ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-015

April 24, 1997

ALBERTA JUSTICE

Review Number 1045

BACKGROUND:

[1.] On November 15, 1995, the Applicants, through their solicitor, applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for access to 13 categories of records related to an investigation and prosecution of a young person under the *Young Offenders Act (Canada)* (the "YOA").

[2.] On November 30, 1995, in a letter to the Applicants, the Public Body claimed that it must refuse to disclose all 13 categories of records because disclosure would be an offence under the YOA (section 19(3) of the Act) and because privilege (section 26(1) of the Act) applied.

[3.] By letter dated January 15, 1996, and received in this Office on January 16, 1996, the Applicants requested that I review the Public Body's decision. Mediation was authorized; however, because the Public Body was firm in its belief that it had properly applied section 19(3) and section 26(1) of the Act, no further mediation occurred. After questioning the mediation process, the Applicants requested an inquiry. The matter was set down for inquiry on July 25, 1996.

[4.] During the inquiry, I determined that it would be necessary to ask for further submissions regarding interpretation of the YOA. I therefore asked that further written submissions be given to me by August 15, 1996.

[5.] On August 9, 1996, the Public Body asked for an extension to September 25, 1996, so that the Public Body's submission could extend the scope of the argument and deal with all the relevant issues related to the case. In addition to the original request to consider section 19(3) of the Act in the context of the YOA, the Public Body proposed to provide argument on section 26(1) (privilege), which it had not discussed during the inquiry, and also on section 16 (personal information), which section it had not previously raised.

[6.] Although I was keenly aware of the cost of any delay to the Applicants if I granted the requested extension, my primary concern was the proper implementation of the Act. Therefore, I felt obliged to grant the extension and accept the Public Body's submission. In these unique circumstances, I also permitted the Public Body to address new issues. I required that the Public Body give the Applicants a copy of the further submission on the same date as I received it, which was September 25, 1996.

[7.] In the meantime, on August 15, 1996, the Applicants provided the submission originally requested during the inquiry, related to the interpretation of the YOA. I gave the Applicants the choice of responding either verbally or in written form to the Public Body's extended submission. On January 16, 1997, I received the Applicants' written response.

RECORDS AT ISSUE:

[8.] The Applicants requested 13 categories of records, which they listed in their original request to the Public Body. In its letter responding to the Applicants, the Public Body claimed that section 19(3) of the Act applied to the records numbered 1-7, and that section 26(1) of the Act applied to the records numbered 8-11, and 13. As to the record numbered 12, the Public Body stated that, if not prohibited by the YOA, that record could be obtained through the offices of the Clerk of the Court.

[9.] However, the Public Body's list of records provided to this Office did not correspond with the Applicant's 13 categories. Instead, the Public Body provided an Inventory of Documents, which it stated was responsive to the Applicants' request.

[10.] There are two files listed in this Inventory of Documents: a "Prosecution File" and a "Correspondence File". Each file contains numbered documents; each document is identified by type of document and by applicable section or sections of the Act. For ease of reference, I will refer to the Prosecution File as Record One, and the Correspondence File as Record Two; collectively, I will

refer to these two records as "the Records". Within each Record, I will refer to each document by the number assigned to it by the Public Body.

[11.] The Public Body said it omitted the following documents from the Records because those documents were not responsive to the Applicants' request:

> Record One: Documents 1, 8, 9
>
> Record Two: Documents 7, 8, 14, 21, 25-28, 40, 47-51, 56, 62, 67, 69-72, 79, 86, 94, 95, 97-100, 108, 109, 115

[12.] When I compared the documents listed in Record One and Record Two with the list of documents in the Public Body's extended submission, I noticed several differences in not only the numbers of the documents, but also the section numbers said to apply to each of the documents. I requested that the Public Body provide clarification. This Order reflects that clarification.

[13.] I then ordered that the Public Body produce to me, for examination, the documents contained in the Records, for which the Public Body was not claiming an exception under section 19(3) of the Act. Upon a further review of those documents, the Public Body notified me that several more documents in the Records were subject to the exception under section 19(3) of the Act.

ISSUES:

[14.] There are nine issues in this inquiry:

> Issue A: Are the Records within the scope of the YOA?
>
> Issue B: If the Records are within the scope of the YOA, would disclosure of the Records constitute an offence under the YOA?
>
> Issue C: Must the Public Body refuse to disclose the information contained in the Records, as required by section 19(3) of the Act?
>
> Issue D: Do I, as Commissioner, have jurisdiction to order that records within the scope of the YOA be produced to me for examination?
>
> Issue E: Did the Public Body correctly apply section 26 (privilege) of the Act to the Records that are not within the scope of the YOA?

Issue F: Did the Public Body correctly apply section 19 (law enforcement) of the Act to the Records that are not within the scope of the YOA?

Issue G: Did the Public Body correctly apply section 16 (personal information) of the Act to the Records that are not within the scope of the YOA?

Issue H: Do the Applicants meet the requirements under section 79(1)(a) of the Act for exercising any right or power conferred on an individual under the Act?

Issue I: Did the Public Body correctly refuse to disclose the record numbered 12 in the Applicants' access request?

DISCUSSION:

Issue A: Are the Records within the scope of the YOA?

[15.] The Public Body claims that the following documents in the Records are within the scope of the YOA:

Record One: Documents 2-7, 10-70

Record Two: Documents 1, 3-6, 9-13, 15, 16 (attached memos), 17-20, 22-24, 29-39, 41-46, 52-55, 57-61, 63-66, 68, 74-78, 80-82, 84, 87-91, 96, 101-107, 110-114, 116

[16.] To be within the scope of the YOA, the Records must meet the requirements of sections 40 to 43 of the YOA, which provide for records that may be kept under the YOA. Section 42 and section 43(1) of the YOA are relevant in this inquiry. Those sections of the YOA provide:

s. 42 A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for, or participating in, the investigation of the offence.

s. 43(1) A department or an agency of any government in Canada may keep records containing information obtained by the department or agency

> *(a) for the purposes of an investigation of an offence alleged to have been committed by a young person;*
>
> *(b) for use in proceedings against a young person under this Act.*
>
> *(c) for the purpose of administering a disposition;*
>
> *(d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act against a young person, to use alternative measures to deal with the young person; or*
>
> *(e) as a result of the use of alternative measures to deal with a young person.*

[17.] Records may also be within the scope of the YOA if they meet the requirements for "reports" that are "published", as provided by section 38(1) of the YOA.

[18.] After reviewing the Public Body's list of documents, I believe that the documents within the scope of the YOA, as provided by section 42 and section 43(1) of the YOA, are:

> Record One: Documents 2-7, 10-70
>
> Record Two: Documents 1, 3-6, 9-13, 15, 16 (attached memos), 17-20, 22-24, 29-39, 41-46, 52-55, 57-61, 63-66, 68, 74-78, 80-82, 84, 87-91, 96, 101-107, 110-114, 116

Issue B: If the Records are within the scope of the YOA, would disclosure of the Records be an offence under the YOA?

[19.] Generally speaking, section 38(1) and section 46(1) of the YOA prohibit the identification of a "young person". Those sections provide:

s. 38(1) Subject to this section, no person shall publish by any means any report

> *(a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or*
>
> *(b) of any hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence*

in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

s. 46(1) Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.

[20.] Contravention of section 38(1) of the YOA is an offence, punishable by a maximum sentence of two years' imprisonment: see section 38(2) of the YOA. A failure to comply with section 46(1) of the YOA is punishable in the same way: see section 46(4) of the YOA.

[21.] The YOA defines "young person" to mean

> *a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under eighteen years of age and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.*

[22.] In this Order, "young person" includes a young person who has committed or is alleged to have committed an offence (section 38(1) of the YOA) or a young person dealt with under the YOA (section 46(1) of the YOA).

[23.] In brief, section 38(1) of the YOA says that a person may not "publish" any report concerning a young person, in which the name of or any information identifying a young person or child is disclosed. The introductory part of section 38(1) sets out the general prohibition (no person can publish any report concerning a young person) and the concluding part of section 38(1) adds a qualification or condition (if the report discloses the name of or information identifying a young person or child).

[24.] Consequently, I do not think that section 38(1) of the YOA can be interpreted as a ban on publishing anything whatsoever. The corollary to section 38(1) must be that a report concerning a young person may be published as long as the report doesn't name or identify a young person or child. Publication that does not so name or identify cannot be an offence under section 38(1). Otherwise, for example, law publishers who publish reports concerning young persons would be in breach of section 38(1). Those publishers avoid committing an offence under section 38(1) by omitting names and substituting initials, thereby not naming or otherwise identifying any young person or child.

[25.] Section 46(1) of the YOA is somewhat more difficult to interpret. In brief, that section says that, except as authorized or required by the YOA, no record kept under sections 40 to 43 of the YOA (a "YOA record") may be made available for inspection or a copy given if that record would "identify the young person to whom it relates as a young person dealt with under the Act [the YOA]" (from here on, "identify a young person"). Section 46(1) sets out the general prohibition (no YOA record may be made available for inspection or a copy given) and a qualification or condition (if the record would identify a young person). However, there is an exception to the prohibition under section 46(1). Section 46(1) allows a record to be made available for inspection or a copy given even if the record identifies a young person, as long as the YOA authorizes or requires the making available for inspection or giving a copy.

[26.] Consequently, I do not think that section 46(1) of the YOA can be interpreted as a total ban on allowing inspection or giving copies of YOA records. The corollary to section 46(1) must be that inspection is allowed or copies may be given as long as the records don't identify a young person. If a record doesn't identify a young person, there is no offence under section 46(1). However, if the record does identify a young person, I believe that the only way to get that record is under the "authorization" or "requirement" provisions of the YOA, as stated in the exception to the section 46(1) prohibition. For the "authorization" or "requirement" provisions, see section 44.1 of the YOA.

[27.] As previously stated, all the Records within the scope of the YOA appear to be records kept under section 42 or section 43(1)(a) or (b) of the YOA.

Therefore, the relevant offence provision is section 46(1). With two exceptions, I am prepared to accept that it would be an offence under section 46(1) to make the Records within the scope of the YOA available for inspection or to provide a copy of them, because these Records would identify a young person.

[28.] However, I have some doubt about whether it would be an offence under the YOA to disclose Documents 27 and 34 of Record One (Document 34 is a copy of Document 27). Those documents are a police service news release consisting of two pages. The nature of a police service news release is that it is written to be broadcast widely to the media and others, and does not mention names of or identify young persons or children, contrary to section 38(1) of the YOA, or identify a young person, contrary to section 46(1).

[29.] The general public may obtain a copy of these news releases. On request to the police service, I asked for and received a copy of Document 27 (Document 34), the news release in question. I gave careful instructions to the police service to release to me only that which would be released to the general public on a similar request.

[30.] I do not think that the police service would give a copy of a news release to the general public if there was a possibility of contravening either section 38(1) or section 46(1) of the YOA. I conclude that because Documents 27 and 34 of Record One do not mention names of or identify young persons or children (section 38(1)), and do not identify a young person (section 46(1)), it is not an offence under the YOA to "publish" those two documents, or to make them available for inspection or to give a copy of them.

[31.] However, I am prepared to say that it would be an offence under section 46(1) of the YOA to make available for inspection or to give a copy of the following, because those documents of the Records would identify a young person:

> Record One: Documents 2-7, 10-26, 28-33, 35-70
>
> Record Two: Documents 1, 3-6, 9-13, 15, 16 (attached memos), 17-20, 22-24, 29-39, 41-46, 52-55, 57-61, 63-66, 68, 74-78, 80-82, 84, 87-91, 96, 101-107, 110-114, 116

Issue C: Must the Public Body refuse to disclose the information contained in the Records, as required by section 19(3) of the Act?

[32.] Section 19(3) of the Act provides:

s. 19(3) The head of a public body must refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Canada.

[33.] Section 19(3) of the Act has two requirements: the disclosure of the information must be an offence under an Act of Canada, and the information must be in a law enforcement record. The "Act of Canada" for the purposes of section 19(3) and this Order is the YOA.

[34.] If both these requirements are met, the Public Body has no choice; it must refuse to disclose the information because section 19(3) is a mandatory ("must") exception.

(a) Would disclosure of the information be an offence under an Act of Canada?

[35.] The Public Body relies on section 38(1) of the YOA as the relevant prohibition resulting in an offence under the YOA. The Public Body argues that because contravention of section 38(1) of the YOA is an offence under an Act of Canada, the Public Body must refuse to disclose the information in the Records, as required by section 19(3) of the Act.

[36.] The Applicants argue that disclosure of the Records to the Applicants would not be an offence under the YOA because section 44.1(5) of the YOA specifically authorizes disclosure to a "victim" upon request. The Applicants believe that both section 44.1(5) and section 44.1(6) support their argument that disclosure of the Records to them would not be an offence under the YOA. Those sections of the YOA provide:

s. 44.1(5) Any record that is kept pursuant to sections 40 to 43 may, on request, be made available for inspection to the victim of the offence to which the record relates.

s. 44.1(6) Any person to whom a record is required or authorized to be made available for inspection under this section may be given any information contained in the record and may be given a copy of any part of the record.

[37.] The Applicants say that they are "victims" for the purposes of the YOA. Although "victim" is not defined in the YOA, the Applicants state that the definition of "victim" in s. 722(4) [re-en. S.C. 1995, c. 22, s. 6] of the Criminal Code, R.S.C. 1985, c. C-46, applies to the YOA. Section 722(4) of the Criminal Code provides:

s. 722(4) For the purposes of this section "victim", in relation to an offence,

> *(a) means the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and*
>
> *(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1)* [subsection (1) refers to a victim impact statement]*, includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.*

[38.] The Applicants say that section 722(4) of the Criminal Code applies because of section 20(8) [re-en. S.C. 1995, c. 22, s. 25] of the YOA. Section 20(8) of the YOA provides:

> *s. 20(8) Part XXIII of the Criminal Code does not apply in respect of proceedings under this Act except for section 722, subsection 730(2) and sections 748, 748.1 and 749, which provisions apply with such modifications as the circumstances require.*

[39.] The Applicants also say that section 44.1(5) and section 44.1(6) of the YOA do not require a victim to apply to the court for disclosure of records. In contrast, section 38 of the YOA specifically requires that a person other than a victim apply to the court for disclosure of information that otherwise could not be published. The Applicants conclude that section 44.1(5) and section 44.1(6) recognize victims as a category separate from persons governed by section 38 of the YOA.

[40.] I believe the Applicants' argument is that because disclosure of the information under section 44.1(5) of the YOA is not an offence, there is no offence under an Act of Canada for the purposes of section 19(3) of the Act. In other words, the Public Body cannot say that section 19(3) applies to the information in the Records because the Public Body has not proven the requirement that disclosure of the information to the Applicants would be an offence under an Act of Canada.

[41.] The YOA is a comprehensive piece of federal legislation dealing with young persons generally, and specifically with records relating to young persons. The main purpose of the YOA is to protect the privacy of young persons.

[42.] Section 38(1) of the YOA appears under the heading "Protection of Privacy of Young Persons". Section 44.1(5) of the YOA is under the heading "Maintenance and Use of Records".

[43.] Under section 38(1) of the YOA, no person may "publish", by any means, any report containing the name of or information that identifies a young person or child. "Publish" is not defined in the YOA. The Public Body referred to the dictionary definition of "publish", which means to make publicly or generally known.

[44.] "Publication" has been interpreted broadly in the case law to include any act of communication from one to another: see *McNichol v. Grandy*, [1932] 1 D.L.R. 225 (S.C.C.). Furthermore, "report" has not been confined to things such as newspapers or other news media accounts, but has been interpreted, as it is commonly understood, to mean an oral or written account of an event: see *Re Peel Board of Education* (1987), 59 O.R. (2d) 654 (H.C.). The High Court in *Re Peel Board of Education* stated that section 38 of the YOA invites a broad interpretation because that section uses phrases such as "by any means" and "any report".

[45.] I believe that section 38(1) of the YOA can be considered as the general provision protecting the privacy of young persons under the YOA. However, section 44.1(5) of the YOA appears to contradict section 38(1) because section 44.1(5) allows for YOA records to be made available to a "victim" for inspection. On the broad interpretation of "publish", allowing a YOA record to be inspected is surely "publishing".

[46.] I am going to presume that section 38(1) and section 44.1(5) of the YOA are not in conflict. I believe that section 44.1(5) must be a specific exception to section 38(1). Rules of statutory interpretation state that the specific prevails over the general: see *Driedger on the Construction of Statutes,* 3rd edition by Ruth Sullivan (Markham, Ontario: Butterworths Canada Ltd., 1994), p. 186. Therefore, it must be that the specific exception contained in section 44.1(5) prevails over the general prohibition against publishing under section 38(1). Consequently, making a YOA record available to a "victim" for inspection, as provided under section 44.1(5) of the YOA, is not an offence under section 38(1) of the YOA.

[47.] Are the Applicants "victims"? As previously mentioned, "victim" is not defined in the YOA, but is defined in the Criminal Code. Section 2(2) of the YOA states that "Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Criminal Code." As the Applicants clearly fall within the definition of "victim" under section 722(4) of the Criminal Code, they must also be "victims" for the purposes of the YOA.

[48.] The final matter to be considered under section 44.1(5) of the YOA is the phrase "on request", because that section provides that the records may, "on request", be made available for inspection. In general, Section 44.1 does not appear to establish a procedure for "requesting" records under the YOA. The case law on this point is somewhat contradictory as to whether a "request" may merely be made to the keepers of the particular records under the YOA, or whether an application must be made to a youth court judge: see *J.M.O. v. Okuda*, [1996] B.C.J. No. 2244 (B.C. Prov. Ct.); *R. v. C.*, [1993] A.J. No. 856 (Alta. Prov. Ct.); *R. v. B.,* [1991] O.J. No. 2711 (Ont. Prov. Ct.); and *R. v. B. (S.)* (1990), 73 O.R. (2d) 249 (Ont. Prov. Ct.).

[49.] However, one thing is clear: if, under section 46(1) of the YOA, the YOA records would identify a young person, the procedure to inspect and obtain copies of those YOA records is under the YOA itself. There is no provision to request those YOA records under any other legislation, including the Act: see my previous discussion on the interpretation of section 46(1) of the YOA.

[50.] Consequently, a YOA record that identifies a young person may not be made available for inspection and no copies may be given *except as authorized or required by the YOA* [my emphasis]. If the Public Body makes such YOA records available for inspection or gives copies without authorization or as required under the YOA, the Public Body will be in breach of section 46(1) of the YOA. A breach of section 46(1) of the YOA is an offence, as provided by section 46(4). That offence under the YOA is an offence under an Act of Canada for the purposes of section 19(3) of the Act.

[51.] Therefore, with two exceptions, disclosure of the information in those documents of the Records within the scope of the YOA would be an offence under an Act of Canada, as provided by section 19(3).

[52.] Documents 27 and 34 of Record One are the two exceptions. Because those documents do not meet the requirement that disclosure of the information be an offence under an Act of Canada, the Public Body would not be committing an offence under the YOA by making those documents available for inspection or giving a copy of them. Therefore, disclosure of the information contained in Documents 27 and 34 of Record One would not be an offence under an Act of Canada for the purposes of section 19(3) of the Act.

(b) Is the information in a "law enforcement record"?

[53.] The second requirement under section 19(3) of the Act is that the information must be in a "law enforcement record".

[54.] The documents comprising the Records said to be within the scope of the YOA consist of two main types: investigations conducted by a police service and prosecution proceedings relating to a young person.

[55.] The Applicants admit that a number of the documents they are seeking are clearly law enforcement records, and the Public Body agrees with the Applicant on that issue. However, it is up to me to determine whether the information contained in those documents is in a "law enforcement record", as provided by the Act.

[56.] In Order 96-006, I discussed the meaning of "law enforcement" as that definition relates to investigations undertaken by public bodies. In that Order, I said that "law enforcement" encompasses the notion that both the Public Body's authority to investigate and the penalty or sanction that could be imposed must be under the same statute or regulation.

[57.] In that Order, I also said that "law enforcement" is not limited to public bodies. This is one of those cases in which a police service conducted the investigation. A police service is not a public body under the Act. Because of the nature of a police service, I do not think that the same requirements can be imposed on a police service that are imposed on a public body, namely, that the investigative authority and the penalty or sanction must be under the same statute.

[58.] My rationale is this: A public body's authority to investigate is confined to the statute which gives it that authority. Consequently, a public body has no authority to investigate anything other than what the relevant statute allows. The penalty or sanction that may be imposed under the particular statute is linked to the results of the public body's investigation.

[59.] The authority of a police service to investigate is not confined to a single statute, as is the case with many public bodies. Unless specifically restricted, a police service has authority to conduct investigations under any federal or provincial statute or regulation containing an offence. This broad investigative authority is given to the police in Alberta by section 2(2) and section 38(1) of the Police Act, S.A. 1988, c. P-12.01, which provide, in part:

> *s. 2(2) Notwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice and Attorney General in respect of matters concerning the administration of justice and the enforcement of those laws that the Government of Alberta is required to enforce.*

s. 38(1) Every police officer is a peace officer and has the authority, responsibility and duty

(a) to perform all duties that are necessary

(i) to carry out his functions as a peace officer.

[60.] Therefore, for an investigation conducted by a police service to be "law enforcement" under the Act, the evidence need only show that the police service is conducting an investigation under a particular statute or regulation containing an offence that leads or could lead to a penalty or sanction being imposed.

[61.] As to the definition of "law enforcement record", I refer to Order 96-019. In that Order, the public body cited "investigations that lead or could lead to a penalty or sanction being imposed" as the definition of "law enforcement" that it was applying (section 1(1)(h)(ii) of the Act). Following on that definition, I stated that a "law enforcement record" must therefore be a record of information produced during the course of an investigation.

[62.] "Law enforcement" in section 1(1)(h) of the Act can also mean "policing, including criminal intelligence operations" (section 1(1)(h)(i)) and "proceedings that lead or could lead to a penalty or sanction being imposed" (section 1(1)(h)(iii)). Therefore, a "law enforcement record" can also be a record of information produced during the course of policing or during the course of proceedings that lead or could lead to a penalty or sanction being imposed.

[63.] In the present case, all the information in the documents of the Records within the scope of the YOA was produced either during the course of investigations or proceedings that lead or could lead to a penalty or sanction being imposed. Consequently, all that information is in a "law enforcement record".

(c) Conclusion under section 19(3) of the Act

[64.] Except for Documents 27 and 34 of Record One, I have found that, for the purposes of section 19(3) of the Act, the information in the documents of the Records within the scope of the YOA is in a "law enforcement record" and that disclosure of the information contained in those documents would be an offence under an Act of Canada. Therefore, I uphold the Public Body's decision to refuse to disclose the information contained in those Records that are within the scope of the YOA and that would identify a young person, as provided by section 46(1) of the YOA. In other words, the Public Body must refuse to disclose the following:

Record One: Documents 2-7, 10-26, 28-33, 35-70

Record Two: Documents 1, 3-6, 9-13, 15, 16 (attached memos), 17-20, 22-24, 29-39, 41-46, 52-55, 57-61, 63-66, 68, 74-78, 80-82, 84, 87-91, 96, 101-107, 110-114, 116

[65.] Because disclosure of Documents 27 and 34 of Record One do not meet the requirement that disclosure of the information be an offence under an Act of Canada, the Public Body cannot refuse to disclose them under section 19(3) of the Act. Since the Public Body has not claimed that any further exception applies to Documents 27 and 34, I intend to order that Documents 27 and 34 of Record One be disclosed to the Applicants. Even though these documents are available from a police service, I intend to order that the Public Body disclose these documents, for the following reasons:

(i) These documents are in the custody or under the control of the Public Body, and are therefore subject to the Act;

(ii) It is unclear to me whether the Applicants would be able to identify these documents sufficiently to request them from the police service in question; and

(iii) I do not consider these documents to be information available for purchase by the public, as provided by section 28(1)(a) of the Act.

[66.] I have concluded that section 46(1) of the YOA prohibits disclosure of a YOA record that would identify a young person. Similarly, section 38(1) of the YOA prohibits "publishing" any "report" that names or identifies a young person or child. The wording of section 19(3) of the Act both recognizes and reinforces the prohibitions provided for by federal legislation, including the YOA. Therefore, such records within the scope of the YOA may not be disclosed under the Act. To inspect and be given copies of the YOA records that the Public Body must refuse to disclose, the Applicants will have to make a "request" under the provisions of the YOA.

Issue D: Do I, as Commissioner, have jurisdiction to order that records within the scope of the YOA be produced to me for examination?

[67.] As Commissioner, I have broad powers to request records under the Act. My powers are set out in section 54(2) and 54(3) of the Act, which provide:

s. 54(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

s. 54(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

[68.] Section 44.1 of the YOA sets out a list of persons who may, on "request" under the YOA, inspect YOA records. Information and Privacy Commissioners are not included in that list, nor could I find a regulation under section 44.1(1)(h) designating me as a person to whom YOA records could be made available for inspection under the YOA. Section 46(1) of the YOA prohibits making YOA records available for inspection, except as provided by the YOA. Furthermore, section 38(1) prohibits "publishing" any "report", except as provided by the YOA.

[69.] Because there appears to be a conflict between the Act and the YOA as to whether I may order production of either YOA records or "reports" under the Act, I must consider whether the Act or the YOA prevails on that issue.

[70.] The Public Body says that in such instances of conflict between valid provincial and federal legislation, the federal legislation, as a matter of constitutional law, is paramount and the provincial legislation, to the extent of the operational inconsistency, becomes inoperative. To support its proposition, the Public Body cites *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 and *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121. The Public Body also cites *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 2218 (Div. Ct.), which held that providing records within the scope of the YOA to the Information and Privacy Commissioner constitutes "publishing", which is an offence under section 38(1) of the YOA.

[71.] As I understand the two Supreme Court of Canada cases, there must be an actual conflict in the operation of the valid provincial and federal laws, so that compliance with the provincial law involves a breach of the federal law such that the legislative purpose of the Parliament of Canada stands to be displaced. If so, then the provincial law is suspended and rendered inoperative by the federal law, to the extent of the operational inconsistency.

[72.] However, I do not think that I need to go as far as considering paramountcy in order to answer the question as to whether I may order

production of "reports" that would name or identify a young person or child, or YOA records that would identify a young person. I believe that I need only look as far as section 54(3) of the Act itself, and at some of the definitions in the Interpretation Act, R.S.A. 1980, c. I-7.

[73.] Section 54(3) of the Act provides that, despite any other "enactment", I may order production of any records required under section 54(1) or section 54(2). "Enactment" is not defined in the Act, but is defined in the Interpretation Act, R.S.A. 1980, c. I-7 to mean "an Act or a regulation or any portion of an Act or regulation". "Act", in turn, is defined to mean "an Act of the Legislature". "Legislature" provides a further reference to the Legislative Assembly of Alberta. In short, "enactment" refers only to Alberta legislation, not to federal legislation.

[74.] Therefore, despite what any other Alberta legislation says, I may order production of records that are within the scope of any Alberta legislation. However, if disclosure of records within the scope of federal legislation would be an offence under an Act of Canada, I may not order production of those records. Because disclosure of YOA records that identify a young person would be an offence under s. 46(1) of the YOA, I may not order production of those YOA records. Similarly, because "publishing" any "report" that names or identifies a young person or child would be an offence under section 38(1) of the YOA, I may not order production of such reports. Like the Applicants, I too am bound by section 19(3) of the Act.

[75.] Nevertheless, it bothers me that I cannot inspect YOA records or "reports" to determine whether they are properly within the scope of the YOA and would either name or identify a young person or child under section 38(1), or would identify a young person under section 46(1). Instead, I am forced to rely on the Public Body's list of documents to make that determination. My inability to inspect makes it impossible to further one of the objects of the Act, namely, to provide for independent reviews of decisions made by public bodies under the Act (section 2(e)).

[76.] I believe that I have a duty to ensure that information is properly excepted under section 19(3) of the Act. Because I cannot inspect, I intend to hold accountable to me any public body that says section 19(3) applies to information.

[77.] Therefore, in all future cases, I intend to require that a public body provide me with an affidavit to the effect that disclosure of the records in question would be an offence under an Act of Canada. In requiring an affidavit, I am following the lead set by the Ontario Assistant Information and Privacy Commissioner when initially he was faced with access requests to YOA records: see Ontario Order P-378, [1992] O.I.P.C. No. 183. I will require the

same contents in the affidavit as does the Ontario Information and Privacy Commissioner, namely:

> (i) information about the person swearing the affidavit, describing his or her qualifications and responsibilities;
>
> (ii) a statement that the person swearing the affidavit is familiar with the records withheld and the subject matter of the records;
>
> (iii) a description of the records withheld, in reasonably specific detail (without revealing the contents of the records), correlating each record to the provision(s) of the offence asserted under an Act of Canada, and demonstrating how the required elements of each provision are satisfied (for example, under section 46(1) of the YOA, how each record would identify a young person);
>
> (iv) a summary of the purpose(s) for which each record was created and the circumstances under which each record was created.

[78.] In the present case, I do not require that the Public Body provide me with an affidavit because the Public Body has already provided evidence which includes the foregoing. A person having the appropriate qualifications and who was knowledgeable about the Records gave evidence at the inquiry. That evidence also concerned the creation of the Records. The Public Body provided a list of records. Generally, the records were described in sufficient detail so that I could clearly identify that they were YOA records. For the most part, Record Two was arranged in reverse chronological order so that I could readily follow the course of the investigation and the YOA proceedings. Although the Public Body relied on section 38(1) of the YOA as the offence provision, I do not believe that should be the basis for ordering an affidavit in this case because the Public Body reviewed the Records a second time, after the inquiry, to determine which Records it would be prohibited from disclosing under the YOA.

Issue E: Did the Public Body correctly apply section 26 (privilege) of the Act to the Records that are not within the scope of the YOA?

[79.] The only documents remaining to be considered are those documents that are not within the scope of the YOA, namely:

Record Two: Documents 2, 16 (first page), 73, 83, 85, 92, 93

[80.] The Public Body applied section 26(1)(a), (b) and (c) to all of these documents. Under section 26(1)(a), the Public Body claimed that both the common law solicitor-client privilege applied to certain of these documents, and that the legal privilege known as "litigation privilege" applied to all of these documents.

(a) Did the Public Body correctly apply solicitor-client privilege under section 26(1)(a)?

[81.] Section 26(1)(a) provides:

> *s. 26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege.*

[82.] Under section 26(1)(a), the Public Body applied solicitor-client privilege to Documents 85 and 92 of Record Two.

[83.] In Order 96-017, I stated that to correctly apply section 26(1)(a) (solicitor client privilege), the Public Body must meet the common law criteria for that privilege, as set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria: (i) it is a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[84.] In Order 96-017, I adopted the Ontario Information and Privacy Commissioner's definition of "legal advice", which is "a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications".

[85.] I have reviewed Documents 85 and 92 of Record Two. Document 85 is a fax cover page. Document 85 does not meet the second criterion in *Solosky v. The Queen*, namely, it does not entail the giving or seeking of legal advice. Therefore, the Public Body did not correctly apply section 26(1)(a) (solicitor-client privilege) to Document 85 of Record Two.

[86.] Document 92 is more problematic. That document is a solicitor's request to the client for factual information. Does solicitor-client privilege apply to

such a document that, on its face, does not entail the seeking or giving of legal advice?

[87.] Ronald D. Manes and Michael P. Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto, Ontario: Butterworths, 1993), at p. 26, say there is a debate as to the extent of solicitor-client privilege. The broad view would have solicitor-client privilege protect all communications passing between a solicitor and client, thus focusing solely on the confidentiality aspect of the professional relationship. The narrower view would have solicitor-client privilege protect only those communications that meet the tests in *Solosky v. The Queen*, thus focusing on the communication and its purpose.

[88.] I believe that I must follow *Solosky v. The Queen*. Furthermore, if solicitor-client privilege is to be applied document by document, as set down in *Solosky*, it must be that the focus of solicitor-client privilege is to protect legal advice, and not solely the confidentiality aspect of the professional relationship. Otherwise, it would not be necessary to examine each document to determine whether solicitor-client privilege applies.

[89.] Applying the second criterion in *Solosky v. The Queen*, it follows that a client's communication with his or her solicitor solely to convey or receive factual information will not be privileged because the communication does not entail the seeking or giving of legal advice. On this premise, a solicitor's request to the client for factual information would also not be privileged.

[90.] I want to make it clear that my conclusion in this regard is based on the application of the second criterion set out in *Solosky v. The Queen*, and not on an application of the rules of discovery relating to what part of a document is factual, and therefore not privileged. As Commissioner, I believe that while I have jurisdiction to apply the *Solosky* criteria to a document to determine whether solicitor-client privilege applies to that document, I do not have jurisdiction to delve into any document to determine what part of a solicitor-client communication is legal advice and therefore privileged, and what part is factual and therefore not privileged.

[91.] I am aware that there is a difference between applying *Solosky v. The Queen* to a document and applying the rules of discovery to a document: see Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner), [1997] O.J. No. 1465 (Div. Ct.). The difference is an application of the *Solosky* criteria in the first instance to determine whether solicitor-client privilege applies to the document and, consequently, whether all or none of the document can be disclosed, as opposed to an examination of a document, to which solicitor-client privilege already applies, to determine what part of the document is factual and must be disclosed. I have applied *Solosky v. The Queen*.

[92.] As previously stated, Document 92 of Record Two is a solicitor's request to the client for factual information. That document does not meet the second criterion in *Solosky v. The Queen*, namely, it does not entail the seeking or giving of legal advice. Therefore, the Public Body did not correctly apply section 26(1)(a) (solicitor-client privilege) to Document 92 of Record Two.

(b) Did the Public Body correctly apply "litigation privilege" under section 26(1)(a)?

[93.] In Order 96-017, I stated that section 26(1)(a) (solicitor-client privilege) is intended to encompass both aspects of solicitor-client privilege: (i) solicitor-client communications and (ii) third party communications. I referred to third party communications as "litigation privilege". The Public Body describes litigation privilege as another kind of legal privilege under section 26(1)(a), separate from solicitor-client privilege.

[94.] I prefer to consider solicitor-client privilege in the manner I described it in Order 96-017, similar to the current view stated by Manes and Silver in *Solicitor-Client Privilege in Canadian Law*, at pp. 7-9. Regardless of how it is classified, litigation privilege is a recognized privilege for the purposes of section 26(1)(a).

[95.] The guiding principle for litigation privilege is that all papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated, are privileged: *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27. This means that such papers and materials are confidential and do not have to be disclosed.

[96.] The privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

[97.] Under section 26(1)(a), the Public Body applied litigation privilege to the following:

> Record Two: Documents 2, 16 (first page), 73, 83, 85, 92, 93

[98.] To correctly apply litigation privilege, the Public Body must show that the "dominant purpose" for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company*

(1984), 30 Alta. L.R. (2d) 183 (C.A.); *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.);

[99.] The "dominant purpose" test consists of three requirements, each of which must be met: see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*,
p. 93. Those requirements are:

> (i) the documents must have been *produced* with existing or contemplated litigation in mind,
>
> (ii) the documents must have been produced for the *dominant purpose* of existing or contemplated litigation, and
>
> (iii) if litigation is contemplated, the prospect of litigation must be *reasonable*.

[100.] The intent of the maker of the document or the person under whose authority the document was made is to be considered when determining "dominant purpose": *Opron Construction Co. v. Alberta* (1989), 71 Alta. L.R. (2d) 28 (C.A.).

[101.] Furthermore, the maker of the document or the person under whose authority the document was made must have intended the document to be confidential (the one possible exception, not applicable in this case, being the "work product" or "lawyer's brief" rule): see Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, p. 96.

[102.] I have carefully reviewed the documents and the evidence. Documents 16 (first page), 83 and 85 of Record Two meet all the requirements for litigation privilege. Therefore, the Public Body correctly applied section 26(1)(a) (litigation privilege) to Documents 16 (first page), 83 and 85 of Record Two.

[103.] Documents 2, 73, 92 and 93 of Record Two do not meet the requirements for litigation privilege, as these documents were not prepared either by the client or by a third party on behalf of the client. Consequently, it is unnecessary to consider whether these documents were prepared for the "dominant purpose" of submitting them to a legal advisor for advice and use in litigation. Therefore, the Public Body did not correctly apply section 26(1)(a) (litigation privilege) to Documents 2, 73, 92 and 93 of Record Two.

(c) Did the Public Body correctly apply section 26(1)(b) (legal services)?

[104.] Section 26(1)(b) provides:

s. 26(1) The head of a public body may refuse to disclose to an applicant

> *(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services.*

[105.] I note that section 26(1)(b) appears to protect that information which would not be protected by either solicitor-client privilege or litigation privilege.

[106.] The Public Body claimed that section 26(1)(b) applies to Documents 2, 73, 92 and 93 of Record Two. Documents 2 and 73 are information prepared by a lawyer of the Minister of Justice and Attorney General in relation to a matter involving the provision of legal services. Therefore, the Public Body correctly applied section 26(1)(b) to Documents 2 and 73 of Record Two.

[107.] Documents 92 and 93 of Record Two do not meet the criteria for section 26(1)(b). Therefore, the Public Body did not correctly apply section 26(1)(b) to Documents 92 and 93 of Record Two.

(d) Did the Public Body correctly apply section 26(1)(c) (advice or other services)?

[108.] Section 26(1)(c) provides:

s. 26(1) The head of a public body may refuse to disclose to an applicant

> *(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.*

[109.] The Public Body applied section 26(1)(c) to Documents 92 and 93 of Record Two. Documents 92 and 93 of Record Two are information in correspondence between a lawyer of the Minister of Justice and Attorney General and any other person in relation to a matter involving the provision of advice or other services by the lawyer. Therefore, the Public Body correctly applied section 26(1)(c) to Documents 92 and 93 of Record Two.

(e) Did the Public Body exercise its discretion properly under section 26(1)?

[110.] Section 26(1) is a discretionary ("may") exception. As such, even if the exception applies, the Public Body must nevertheless consider whether it should disclose the information.

[111.] The Public Body said that the test to apply is whether there is anything improper or inappropriate in the exercise of the decision-maker's discretion. The Public Body concluded that since there was no evidence of anything improper or inappropriate in the exercise of its discretion, it exercised its discretion properly.

[112.] In Order 96-017, which was issued after this inquiry, I said that the test to apply is whether the Public Body considered the objects and purposes of the Act when exercising its discretion. One of the main objects of the Act is to provide a right of access to records in the custody or under the control of the Public Body (section 2(a)).

[113.] In Order 96-017, I also said that I cannot exercise the discretion *de novo*. In other words, I cannot substitute my own decision if I find that the discretion has not been exercised properly. In such a case, I must return the decision to the Public Body.

[114.] There is no evidence before me that the Public Body considered the objects and purposes of the Act when it exercised its discretion. However, the Public Body applied a test which it considered was appropriate prior to my decision in Order 96-017 relating to the proper exercise of discretion. In these unique circumstances, I do not think that it would be proper for me to apply that test retroactively to the Public Body's exercise of its discretion. Therefore, I do not find fault with the Public Body's exercise of its discretion in this case.

Issue F: Did the Public Body correctly apply section 19 (law enforcement) of the Act to the Records that are not within the scope of the YOA?

[115.] Because I have already dealt with all the documents of the Records that are not within the scope of the YOA, I do not find it necessary to consider the issue of law enforcement under section 19 of the Act.

Issue G: Did the Public Body correctly apply section 16 (personal information) of the Act to the Records that are not within the scope of the YOA?

[116.] Similarly, because I have already dealt with these documents, I do not need to consider the issue of personal information under section 16 of the Act.

Issue H: Do the Applicants meet the requirements under section 79(1)(a) of the Act for exercising any right or power conferred on an individual under the Act?

[117.] I do not find it necessary to consider any issues under section 79(1)(a) of the Act. I have already dealt with all the documents in the Records. Furthermore, section 79(1)(a) of the Act does not bear on the documents that I intend to order disclosed to the Applicants, namely, Documents 27 and 34 of Record One. Those documents do not contain personal information to which an individual would have a right of access under the Act.

Issue I: Did the Public Body correctly refuse to disclose the record numbered 12 in the Applicants' access request?

[118.] The Public Body informed the Applicants that the record numbered 12 in the Applicants' access request could be obtained through the offices of the Clerk of the Court if access to that record was not prohibited by the YOA. Accordingly, the Public Body did not include that record in its Inventory of Documents.

[119.] In refusing to disclose that record, the Public Body presumably was applying section 28(1)(a) of the Act, which says that a Public Body may refuse to disclose information that is available for purchase by the public.

[120.] The record numbered 12 is the "Notices of Appeal served on Alberta Justice by the Young Offender and accomplices in this matter". No evidence was presented to me as to whether that record was available for purchase. However, I do not think I need to consider the section 28(1)(a) issue because the record, as named, would be a YOA record that would identify a young person, as provided by section 46(1) of the YOA. As such, disclosure of that record, which would also meet the tests for a "law enforcement record", would be an offence under an Act of Canada, thus meeting both requirements of section 19(3) of the Act. Accordingly, the Public Body would be prohibited from disclosing that record under section 19(3). Therefore, the Public Body was correct in refusing to disclose that record, although not for the reason it stated.

ORDER:

[121.] **1.** Under section 19(3) of the Act, I uphold the Public Body's decision to refuse to disclose to the Applicants the information contained in the following:

Record One: Documents 2-7, 10-26, 28-33, 35-70

Record Two: Documents 1, 3-6, 9-13, 15, 16 (attached memos), 17-20, 22-24, 29-39, 41-46, 52-55, 57-61, 63-66, 68, 74-78, 80-82, 84, 87-91, 96, 101-107, 110-114, 116

[122.] **2.** Under section 19(3), I also uphold the Public Body's decision to refuse to disclose the record numbered 12 in the Applicants' access request.

[123.] **3.** Under section 19(3) of the Act, I do not uphold the Public Body's decision to refuse to disclose to the Applicants the information contained in Documents 27 and 34 of Record One. I order the Public Body to disclose Documents 27 and 34 of Record One to the Applicants.

[124.] **4.** Under section 26(1)(a) (litigation privilege), I uphold the Public Body's decision to refuse to disclose Documents 16 (first page), 83 and 85 of Record Two.

[125.] **5.** Under section 26(1)(b), I uphold the Public Body's decision to refuse to disclose Documents 2 and 73 of Record Two.

[126.] **6.** Under section 26(1)(c), I uphold the Public Body's decision to refuse to disclose Documents 92 and 93 of Record Two.

[127.] **7.** I order that the Public Body notify me, in writing, within 30 days of receiving a copy of this Order, that this Order has been complied with.

Robert C. Clark
Information and Privacy Commissioner