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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 321-1999
July 30, 1999

INQUIRY RE: A decision by the Ministry of Attorney General to refuse to disclose records to an applicant concerning his Internet domain and his business

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 7, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Attorney General (the Ministry) to withhold information concerning an applicant's Internet domain and his business.

2. Documentation of the inquiry process

On July 20, 1998 the applicant submitted a request to the Ministry for records concerning or mentioning him, his business, or his Internet domain. On October 7, 1998 the Ministry responded by partially disclosing records to the applicant and by severing and withholding records under sections 15, 19, and 22 of the Act. On November 6, 1998 the applicant submitted a request to my Office for a review of the Ministry's decision.

On April 8, 1999 the Ministry applied section 16(1) of the Act to certain of the withheld and severed records. On April 12, 1999 the Ministry also applied section 3(1)(b) of the Act to some of the withheld records. On April 16, 1999 the Ministry applied section 22 of the Act to certain severed records to which only section 19 had previously been applied. The Ministry waived the application of section 15 of the Act to information on one page of records that had previously been severed. On April 21, 1999 the Ministry applied section 14 of the Act to certain of the withheld records.

The parties consented to extensions of the original ninety-day deadline for this review from February 9, 1999 to April 30, 1999. Notices of Inquiry were sent to the

parties on April 8, 1999. Before initial submissions were due, the parties consented to extend and adjourn the inquiry for one week from April 30, 1999 to May 7, 1999.

I accepted the Royal Canadian Mounted Police (the RCMP) and the Vancouver Police Department as intervenors in this inquiry.

On July 26, 1999, the Ministry submitted a further affidavit to this inquiry. A copy was sent to counsel for the applicant for a reply. No reply has been received. I realize that the time frame for a reply was very short and have decided not to review the affidavit, nor to rely on it in my deliberations.

3. Issue under review and the burden of proof

The issue before me is whether the Ministry correctly applied sections 3(1)(b), 14, 15(1)(a) and (g), 16(1)(a) and (b), 19(1)(a), and 22 of the Act to the withheld and severed records. The relevant parts of these sections are as follows:

Scope of the 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:

…

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

….

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

…

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

….

Disclosure harmful to intergovernmental relations or negotiations

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;

…

(iv) the government of a foreign state;

(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

….

(2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information, or

….

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

….

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

…

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

….

(3) A disclosure of personal information 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,

….

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 14, 15, 16, and 19, it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

Section 57 of the Act is silent as to the burden of proof where a public body has relied on section 3(1)(b) of the Act. For reasons expressed in Order No. 170-1997, June 12, 1997, I find that the Ministry has the burden of proof. Accordingly, it is up to the Ministry to prove that the withheld records are excluded from the scope of the Act by the operation of section 3(1)(b).

4. The records in dispute

The applicant requested all records concerning or mentioning him, his business, or his Internet domain. He specifically requested the following records and information:

- information forwarded to the Ministry from BC Tel pertaining to its analysis of website content hosted at the applicant's Internet domain;
- a report from the RCMP Hate Crimes Team; and
- other correspondence with various organizations and individuals.

5. The applicant's case

Until recently, the applicant ran an Internet provider service, which came under attack from the Simon Wiesenthal Centre, B'nai Brith, and other organizations. The applicant further states that when he attempted to hold a public meeting on the issue, his rental of a meeting place was cancelled. He further claims that his critics have been corresponding with the Ministry in order to have "hate charges" laid against him under the *Criminal Code*. He also believes that BC Tel forwarded its analysis of his Internet domain to the Ministry. In general, the applicant wants to know what activities the Ministry has undertaken with respect to himself and his business.

In his submission to me, the applicant states that he is seeking three pieces of information:

1. Correspondence between Sol Littman, Director of Canadian Friends for Simon Wiesenthal Centre, and the Attorney General of British Columbia.
2. A copy of the B.C. Tel report on the applicant's service provider, as provided to the Attorney General of British Columbia; and
3. Any report by the Hate Crimes Unit [of the RCMP] on the Free Speech Conference held [by the applicant] on March 21, 1998.

In the applicant's view, it is in the "public interest" for this information to be released to him.

With respect to item 1, the applicant submits as follows:

> Sol Littman has a history of providing deceptive or erroneous information. The Deschenes Commission makes specific references to his false or inaccurate statements. The Applicant believes he has the right to correct false, misleading or inaccurate information supplied by Sol Littman to the BC Attorney General.

The applicant further argues that Mr. Littman cannot assert privacy rights under section 22 of the Act, "since he is a public person and is acting in his public role as an official of the Wiesenthal Centre... he has publicly bragged on various media outlets that he has supplied information about the Applicant and/or the Applicant's company to the BC Attorney General."

With respect to item 2, the applicant states that Attorney General Ujjal Dosanjh "has publicly acknowledged receipt of it and has issued a press release dated April 17, 1998 referencing its contents." Further:

> Release of this document is both in the public interest and public benefit, since it would provide guidelines and assistance to those who wish to comply with the law, as does the Applicant. Service Providers should know what senior legal counsel at B.C. Tel see as their legal obligations....

I will present below the applicant's submissions with respect to the application of various sections of the Act to the several records in dispute.

Douglas H. Christie acted as counsel for the applicant in his reply submission. He elaborated on the various reasons why his client is seeking access to the three items listed above, including:

> We simply want the report of [a police officer] on that meeting [by the applicant] to determine if the RCMP were instrumental or active in intimidating the town of [where the meeting was to be held] to cancel the venue. We think freedom of assembly and freedom of association are being threatened by collaboration of the police in threats of violence and intimidation.....
>
> Nothing in the nature of public interest requires the protection of this information [the records in dispute] except protection of the parties involved from a revelation of their own oppressive contempt for freedom of expression and freedom of assembly.

It is noteworthy that Mr. Christie did not advance any arguments derived directly from the Act itself, which creates the framework for my jurisdiction in this inquiry.

6. The Ministry of Attorney General's case

The Ministry submits that the police investigate alleged criminal activity in this province, but Crown Counsel employed by the Ministry make the decisions on whether to initiate a prosecution. The Attorney General opened a Hate Crime Team office in 1997 "to ensure the effective identification, investigation, and prosecution of crime motivated by hate, bias, or prejudice." It is composed of Crown Counsel, a member of the Vancouver Police Department, and a member of the RCMP, among others. The two police officers participate in this "joint forces operation" as members of their respective units:

> While participating on the Hate Crime Team, Vancouver Police Department and/or RCMP members share information with other Hate Crime Team members from files of which the respective police departments retain custody and over which they retain control. Sometimes they provide records to the Crown Counsel members of the Hate Crime Team. When they do, these records are then in the custody of the Public Body. (Submission of the Ministry, paragraph 2.08)

The Ministry states that this applicant is aware that he is the subject of a criminal investigation in response to complaints from the public that his web sites carried hate propaganda. He is not aware, however, of any details that have not been made public by the Attorney General, and the investigation is ongoing; a decision on whether to approve charges has not yet been made. (Submission of the Ministry, paragraphs 2.09, 2.10)

In its submissions, the Ministry distinguishes between two sets of records responsive to the broad access request of the applicant:

> (1) records which were retrieved from various parts of the Public Body by the Public Body's Information and Privacy Program; [**the IPP records**] and
>
> (2) records held by Crown Counsel on the Public Body's Hate Crime Team, which were not forwarded to the Public Body's Information and Privacy Program. (Submission of the Ministry, paragraph 2.14) [**the HCT records**]

With respect to the IPP records, the Ministry has disclosed some records, severed others, and refused to disclose still others, relying upon sections 15(1)(a), 15(1)(g), 19(1)(a) and 22(3)(b). All of the HCT records have been withheld in their entirety, under sections 3(1)(b), 14, 15(1)(a), 15(1)(g), 16(1)(b), 16(2)(a), and 22(3)(b).

7. The Vancouver Police Department's Submission as an Intervenor

The Vancouver Police Department submits that the Provincial Hate Crime Team is a joint forces operation staffed by the RCMP and itself:

> It is the position of the Vancouver Police Department that any and all records as defined under the *Freedom of Information and Protection of Privacy Act*, which are authored by Vancouver Police Department members with the PHCT, remain in the custody and control of the Vancouver Police Department for *Freedom of Information and Protection of Privacy Act* purposes.

However, the Vancouver Police Department has not seen the records in dispute in this inquiry. It believes that only two memos written by one of its police officers are at issue. In its view, the Ministry should not have collected these records in response to the applicant's access request or claimed that section 16(1)(b) of the Act applies to them. In my view the Vancouver Police Department's authorship of some items in the IPP and HCT records does not diminish the fact that those records are both in the custody and under the control of the Ministry for the purposes of the Act.

I have elaborated further below on the Vancouver Police Department's views on the application of section 15 of the Act.

8. The Royal Canadian Mounted Police's Submission as an Intervenor

The RCMP accepts my jurisdiction in this inquiry over "RCMP-originated records, because they were in the custody or under the control of the Criminal Justice Branch at the time of the applicant's request." (Submission of the RCMP, p. 4) It also submits that no one other than the Information and Privacy Commissioner should have access to the records in dispute during the inquiry process. (Submission of the RCMP, p. 5)

The RCMP makes the point that disclosure of the records in dispute to the applicant should better occur through the criminal trial process, if a decision to prosecute is made. (Submission of the RCMP, p. 8) However, while disclosure may also occur in the course of a criminal prosecution, this does not exclude records from the scope of the Act. The records would be excluded only if they related to a prosecution in respect of which all proceedings have not been completed, because of section 3(1)(h) of the Act.

The RCMP's general submission with respect to the records in dispute is that:

> ... premature disclosure could reasonably be expected to harm law enforcement matters by making those under investigation aware of police interests, thus resulting in the potential loss of evidence, uncovering of investigative techniques, and frustration of surveillance, if and where it is used. (Submission of the RCMP, pp. 8-9)

The RCMP relies in particular upon sections 15(1)(a) and (g) of the Act. See Order No. 196-1997, November 13, 1997.

9. Discussion

Examination of the records in dispute

The Ministry provided the IPP records to me on an *in camera* basis with references indicating those which have been withheld, in whole or in part, and on what basis. The Ministry also provided the applicant and me with a several page tabular grid of the severances that it has made of the IPP records. I found my examination of the records in conjunction with the Ministry's scheme of severances helpful and necessary to my review of the merits of the Ministry's arguments.

The Ministry did not initially provide me with access to the HCT records. It argued that the information in such records, by its nature, was highly sensitive, and it was therefore preferable for me to conduct my inquiry under the Act without examining them. I found that I could not discharge my review function and properly assess the merits of the Ministry's arguments in relation to the HCT records without examining them. As a result, I conducted a site visit in the presence of my counsel, the Ministry's counsel, one of the prosecutors on the Hate Crime Team and his superior, the Assistant Deputy Attorney General. On this occasion, the HCT records were made available for my

examination. The records and information in them were also identified by the prosecutor and his superior in relation to the various provisions in the Act, which the Ministry has relied upon to withhold access under the Act.

Section 3(1)(b): the Scope of the Act

The Ministry argues that the exercise of prosecutorial discretion in the charge approval process is a judicial function. Section 3(1)(b) therefore excludes from the coverage of the Act "any personal notes or communications generated by Crown Counsel in the course of performing this function." (Submission of the Ministry, paragraph 7.19)

The purpose of section 3(1)(b) appears to be to create an exclusion from the scope of the Act which extends deliberative secrecy to personal notes, communications, and draft decisions of those engaged in a judicial and quasi-judicial capacity. The only functional parameter required to trigger section 3(1)(b) is a person acting in a judicial or quasi-judicial capacity. Thus, despite the fact that the deliberative secrecy concept normally revolves around protecting the integrity and independence of *adjudicative* processes, there is no requirement in 3(1)(b) that the function be *adjudicative*.

Defining judicial or quasi-judicial functions, as distinct from administrative, executive, or legislative functions, can be notoriously difficult. The leading case on the distinction is *M.N.R. v. Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1, in which the Supreme Court of Canada formulated the following criteria for judicial and quasi-judicial functioning:

(1) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These criteria are non-exhaustive, and no one factor is necessarily determinative of the nature of the function.

The Ministry argues that in the case of *Hoem v. Law Society of British Columbia*, [1985] B.C.J. No. 2300, the Court of Appeal held that the exercise of prosecutorial discretion is a judicial function and that the exercise of prosecutorial discretion is immune from review by the Law Society. In doing so, the court did compare the basis for that immunity with the basis for judicial immunity from suit. Also central to the court's decision was its characterization of the charging decision as essentially one of policy.

Because of its very different context, the *Hoem* case cannot be considered conclusive authority for the proposition that section 3(1)(b) of the Act can be invoked in relation to prosecutorial discretion. Prosecutorial discretion and judicial decision-making may be analogous for purposes of justifying immunity from review (as found in *Hoem*), but the *Coopers v. Lybrand* criteria would indicate that prosecutorial discretion is not a function which is exercised judicially in all senses.

The case which I find most relevant to this issue is *Nelles v. Ontario*, [1989] 2 S.C.R. 170. There the Supreme Court of Canada held that the Attorney General and Crown prosecutors are not immune from suit for malicious prosecution. Lamer J., speaking for the majority, agreed with McIntyre J. that the action by a Crown prosecutor in deciding to prosecute a person is a "judicial function." McIntyre J.'s minority judgement was more expansive on the "judicial" nature of some prosecutorial functions:

> The decision to prosecute is a judicial decision and is obviously vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys: see *The Queen v. Comptroller-General of Patents, Designs, and Trade Marks*, [1899] 1 Q.B. 909 (C.A.)
>
> *****
>
> The "judicial" nature of the Attorney General's decision to prosecute does not in any way render him a "court." That is, an *adjudicative* entity. See on this point, *Re Van Gelder's Patent* (1988), 6 R.P.C. 22 (C.A.)
>
> *****
>
> Hence, the law is settled that the Attorney General's exercise of his "judicial" functions, such as the commencement of criminal proceedings, the entering of a *nolle prosqui*, the entering of a stay under s. 579(1) of the *Criminal Code*, or the preferring of direct indictments in the absence of a committal for trial after a preliminary hearing, are all incapable of judicial review and to that extent, the Attorney General enjoys absolute and total immunity on the basis that he is performing a judicial function.
>
> Immunity from judicial review, however, does not equate to immunity from civil suit for damages incurred as a result of a maliciously instituted and executed prosecution. This Court has held that, in respect of *adjudicative* judicial decisions, there is complete immunity from civil suit: *Morier v. Rivard*, [1985] 2 S.C.R. 716…however, I am loath to make a ruling on an appeal of a preliminary motion that a similar absolute immunity exists for the benefit of the Attorney General and his agents in respect of suits for malicious prosecution.
>
> *****

> Furthermore, the Attorney General's immunity from judicial review, based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys, as agents of the Attorney General, would fall into this category and, accordingly, the immunity may not extend to claims for damages as a result of a prosecution, however instituted but carried out with malice.

I consider *Nelles* to hold that, although a Crown prosecutor has investigative and administrative functions which are not judicial in nature, the exercise of prosecutorial discretion to charge is a judicial function, albeit not one of an *adjudicative* quality. Section 3(1)(b) of the Act is drafted so that the function involved need not be *adjudicative*, just judicial or quasi-judicial in nature. As a result, this exclusion may be applicable to some records generated by Crown prosecutors.

On the basis of my examination of the HCT records, the Ministry has satisfied me that they include identifiable personal notes and communications made by a prosecutor in the judicial exercise of his discretion to charge. I find that these notes and communications are excluded by section 3(1)(b) from the scope of the Act.

Section 14: Legal Advice

The Ministry is applying solicitor-client privilege to a legal opinion and appendices forwarded by BC Tel to Crown Counsel on the Hate Crime Team; the claim of privilege is by BC Tel. (Submission of the Ministry, paragraph 7.49) The Ministry submits that, because BC Tel and the Criminal Justice Branch of the Ministry had and have a common interest in the possible prosecution of the applicant, the disclosure by BC Tel to the Ministry did not amount to a waiver of BC Tel's privilege over the legal opinion and appendices. (Submission of the Ministry, paragraph 7.51)

The applicant argues that claims of solicitor-client privilege have no application, since BC Tel voluntarily supplied the information to the Ministry, and the applicant is not seeking the information from BC Tel.

I find it unnecessary to resolve this issue in this inquiry because, apart from section 14 of the Act, I find that the BC Tel legal opinion is subsumed by the section 15(1)(a) and (g) exceptions claimed by the Ministry.

Section 15: Disclosure harmful to law enforcement

With respect to correspondence between Sol Littman and the Attorney General, the applicant submits that the use of this exemption is frivolous and vexatious:

> The applicant ceased being a service provider over one year ago. There is no website still in existence. There could not possibly be any ongoing matter to investigate.

At the very least, the applicant claims, he should receive severed copies of the records.

The Ministry has relied on section 15(1)(a) to entirely withhold 12 of the IPP records and all of the HCT records on the grounds that disclosure of information about an ongoing criminal investigation could "reasonably be expected to harm a law enforcement matter." It adds:

> The application of section 15(1)(a) is not limited by degree of harm. A reasonable expectation of any degree of harm is all that is required in order for a public body to be authorized to apply section 15(1)(a).
>
> The Public Body submits that any disclosure that could reasonably be expected to result *in any degree of harm* to the criminal investigation of the Applicant may be refused under section 15(1)(a). (Submission of the Ministry, paragraphs 6.05 and 6.06)

The Ministry submitted affidavit evidence in support of its position of harm to a law enforcement matter, some of it *in camera*. Included is the following statement:

> [The applicant and his business] are currently under investigation by the RCMP. The investigation is ongoing and a decision has not yet been made on whether to approve criminal charges against him and his company. (Affidavit of Elisabeth Burgess, paragraph 5)

The Vancouver Police Department submits that the subject matter of this inquiry "remains an ongoing, active police investigation.... In fact, this matter is being investigated by international authorities." It offered to submit *in camera* evidence on this latter point, if I had wished to receive it. The Vancouver Police Department also, appropriately, raised the issue of the negative impacts on policing work, if information about ongoing investigations should be disclosed under the Act.

"Harm" is defined in Webster's Ninth New Collegiate Dictionary (1984 ed.) to mean "injury," "mischief," or "hurt." I agree that the unqualified use of the word "harm" in section 15(1)(a) signifies that there is no need to establish serious or overwhelming harm in order for this exception to apply. A contrasting provision is section 19(2) of the Act, where "harm" is modified by the adjective "grave." On the other hand, I would not agree that section 15(1)(a) is intended to be available where the only impact that can be established is so fleeting or minimal as to be truly insignificant to the law enforcement matter involved. Thus, in my view, the "harm" in section 15(1)(a) need not be shown to be grave, but neither would it be sufficient to establish a harmful impact which is of an utterly frivolous or insignificant variety.

Based upon the evidence provided by the Ministry and my own review of the records in respect of which section 15(1)(a) of the Act has been claimed, the Ministry has satisfied me that those records concern an ongoing investigation into specific possible breaches of the *Criminal Code*. I am also satisfied that disclosure of these records to the applicant could be reasonably expected to cause harm, within the meaning of section 15(1)(a), by revealing to the applicant non-public information about that criminal investigation and otherwise interfering with the ongoing investigation process.

The Ministry has similarly relied on section 15(1)(g) to protect "any information relating to or used in the exercise of prosecutorial discretion," a term that is defined in Schedule 1 of the Act to include a decision by Crown Counsel "to approve or not to approve a prosecution." As with section 15(1)(a), it submits that twelve of the IPP records and all of the HCT records were considered by, and thereby used in, the exercise of prosecutorial discretion. The RCMP also seek to apply this subsection to "all the records supplied by the RCMP in confidence to the Crown Counsel who is assigned to the Hate Crime Team." (Submission of the RCMP, p. 10)

Once again, based upon the evidence provided by the Ministry and my own review of the records over which section 15(1)(g) of the Act has been claimed, I am satisfied that these records were collected or generated by the Ministry for prosecutorial purposes. I am also satisfied that, though the criminal investigation is not yet concluded and no charges have been approved, the disclosure of these records to the applicant could reasonably be expected to reveal information used in the ongoing exercise of prosecutorial discretion by Crown Counsel working for the Ministry.

Section 16: Disclosure harmful to intergovernmental relations or negotiations

The applicant believes that reliance on this section "is another frivolous and vexatious claim with the intent to deny him access to the requested documents."

The Ministry relies on sections 16(1)(b) and 16(2)(a) to protect from disclosure information in the HCT records received in confidence from the RCMP and for which the Attorney General has not consented to disclosure. (Submission of the Ministry, paragraph 7.44) The RCMP supports a similar position. (Submission of the RCMP, pp. 11-13)

The RCMP itself submits that section 16(1) incorporates a third-party rule that governs the exchange of sensitive law enforcement information between various levels of government, including the Ministry and the RCMP. (Submission of the RCMP, pp. 11-13) Disclosure would harm such relations, provincially, nationally, and internationally. See Order No. 34-1995, February 3, 1995.

Because of my decision on section 15 of the Act, I find it unnecessary to resolve this issue in this inquiry.

Section 19: Disclosure harmful to individual or public safety
Section 22: Disclosure harmful to the personal privacy of third parties

The Ministry (with the RCMP) has relied on section 19(1)(a) to sever "small amounts of information that would identify particular individuals" from the IPP and the HCT records and thus protect their safety and mental health. (Submission of the Ministry, paragraph 6.16) It submits that the standard is whether disclosure "could reasonably be expected to threaten anyone else's safety or mental or physical health...." (Submission of the Ministry, paragraph 6.17) I agree that this is the correct standard and that "a reasonable expectation that disclosure could create **the possibility of risk of** harm is much different from a reasonable expectation that disclosure could **harm**." (Submission of the Ministry, paragraph 6.20) See Order No. 58-1995, October 12, 1995, p. 6; and Order No. 277-1998, November 26, 1998.

The Ministry also relied on various parts of section 22 to protect small amounts of personal information that would identify individuals in the IPP and HCT records. Section 22(3)(b) is especially powerful in this regard, since it creates a presumption of unreasonable invasion of privacy for personal information that "was compiled and is identifiable as part of an investigation into a possible violation of law,...." (Submission of the Ministry, paragraph 6.28)

The RCMP similarly relies on section 22(3)(b), read in conjunction with section 22(2)(f) ("the personal information has been supplied in confidence"). See also Order No. 193-1997, October 7, 1997, p. 13. (Submission of the RCMP, pp. 15-16) On the basis of the same Order, the RCMP also correctly submits that there is no obligation under section 22(5) to prepare a summary of the information in dispute for the applicant.

Because there are severances in 18 records in dispute, I decided not to itemize each item here, not least because it would be meaningless to readers. The Ministry has severed such information as follows on the basis of sections 19 and 22 of the Act:

- the identity of a person(s) (other than Sol Littman) who complained about hate propaganda in relation to the applicant;
- the name(s) of staff persons at the Ministry who may have assisted in preparing responses to complaints on behalf of the Minister;

In its reply submission, the Ministry acknowledges that it is "public knowledge that Sol Littman has complained to the Attorney General about the content of websites hosted by the Applicant." Thus it withdrew its application of sections 19 and 22 to "his name and other identifying information wherever they appear in the withheld records." (Reply Submission of the Ministry, paragraph 2.01)

Most, but not all, of the severances under sections 19 and 22 are in records I have found the Ministry is authorized to withhold entirely under section15. I have nonetheless

reviewed all of the severances and find them to be authorized under section 19(1)(a) and 22 of the Act.

10. Order

I find, with respect to the HCT records, that the Ministry has correctly identified personal notes and communications by a prosecutor in the judicial exercise of his discretion to charge. These records are excluded by section 3(1)(b) from the scope of the Act.

I find, with respect to the HCT records which fall within the scope of the Act and the IPP records withheld or severed by the Ministry, that the Ministry is authorized to refuse access by section 15(1)(a) and (g) of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Ministry to refuse access.

I find, with respect to the HCT records which fall within the scope of the Act and the IPP records withheld or severed by the Ministry, that the Ministry is authorized by sections 19(1)(a) and 22 of the Act to refuse access to the identity of person(s) who complained to the Ministry about hate propaganda in relation to the applicant, and Ministry staff persons who assisted in preparing responses to complaints on behalf of the Ministry.

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David H. Flaherty
Commissioner

July 30, 1999