the Criminal Code of Canada". Reyat was recently sentenced for that offence and other charges against him have been stayed by the Crown.

In nine letters to the Ministry dated May 2, 2002, which it received on May 7, 2002, the applicant made nine separate access requests under the Act. These requests, each of which named a different lawyer, were in identical terms. The applicant requested "access to copies of all documents, reports and emails dealing with fees" paid to the named individuals "for work on the Air India case". The applicant also asked for "access to all invoices and billings for work, received by the government, from" the various lawyers. A further May 2, 2002 letter from the applicant also sought "access to a list of all lawyers

representing the defendants, and paid for by the government, in connection with the Air India case."

In a July 10, 2002 letter to the applicant, the Ministry took the position that the requested records contained information excepted from disclosure by s. 14 of the Act. The Ministry's response prompted the applicant to ask, in a July 23, 2002 letter to this office, for a review of the Ministry's decision. In an August 30, 2002 letter to the applicant, the Ministry said the following:

> Upon further consideration we have determined the requested records do not fall within the scope of the Act pursuant to section 3(1)(h) as the documents relate to a prosecution which has not been completed. Once the prosecution has been completed the documents would then be excepted pursuant to Section 13 (Policy Advice); Section 14 (Legal Advice); and Section 17 (Financial interest of the public body).

Because the matter did not settle in mediation, this office issued a notice of inquiry to the parties on October 29, 2002. A November 7, 2002 letter to this office from the Ministry's counsel submitted that, since s. 3(1)(h) is in issue, it would be appropriate for me to deal with its applicability as a preliminary matter, before addressing the applicability of the exceptions to disclosure in ss. 13, 14 and 17. On November 8, 2002, I wrote to the parties and invited submissions on s. 3(1)(h). Both parties have made written submissions in response.

On February 7, 2003, a new indictment was filed against Reyat alone ("Reyat indictment") charging him with manslaughter by aiding and abetting in the construction of an explosive device placed on board Air India Flight 182. He pleaded guilty to the charge in the Reyat indictment on February 10, 2003 and was sentenced to five further years in prison. The Crown entered a stay of proceedings for the charges against Reyat in the joint indictment. Also on February 7, 2003, the Crown filed a new indictment against Malik and Bagri only ("Malik-Bagri indictment"). On February 12, 2003, I invited further submissions as to what effect, if any, Reyat's guilty plea had on the s. 3(1)(h) issue. This is because s. 3(1)(h) only operates to exclude records from the scope of the Act if all proceedings in respect of the prosecution have not been completed. The Ministry argues that, especially since all three accused were jointly charged under a single indictment, "the Air India criminal matter" is a single "prosecution" for the purposes of s. 3(1)(h). It says that, since proceedings respecting the two remaining defendants are still ongoing, Reyat's guilty plea does not change the outcome of the s. 3(1)(h) issue. The applicant argues that Reyat's guilty plea means records relating to him should be made available under the Act without delay.

2.0 ISSUE

The issue to be determined here is whether s. 3(1)(h) applies to the requested records. If that is the case, the right of access under s. 4(1) of the Act does not apply to the records and this inquiry will end for that reason. Both parties have accepted that the Ministry has the burden of establishing that s. 3(1)(h) applies.

3.0 DISCUSSION

3.1 Relevant Provisions – The relevant portions of s. 3(1) of the Act read as follows:

> **Scope of this Act**
>
> **3** (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
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> …
>
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

The word "prosecution" is defined in Schedule 1 to the Act as "the prosecution of an offence under an enactment of British Columbia or Canada".

3.2 Description of the Records –Under s. 44(2) of the Act, I required the Ministry to produce the requested records, which I viewed, *in camera*, at the Ministry's Victoria offices on March 26, 2003.

On viewing the records *in camera*, I was told by Ministry representatives that all of the records are in the files of the Ministry's Justice Services Branch. That Branch is responsible for entering into funding agreements and administering them. None of the disputed records, I was told, are found in the files of Crown counsel. Indeed, in order to ensure that criminal proceedings are not jeopardized, Crown counsel do not have access to these records.

My examination revealed that the records fall into several categories:

- copies of the funding agreement between the Ministry and defence counsel,
- copies of legal accounts rendered to the provincial government by counsel, in most cases with descriptions of services rendered severed out by a reviewing lawyer from outside of the Ministry,
- so-called 'review certificates', given by a reviewing lawyer to the Ministry, certifying that the lawyer has, as provided in the funding agreement, reviewed the appended (and severed) legal account and that it can be paid, or certificates relating to payments defence counsel made to third-party suppliers of services (including expert witnesses retained by the defence) or goods (such as office supplies and computer equipment),
- correspondence to and from the Ministry, defence counsel or the reviewing lawyer about some of the legal accounts or enclosing payments for accounts, and
- internal Ministry communications respecting payment of accounts.

3.3 Interpretation of Section 3(1)(h) – The first issue I must address is the interpretation of s. 3(1)(h).

Summary of the parties' positions

The Ministry says the word "prosecution" in s. 3(1)(h) is ambiguous, because it can be interpreted to refer to a prosecution in the sense of a "criminal proceeding generally" or to refer to the prosecution team, in the sense of the Crown or other prosecuting authority

as a party. The Ministry argues that, for a variety of reasons, the first interpretation is the correct one. The Ministry finds support for its position from comments made by the Attorney General during legislative debate on s. 3(1)(h) (Hansard, British Columbia Debates, June 22, 1992 (Afternoon Sitting), at p. 2867:

> [T]he record relating to the prosecution of all proceedings in respect to the prosecution not being completed [*sic*] is simply to ensure that well-developed, common-law rules of disclosure in prosecutions are not replaced by Bill 50 [the Act]. It's to protect the common-law provisions in prosecutions [*sic*].

The Ministry says these comments indicate that the Legislature intended to "protect the criminal law disclosure process generally", regardless of whether the requested records are records of the prosecuting authority or of the accused (para. 4.25).

Section 3(1)(h) refers to "records relating to a prosecution". The word "prosecution" is defined as "the prosecution of an offence" and s. 3(1)(h) contemplates "proceedings in respect of the prosecution". In my view, these features point to a prosecution in the sense of a proceeding for the prosecution of an offence against an accused. Moreover, if the Legislature had intended the word "prosecution" to refer to the prosecuting authority, it could have used language closer to that used in, for example, s. 3(1)(a) ("a record in a court file"), s. 3(1)(b) ("a personal note, communication or draft decision of a person acting in a quasi-judicial capacity") or s. 3(1)(c) ("a record that is created by or for, or is in the custody or control of, an officer of the Legislature").

This is not the end of the matter, however, since the meaning of the words "relating to" is critical to the issue of whether the Act applies to the requested records. The Ministry relies on the following portions of the *New Shorter Oxford English Dictionary* definition of "relate":

> …4. Bring (a thing or person) into relation with; establish a connection between…8. Have some connection with, be connected… .

The Ministry asks me to interpret "relating to" so that s. 3(1)(h) applies whenever there is some "logical, reasonable" connection between requested records and an ongoing prosecution. The Ministry also argues that the requested records would not exist "but for" the Air India prosecution, which means they "clearly had some connection with, and therefore relate to, the Air India prosecution" (para. 4.29). It says the records were created for the sole purpose of providing legal defence funding to the Air India accused "in order to ensure a fair trial", so records arising out of those funding agreements are records relating to the prosecution (para. 4.29).

The Ministry relies on Order No. 20-1994, [1994] B.C.I.P.C.D. No. 23, the first case to consider s. 3(1)(h). That decision involved the Ministry's contention that records related to its decision whether or not to proceed with child abuse charges were excluded from the Act's operation by what was, at the time, s. 3(1)(g). The Ministry argued there that, although charges had not yet been laid, the section applied because its legislative purpose was to ensure that the criminal justice process – including the investigative stages of that process – can operate in an efficient manner without any interruptions resulting from requests under the Act. The Ministry quotes and relies on the following passage from p. 7 of Commissioner Flaherty's decision:

> … I need to interpret section 3(1)(g) of the Act in the context in which it appears, that is, a general exemption for records that pertain to the administration of justice through the courts. …

The Ministry also relies on Order No. 256-1998, [1998] B.C.I.P.C.D. No. 51, in which Commissioner Flaherty dealt with an access request the British Columbia College of Teachers had made to the Vancouver Police Department. The College sought a copy of a statement that a victim had made to the Department during its investigation of a teacher's conduct. The Ministry cites the following statement, at p. 4, about the interpretation of s. 3(1)(h):

> … The plain meaning of section 3(1)(h) extends to all records relating to a prosecution, whether or not they are in the custody of Crown Counsel. It is worth noting also that section 3(1)(h) is not limited, either expressly or by implication, to records in the custody of Crown Counsel.

Turning to judicial interpretation, the Ministry relies on *Haskett* v. *Insurance Corp. of B.C.* (1990), 48 B.C.L.R. (2d) 119; [1990] B.C.J. No. 1551 (C.A.), which involved a regulation made under the *Insurance (Motor Vehicle) Act*. The regulation provided that an insured motorist was deemed to be in breach of a condition of that Act – an event that would allow ICBC to deny coverage – where the insured's claim arose out of or was "related to circumstances that result in his conviction for … a motor vehicle-related *Criminal Code* offence." The insured had been convicted of failing to remain at the scene of an accident, contrary to the *Criminal Code*. At p. 4 (B.C.J.), Proudfoot J.A. quoted the following *Black's Law Dictionary* definition of the word "relate" with approval:

> To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with 'to'.

Proudfoot J.A. said this definition "without any doubt imports some logical, reasonable connection." She went on to conclude that the *Insurance (Motor Vehicle) Act* and regulation required a causal connection between the criminal conduct and the loss suffered in order to fall within the words "related to". *Haskett* is the source for the Ministry's "logical, reasonable connection" submission in this case.

For his part, the applicant says the requested records were not prepared in order to ensure a fair trial, but relate only to funding arrangements for the three accused. The applicant notes he has not requested details of those arrangements, including their specific terms or the processes under which defence counsel came to be appointed (pp. 3 and 4). He contends that this access request "involves a criminal justice process whereby criminal investigation, prosecution and subsequent appeals cannot be compromised by public disclosure". This submission assumes that the test under s. 3(1)(h) calls for an inquiry into whether disclosure of the requested records would or could compromise or injure a "criminal investigation, prosecution and subsequent appeals". I have concluded below that such an approach is closer to the test for the disclosure exception in s. 15(1)(a) of the Act and cannot be equated with the test in s. 3(1)(h) for records "relating to a prosecution" in respect of which all proceedings have not been completed.

Discussion

The following discussion addresses the interpretation of s. 3(1)(h).

In *Slattery (Trustee of)* v. *Slattery* (1993), 106 D.L.R. (4th) 212, the Supreme Court of Canada dealt with the confidentiality obligations in ss. 241(1) and (2) of the *Income Tax Act*. Section 241(3) provided that ss. 241(1) and (2) did not prohibit testimony "in respect of proceedings relating to the administration or enforcement of" the *Income Tax Act*. At p. 226, Iacobucci J. (writing for the majority) said the following:

> The connecting phrases used by Parliament in s. 241(3) are very broad. The confidentiality provisions are stated not to apply in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.
>
> The phrase "in respect of" was considered by this court in *Nowegijick* v. *Canada* (1983), 144 D.L.R. (3d) 193 at p. 200, [1983] 1 S.C.R. 29, [1983] C.T.C. 20:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters
>
> (Emphasis added.) In my view, these comments are equally applicable to the phrase "relating to". The *Pocket Oxford Dictionary*, 7th ed. (1984) defines the word "relation" as follows:
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> > ... what one person or thing has to do with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things... .
>
> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.

In *R.* v. *Wilder*, [2000] B.C.J. No. 62, the British Columbia Court of Appeal considered s. 241(3) of the *Income Tax Act*. In adopting the *Slattery* approach to s. 241(3), Esson J.A. noted, at para. 44, what he called the "broad interpretation" of the words "relating to" that had been adopted by the majority in *Slattery*.

In a different context, *Re Woodward Stores (British Columbia) and McCartney* (1983), 145 D.L.R. (3d) 193 (B.C.S.C.), involved consideration of a prohibition found at the time in the *Human Rights Code* against occupational or employment discrimination without reasonable cause. The legislation provided that there was no discrimination on the basis of a conviction for a criminal or summary conviction matter if the charge "relates to" the person's occupation or employment. The Court did not agree that a shoplifting conviction, of itself, involved a charge that related to employment with a retail store. It held that an employer must consider the circumstances of the conviction before concluding that the charge relates to the employment, including such factors as the details of the offence, the length of time intervening between the conviction and the employment

decision, the employment history of the individual concerned, his or her age at the time of the offence and her or his efforts at rehabilitation.

The wording of the relevant provision in the *Human Rights Code* is now framed slightly differently. The present prohibition is against refusing to employ or continue to employ a person convicted of a criminal or summary conviction offence that is "unrelated" to the person's employment. In *British Columbia (Human Rights Commission)* v. *British Columbia (Human Rights Tribunal)*, [2000] B.C.J. No. 2162 (C.A.), it was not contended that the nature of the offence for which the complainant had been convicted was related to his employment. Rather, his employment had been terminated because his incarceration for the offence prevented him from attending work. Hollinrake J.A. held the "offence" could not be separated from its sentencing consequences, so the complainant's incarceration was related to his employment. By contrast, Saunders J.A. held that refusing to continue to employ the complainant because he was unable to attend work was not discriminatory because being "convicted of a[n] … offence" was "unrelated" to the sentencing consequences of the conviction. Ryan J.A. agreed with both sets of reasons.

The Supreme Court of Canada has also very recently considered the meaning of the phrase "relating to" in a case dealing with access to information, *Canada (Information and Privacy Commissioner)* v. *Canada (Commissioner of the RCMP) et al.*, 2003 SCC 8. That case required the Court to interpret the meaning of "relating to" in the context of the definition of "personal information" found in the federal *Privacy Act*. That definition is broadly stated and gives examples of some kinds of information that are "personal information", including "information relating to ... employment history" (s. 3(b)). At para. 25, Gonthier J., writing for the Court, referred to the *Black's Law Dictionary* definition of "relate", quoting the definition as "to bring into association with or connection with." (As noted earlier, the British Columbia Court of Appeal relied on the *Black's Law Dictionary* definition of "relate" in *Haskett*.) Gonthier J. had no difficulty concluding that the requested information – which had to do with historical postings, ranks and other such career information – was "personal information" because it was about an identifiable individual relating to his or her employment history.

The Court also had to determine whether the requested information had to be disclosed under the federal *Access to Information Act* because it fell under s. 3(j) of the *Privacy Act*. Section 3(j) provides that a federal institution cannot refuse to disclose information about a federal employee or officer that "relates to the position or functions of the individual", including the kinds of information given as examples in s. 3(j). At para. 38, Gonthier J. said that s. 3(j) should only apply, thus excluding information from the definition of "personal information",

> ... when the information requested is sufficiently related to the general characteristics associated with the position of functions held by an officer or employee of a federal institution.

He also rejected as artificial and unhelpful a distinction between "information about the person" and "information about the position or functions" and said that s. 3(j) instead applies

> … when the information – which is always linked to an individual – is directly related to the general characteristics associated with the position or functions held by an employee, without the objective or subjective nature of that information being determinative.

These cases illustrate how the same or similar words can yield narrow or broad interpretations. *Haskett* found that the words "relating to" necessitated a "logical, reasonable connection" and it also imposed a requirement for a causal connection. The majority judgment in *Slattery*, by contrast, took a broader view of the meaning of "relating to" in s. 241(3) of the *Income Tax Act*. In *Re Woodward Stores*, the words "relates to" were interpreted to require an examination of the surrounding circumstances in each case. In *British Columbia (Human Rights Commission)*, the words "unrelated to" took on broader or narrower meaning (but with the same impact on the outcome of the case) depending on whether the emphasis was on "convicted" or "offence" in the phrase "convicted for a[n] … offence". In *Commissioner of the RCMP*, the disputed information was found to be both information "relating to" individual employment history and information about an employee that "relates to" their position or functions.

Differences between these judicial interpretations of "related", "relating to" and "unrelated" are, of course, the result of different statutory contexts. That is clear from the decisions. The relevance of statutory context was also underlined by Iacobucci J. in *Sarvanis* v. *Canada*, [2002] S.C.J. No. 27, which addressed the meaning of the phrase "in respect of" in the federal *Crown Liability and Proceedings Act*:

> ¶ 22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.
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> **…**
>
> ¶ 24 In both cases [the English and French versions of the statutory provision], we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:
>
> > … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states
> >
> > > Today there is only one principle or approach, namely, the 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.

> In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, has not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.

Also see, most recently, *Markevich* v. *Canada (Minister of National Revenue)*, 2003 SCC 9, where Major J. approved of the above-quoted passage from *Nowegijick* while acknowledging the relevance of statutory context in interpreting statutory language.

As for the general interpretive approach to the Act, I have previously acknowledged and applied the approach mentioned in *Sarvanis*, as well as the need to interpret the Act in light of s. 8 of the *Interpretation Act*. See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 47-49.

At the end of the day, the scope of the words "relating to" in s. 3(1)(h) depends on analysis of the statutory context in which they occur. Section 2 of the Act is an important part of that context:

> **Purposes of this Act**
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> 2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
> (c) specifying limited exceptions to the rights of access,
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

The s. 2(1) legislative goal of accountability through a public right of access to records is relevant to but not determinative of the meaning of s. 3(1)(h). Section 2(1)(a) specifies that the accountability goal is to be advanced by giving the public a "right of access to records". As the opening words of s. 3(1) affirm, however, the right of access only applies to records that are "in the custody or under the control of a public body" and are not otherwise excluded from the Act's application under s. 3(1). The effect of s. 3(1) is to exclude records from the scope of not only Part 2 of the Act – with the possible exception of s. 25 – but also from the privacy protection code found in Part 3 of the Act.

In Order No. 20-1994, my predecessor spoke of s. 3(1)(h) as an exemption for records pertaining to the "administration of justice". I agree that the administration of justice is a general focus of ss. 3(1)(a), (b) and (h). Sections 3(1)(a) and (b) read as follows:

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;

Section 15 of the Act provides further statutory context. That section advances the public interest in fair and effective law enforcement and justice systems in various ways. Section 15(1)(a) authorizes a public body to refuse to disclose information the disclosure of which could reasonably be expected to "harm a law enforcement matter". Schedule 1 to the Act defines "law enforcement" as follows:

"law enforcement" means

(a) policing, including criminal intelligence operations,

(b) investigations that lead or could lead to a penalty or sanction being imposed, or

(c) proceedings that lead or could lead to a penalty or sanction being imposed;

Prosecution of the Air India accused is both a "prosecution" within the meaning of Schedule 1 to the Act and a "law enforcement matter" within the meaning of paragraph (c) of the Schedule 1 definition of "law enforcement".

Sections 15(1)(b) to (i) and s. 15(2) also permit the withholding of information that is tied to harm to law enforcement. Section 15(3) prevents s. 15 from being applied to withhold three classes of records, none of which is relevant here. Section 15(4) limits a public body's ability to refuse to disclose the reasons for a decision not to prosecute after a police investigation is complete. None of the triggering provisions in s. 15 is conditional on the existence of pending charges or prosecutorial proceedings. Most relate to investigative and post-investigative phases of law enforcement, though some of them (ss. 15(1)(g) and (h)) connect more closely to charging or trial and hearing phases.

Section 15(1)(g) of the Act authorizes a public body to refuse to disclose information "relating to or used in the exercise of prosecutorial discretion". This may suggest a distinction between information that "relates to" the exercise of prosecutorial discretion and information "used" in the exercise of such a discretion. One would think that information "used" in the exercise of prosecutorial discretion would also be information "relating to" it, but that not all information "relating to" is necessarily "used" in the exercise of prosecutorial discretion. Perhaps the most that can be said of the contrast between the words "relating to" in s. 3(1)(h) and "relating to or used" in s. 15(1)(g) is that, since no "use" test has been included in s. 3(1)(h), the applicability of

that provision does not turn on establishing the actual or intended "use" of records in a prosecution.

Section 15(1)(h) authorizes a public body to refuse to disclose information the disclosure of which could reasonably be expected to "deprive a person of the right to a fair trial or impartial adjudication". This provision evinces a legislative goal of protecting the rights of persons accused of an offence or subject to an adjudicative process. Section 15(1)(h) could apply to records relating to or used in a prosecution and it might cover records such as those in dispute here. Section 15(1)(h) could also apply where s. 3(1)(h) would not apply, such as in a case where a prosecution has not been initiated or to information relating to law enforcement proceedings that are not criminal or quasi-criminal in nature.

Section 22(3)(b) of the Act offers further context. It provides that a disclosure of personal information in response to an access request is presumed to be an unreasonable invasion of a third party's personal privacy if

> (b) the personal information 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,

Section 22(3)(b) affects the right of access in Part 2 of the Act. It also links with Part 3 of the Act because of s. 33(a), which provides that a public body may disclose personal information in accordance with Part 2.

The reference in s. 22(3)(b) to the disclosure of personal information necessary to prosecute a violation of law must have meaning. If, however, a record falls under s. 3(1)(h) as "relating to a prosecution if all proceedings in respect of the prosecution have not been completed", then there is no need to refer in s. 22(3)(b) to the disclosure of that record "to prosecute the violation", because the Act does not apply to the records described in s. 3(1)(h). One explanation for the wording of s. 22(3)(b) might be that there could be records that would have to be disclosed to prosecute a criminal or quasi-criminal offence, but which would not be excluded from the Act by s. 3(1)(h). Another explanation might be that "violation of law" in s. 22(3)(b) is wider than "a prosecution" as defined in Schedule 1 and as used in s. 3(1)(h) of the Act. This would give the words "to prosecute the violation" in s. 22(3)(b) meaning apart from records relating to "a prosecution" that are excluded from the Act by s. 3(1)(h).

In terms of interpretive aids, comments made during legislative debate can assist with the Act's interpretation. The above-quoted comments by the Attorney General of the day during debate on s. 3(1)(h) can, as the Ministry suggests, be read as supporting the view that s. 3(1)(h) is intended to ensure that a prosecuting authority only needs to comply with its common law disclosure obligation. But those comments can also be seen as reinforcing the view that s. 3(1)(h) only applies to records relating to "a prosecution" in the sense of records connected with the prosecuting authority's case, not "a prosecution" more broadly understood. Certainly, at the time s. 3(1)(h) was introduced in the Legislature, the Supreme Court of Canada's decision in *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, had recently established that the prosecution has a common law duty to disclose certain information to the defence. The Court was clear, however, that the defence did not have a reciprocal disclosure obligation. It left open the

possibility that such a reciprocal duty might be found, but took the view that one did not exist at that time. The Ministry's submissions appear to assume the defence had such an obligation at the time s. 3(1)(h) was debated in the Legislature. In light of *Stinchcombe*, however, the Attorney General's comments could equally suggest an exclusion from the Act only for records 'of the prosecution'.

Returning to my predecessor's s. 3(1)(h) decisions, I should comment on the Ministry's reliance on Order No. 20-1994. It is important to consider the rest of the passage from which the above-quoted portion, on which the Ministry relies, was taken:

> … Given the careful shaping of section 15 of the Act to cover law enforcement matters, it would be difficult to conclude that the Legislature intended to cover anything to do with a potential prosecution under section 3(1)(g). It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point the Legislature intended to insulate Crown Counsel from requests for access under this Act until a prosecution is completed.

This passage suggests that Commissioner Flaherty considered s. 3(1)(h) was intended to protect Crown counsel from access requests only while a prosecution is under way, not before and of course not after proceedings respecting it have been completed. Order No. 20-1994, in other words, may indicate a narrower interpretation of "relating to" than the Ministry suggests. Moreover, as regards the Ministry's reliance on Order No. 256-1998, it is important to note that Commissioner Flaherty went on to say, in the same passage from p. 4 on which the Ministry relies, that s. 3(1)(h) "only applies to records directly associated with a prosecution that is officially underway." He said the same thing in both Order No. 20-1994 and Order No. 202-1997.

The question remains how direct, close, specific or compelling the relationship between a prosecution and a record must be for the record to be "relating to" the prosecution under s. 3(1)(h). The records requested here are Ministry records relating to funding arrangements and resulting payments of accounts of counsel for criminally charged accused. They also disclose the identity of defence counsel involved. They are generated or received by the Ministry's Justice Services Branch and are not records from Crown counsel's files or available to them.

To the extent the Ministry argues that s. 3(1)(h) applies to any record that would not exist 'but for' the prosecution, that submission goes too far. Especially given the broad definition of "record" in Schedule 1 of the Act, a 'but for' test could encompass general records containing statistical or financial data that would not be the same 'but for' costs or staffing requirements associated with a particular prosecution. Sweeping such records into s. 3(1)(h), on a class basis, as records "relating to a prosecution" would have an over-inclusive effect. Even if one accepts that the aim of s. 3(1)(h) is to enhance the fairness and effectiveness of proceedings in respect of the prosecution of criminal and quasi-criminal offences by relieving public bodies of their obligations under the Act respecting records that relate to those proceedings, while the proceedings are under way, a 'but for' test extends s. 3(1)(h) far beyond that rationale.

On the other hand, I consider the applicant is wrong to equate the test under s. 3(1)(h) with harms tests under s. 15 of the Act.

In my view, the words "relating to" in s. 3(1)(h) should not be given a cramped or technical interpretation so that the determination of whether records are excluded or not excluded under that section becomes an exercise in microscopic examination of the conduct of a prosecution while proceedings in respect of it are still under way. I do not accept, however, that "relating to" covers records that exist primarily (or exclusively) for different or more general purposes and are remote from the actual conduct of proceedings in respect of a prosecution. An administrative record, for example, may contain information linked to the justice system and its operation, but not necessarily be a record "relating to a prosecution" under s. 3(1)(h).

3.4 Does Section 3(1)(h) Apply Here? – The applicant does not dispute that this case involves a "prosecution" within the meaning of the Act. Criminal offences under the *Criminal Code* have been charged. There is no doubt we are dealing with a "prosecution" as defined in the Act.

I will first address the s. 3(1)(h) status of the requested records before February 10, 2003, when Reyat pleaded guilty to a single count in the Reyat indictment, was sentenced for that offence and other charges against him were stayed. Second, I will address the question of whether the events of February 10, 2003 have affected the s. 3(1)(h) status of any of the requested records.

On the first question, I am driven to the conclusion, after very careful reflection, that the requested records are records "relating to a prosecution". Not only are they records that relate specifically and directly to the prosecution of criminal offences, they are also sufficiently closely connected to the conduct of the trial proceedings involved. I say this acknowledging that Crown counsel have no access to such records. The fact that the Crown is thus precluded from using information in the records does not mean these records cannot relate to a prosecution within the meaning of s. 3(1)(h). The requested records are not merely justice system administrative records that for some reason would not exist, or would not exist in the same form, 'but for' the prosecution of offences with which Air India defendants were charged. The requested records disclose the identities of various defence counsel and the details of funding arrangements for, and the actual payments to, defence counsel at various specific times, for the defence of specific criminal charges. These records, which implicate the interests of the accused, are sufficiently connected to the prosecution of the offences charged that they fall within s. 3(1)(h). It may be noted that the identities of many or all the defence counsel may well be matters of public record, in which case the applicant could discover them by other means and the Ministry could release them without concern for confidentiality or privacy. I make no findings and offer no opinion on this, however, because whether or not information in the requested records is already public is not the test for the exclusion of records from the scope of the Act under s. 3(1)(h).

On the second question, I am persuaded that, because of Reyat's guilty plea and sentencing and the staying of other charges against him, s. 3(1)(h) no longer excludes from the Act's scope those of the requested records that are specific to Reyat's defence only, *i.e.*, records disclosing the identity of Reyat's defence counsel and records relating

to funding arrangements and payments to any of those counsel. The reasons for this conclusion follow.

The Ministry's position on this aspect of the matter is summarized in the following paragraphs from p. 2 of its supplementary submission (footnotes omitted):

> If the Air India prosecution is more appropriately considered one prosecution then section 3(1)(h) of the Act would apply to any records relating to the prosecution, even if the record in question related to an individual against whom criminal charges had been finally determined. The rationale for that position would be that the prosecution in relation to the Air India tragedy continued, despite the fact that the charges against one of the accused were finally determined. In contrast, if the prosecution was more appropriately considered to be three separate prosecutions then section 3(1)(h) of the Act would presumably no longer apply to records relating to a particular accused where the criminal charges against that accused had been finally determined (such as is the case with Mr. Reyat).
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> In order to decide the section 3(1)(h) issue in this case, we must consider the direct indictment against Ripudaman Singh Malik, Ajaib Singh Bagri and Inderjit Singh Reyat (hereinafter referred to as the "Indictment", attached as Tab 4). The indictment was dated June 4, 2001, and filed on June 5, 2001. The records requested by the Applicant that relate to Mr. Reyat, namely records pertaining to the costs of his legal defence, were created after the issuance of the Indictment and prior to the Ministry's receipt of the Applicant's request. The Ministry submits that when we deal with the issue of whether or not those records "relate to a prosecution" for the purposes of section 3(1)(h), we need to consider the circumstances existing at the time the records in question were created. The Ministry submits that the nature of the Indictment in relation to the Air India matter weighs in favour of a finding that there was no prosecution in relation to the Air India tragedy at that time, i.e. there were three accused charged together in one direct indictment.

As noted above, on February 7, 2003 the joint indictment was withdrawn and replaced by two new indictments. One was the Reyat indictment, which set out the charge to which Reyat pleaded guilty three days later. The second was the Malik-Bagri indictment, which jointly charged those individuals with various *Criminal Code* offences. I cannot agree with the Ministry that the s. 3(1)(h) status of a record is determined, and frozen, on the basis of the circumstances that exist at the time the record was created. The Ministry would, in effect, read s. 3(1)(h) with the following words added: "a record relating to a prosecution if *at the time the record was created* all proceedings in respect of the prosecution *had not been* completed." This is not the meaning conveyed by the words actually found in s. 3(1)(h). Those words plainly contemplate that records will be excluded from the scope of the Act until the completion of all proceedings in respect of a prosecution, after which they will no longer be excluded from the scope of the Act.

In this case, records relating to Reyat were excluded from the scope of the Act by s. 3(1)(h) when those records were created and at the time they were requested. At the time those records were requested by the applicant, however, the Ministry did not consider them to be out of scope and instead simply denied access under s. 14 of the Act. The Ministry only later asserted s. 3(1)(h) (at that time also taking the position that, once the prosecution has been completed, the disclosure exceptions in ss, 13, 14 and 17 apply

to the requested records). As it turned out, Reyat's guilty plea, sentencing and the stay of other charges against him did follow and completed the prosecution against him.

In conducting an inquiry under Part 5 of the Act, I am not limited to considering only information that existed, was known to or was relied upon by the access applicant when he made his request or by the public body when it responded to the access request. The applicant has requested a review of the Ministry's response to his access request. Again, that response did not raise s. 3(1)(h), but the Ministry put it in issue at the time of the inquiry. The s. 3(1)(h) issue needs to be decided and the intervening resolution of all charges against Reyat is relevant to that decision. Rather than confining my ruling on the s. 3(1)(h) issue to circumstances that have become academic, this inquiry calls out for a ruling on the applicability of s. 3(1)(h) to these records in the present circumstances. That is what governs whether the requested records are currently within the scope of the Act and what matters to the access applicant. There is also no unfairness to the Ministry in proceeding in this way.

The Ministry seeks support for its one-prosecution theory from the fact that Crown counsel prosecuting the charges against the Air India accused have their own offices and administrative structure. It also notes that the Ministry's own February 24, 2003 media release refers to Malik and Bagri as the two remaining persons charged in the "Air India prosecution". Neither of these submissions is persuasive. Taking the latter point first, the language chosen by the Ministry's public relations staff in a media release is not relevant to my determination of whether, for the purposes of s. 3(1)(h), all proceedings respecting "the prosecution" have been completed for Reyat. Nor is it particularly compelling that the Crown counsel involved have their own suite of offices and their own administration. That may be convenient for them, but it does not dictate that only one "prosecution" is involved here for the purposes of s. 3(1)(h).

The Ministry relies on ss. 581 and 591(3) of the *Criminal Code*. The first section, the Ministry says, supports the Ministry's single-prosecution theory because that provision provides that, in general, each count in an indictment must apply to a single transaction. In this case, the Ministry says, the joint indictment contained allegations common to all three accused and (I infer) connected to one set of facts. Section 591(3), in turn, authorizes a court to order jointly-accused persons to be "tried separately". The words "tried separately" indicate, the Ministry suggests, that where accused are to be tried together, there is only one prosecution.

It is not clear to me how the single-transaction rule in s. 581 leads to the conclusion that, in the circumstances of this case, there was or is only one "prosecution" for the purposes of s. 3(1)(h). One could plausibly imagine a case where separate indictments are filed, against multiple accused who are tried separately, in which allegations are made or offences charged against all accused in relation to one set of facts or one event. Nor am I clear how, if multiple accused are being tried jointly because the court has not made a s. 591 order for separate trials, the possibility or fact of a joint trial leads one to conclude that only one "prosecution" is involved for s. 3(1)(h) purposes.

The overall thrust of the Ministry's position respecting the significance of Reyat's guilty plea is that there has only ever been one "prosecution" for the "Air India tragedy". In my view, the Ministry's arguments confuse the tragedy with an assessment, through the lens

of s. 3(1)(h), of the nature of the criminal proceedings now underway. Any assessment of the guilty plea's effect must keep in mind both the explicit language of s. 3(1)(h) and the Act's definition of "prosecution". Schedule 1 to the Act defines that word as "the prosecution of an offence under an enactment of British Columbia or Canada". Section 3(1)(h) refers to "a prosecution" and proceedings relating to "the prosecution".

Even where a single event leads to multiple individuals being charged with the same or a similar offence or offences, the charges and related proceedings are, in my view, prosecuting those various individuals for the offence or offences charged against each of them. Each individual is charged with an offence or offences, regardless of the fact that the charges stem from one event and regardless of whether the charges are laid in one indictment or information. Describing this situation as a single 'tragedy', 'case' or 'prosecution' does not get around the fact that Reyat and the others were each being prosecuted for various offences and that, more recently, Reyat pleaded guilty to one charge, that had been laid in a new indictment, separate from the others.

I will also add that I do not agree with the Ministry that the characterization of the joint indictment as one prosecution or as three prosecutions is determinative of whether proceedings in respect of the prosecution of Reyat completed on February 10, 2003. In my view those proceedings did complete because, even if the joint indictment could be characterized as one prosecution, as I said above a prosecution relates to one or more offences charged against one or more accused and proceedings in respect of the prosecution of Reyat concluded on February 10, 2003. As a result, requested records relating only to the prosecution of Reyat that were out of scope by reason of s. 3(1)(h) then came within the scope of the Act.

Of course, a record could relate to the prosecution of each of the co-accused in a joint indictment or to multiple defendants who are charged and tried separately for offences arising out of related events. This would be typical of a record that is part of the Crown's case or cases against a number of the defendants. The requested records in this inquiry do not have that quality however. They relate distinctly to individual accused by reference to the separate identities of and services rendered by counsel involved.

Further, details of legal services rendered by counsel have been severed from copies of the accounts of defence counsel so that, even if it was possible for severed details in the accounts of defence counsel for an accused to bear some relation to his co-accused, that severed information is absent from and not part of the records that are in the custody or under the control of the Ministry.

To conclude, I find that the requested list of the identities of Reyat's defence counsel is not excluded from the scope of the Act by s. 3(1)(h), but that lists for the defence counsel of Malik and Bagri are excluded under s. 3(1)(h). I also find that records relating to funding arrangements and the payment of defence counsel are not excluded from the scope of the Act by s. 3(1)(h) for Reyat, but they are excluded at this time for Malik and Bagri. This inquiry will therefore continue and will address the applicability of the disclosure exceptions claimed by the Ministry for the Reyat-related requested records, but it will not continue for the Malik- and Bagri-related requested records.

This ruling is no indication, of course, that the applicant will get access to the Reyat-related requested records that I have found fall within the scope of the Act. The disclosure exceptions that have been claimed – the applicability of which I have not yet determined – may well stand in the way.

This office's Registrar of Inquiries will contact the parties next week regarding the schedule for submissions respecting the applicability of the disclosure exceptions claimed by the Ministry for Reyat-related requested records.

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Registrar of Inquiries, OIPC

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