

I N D E X

VOLUME 28

CORRESPONDENCE RE DISCLOSURE;
OCT. - DEC., 1984; 1986 -----PAGES 1 - 17

MEDIA POOL COPY

FE 27



Department of
Attorney General

PO Box 7
Halifax, Nova Scotia
B3J 2L6

Our File No 09-84-0255-09

October 23, 1984

Mr. Frank C. Edwards
Prosecuting Officer
77 Kings Road
Sydney, Nova Scotia B1S 1A2

Dear Mr. Edwards:

On October 19th you advised me that you had given the police reports on the Marshall case to Stephen Aronson on June 23, 1982. The Deputy Attorney General has asked that you provide us with a report as to how and why and under what conditions you gave the police reports to Aronson. Accordingly, would you please provide a written report for his information.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Gordon S. Gale". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Gordon S. Gale
Director (Criminal)

GSG:jd



CROWN PROSECUTOR'S OFFICE
CAPE BRETON COUNTY
SYDNEY, N. S.

77 Kings Road
Sydney, Nova Scotia
B1S 1A2
October 29, 1984

Deputy Attorney General
RECEIVED
NOV 1 1984
Nova Scotia

Mr. Gordon S. Gale
Director (Criminal)
Dept. of Attorney General
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

Dear Mr. Gale:

RE: Donald MARSHALL Jr.

This will acknowledge your letter of October 23, 1984.

The R.C.M.P. Report was given by me to Stephen Aronson on June 23, 1982. I have no independent recollection of actually giving the report to Aronson but I see there is a letter on file dated July 2, 1982, from Aronson to the undersigned which begins as follows: "I have now had the opportunity of reviewing the R.C.M.P. Report....which you provided to me on June 23." The body of the letter makes it clear that the Report of May 20, 1982, was included in the material provided to Aronson.

Because I cannot remember the specific occasion upon which the Report was given, I cannot be specific about exactly what I told Aronson at that time. I believe I told him the Report was for his eyes only and that it was given to him personally when he visited this area around that time. This may explain why the Report was not disclosed for approximately 2 1/2 years and why there is no covering letter from me to Aronson.

My suspicion is that when Marshall changed lawyers, Mr. Cacchione would have inherited the file complete with the Report. Apparently, any stricture I may have placed on Aronson was not then communicated to Cacchione who then may have passed the Report along.

Though I very much regret the fact that the Report is being exploited for partisan political gain, I believe that it was proper, given the very unusual circumstances of this case, to give Mr. Aronson a copy of the Report. The Reference to the Court of Appeal (June 16, 1982) was under s. 617 (b) thus requiring Mr. Aronson to "carry the ball". It therefore likely seemed obvious to me then that he should be privy to every aspect of the new investigation including the details of the Report.

This case had engendered (and continues to engender) considerable suspicion about the disclosure practices of the Police and the Crown. In that context, how would it have looked had I refused to make the Report available to Aronson? I submit that the fallout we are now experiencing is mild in comparison to what might have been.

The disclosure of the Report should cause us to re-examine the role of the Crown during a police investigation. In hindsight, it is clear to me that the decision to question or not to question Chief MacIntyre should have been solely the investigator's prerogative. This is not the first time where the police have been able to avoid making an uncomfortable decision by having us make it for them.

I trust the foregoing is the information you require. Should you have further questions, please do not hesitate to get in touch.

Yours very truly,



Frank C. Edwards
Crown Prosecutor

FCE:sc

Nova Scotia


**Department of
Attorney General**

Deputy Attorney General

Gordon F. Coles, Q.C.

 PO Box 7
 Halifax, Nova Scotia
 B3J 2L6

902 424-4223

File Number

09-84-0255-09

November 20, 1984

 Mr. Frank C. Edwards
 Prosecuting Officer
 77 King Street
 Sydney, Nova Scotia
 B1S 1A2


Dear Mr. Edwards:

Re: Donald Marshall Jr.

Mr. Gale has passed to me your reply advice of October 29th in reply to his letter of October 23rd.

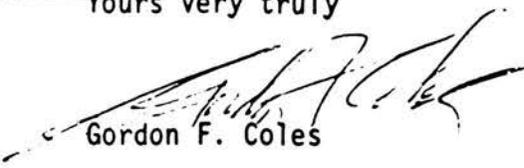
Police reports prepared for the use of the Attorney General are confidential for good reason. The investigators, in their effort to be as helpful as possible, set out their own personal views and opinions, suppositions and statements, including hear-say and a great many other matters which may or may not be relevant to particular issues. Unless they can be assured of the confidentiality of such reports they, of necessity, will need to change their content. It has been a long established policy of Attorneys General of this Province, and other provinces, that the confidentiality of such reports be protected. Indeed the Attorney General, as his predecessors in the past, has made it clear in response to questions put to him in the House, that such reports are confidential and privilege documents.

I was surprised, to say the least, that you would think that you had either the authority or prerogative to release a confidential report to Mr. Aronson, or anyone else, whether it dealt with matters in respect to Donald Marshall or any other investigation. With deference, your personal opinions on whether Mr. Aronson should have been privy to the report or whether "the fallout" might have been different had you not copied the report to him, are extraneous.

- 2 -

Lest there be any doubt, you are to understand that police reports prepared and delivered for the use of the Attorney General, his Deputy and agents, are not to be copied to other persons without the expressed authorization of the Attorney General or your superiors in the Department.

Yours very truly



Gordon F. Coles

c.c. Gordon S. Gale
Martin E. Herschorn



AE 8



CROWN PROSECUTOR'S OFFICE
CAPE BRETON COUNTY
SYDNEY N. S.

COPY

77 Kings Road
Sydney, Nova Scotia
B1S 1A2
November 26, 1984

Dept. of Attorney General
P.O. Box 7
Halifax, Nova Scotia
B3J 2L6

ATT: Gordon F. Coles, Q.C.
Deputy Attorney General

Dear Mr. Coles:

RE: Donald Marshall Jr.

This will acknowledge your letter of November 20, 1984.

First, I would like to re-affirm what I said in my letter of October 29, 1984, namely, that I very much regret that the Report was exploited for partisan purposes against the Attorney General. In hindsight, I was remiss in not having gotten a written undertaking from Mr. Aronson whereby he agreed that he would ensure that the Report would not be made public.

Second, I want to re-affirm my position that it was proper to give Mr. Aronson a copy of the Report. At the time, Mr. Aronson was obliged to carry the appeal under Section 617(b) of the Criminal Code. As such, he had the right to full disclosure of the findings of the 1982 investigation in order to prove to the Court that his client should be acquitted. Mr. Marshall would not have been convicted of murder in 1971 had it not been for the failure of the police and/or the Crown to disclose to his Counsel the existence of the first written statements of Chant, Pratico and Harriss. Further, his appeal in 1972 would likely have been successful had his Counsel been apprised of the re-investigation in November, 1971. In those circumstances, to argue that Mr. Marshall was entitled to something less than full disclosure in 1982 is completely untenable.

You stated that you were surprised that I would think I had either the authority or prerogative to release a confidential report to Mr. Aronson. You apparently based your admonition on the premise that the Report had been prepared for the use of the Attorney General. In fact, the Report was a copy of correspondence between the Officer-in-Charge in Sydney and the CIB Officer in Halifax. My copy was given to me personally by S/Sgt. Wheaton in Sydney. It was therefore not per se a confidential memo to the Attorney General.

The Report was information in my possession pertinent to a case for which I was responsible in my capacity as Chief Prosecuting Officer for the County of Cape Breton. An important part of that responsibility involves the duty to disclose the Crown's case to the Defence. With respect, I submit that the basis of my "authority or prerogative" to disclose this Report to Mr. Aronson need be traced no further.

I am not saying that I had the right to make this Report public. I certainly did not then nor do I now. I am saying that in this particular situation I had a right and even a duty to disclose the information to Mr. Aronson, so that he could properly prepare his case.

You mentioned that the Attorney General and his predecessors have made it clear that such reports are confidential and privilege documents. My disclosure to Mr. Aronson is not inconsistent with that position. As I recall, the Minister made the statement when he was explaining why he would not make the Report public. With respect, that is entirely separate from the issue of disclosure to Defence Counsel. I recognize and appreciate why many reports need to be confidential. In this case, that "need" (if present at all) was far outweighed by the necessity for full disclosure.

I find it ironic that you would say that my personal opinions about "fallout" over disclosure or non disclosure are extraneous. Was it not the "fallout" in the election campaign that caused you to be upset that I had given the Report to Aronson? Did the potential for adverse reaction cause you to phone me personally on July 21, 1982, after you had been visited by Michael Whalley? Did possible public reaction have anything to do with your threatening to take me off the case on January 25, 1983?

I fully agree that considerations of public reaction should be extraneous in criminal prosecutions. I must also confess that such considerations were totally absent from the thoughts that governed my conduct during the Marshall case.

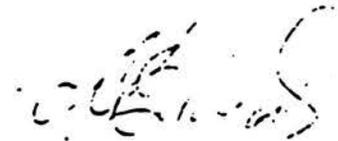
.....

With deference, your letter fails to address problems in our system which are far more pressing than the need for confidentiality. I mentioned one in my October 29, 1984, correspondence, namely, the need to examine the role of the Crown (and the Department) in police investigations. Another would be the need to ensure a minimum level of independence for the Crown in the conduct of a criminal prosecution. Under the present setup, the public sometimes perceives that there may be a political motivation in our actions.

These issues should have been obvious to us all long before now and my colleagues and I must bear some of the responsibility for their neglect. For instance, we have failed to form an association as they have in other provinces. Such a body would enable those who are in the trenches to better articulate the difficulties and through your good auspices help to improve the administration of justice in this province.

I note that copies of your letter of November 20, 1984, went to Messers Herschorn and Gale. In the same vein, I have copied this letter to them.

Very truly yours,

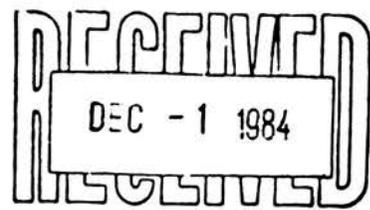


F.C. Edwards
CROWN PROSECUTOR

FCE:ami

c.c. Mr. Gordon S. Gale
✓ Mr. Martin E. Herschorn

FE 57 9



**Department of
Attorney General**

Deputy Attorney General

Gordon F. Coles, Q.C.

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4223

File Number

25-83-0019-06

November 30, 1984

Mr. F. C. Edwards
Prosecuting Officer
77 King Street
Sydney, Nova Scotia
B1S 1A2

Dear Mr. Edwards:

I acknowledge yours of November 26th.

No purpose is served by my replying in particular to your comments other than to say your opinion as to what may or may not have happened in respect to the proceedings against Mr. Marshall if certain information known to the Police and Crown had been communicated by them to counsel for Mr. Marshall is purely speculative and in my opinion not relevant to the question of your taking the decision to release a copy of the police report to Mr. Aronson or anyone else. I could hardly have dealt with this matter before it came to my attention.

My concern in having you continue to represent the Crown in the hearing under Section 617(b) resulted upon learning of the position which you were taking on behalf of the Crown which, in my appreciation of the situation, was not the proper position for the Crown to take - a view concurred in by other senior members of the Department. I made my position in this matter very clear to you and informed you in no uncertain way that I would have taken you off this case if time had permitted the briefing of other counsel.

I expect you to understand that as a prosecuting officer employed in this Department, you are the agent of the Attorney General and are to give effect to the instructions and directions of the Attorney General, the Deputy Attorney General and your other superiors in the Department.

Yours truly

Gordon F. Coles

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

Our File No.

09-84-0255-04

FROM:

Gordon F. Coles, Q. C.

TO: Martin E. Herschorn

It might be appropriate, without making specific reference to this incident, for you to remind all our Prosecuting Officers and Assistant Prosecuting Officers, of our policy in respect to RCMP REPORTS.

November 20, 1984

09-84-0255-09



Attorney General

Memorandum

From Martin E. Herschorn
Assistant Director (Criminal)

Our File Reference
08-84-0025-00

To Prosecuting Officers and
Assistant Prosecuting Officers

Your File Reference

Subject Police Reports

Date November 21, 1984

I wish to point out this Department's policy with respect to police reports prepared by police investigators for the assistance of the Attorney General, his Deputy and Agents. Such reports, which by their very nature often include personal views and opinions of the investigator, suppositions and matters of hear-say, are confidential and privileged documents which are not to be provided to persons outside the Department, except with the express authorization of the Director or Assistant Director (Criminal).

MEH:if

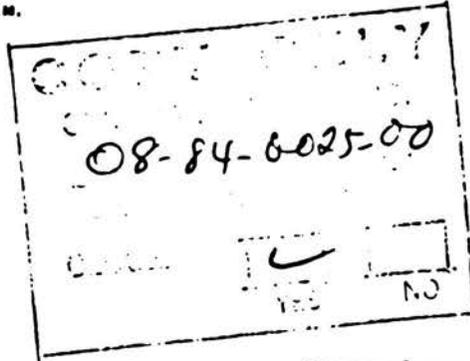
M.E.H.

COPY ONLY		
ORIGINAL IN FILE NO.		
<i>08-84-0025-00</i>		
REFERENCE FILE		
CLOSED	<input checked="" type="checkbox"/>	<input type="checkbox"/>
	YES	NO

*Durland, Gillis & Parker**Barristers, Solicitors, Notaries*

CLARE H. DURLAND, B.C.
 W. BRUCE GILLIS, B.Sc., LL.B., LL.M.
 CHRIS K. PARKER, B.A., LL.B.

COUNSEL
 MON. K. L. CROWELL, B.C.



OFFICES:

76 COMMERCIAL STREET
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 GREENWOOD, NOVA SCOTIA
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 TELEPHONE (802) 765-4992

REPLY TO Middleton OFFICE

FILE G-P-1

November 23, 1984

Department of Attorney General
 P. O. Box 7
 Halifax, Nova Scotia
 B3J 2L6

Attention: Martin E. Herschorn

Dear Martin:

I have your memo of November 21st regarding police reports.

For a number of years the Department has instructed the Prosecutors that they were to provide all information to Defence Counsel which was not privileged or confidential and it has been our practice in Annapolis County to provide copies of the Crown Sheets as well as any statements so that the Defence would know the case which it had to meet.

This latest memo leaves me somewhat uncertain as to what is to be provided and what is not.

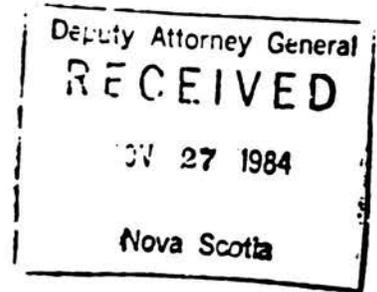
Are you suggesting that we should not provide copies of Crown Sheets?

Yours very truly,
 DURLAND, GILLIS & PARKER

W. Bruce Gillis

W. BRUCE GILLIS

WBG/jag



Nova Scotia



Attorney General

MEMORANDUM

From: Martin E. Herschorn
Assistant Director (Criminal)

To: Prosecuting Officers &
Assistant Prosecuting Officers

Subject: Police Reports

08-84-0025-00

Date: December 3, 1984

Further to my Memorandum of November 21, 1984, I wish to clarify that nothing contained in that Memorandum was intended to affect this Department's policy respecting disclosure, as set out in the Attorney General's Memorandum of July 17, 1984, a copy of which is attached.

You are to continue to make full disclosure of the Crown's case to an accused person or his counsel. Any statements made by the accused person are to be made available, as well as statements of all witnesses. In most cases, the Crown Sheet prepared by the police which details the facts in support of the charge laid may be made available to the defence. There will be the exceptional instance where a Crown Sheet includes personal views or opinions of an investigator, or other matters of a confidential nature which ought not to be disclosed to the defence. In such cases, it may be necessary for you to summarize those portions of the Crown Sheet which disclose the Crown's case and provide that summary to the defence.

Should you be uncertain as to whether any particular report, or portion thereof, ought to be disclosed to the defence, you should seek direction from the Prosecuting Officer for the County or, alternatively, the Assistant Director or Director (Criminal).

MEH:if

M.E.H.



AG 6

Department of
Attorney General

PO Box 7
Halifax Nova Scotia
B3J 2L6

Our File No. 08-87-00-100

July 17, 1984

M E M O R A N D U M

TO: Prosecuting Officers
Assistant Prosecuting Officers
Special Prosecuting Officers

FROM: Hon. Ronald C. Giffin, Q.C.
Attorney General

Re: Policy Directive on Disclosure

The Crown shall make full disclosure of its case to the accused, or counsel for the accused. The accused is entitled to any statements that he or she has made. In addition, the Crown shall make available to the accused, or counsel, statements of all witnesses indicating which witnesses the Crown intends to use. Wherever possible, copies shall be provided upon request. It is incumbent on the Crown to fully disclose all statements and other evidence which it intends to present when the same is known at the earliest opportunity.

Disclosure may be limited or withheld if there are reasonable grounds to believe that there may be possible destruction of evidence or, intimidation or threats to the well-being of a witness. However, where it is felt that full disclosure should not be made this must be communicated to the Assistant Director (Criminal) or the Director (Criminal) for decision and their instructions.

Nova Scotia



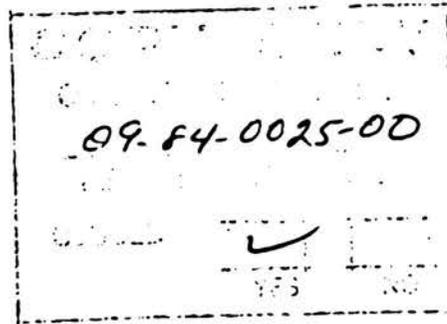
Department of
Attorney General

PO Box 7
Halifax, Nova Scotia
B3J 2L6

Our File No 08-84-0025-00

December 3, 1984

Mr. David W. Thomas, Q.C.
Prosecuting Officer
The Law Courts
1815 Upper Water Street
Halifax, Nova Scotia
B3J 1S7



Dear Mr. Thomas:

Re: Disclosure to Defence Counsel

In due course, you will be receiving a copy of a Memorandum which will clarify that my Memorandum of November 21, 1984 concerning police reports is not to be interpreted as affecting the previous policy directive dated July 17, 1984 concerning disclosure.

I understand from our earlier conversation that your office staff has been instructed to refrain from providing copies of statements obtained by the police except the statements of the accused person. I wish to advise that you should immediately reinstate the practice of providing statements of the accused and all witnesses to the accused or his or her counsel, in conformity with the Minister's Memorandum of July 17th.

Yours very truly,

Martin E. Herschorn
Assistant Director (Criminal)

MEH:if

Nova Scotia



AG 20

Attorney General

Memorandum

From The Honourable Ronald C. Giffin
Attorney General

Our File Reference
08-85-0026-00

To Prosecuting Officers and
Assistant Prosecuting Officers

Your File Reference

Subject Policy Directive on Disclosure

Date September 15, 1986

The Crown shall make full disclosure of its case to the accused, or counsel for the accused. The accused is entitled to any statements that he or she has made. In addition, the Crown shall make available to the accused, or counsel, statements of all witnesses indicating which witnesses the Crown intends to use. Whenever possible, copies shall be provided upon request. In most cases, the Crown Sheet prepared by the police which details the facts in support of the charge laid may be made available to the defence. It is incumbent upon the Crown to fully disclose all statements and other evidence which it intends to present when the same is known at the earliest opportunity.

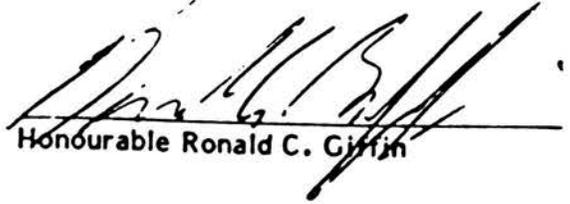
Notwithstanding the above, disclosure may be limited or withheld by the Crown in any of the following situations:

1. Where there are reasonable grounds to believe that there may be destruction of evidence or, intimidation or threats to the well being of a witness.
2. The statement, and address of a young sexual assault victim may be withheld if there is concern that provision of that young person's statement and whereabouts to the defence may result in excessive stress for that witness.
3. Any other situation where upon perusal of the file, it is felt that disclosure would be contrary to the interests of justice.

In any case in which it is felt that full disclosure should not be made, this must be referred to the Director (Prosecutions) for decision and instructions.

AG 289

Prosecuting Officers are reminded that in no case should a file be turned over to the defence for perusal, without the file having first been checked to ensure that it does not contain any confidential or extraneous material or police reports containing expressions of personal views or opinions of the police investigator which ought not to be disclosed to the defence.



Honourable Ronald C. Griffin