CITATION: Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner, 2009 ONCA 20

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COURT OF APPEAL FOR ONTARIO

Moldaver, Sharpe and Blair JJ.A.

BETWEEN

Toronto Police Services Board

Applicant (Respondent in Appeal)

and

Information and Privacy Commissioner/Ontario

Respondent (Appellant)

and

James Rankin

Respondent (Respondent in Appeal)

AND BETWEEN

Toronto Police Services Board

Applicant (Respondent in Appeal)

and

James Rankin

Respondent (Appellant)

and

Information and Privacy Commissioner/Ontario

Respondent (Respondent in Appeal)

Darrel A. Smith, for the Toronto Police Services Board

William S. Challis, for the Information and Privacy Commissioner/Ontario

Tony S. K. Wong and Iris Fischer, for James Rankin

Wendy Matheson and Alisse D. Houweling, for Canadian Civil Liberties Association, Intervener

Heard: September 22 and 23, 2008

On appeal from the decision of the Divisional Court (Carnwath, Greer and Swinton JJ.) dated June 21, 2007 and reported at (2007), 225 O.A.C. 238, allowing the application for judicial review brought by the Toronto Police Services Board and quashing Order MO-1989 made by the Information and Privacy Commissioner/Ontario on November 7, 2005.

Moldaver J.A.:

OVERVIEW

[1] This appeal raises a narrow but important point of statutory interpretation. At issue is the proper construction of the term "record" in s. 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56 (the "Act"). At stake is the ability of the public to access electronically recorded information, under the control of a municipal government institution, in a format that would require the institution to develop a new algorithm to modify its existing computer software.

[2] Subsection 2(1) of the Act is titled "Interpretation". It contains a number of defined terms, including the term "record", which is defined as follows:

> 2. (1) In this Act,
>
> …

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise *normally used by the institution*; ("document") [Emphasis added.]

[3] Subsection (b) of s. 2(1) is the provision at issue in this appeal. Of particular concern is the emphasized phrase "normally used by the institution" and the interpretation it is to be given in the context of this case. The factual background to this interpretative issue is briefly stated as follows.

[4] The appellant, James Rankin, is a journalist with the Toronto Star newspaper. He made two related requests under the Act for information stored in two electronic databases maintained by the Toronto Police Service (the "Police"), in a format different than the format in which the information is stored by the Police. The Police have the technical expertise needed to retrieve the information he seeks, in the format he has requested. To do so, however, they have to design an algorithm that is capable of extracting and manipulating the information that presently exists in the two electronic databases and re-formatting it.

[5] The Toronto Police Services Board (the "Board") refused Mr. Rankin's requests for various reasons. Central to this appeal is the Board's contention that the Police are not legally obliged to provide Mr. Rankin with the information he seeks, in the format requested, because to do so would require the Police to create new software – software that they do not normally use. The Board contends that, because the requests require the use of new software, the information being sought is not a "record" under s. 2(1)(b) of the Act. Since Mr. Rankin's entitlement to access is limited by s. 4(1) of the Act to a "record", his requests therefore fail.

[6] The Board did not raise that specific argument on Mr. Rankin's appeals to the Information and Privacy Commissioner/Ontario challenging the Board's refusal to disclose. Before Adjudicator DeVries (the "Adjudicator"), the Board raised three points: first, it was impossible to produce the records sought by Mr. Rankin, in the format requested, because the data needed to produce them did not exist in a recorded form; second, if the data did exist in a recorded form, the records being sought were exempted by s. 1 of Regulation 823, R.R.O. 1990, because the process of producing them would unreasonably interfere with the operations of the Police; and third, if the data did exist in a recorded form, compliance with Mr. Rankin's requests would require the Police to create a new record, something they were not obliged to do.

[7] The Adjudicator rejected those arguments. His reasons are found in *Re Toronto Police Services Board* (November 7, 2005), Order MO-1989 (IPC/Ontario). In a nutshell, he found that the information being sought by Mr. Rankin constituted a "record" under the Act and he ordered the Board to respond to Mr. Rankin's requests by issuing access decisions in accordance with the notice provisions of the Act.

[8] The Board applied to the Divisional Court for judicial review of the Adjudicator's order. On the application, the Board explicitly raised for the first time the issue that the information requested by Mr. Rankin did not constitute a "record" within the language of s. 2(1)(b) of the Act because it could only be produced by means of software that the Police did not normally use. The Divisional Court found favour with that argument and quashed the order of the Adjudicator.

[9] Mr. Rankin and the Commissioner now appeal to this court, with leave, from that decision. The intervener, Canadian Civil Liberties Association, supports their bid to have the order of the Commissioner restored.

[10] For reasons that follow, I would allow the appeal, set aside the order of the Divisional Court and restore the order of the Adjudicator.

THE RELEVANT LEGISLATION

Municipal Freedom of Information and Protection of Privacy Act

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific,

…

2. (1) In this Act,

…

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

4. (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 6 to 15; or

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

45. (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

…

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record;

47. (1) The Lieutenant Governor in Council may make regulations,

…

(b) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of “record” for the purposes of this Act;

…

(f) prescribing the amount, the manner of payment and the manner of allocation of fees described in clause 17(1)(c) or 37(1)(c), subsection 39 (1.1) or section 45 and the times at which they are required to be paid;

(g) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 45;

…

R.R.O. 1990, Regulation 823

1. A record capable of being produced from machine readable records is not included in the definition of “record” for the purposes of the Act if the process of producing it

would unreasonably interfere with the operations of an institution.

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:

…

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

THE FACTS

[11] The pertinent facts are largely identified in the overview. By way of brief elaboration, James Rankin is a journalist with the Toronto Star newspaper. Since May 2003, he has been seeking information about individuals with whom the Police have come into contact in the course of their duties. The information he wants is stored in two electronic databases maintained by the Police – the Criminal Information Processing System ("CIPS") and the Master Name Index ("MANIX").

[12] In its present form, the recorded information contains personal identifiers from which an individual's identity can be determined. That information raises obvious privacy concerns and Mr. Rankin does not want it. What he seeks is information from

which he can determine whether a particular individual, on record with the Police, has been arrested on one occasion only or on more than one occasion. To accomplish that, he has asked that the unique identifiers for each individual "be replaced with randomly generated, unique numbers, and that only one unique number be used for each individual." That way, he can obtain the information he seeks without infringing the privacy rights of the individuals with whom the Police have made contact.

[13] No issue is taken with the *bona fides* of Mr. Rankin's requests. His purpose in seeking the information is to test the Board's claim, in response to an earlier series of articles he wrote, that the Police do not engage in racial profiling.

[14] The evidence pertinent to the various issues raised before the Adjudicator and the Divisional Court comes essentially from Detective David Angus, a computer analyst employed by the Police, and from Richard Faulkner, an IT consultant retained by Mr. Rankin.

[15] In an affidavit filed with the Adjudicator, Detective Angus stated that in order to provide Mr. Rankin with the information he seeks, in the format requested, the Police would need to design "an algorithm capable of replacing a person specific unique identifier with a randomly generated number." Based on their technical know-how, the Police can design the algorithm using software they presently have. According to Detective Angus, "[i]t would take approximately two weeks to extract and manipulate the data to meet the request." Detective Angus further deposed that the end product would be less than accurate because in his view, it would not be "possible to create the unique person identifiers to a degree higher than 65 to 70% at best."

[16] As indicated, the Board refused Mr. Rankin's requests for the information and Mr. Rankin appealed to the Information and Privacy Commissioner/Ontario (the "Commissioner").

MR. RANKIN'S APPEALS TO THE COMMISSIONER

[17] On Mr. Rankin's appeals to the Commissioner from the Board's refusal to produce the records in the format requested, Adjudicator DeVries considered the affidavit evidence filed and the arguments presented and identified three issues for determination:

> The first issue is whether the basic information – that is, unique identifiers – exist in a "recorded" form in the identified database, and are capable of being produced from machine readable records by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

> If the answer to this issue is yes, the second issue to be decided is whether the process of producing the information would unreasonably interfere with the operations of the Police (as the definition of "record" is limited by section 1 of Regulation 823).
>
> If the process of producing the record would not unreasonably interfere with the operations of the institution, then the unique identifiers constitute a "record" for the purpose of the *Act*. The final issue to be decided, based on the wording of the request, is whether the Police are required to provide the appellant with a record which replaces the unique identifiers with randomly-generated, unique numbers (p.9).

[18] On the first issue, contrary to the position of the Board, the Adjudicator found that unique identifiers, such as names or other personal information that could potentially identify individuals, did exist in a "recorded" form for individuals whose information is entered in the databases and that these unique identifiers were capable of being produced from a machine readable record. In so concluding, the Adjudicator accepted the Police's submissions that "the extraction of the requested information would be time-consuming, and would result in certain inaccuracies in the information." However, he concluded that "this does not mean that a unique identifier does not exist in a form that is accessible, and that it is not a 'record' for the purpose of the *Act*." To the extent that the "records produced would [only] be between 65-70% accurate", the Adjudicator found that "the accuracy of the data is not relevant to whether it should be produced or not." In his opinion, "as long as a requester is advised of the potential inaccuracies in a record, the test for whether a record is required to be produced under the *Act* is not contingent on its accuracy" (pp. 14-15).

[19] In sum, on the evidence before him, the Adjudicator was satisfied that unique identifiers did exist in the two electronic databases controlled by the Police and that these identifiers were capable of being produced from a machine readable record.

[20] On the second issue of whether the process of producing the record would unreasonably interfere with the operations of the institution, the Adjudicator noted that the Police did "not identify how the extraction of the information would obstruct or hinder the range of effectiveness of the Police's activities." In the Adjudicator's opinion, the fact that "extracting the information would take time and effort" is not a sufficient basis for finding that the process would unreasonably interfere with the operations of the Police. In this regard, he observed by way of "an aside" that the "costs regarding the production of records are chargeable under the *Act*" (pp. 17-18).

[21] In his consideration of the third issue – would replacing the unique identifiers with randomly-generated numbers constitute creating a record – the Adjudicator reviewed the pertinent facts:

> In this appeal, I have found that the information containing unique identifiers exists in both the CIPS and MANIX databases. As noted above, these identifiers may vary in the information they contain; however, these unique identifiers "link" the information in the records to identifiable individuals – and consequently "link" certain occurrences found in the records to each other. In my view, these "linkages" constitute "recorded" information for the purpose of the *Act*. These links exist and are capable of being produced from machine readable records (p. 19).

[22] The Adjudicator then reviewed an earlier order of the Commission in which Assistant Commissioner Mitchinson held that the Police were required to disclose a record notwithstanding the need for it to be reformatted prior to disclosure: *Re Toronto Police Services Board* (December 21, 2000), Order MO-1381 (IPC/Ontario). Applying that reasoning to the facts before him, Adjudicator DeVries concluded:

> In the present appeals, I have determined that the unique identifiers or "linkages" exist in the database. Due to the fact that the information is contained in a record that is capable of being produced from a machine readable record under the control of an institution by means of computer software, I am satisfied that replacing these unique identifiers or "links" with unique numbers does not constitute "creating" a record – no "new" information is created. The information provided to the appellant in response to the request is the same recorded information, but simply in a modified, anonymized format. Replacing the unique identifiers with randomly-generated numbers does not change the nature of the information; rather, in these circumstances, it serves the purpose of anonymizing the information. In my view doing so does not result in the creation of new information or the creation of a new record (p.22).

[23] Finally, in deciding whether the information constituted a record that had to be created, the Adjudicator addressed "the issue of how difficult it might be to replace the

identifiers with randomly generated numbers." In this regard, he noted Detective Angus' evidence and found:

> … that it is possible to develop software which would replace a unique identifier with a random number. The Police's concern that an algorithm would have to be specifically developed seems to me to be covered in the fees section of the *Act* (see section 6 of Regulation 823, which allows for fees for developing a computer program or other method of producing a record from machine readable record, and for the costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received) (p. 23).

The Adjudicator also took account of the affidavit evidence of Mr. Rankin's expert, Mr. Faulkner, regarding the relative ease of creating the algorithm needed to replace unique identifiers with random, unique numbers.

[24] In the end, the Adjudicator found it unnecessary to determine the degree of difficulty involved in producing the records sought by Mr. Rankin, in the format requested. Taking his lead once again from the decision of Assistant Commissioner Mitchinson in Order MO-1381, the Adjudicator found "that the method or format by which these linkages [unique identifiers] are ultimately produced is not critical to the issue of whether they constitute a record" (p. 23).

[25] In the result, having determined all three issues in Mr. Rankin's favour, the Adjudicator ordered the Board to respond to Mr. Rankin's requests by issuing access decisions in accordance with the notice provisions of the Act.

THE BOARD'S APPEAL TO THE DIVISIONAL COURT

[26] At the Divisional Court, in addition to relying on the arguments it had raised before the Adjudicator, the Board advanced for the first time the argument that the information Mr. Rankin was seeking did not constitute a "record" as defined by s. 2(1)(b) of the Act because it could only be produced, in the format requested, by means of software the Police did not normally use.

[27] As indicated, the Divisional Court accepted that argument. Carnwath J., for the court, addressed the s. 2(1)(b) issue in brief but succinct reasons, the relevant portions of which are reproduced here:

In construing s. 2(b), I conclude that the words “normally used by the institution” qualify both “by means of computer hardware and software” and “any other information storage equipment and technical expertise”.

I do so for two reasons. First, the use of the words “any other” convey the sense that the two phrases connected by “or” speak of equipment, similar in nature, capable of producing a record from a machine-readable record.

Second, it would make no sense to have different requirements of the institution to “produce a record” depending on whether it could be done “by means of computer hardware and software” or whether “by any other information storage equipment and technical expertise”.

Thus, an analysis of s. 2(b) requires:

1. a finding there is a “record” capable of being produced from a machine-readable record;

2. a finding that such a “record” is under the control of the institution; and,

3. a finding that the “record” can be produced “by means of computer hardware and software or any other information storage equipment and technical expertise **normally used by the institution**”.

If requirement three is not satisfied, that is the end of the matter. If it is satisfied, there remains the requirement established by s. 1 of Reg. 823 that the “producing” must not unreasonably interfere with the operation of the institution.

The Assistant Commissioner, in answering the first question, found that a unique identifier existed in a form accessible through the CIPS system and the MANIX system. It matters not, for the purposes of this review, that I might not have come to the same conclusion. What is fatal to the Assistant Commissioner’s decision is his failure to consider whether

> the means required to produce the record were means "normally used by the institution".
>
> I have reviewed the Assistant Commissioner's decision, paragraph by paragraph, and nowhere do I find where his mind turned to the question he was required to ask of himself. Having failed to do so, his decision cannot stand (paras. 36-42). [Emphasis in original.]

[28] In light of his conclusion on the s. 2(1)(b) issue, Carnwath J. found it unnecessary to address the other issues that the Board had unsuccessfully raised before the Adjudicator.

[29] On appeal to this court, the appellants, Mr. Rankin and the Commissioner, contend that the Divisional Court erred in its interpretation of s. 2(1)(b). In addition, the respondent Board seeks to resurrect two of the issues that it had unsuccessfully raised before the Adjudicator: (1) that unique identifiers do not exist in the database and are therefore not capable of being produced; and (2) that to fulfill Mr. Rankin's requests, the Police would be required to create a new record. The Board raises these issues in the event we should disagree with the Divisional Court's conclusion on the s. 2(1)(b) issue. The Board has not pursued its "unreasonable interference" argument.

DID THE DIVISIONAL COURT ERR IN QUASHING THE ORDER OF THE ADJUDICATOR?

[30] The Divisional Court held that reasonableness was the appropriate standard upon which to review the Adjudicator's decision. Although the parties disputed the issue of the appropriate standard of review before the Divisional Court, they do not raise that issue before this court. Thus, the primary question is whether the Divisional Court erred in finding that the Adjudicator's interpretation of s. 2(1)(b) was unreasonable.

[31] Subsequent to the Divisional Court's decision in this case, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In *Dunsmuir*, Bastarache and Lebel JJ., writing for the majority of the court, collapsed the patent unreasonableness and reasonableness *simpliciter* standards into one standard – reasonableness (at para. 45). They provided the following guidance to reviewing courts in explaining the application of the reasonableness standard of judicial review:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one

> specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (at para. 47).

[32] Thus, when determining whether the Divisional Court erred in holding that the Adjudicator's interpretation was unreasonable, consideration will be given to the qualities underlying the Adjudicator's decision-making process and whether his decision fell within a range of possible, acceptable outcomes given the particular factual and legal context.

[33] I propose to begin my analysis by first addressing the secondary issues raised by the Board. I do so because they are straightforward and can be dealt with in short order. I then address the primary interpretative issue raised by the appellants Mr. Rankin and the Commissioner.

The Secondary Issues Raised by the Board

[34] The first of the secondary issues raised by the Board – the reasonableness of the Adjudicator's finding that unique identifiers exist in the databases and are capable of being produced from a machine readable record – is largely fact-driven. The Adjudicator thoroughly reviewed the representations made by both parties and paid careful attention to the affidavit evidence of Detective Angus for the Board and Mr. Faulkner for Mr. Rankin. Further, the Adjudicator shared each side's representations with the other and solicited additional submissions in reply and sur-reply. In my view, the Adjudicator weighed the evidence before him in a transparent and intelligible manner and was justified in making the findings he did. I am satisfied that his findings were reasonable, falling within a range of possible, acceptable outcomes, and that he committed no legal error in arriving at them. I see no merit in the contrary position advanced by the Board.

[35] Turning to the second issue of whether replacing the unique identifiers with unique, randomly-generated numbers constitutes "creating" a record, I again am of the

view that the Adjudicator's analysis and conclusion were reasonable. As I have already observed, the Adjudicator weighed the parties' submissions and evidence in a transparent and reasoned manner. On this basis, he concluded that re-formatting information that already existed in a recorded form does not constitute "creating" a record. This outcome reflects an acceptable approach in the factual and legal context of modern electronic record-keeping and falls squarely within one of a number of possible, reasonable conclusions. Accordingly, I would not give effect to the Board's position on this issue.

The Primary Issue: Did the Divisional Court err in concluding that the Adjudicator's interpretation of s. 2(1)(b) was unreasonable?

[36] The Divisional Court concluded that the words "normally used by the institution" in s. 2(1)(b) of the definition of "record" modify both "by means of computer hardware and software" and "any other information storage equipment and technical expertise" (para. 36). The court went on to hold that the Adjudicator's decision was unreasonable due to "his failure to consider whether the means required to produce the record were means 'normally used by the institution'" (para. 41). The court considered this failure to be fatal to the Adjudicator's decision.

[37] In my respectful view, the Divisional Court erred in holding that the Adjudicator failed to consider whether the means required to produce the record were means normally used by the institution. Although this interpretative issue was not explicitly put to the Adjudicator by the parties in their submissions, the Adjudicator's reasons indicate that he turned his mind to the question and that his decision on the point was not unreasonable. I reach this conclusion for the following four reasons.

[38] First, the Adjudicator indicated twice in his reasons that his decision was based on a comprehensive reading of the definition of "record" contained in s. 2(1) of the Act. For example, in considering the questions raised by the parties, the Adjudicator stated that "it is necessary to review the wording of the definition as a whole" and he then set out the complete definition of the term "record" in s. 2(1). In concluding that Mr. Rankin's requests would not require the Board to create a new record, the Adjudicator repeated the need to review the wording of the definition as a whole, and he again set out the entirety of the provision. It thus cannot be said that the Adjudicator failed to consider all of the language in the statutory definition.

[39] Second, the Adjudicator specifically addressed the Board's evidence that the Police would be required to develop new software in order to replace unique identifiers with randomly-generated numbers. The Divisional Court failed to note the following significant passage in the Adjudicator's reasons:

> *The affidavit of the Police suggests that it is possible to develop software which would replace a unique identifier with a random number. The Police's concern that an algorithm would have to be specifically developed seems to me to be covered in the fees section of the Act (see section 6 of Regulation 823*, which allows for fees for developing a computer program or other method of producing a record from machine readable record, and for the costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received) (p. 23). [Emphasis added.]

[40] I pause here to note that in his decision, the Adjudicator used the words "computer program", "software" and "algorithm" interchangeably. For present purposes, I am prepared to accept that those words share a common meaning.

[41] Although the Adjudicator did not specifically address whether the means required to produce the record were means normally used by the institution, his reasons for decision indicate that he was aware the Police would need to develop a new algorithm or software and found that the Police's concerns in this regard were addressed by the fees provisions in the Regulation enacted under the Act. In other words, he must be taken to have found that where the institution has the technical expertise, using its existing software, to develop a computer program to provide the requested information, that does not take the requested information outside the s. 2(1)(b) definition of record. The Adjudicator could not fairly be expected to have given a more detailed analysis of this issue when it was not specifically put in issue before him.

[42] It is clear that the phrase "normally used by the institution" modifies the immediately preceding words "technical expertise" in s. 2(1)(b). In my view, it is open to argument whether that phrase also modifies "computer hardware or software or other information storage equipment." In the present case, the requested information can be extracted from the Police's databases by developing an algorithm through the use of technical expertise and software that is normally used by the institution. Thus, the requested information falls within the s. 2(1)(b) definition of record regardless of whether the phrase modifies "computer hardware or software". It is not necessary to go on to decide the question whether the phrase "normally used by the institution" should be interpreted as precluding the need for an institution to acquire or purchase new software that is beyond its technical expertise to develop using its existing software. We would thus leave it to the Commissioner to decide that question in a future case, should it arise.

In the event that it does arise, the Commissioner will be free to construe the provision afresh.

[43] My third reason for concluding that the Adjudicator's decision on the s. 2(1)(b) issue is not unreasonable is that the principles of statutory interpretation and the requirement that the Act be given a fair, large and liberal construction support the decision he reached. As recently held by this court in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario* (2008), 292 D.L.R. (4th) 706, at paras. 28 and 30, the Act should be given a broad interpretation to best ensure the attainment of its object, according to its true intent, meaning and spirit.

[44] In accordance with this approach, any question of statutory interpretation must begin with a consideration of the purpose and intent of the legislation. Here, s. 1 of the Act takes the mystery out of that exercise. In particular, ss. 1(a)(i) and (ii) state that the purpose of the Act is to provide the public with a right of access to information under the control of municipal government institutions, in accordance with the principle that information should be made available subject only to limited and specified exemptions.

[45] That approach – one of presumptive access – reflects the fact that, because municipal institutions function to serve the public, they ought in general to be open to public scrutiny. In this regard, I agree with the submissions of the intervener that in enacting the Act, the legislature "wanted to improve the democratic process at the municipal and local board level" by ensuring members of the public would be able to access information needed "to participate in our democratic process in a worthwhile manner." As noted by the intervener, the Act was advanced by the legislature as an "important step towards ensuring an open and very public operation of government at both the provincial and municipal levels": Ontario, Legislative Assembly, *Official Reports of the Debates (Hansard)*, 49 (10 October 1989) at 2772 (Mr. Elston).

[46] Along these same lines, the Supreme Court of Canada has recognized that the overarching purpose of "access to information" legislation is to facilitate democracy. It does so in two ways – first, it helps to ensure that citizens have the information required to participate meaningfully in the democratic process and second, it helps ensure that politicians and bureaucrats remain accountable to the citizenry: *Dagg v. Canada (Minister of Finance*), [1997] 2 S.C.R. 403, at para. 61.

[47] *Dagg* also teaches that members of the public cannot hope to hold the government to account without having adequate knowledge of what government institutions are doing; nor can they hope to participate in the decision-making process and contribute to the formation of policy and legislation if that process is hidden from view. It is fundamental to a healthy democracy that government processes be easily scrutinized by the very public the government is elected to serve. Transparency and accountability are

vital to the democratic process: *Dagg* at para. 61, citing Donald C. Rowat, "How Much Administrative Secrecy?" (1965) 31 *Can. J. of Econ. and Pol. Sci.* 479 at 480; see also *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, at p. 1373.

[48] A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information.

[49] The Divisional Court made no mention of these principles of interpretation in constructing s. 2(1)(b) of the Act and in concluding that the Adjudicator's interpretation was unreasonable. This omission led the court to give s. 2(1)(b) a narrow construction – one which, in my respectful view, fails to reflect the purpose and spirit of the Act and the generous approach to access contemplated by it.

[50] The Divisional Court's interpretation of s. 2(1)(b) would eliminate all access to electronically recorded information stored in an institution's existing computer software where its production would require the development of an algorithm or software within its available technical expertise to create and using software it currently has. In my view, other provisions in the Act and the regulations tell against this interpretation.

[51] Sections 45(1)(b) and (c) of the Act require the requester to bear the "costs of preparing the record for disclosure" and "computer and other costs incurred in locating, retrieving, processing and copying a record," in accordance with the fees prescribed by the regulations. Subsections 6(5) and (6) of Reg. 823 were enacted pursuant to s. 45(1) of the Act. These provisions state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:
>
> …
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those

> costs are specified in an invoice that the institution has received.

[52] In my view, a liberal and purposive interpretation of those regulations when read in conjunction with s. 2(1)(b), which opens with the phrase "subject to the regulations," and in conjunction with s. 45(1), strongly supports the contention that the legislature contemplated precisely the situation that has arisen in this case. In some circumstances, new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it.[1]

[53] That interpretation makes good sense: far more so, in my respectful view, than the one suggested by the Board – namely, that ss. 6(5) and (6) of Reg. 823 are only designed to cover situations in which the institution voluntarily chooses to develop new computer software to retrieve a record. The Board's proposed reading coincides with the narrow approach that it has asserted throughout and advocates an interpretation of ss. 6(5) and (6) of Reg. 823 that would very much restrict, rather than foster, the public's right of access to electronic records.

[54] My fourth reason for concluding that the Divisional Court erred in holding that the Adjudicator's decision was unreasonable is that the outcome reached by the Adjudicator is consistent with the principles expressed in previous decisions of the Commissioner in this province and other provinces, along with a decision of the Federal Court of Appeal: see *Re British Columbia (Ministry of Forests)* (2003), Order 03-16 (Office of the Information and Privacy Commissioner for British Columbia); *Re The Regional Municipality of Niagara* (December 10, 2003), Order MO-1726 (IPC/Ontario); *Re Le Conseil scolaire public de district du Centre-Sud-Ouest* (May 6, 2005), Order MO-1924 (IPC/Ontario); *Re Toronto Police Services Board* (November 30, 2006), Order MO-2129 (IPC/Ontario); *Yeager v. Canada (Correctional Service)*, [2003] 3 F.C. 107 (C.A.), application for leave to appeal to the Supreme Court of Canada denied, [2003] S.C.C.A. No. 120. The policy considerations that inform the open access approach and the use of new techniques and initiatives to achieve it are eloquently stated in some of the decisions. I propose to refer to two of them.

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[1] I note that s. 45(4) of the Act requires an institution to waive the payment of fees if in its opinion it would be fair and equitable to do so, having regard to several factors including: the actual cost of producing the record; whether access to the record is ultimately given; any financial hardship suffered by the requester; and whether production of the record will benefit public health or safety. Subsection 45(5) allows the Commission, upon request, to review an institution's refusal to waive the applicable fees. I highlight these subsections only to make the point that the Act provides a mechanism by which requesters who cannot bear the financial burden of developing a new computer program or other computer costs may still obtain access to records.

[55] First, in Order 03-16, the British Columbia Commissioner observed that s. 6(2) of that province's access statute required the Ministry of Forests to create an electronic record in response to a request and to develop additional software to perform the necessary severance of exempt and non-responsive information. Although the Commissioner ultimately decided the information need not be produced and despite the fact that his decision was made pursuant to provisions of British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, which differ somewhat from the Ontario Act, I nonetheless find his comments on the larger issue of access to electronic records apposite to this appeal. He observed at para. 64:

> It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems… Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. *The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective*. [Emphasis added.]

[56] Second, in Order MO-1726, a case involving the recovery of deleted emails from electronic back-up tapes, which required the institution to "acquire the services of an information technology professional" to undertake the relevant searches, Adjudicator Liang said the following:

> I am not convinced that these circumstances bring the information in the tapes beyond the scope of a "record". The fact alone that the retrieval of information from "machine readable" records may require an institution to employ measures which are not part of its ordinary records retention and control procedures is not enough to exclude information from the *Act*. It is not difficult to imagine the potential breadth of such an exclusion from the *Act*, and I am not convinced that such an interpretation is required (p.6).

[57] Any interpretation of s. 2(1)(b) of the Act must, in my respectful view, take into account the important policy considerations reflected in these authorities. The approach advocated by the Board and accepted by the Divisional Court fails to give effect to them. Indeed, it does just the opposite. The Divisional Court's narrow interpretation provides

government institutions with the ability to evade the public's right of access to information by eliminating all access to electronic information where its production would require the development of software that is within the technical expertise normally used by the institution. On the Divisional Court's interpretation, access would be determined based upon the coincidence of whether the software was already in use, regardless of how easy or inexpensive it would be to develop.

[58] To summarize, in my view, the Divisional Court erred in concluding that the Adjudicator's interpretation of s. 2(1)(b) was unreasonable. The Adjudicator considered that the Police would be required to create new software to extract the requested information, but he must be taken to have found that the need to create that new software did not take the requested information outside the scope of the statutory definition of record. In this regard, the Adjudicator noted that the regulations contemplate that an institution will be able to recover fees for developing a computer program and other computer costs incurred in producing or retrieving a record. The Divisional Court failed to advert to the Adjudicator's reasons in this regard. The Divisional Court further failed to apply the governing principles of statutory interpretation and the policy considerations reflected in previous access decisions in arriving at a narrow interpretation of s. 2(1)(b) – an interpretation that would eliminate access to electronic information stored in an institution's existing computer software where its production would require the development of an algorithm within the technical expertise available to the institution.

CONCLUSION

[59] The essence of the Adjudicator's decision may be summarized as follows – where the information being sought can be produced from an institution's existing computer software by means of technical expertise normally used by it, it will constitute a record under s. 2(1)(b). I see no error in his analysis or conclusion and certainly none which would displace the deference owed to his decision.

[60] In the result, I would allow the appeal and restore the order of the Adjudicator. The information being sought by Mr. Rankin exists in the two electronic databases controlled by the Police and the Police need not gather further information to fulfill his requests. Assuming that Mr. Rankin is willing to pay the costs prescribed by Reg. 823 in relation to developing the computer program needed to collate and anonymize the information he is seeking, the definition of "record" in s. 2(1)(b) presents no obstacle to his requests. Subject to any exemptions the Board may claim, steps should be taken immediately to respond to Mr. Rankin's requests in accordance with the appropriate interpretation of s. 2(1)(b).

COSTS

[61] The Commissioner and the intervener do not seek costs. Mr. Rankin is entitled to costs throughout. If the parties cannot agree, they may submit brief written submissions (not to exceed five pages, double spaced) within thirty days of the release of these reasons.

Signed: "M.J. Moldaver J.A."
"I agree Robert J. Sharpe J.A."
"I agree R. A. Blair J.A."

RELEASED: "MJM" January 13, 2009