



SUPREME COURT OF CANADA

CITATION: Ontario (Public Safety and Security) v. Criminal
Lawyers' Association, 2010 SCC 23

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BETWEEN:

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants

and

Criminal Lawyers' Association

Respondent

- and -

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of
Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
Association, Canadian Association of Journalists and
British Columbia Civil Liberties Association**

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 76)

McLachlin C.J. and Abella J. (Binnie, LeBel, Fish, Charron
and Rothstein JJ. concurring)

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ONTARIO v. CRIMINAL LAWYERS' ASSOCIATION

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants

v.

Criminal Lawyers' Association

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and

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of
Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
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Interveners

Indexed as: Ontario (Public Safety and Security) v. Criminal Lawyers' Association

2010 SCC 23

File No.: 32172.

2008: December 11; 2010: June 17.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Access to information — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under s. 14 (law enforcement) and s. 19 (solicitor-client privilege) of Ontario Freedom of Information and Protection of Privacy Act — Whether s. 23 of Act violates guarantee of freedom of expression by failing to extend “public interest” balancing to exemptions found in ss. 14 and 19 — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Constitutional law — Charter of Rights — Freedom of expression — Scope — Access to government held information — Whether freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b).

Access to information — Access to records — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under freedom of information legislation — Whether constitutional guarantee of freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

The trial judge ordered a stay of proceedings in a murder trial, finding many instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without giving reasons for their finding. Concerned about the disparity between the findings at trial and the conclusion of the police investigation, the Criminal Lawyers' Association ("CLA") made a request under the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") to the responsible Minister for disclosure of records relating to the investigation. The records at issue were a lengthy police report and two documents containing legal advice. *FIPPA* exempts various categories of documents from disclosure, some of which may be disclosed pursuant to a discretionary ministerial decision, including law enforcement records under s. 14 and solicitor-client privileged records under s. 19. Some records in the ministerial discretion category, but not those under ss. 14 and 19, are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*.

The Minister refused to disclose any of the records without explanation, claiming exemptions under, among other provisions, s. 14 and s. 19 of *FIPPA*. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of *FIPPA*, and accordingly, did not determine whether there was a compelling public interest at play. He also concluded that the omission of ss. 14 and 19 from the public interest override in s. 23 did not constitute a breach of the CLA's right to freedom of expression guaranteed under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Divisional Court upheld the decision not to

disclose the documents and agreed with the conclusion that the exclusion of ss. 14 and 19 from s. 23 did not violate s. 2(b) of the *Charter*. In a majority decision, the Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*.

Held: The appeal should be allowed. The Assistant Commissioner's order confirming the constitutionality of s. 23 of *FIPPA* should be restored. The documents protected by s. 19 of *FIPPA* dealing with solicitor-client privilege should be exempted from disclosure. The claim under the law enforcement provision, s. 14 of *FIPPA*, should be returned to the Commissioner for reconsideration.

The real constitutional issue before the Court is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*. Section 2(b) of the *Charter* guarantees freedom of expression, but it does not guarantee access to *all* documents in government hands. Determining whether s. 2(b) of the *Charter* protects such access is essentially a question of how far s. 2(b) protection extends. It asks whether s. 2(b) is engaged at all and is best approached by building on the methodology set out in *Irwin Toy*.

To demonstrate that there is expressive content in accessing these documents, a claimant must establish that the denial of access effectively precludes meaningful public discussion on matters of public interest. If this necessity is established, a *prima facie* case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are

protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(b) of the *Charter*. It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged, and the only remaining question is whether the government action infringes that protection.

The legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Charter*. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place under the current legislative scheme. Even if the first step were met, the CLA would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. Sections 14 and 19 are intended to protect documents from disclosure on these very grounds.

On the record before us, it is not established that the CLA could satisfy the requirements of the framework and, as a result, s. 2(b) is not engaged. In any event, the impact of the absence of a s. 23 public interest override in relation to documents under s. 14 and s. 19 is so minimal that even if s. 2(b) were engaged it would not be breached. The ultimate answer to the CLA's claim is that the absence of a second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents given that those sections, properly interpreted, already incorporate considerations of the public interest. The

CLA therefore would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

In reviewing the Minister's decision not to disclose the records, the Commissioner must determine whether the exemptions were properly claimed and, if so, whether the Minister's exercise of discretion was reasonable. In this case, the order pertaining to the claim under s. 14 of *FIPPA* should be returned to the Commissioner for reconsideration. The Commissioner upheld the Minister's decision without reviewing the Minister's exercise of discretion under ss. 14 and 19 of *FIPPA* because s. 23 did not apply to these sections. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought raise concerns which should have been investigated by the Commissioner. Had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Commissioner's decision on the s. 19 claim, however, should be upheld. It is difficult to see how these records could have been disclosed under the established rules on solicitor-client privilege and based on the facts and interests at stake.

Cases Cited

Applied: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; **Referred to:** *R. v. Court* (1995), 23 O.R. (3d) 321; *R. v. Court* (1997), 36 O.R. (3d) 263; *Ontario (Ministry of Finance) v.*

Ontario (Inquiry Officer) (1998), 5 Admin. L.R. (3d) 175, rev'd (1999), 13 Admin. L.R. (3d) 1; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 11(b), (d).

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 10, 12 to 23, 50(1)(a).

Authors Cited

Brandeis, Louis D. “What Publicity Can Do” (1913), *Harper’s Weekly* 10.

Mitchinson, Tom. “‘Public Interest’ and Ontario’s *Freedom of Information and Protection of Privacy Act*”. Speech to Law Society of British Columbia, February 16, 2001.

Ontario. Commission on Freedom of Information and Individual Privacy. *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*. Toronto: The Commission, 1980.

APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, MacFarland and LaForme JJ.A.), 2007 ONCA 392, 86 O.R. (3d) 259, 224 O.A.C. 236, 280 D.L.R. (4th) 193, 60 Admin. L.R. (4th) 279, 220 C.C.C. (3d) 343, 58 C.P.R. (4th) 298, 156 C.R.R. (2d) 1, [2007] O.J. No. 2038 (QL); 2007 CarswellOnt 3218, setting aside a decision of Blair R.S.J. and Gravely and Epstein JJ. (2004), 70 O.R. (3d) 332, 237 D.L.R. (4th) 525, 184 O.A.C. 223, 13 Admin. L.R. (4th) 26, 30 C.P.R. (4th) 267, 116 C.R.R. (2d) 323, [2004] O.J. No. 1214 (QL), 2004 CarswellOnt 1172.

Appeal allowed.

Daniel Guttman, Sophie Nunnelley and Don Fawcett, for the appellants.

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Guy J. Pratte and Nadia Effendi, for the intervener the Federation of Law Societies of Canada.

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Catherine Beagan Flood and Iris Fischer, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

1. Overview

[1] Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

[2] Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "*Act*"). The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.

[3] The *Act* exempts various categories of documents from disclosure. This case concerns records that *may* be disclosed pursuant to a discretionary ministerial decision. More particularly, this case concerns records prepared in the course of law enforcement investigations (s. 14) and records protected by solicitor-client privilege (s. 19). The *Act* provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*. The *Act* does not require this additional public interest review for solicitor-client records or law enforcement records.

[4] The Criminal Lawyers' Association ("*CLA*") is an advocacy group representing members of the criminal defence bar in Ontario. It is seeking records in the hands of the Crown

relating to a murder case which gave rise to judicial expressions of concern: two documents containing legal advice and a 318-page report looking into alleged police misconduct. The Minister refused to disclose either the report or related documents, stating that the exemptions in the *Act* for solicitor-client privilege and law enforcement privilege covered all the material. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the *Act*, including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of the *Act* and, as such, he did not determine whether there was a compelling public interest at play here in the context of ss. 14 and 19.

[5] Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

[6] The CLA argues that the *Act*'s failure in s. 23 to include a public interest review for solicitor-client and law enforcement privileged documents violates freedom of expression in s. 2(b) of the *Charter*. For the reasons that follow, we conclude that there is no such violation.

[7] This said, it is not clear on the material before us that the Assistant Commissioner, in applying the *Act*, fully considered the scope of his discretion under s. 14, the law enforcement provision. We therefore remit this matter to the Commissioner for reconsideration to determine

whether any or all of the report should be disclosed.

2. Background

[8] This case arises out of the murder of Domenic Racco in 1983, for which four men (Anthony Musitano, Domenic Musitano, Guiseppe Avignone, and William Rankin) were originally charged. They pled guilty to lesser charges in 1985. In 1990, two other individuals, Graham Rodney Court and Peter Dennis Monaghan, were alleged to have been hired to kill Racco. Court and Monaghan were convicted after a jury trial in 1991.

[9] In 1995, the Ontario Court of Appeal ordered a new trial for Monaghan on the basis, *inter alia*, of fresh evidence (*R. v. Court* (1995), 23 O.R. (3d) 321). It was evidence that had been lost before trial, but the police did not reveal its loss to the defence until two-and-a-half years after the trial. A new trial was also ordered, for both Monaghan and Court, based on inadequate jury instructions at trial.

[10] Both men applied for a stay of proceedings in 1997 on the grounds of a breach of their *Charter* rights. Glithero J. concluded that their rights under ss. 7, 11(b) and 11(d) of the *Charter* had been violated to such a degree that the proceedings should be stayed, stating:

I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or

prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996. [Emphasis added]

(*R. v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300)

[11] As a result of Glithero J.'s rebuke, the Ontario Provincial Police ("OPP") undertook an investigation into the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police, and the Crown Attorney in the case. In a terse press release on April 3, 1998, the OPP exonerated the police on the grounds that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice". Despite the clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges, the OPP offered no explanation for its conclusions.

[12] Concerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP, the CLA made a request under *FIPPA* to the Minister of the Solicitor General and Correctional Services (later the Minister of Public Safety and Security and now the Minister of Community Safety and Correctional Services) for disclosure of records relating to the OPP investigation. The records at issue were a 318-page police report detailing the results of the OPP's investigation; a March 12, 1998 memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a March

24, 1998 letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation.

[13] The Minister refused to disclose any of these records, claiming several exemptions under the *Act*, including: s. 14 (law enforcement), s. 19 (solicitor-client privilege), s. 20 (danger to health and safety), and s. 21 (personal privacy). He did not explain how or why each of these exemptions applied to the material in question and did not address the possibility of partial disclosure.

[14] The CLA appealed the Minister's decision not to disclose the records to the Commissioner pursuant to s. 50(1)(a) of *FIPPA*.

[15] The Minister's decision was reviewed by the Assistant Information and Privacy Commissioner, Tom Mitchinson. Reliance on the s. 20 exemption was withdrawn. On May 5, 2000, Mr. Mitchinson upheld the propriety of the Minister's decision not to disclose the records (IPC Order PO-1779). He found that the public interest in disclosure "clearly outweigh[ed]" the purpose of the exemption on the facts of this case, and would have applied the s. 23 override with respect to the s. 21 personal privacy exemption; however, he upheld the Minister's refusal because the other claimed exemptions (ss. 14 and 19) are not included within the s. 23 override. He was also asked to consider whether the omission of ss. 14 and 19 from the public interest override constituted a breach of the CLA's *Charter* right to freedom of expression. He concluded that it did not.

[16] At the Divisional Court, Blair R.S.J. upheld the decision not to disclose the

documents and agreed with the conclusion that the *FIPPA* exemption scheme did not violate s. 2(b) of the *Charter*: (2004), 70 O.R. (3d) 332.

[17] The appeal was allowed by the Court of Appeal: 2007 ONCA 392, 86 O.R. (3d) 259. LaForme J.A., for the majority, concluded that the exemption scheme in *FIPPA* violated the *Charter*. Juriansz J.A. dissented, concluding that there was no *Charter* violation, and questioned whether expression was genuinely at issue at all.

[18] The Minister appealed the matter to this Court on the issue of the constitutionality of s. 23, given the exclusion of ss. 14 and 19 from its scope. Before this Court, and before the Court of Appeal for that matter, the CLA based its attack on the constitutionality of the statutory scheme and not on the Minister's exercise of discretion under either s. 14 or s. 19.

3. The Legislative Scheme

[19] The *Act (FIPPA)* provides for limited access to information in the government's hands. Section 10(1) provides for general rights of access to information, subject to a limited number of statutory exemptions:

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; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[20] The exemptions include Cabinet records (s. 12); advice to government (s. 13); law enforcement records (s. 14); records relating to relations with other governments (s. 15); defence records (s. 16); third-party information (s. 17); records related to Ontario's economic and other interests (s. 18); records to which solicitor-client privilege applies (s. 19); records whose disclosure might reasonably be expected to seriously threaten the safety or health of an individual (s. 20); personal information (s. 21); records putting species at risk (s. 21.1); and information already or soon to be publicly available (s. 22).

[21] There is no discretion, and disclosure must be refused in the case of some categories of exemptions, including Cabinet records, records containing certain third-party information, and records containing personal information. Other categories of exemptions are discretionary. They include the exemptions at issue in this case: law enforcement records under s. 14 and solicitor-client privileged records under s. 19.

[22] Section 14, dealing with law enforcement records, states:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a

law enforcement matter, or disclose information furnished only by the confidential source;

- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

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

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
- (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
- (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
- (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Section 19 deals with solicitor-client privilege. At the material time, it stated:

19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[23] The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner. In reviewing ministerial decisions made pursuant to certain exemptions, the Commissioner considers the public interest pursuant to s. 23, the “public interest override”:

23. An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy] and 21.1 [species at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[24] The s. 23 public interest override does not apply to documents exempted from disclosure for law enforcement (s. 14) and solicitor-client privilege (s. 19). The main issue in this case as it was argued before us is whether this renders s. 23 unconstitutional.

[25] When an exemption is invoked by the head of an institution (the Minister) under ss. 13, 15, 17, 18, 20, 21 and 21.1, the effect of s. 23 is to require the Commissioner to not only

review whether the exemption was validly claimed, but whether the public interest in the disclosure of the record “clearly outweighs the purpose of the exemption” (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175 (Ont. Div. Ct.), rev’d (1999), 13 Admin. L.R. (3d) 1 (C.A.)).

[26] This public interest override was a late addition to the legislation. The Attorney General took the position that it would undermine the context of the *Act*:

You are just saying to them, ignore the standards of the *Act* that the Legislature has set up and do what you please by looking at the public interest.

[27] Nevertheless, a public interest provision was eventually introduced for some but not all categories of exemptions on the insistence of some of the members of the legislature. This was despite the fact that the Williams Commission Report on which the *Act* was based had not specifically recommended its adoption (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the “Williams Commission” Report); Speech by Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commissioner, “*Public Interest*” and *Ontario’s Freedom of Information and Protection of Privacy Act*, February 16, 2001).

[28] This review of the general statutory scheme brings us to the specific challenge before us. The CLA argued that s. 23 of *FIPPA* infringes s. 2(b) of the *Charter* by failing to extend the “public interest” balancing to the exemptions found in ss. 14 and 19 concerning law enforcement and solicitor-client privileged records.

4. Is the Legislation Constitutional?

[29] It is essential to correctly frame the real constitutional issue before the Court. That issue is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*.

(a) *Access to Information Under Section 2(b) of the Charter*

[30] The first question to be addressed is whether s. 2(b) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

[31] Determining whether s. 2(b) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(b) protection extends. A question arises as to how the issue should be approached. The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather,

it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141). The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed more fully below, that in this case these requirements are not satisfied. As a result, s. 2(b) is not engaged.

[32] The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)?; (2) Is there something in the method or location of that expression that would remove that protection?; (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(b) requires the production of government documents.

[33] This leads us to more detailed comments on the scope of s. 2(b) protection where the issue is access to documents in government hands. To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected

by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.

[34] The first inquiry into expressive content asks whether the demand for access to information furthers the purposes of s. 2(b). In the case of demands for government documents, the relevant s. 2(b) purpose is usually the furtherance of discussion on matters of public importance.

[35] Not every demand for government information serves this purpose. Thus the jurisprudence holds that there is no general right of access to information. The position is well put in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.), *per* Adams J.:

By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. . . . Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation. [Emphasis added; p. 204.]

[36] To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: “members of the public have a right to information

pertaining to public institutions and particularly the courts” (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339). The “open courts” principle is “inextricably tied to the rights guaranteed by s. 2(b)” because it “permits the public to discuss and put forward opinions and criticisms of court practices and proceedings” (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).

[37] In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in *Harper’s Weekly* entitled “What Publicity Can Do”: “Sunlight is said to be the best of disinfectants” Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

[38] If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

[39] Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(b) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen’s Privy Council

under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well- settled, providing predictability and certainty to what must be produced and what remains protected.

[40] It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

(b) *The Constitutionality of Section 23*

[41] The CLA argues that the failure of the legislature to make the s. 23 public interest override applicable to the exemptions in s. 14 and s. 19 denies it access to the documents it seeks

and thus violates s. 2(b) of the *Charter*. The CLA argues that if the override were applicable, the CLA would be entitled to the records in question due to their public interest nature.

[42] We first address the question of the extent to which the absence of a s. 23 public interest override impairs the ability to obtain documents protected by s. 14 and s. 19 of the *Act*. Against this background, we ask whether s. 2(b) is engaged in the case at bar, and if so, whether it is breached.

(i) The Impact of the Absence of the Section 23 Public Interest Override in this Case

[43] In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in s. 14 and s. 19 of the *Act*.

[44] We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the *Act*. As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr.*, *Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 33; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 623, *per* L'Heureux-Dubé J.; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*,

2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the *Act* reflects this. The legislature in s. 14(1) has in effect declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.

[45] However, by stipulating that “[a] head may refuse to disclose” a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

[46] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

[47] By way of example, we consider s. 14(1)(a) where a head “may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter”. The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word “may” which confers a discretion on the head to make the decision whether or not to disclose the information.

[48] In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the

determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[49] The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply “where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption”. But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists the head would exercise the discretion conferred by the word “may” and order disclosure of the document.

[50] The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head “may refuse to disclose a record ... that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law”. The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth

of what really happened. At the same time, the discretion conferred by the word “may” recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

[51] This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO’s submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.

(IPC Order PO-2508-I September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

[52] We therefore conclude that s. 14 already provides for adequate consideration of the public interest in the disclosure of the records. In reviewing a claim for an exemption under s. 14, the Commissioner, as discussed more fully below, focuses on the exercise of discretion under that section. A further consideration under s. 23 would add essentially another level of review.

[53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the *Act* provides that a head “may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for

Crown counsel for use in giving legal advice or in contemplation of or for use in litigation”. The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

[54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word “may” would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

[55] The conclusion that the s. 23 override in the case of the law enforcement and solicitor-client exemptions adds little more than a second level of review is consistent with the

legislative history of the *Act*. The Williams Commission Report, on which the *Act* was based, did not recommend a public interest override, presumably not finding such an override necessary. The Minister who spoke to the legislation resisted suggestions for a public interest override. It was tacked on by amendment, but made applicable only to certain exemptions. These are generally exemptions of a political or personal nature — advice to government; third-party information; economic and other interests of Ontario; danger to health and safety; personal privacy; and species at risk. These exemptions reflect a legislative choice that is not at issue in this appeal. But by way of comparison, it may be possible to argue that the s. 23 public interest override might serve a purpose with respect to these issues, since they may not inherently raise the need to balance all conflicting interests, raising the risk that the public interest in disclosure might be overlooked. But that cannot be said of the law enforcement and solicitor-client exemptions.

[56] We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.

(ii) Is the Section 23 Public Interest Override Constitutionally Required?

[57] Having examined the impact of the legislature's decision not to make documents under s. 14 and s. 19 subject to the s. 23 public interest override, we are in a position to address the ultimate question: does this decision violate the right to free expression guaranteed by s. 2(b) of the *Charter*? To answer this question, we must return to our earlier discussion of when disclosure of documents in government hands may be constitutionally required under the *Irwin Toy* framework.

[58] The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.

[59] In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:

I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]

The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the *Act*, as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[60] If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents,

obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

[61] It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under s. 14 and s. 19 is so minimal that even if s. 2(b) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

5. Exercise of the Discretion Under the Act

[62] Having decided that s. 23 of the *Act* itself is constitutional, our focus shifts now to determining whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the *Act*.

(a) *The Decisions*

[63] The Minister's decision not to disclose the records in question was conveyed to the

CLA in a letter dated November 27, 1998, citing a number of statutory exemptions as the reason for the denial, including s. 21 (the personal privacy exemption), s. 19, and a number of subsections of s. 14. The letter provided no explanation for applying these exemptions; nor did it explain why no part of the records sought would be disclosed.

[64] On review, the Assistant Commissioner recognized that the documents contained personal information about people involved in the case, including police officers, Crown counsel, witnesses, the victim, the accused and others. He concluded, however, that there was “a compelling public interest” in disclosure that “clearly outweighed” the interest in non-disclosure. Therefore, if only the s. 21 personal privacy exemption were at issue, he would have ordered disclosure pursuant to the s. 23 override.

[65] The Assistant Commissioner also determined that the discretionary exemptions in ss. 14 and 19 could be applied to the records at issue. Because s. 23 does not apply to ss. 14 and 19, he upheld the Minister’s decision not to disclose without reviewing the Minister’s exercise of discretion under ss. 14 and 19 of the *Act*.

(b) *The Duty of the “Head” (or Minister)*

[66] As discussed above, the “head” making a decision under s. 14 and s. 19 of the *Act* has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First,

the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

[67] The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, “the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions”.

(c) *The Duty of the Reviewing Commissioner*

[68] The Commissioner’s review, like the head’s exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head’s exercise of discretion was reasonable.

[69] In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head’s exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

[70] Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

[71] The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[72] In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

[73] The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.

[74] Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[75] We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

6. Conclusion

[76] We would allow the appeal, set aside the decision of the Court of Appeal, and restore the Assistant Commissioner's Order confirming the constitutionality of s. 23 of *FIPPA*. The

documents protected by s. 19 of *FIPPA* are exempted from disclosure. We would, however, order that the claim under s. 14 of the *Act* be returned to the Commissioner for reconsideration in light of these reasons. In accordance with the request of the parties, there will be no order for costs.

Appeal allowed.

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Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

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