



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 192

Appeal 890043

Ministry of Community and Social Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 12, 1989, the requester wrote to the Ministry of Community and Social Services (the "institution") seeking access to:

my personal file as well as [to] obtain copies of the investigator's report ... this would include statements made by all staff in the Mississauga, Burlington, Hamilton, and Brantford offices, those interviewed outside the Ministry as well as my own interview. I am also requesting a copy of a letter concerning myself forwarded to the Minister's office from Barrier Free Design Centre in Toronto on or about July 29, 1988.

2. On February 10, 1989, the institution responded to the request in the following manner:

following the review of the documents you requested it is our intention to release as much information to you as possible, without unjustly invading the privacy of another individual (in accordance with section 49 of the Act).

Attached to the institution's response letter was a brief description of each requested record along with the exemptions claimed for those being severed or withheld in their entirety. Section 19 of the Act was also cited as an exemption being relied upon.

3. On March 1, 1989, the requester appealed the decision of the head to this office. Notice of the appeal was given to the institution and the appellant on March 8, 1989.
4. The Appeals Officer assigned to the case obtained and reviewed the records at issue in this appeal. The Appeals Officer then undertook settlement discussions with the institution and the appellant. Two persons who might be affected by the disclosure of the requested records (the "affected persons") were notified of the appeal pursuant to subsection 50(3) of the Act, and consequently were included in settlement discussions.
5. On June 22, 1989, the institution disclosed additional records to the appellant. However, a full settlement of the issues was not effected. The following records remain at issue in this appeal. They have been withheld in their entirety except where otherwise noted. Throughout this Order, I will refer to the records by the numbers noted below.

- Record 1. Memorandum dated August 9, 1988.
(1 page. Severances only at issue.)
- Record 2. Memorandum dated August 10, 1988.
(1 page.)
- Record 3. Memorandum dated December 22, 1988.
(10 pages. Severances only at issue.)
- Record 4. Memorandum dated November 14, 1988.
(4 pages.)
- Record 5. Memorandum dated December 14, 1988.
(6 pages.)
- Record 6. Investigation Report dated October 27, 1988.
(18 pages. Severances only at issue.)
- Record 7. Letter dated July 27, 1988.
(1 page.)
- Record 8. Letter dated July 27, 1988.
(1 page.)
6. By letters dated January 22, 1990 and January 31, 1990, the institution, the appellant and the affected persons were notified that an inquiry was being conducted to review the decision of the institution. The notice of inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations to me, need not limit themselves to the questions set out in the report.

7. Written representations were received from the institution and one of the affected persons. The appellant chose to rely on representations previously made to this office. I have considered all representations in making this order.
8. In the institution's representations, subsections 14(1)(d) and 14(1)(f) were raised as new exemptions for refusing to provide access to some of the records at issue.
9. During the inquiry, the appellant indicated that she was no longer interested in obtaining the following information which had been severed or withheld from disclosure:
 - (i) the names of individuals other than the appellant (with the exception of the name of the author of Records 7 and 8); and
 - (ii) personal pronouns, job titles and other severances that do not contain information about the appellant but may result in the identification of other individuals.

Therefore, I will consider all of the above to be outside the scope of the appeal.

The issues arising in this appeal are as follows:

- A. Whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.
- B. Whether the requested records would qualify for exemption under section 19 of the Act.
- C. Whether the requested records would qualify for exemption under subsections 14(1)(d) or 14(1)(f) of the Act.

- D. If the answer to either Issue B or C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.
- E. Whether the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.
- F. Whether the requested records fall within the discretionary exemption provided by subsection 49(c) of the Act.

By way of background, the appellant is a former employee of the institution. The institution commenced an investigation to determine whether the appellant's involvement in a particular private business gave rise to a conflict of interest with respect to her employment with the institution. Following the investigation, the appellant was given a choice between resigning from her employment with the institution or giving up her business undertakings. The appellant ultimately resigned. During the

course of these events, grievances were filed by the appellant. Hearings before the Crown Employees Grievance Settlement Board have been adjourned pending the outcome of settlement discussions.

ISSUE A: Whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal

information" in subsection 2(1) of the Act, and to determine whether this information relates to the appellant, another individual, or both.

Subsection 2(1) of the Act states:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the

name would reveal other personal information about the individual;

In my view, the information contained in the records at issue in this appeal falls within the definition of personal information under subsection 2(1). I find that the information contained in the requested records is properly considered personal information about the appellant and others.

Subsection 47(1) of the Act gives individuals a general right of access to personal information about the individual in the custody or under the control of an institution. However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

I will now consider whether sections 14, 19 and subsections 49(a), 49(b) and 49(c) of the Act have been properly applied to exempt the requested records from disclosure.

ISSUE B: Whether the requested records would qualify for exemption under section 19 of the Act.

The institution has relied upon section 19 to exempt parts of Record 3 and all of Records 4 and 5 from disclosure. Section 19 of the Act reads as follows:

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

The institution submits that Records 4 and 5 were prepared for Crown counsel to clarify matters and reach a common consensus

such that legal advice (Record 3) could be given. It also submitted that these records were prepared in contemplation of litigation before the Crown Employees Grievance Settlement Board.

Commissioner Sidney B. Linden considered the proper interpretation of section 19 of the Act in a number of his Orders. In Order 49 (Appeals Nos. 880017 and 880048), dated April 10, 1989 he indicated that section 19 provides an institution with a discretionary exemption covering two possible situations: (1) a head may refuse to disclose a record that is subject to the common law solicitor_client privilege; or (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. He further indicated that a record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied. I agree with and for the purposes of this Order I adopt Commissioner Linden's interpretation of this exemption.

Following a review of the records in question, I am satisfied that they were prepared by or for Crown counsel for use in giving legal advice. Therefore, the second branch of the section 19 exemption has been satisfied as it relates to the severed portions of Record 3 as well as Records 4 and 5 in their entirety.

ISSUE C: Whether the requested records would qualify for exemption under subsections 14(1)(d) or 14(1)(f) of the Act.

The institution has relied on subsections 14(1)(d) or 14(1)(f) of the Act to exempt parts of Records 1 and 6 as well as all of Records 2, 7 and 8 from disclosure. Subsections 14(1)(d) and 14(1)(f) of the Act read as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

...

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

...

(f) deprive a person of the right to a fair trial or impartial adjudication;

...

In order for the requested records to qualify for exemption under subsection 14(1)(d), the investigation that generated the records must satisfy the definition of the term "law enforcement" as found in subsection 2(1) of the Act. Subsection 2(1) of the Act reads as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

The institution submits that the "law enforcement" definition has been satisfied since the Crown Employees Grievance Settlement Board is a tribunal where labour relations related penalties and sanctions could be imposed.

In Order 157 (Appeal Number 890173) dated March 29, 1990, Commissioner Linden considered an appeal in which the records at issue related to an internal investigation conducted by the Ontario Securities Commission. The investigation centred upon the background and activities of an employee who may have breached his employment contract as it related to the internal security of the Ontario Securities Commission.

Commissioner Linden considered whether an investigation conducted within the context of internal security at an institution satisfied the second part of the law enforcement definition (i.e. investigations or inspections that lead or could lead to proceedings in a court or tribunal...). At page 10 of that Order he stated that:

The investigation or inspection was not conducted with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights, but rather, was conducted with a view to providing the employer with information respecting its employee. In this latter instance, the employer can go on to impose an employment penalty without recourse to a court or tribunal.

I concur with Commissioner Linden's view and similarly I find that, in the circumstances of this appeal, the institution's internal investigation was not conducted with a view to

proceedings in a court or tribunal where a penalty or sanction could be imposed. The investigation which generated the records at issue in this appeal was conducted by employees of the institution in order to determine whether or not the appellant was in a conflict of interest position. The fact that the appellant subsequently filed grievances and those grievances have come before the Crown Employees Grievance Settlement Board does not alter my view of the nature of the institution's original investigation. This investigation was not conducted by or on behalf of the Crown Employees Grievance Settlement Board.

Therefore, it is my view that the investigation which generated the records at issue in this appeal does not satisfy the definition of "law enforcement" as found in subsection 2(1) of the Act. As such, subsection 14(1)(d) cannot apply to exempt any of the records from disclosure.

I turn now to the institution's arguments with respect to the application of subsection 14(1)(f) of the Act. This subsection reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

...

(f) deprive a person of the right to a fair trial or impartial adjudication;

...

The institution, in its representations concerning this subsection, refers once again to the hearings before the Crown Employees Grievance Settlement Board. It is submitted that

there is no process of discovery at this Board. Therefore, release of the records to the appellant would give her an unfair advantage in the proceedings, in that it would reveal the facts the institution intends to rely on, its witnesses and the overall strategy and theory of the institution's case. The institution argues as a result, it would be disadvantaged and deprived of "the right to a fair trial or impartial adjudication".

Section 14 of the Act provides that an institution may refuse to disclose a record where doing so could reasonably be expected to [emphasis added] result in specified types of harms. In Order 188 (Appeal Number 890265) dated July 19, 1990, I found that this section requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on

reason. I stated that an institution relying on the section 14 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act.

Record 6 is an 18 page Investigation Report relating to the question of whether the appellant was in a position of a conflict of interest between her employment with the institution and her private business activities. The majority of this report has been disclosed to the appellant, including its findings, recommendations and conclusions. For the most part, the severances made to this record consist of the names, personal pronouns, job titles and other severances that do not contain information about the appellant but may result in the

identification of other individuals. As noted on page 3 of this Order, the appellant is not interested in this information. However, there are severances on pages 7, 8, 9 and 10 of this record which contain more than the information described above.

Record 1 has been severed in the same manner as Record 6. Records 2, 7 and 8 have been withheld in their entirety.

Given the foregoing, I believe that the institution has failed to establish that disclosure of the balance of the severed information in Record 1 and on pages 7, 8, 9 and 10 of Record 6 and that the disclosure of Records 2, 7 and 8 could reasonably be expected to deprive the institution of the right to a fair trial or impartial adjudication.

ISSUE D: If the answer to either Issue B or Issue C is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies in the circumstances of this appeal.

Subsection 49(a) of the Act provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

I have found under Issue A that the contents of the records at issue in this appeal qualify as "personal information" about the appellant and the affected persons. In Issue B, I found that the severed portions of Record 3 and Records 4 and 5 in their entirety qualify for exemption under section 19 of the Act.

However, in Issue C I found that Records 1, 2, 6, 7 and 8 do not qualify for exemption under subsection 14(1)(d) or 14(1)(f) of the Act. Therefore, the exemption provided by subsection 49(a) is available only for Records 3, 4 and 5.

Having considered the representations of all parties, I can find no basis on which to interfere with the head's exercise of discretion in favour of non-disclosure of Records 3, 4 and 5 in the circumstances of this appeal and I uphold the head's decision to exempt them from disclosure.

ISSUE E: Whether the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.

The institution refused to disclose the severed portions of Records 1 and 6 and Record 2 in its entirety, claiming that they are exempt from disclosure by virtue of subsection 49(b) of the Act. As I have received representations from one of the affected persons with respect to Records 7 and 8, which have been withheld in their entirety, I will also consider the application of subsection 49(b) to these records as well.

Subsection 49(b) of the Act reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

...

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

...

Prior to considering the application of subsection 49(b) of the Act, it is important to reiterate that the appellant considers those portions of the records which contain names, personal pronouns, job titles and other severances that do not contain information about the appellant but may result in the identification of other individuals, outside the ambit of this appeal.

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to her own personal information against other individuals' rights to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then subsection 49(b) gives the head the discretion to deny access to the personal information of the requester.

Subsection 21(2) of the Act provides guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy.

Personal information relating to one of the affected persons, can be found in Record 2 (withheld in its entirety); the third and fourth paragraphs which have been severed in Record 1; and in the severances to the third paragraph on page 7 and the second paragraph on page 8 of Record 6. Since the affected person has indicated to this office that he does not object to the release of

the information that relates to him, I order that it be disclosed to the appellant.

Personal information relating to other individuals can be found in the severances to the first and second paragraphs on page 9 and the first paragraphs on page 10 of Record 6. I have considered the institution's representations and reviewed the severances at issue. Having done so, I accept that disclosure of the personal information would constitute an unjustified invasion of the personal privacy of these individuals. Therefore, I uphold the head's decision to sever the first and second paragraphs on page 9 and the first paragraph on page 10 of Record 6.

As previously mentioned, Records 7 and 8 are both letters which have been withheld from disclosure in their entirety. The records indicate that copies have been sent to individuals other than the addressee. The appellant is particularly interested in the author's name. I have received representations from the author of these records, the second affected person, who states that she was acting in her capacity as an employee of a named organization when the letter was written. She stated that she did so with the full backing of the organization and its Executive Director. This affected person is no longer working for this organization and stated that she has no personal interest in the investigation. She indicated that she prefers that her name not be released, but suggested that her former employer be consulted concerning the disclosure of these records. The affected person's former employer indicated that the organization had no objection to these records being released. In light of the above, I am of the opinion that disclosure of records 7 and 8, in their entirety, would not constitute an unjustified invasion of the personal privacy of this affected person.

ISSUE F: Whether the requested records fall within the discretionary exemption provided by subsection 49(c) of the Act.

The institution has claimed the discretionary exemption provided by subsection 49(c) of the Act with respect to the severances in Records 1 and 6 and Records 7 and 8 in their entirety. Subsection 49(c) of the Act reads as follow:

A head may refuse to disclose to the individual to whom the information relates personal information,

...

- (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

The institution submits that Record 6, the investigation report, was conducted "to amass facts and evidence regarding [the appellant's] private business so that a determination could be made as to whether or not a conflict of interest existed" and consequently, whether her employment with the institution should continue. Records 7 and 8 "contain the personal and evaluative opinion of [the appellant's] work and the manner in which she provided services while employed [by the institution]. This information could have determined the suitability or qualification of [the appellant] for continued employment with the [institution]." It is the institution's position that the

"individuals involved would have likely believed that the information they provided would remain confidential."

In Order 157 (Appeal Number 890173) dated March 29, 1990, Commissioner Linden considered subsection 49(c) of the Act. At page 17 he stated:

To qualify for exemption under subsection 49(c), the personal information contained in a record must satisfy each part of a three_part test:

1. The personal information must be evaluative or opinion material;
2. The personal information must be compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. Disclosure of the personal information would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

...

To qualify for exemption each part of the test must be satisfied. Failure to satisfy a single part of the test means that the personal information contained in the record cannot be exempted pursuant to subsection 49(c).

In referring to the first part of the test, Commissioner Linden went on to state that:

In my view, the words "evaluative" and "opinion" connote a personal or subjective interpretation of an objective set of facts and circumstances. Typical of

evaluative or opinion material would be test scores, ratings, and grades.

A review of the records at issue leads me to conclude that Record 8 and the severances in Records 1 and 6 do not contain personal information which is either evaluative or opinion material. These records consist of factual summaries of the interactions of a variety of individuals with the appellant. As a result, these records do not satisfy the first part of the test and I therefore order that they be disclosed to the appellant.

In my view, Record 7 does contain personal information which is opinion material such that it satisfies the first part of the test.

As far as the second part of the subsection 49(c) test is concerned, information provided to this office indicates that Record 7 was created in order to clarify that there was no connection between the author's organization and the appellant. Further, Record 7 was not compiled, but rather it was forwarded unsolicited to the institution. Therefore, it could not be said that the personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits. Consequently, the second part of the test has not been satisfied with respect to Record 7.

Accordingly, I order that the severances in Records 1 and 6 and Records 7 and 8, in their entirety, be disclosed to the appellant.

In summary my Order is as follows:

1. I uphold the head's decision to withhold the severed portions of Record 3 as well as Records 4 and 5, in their entirety, pursuant to section 19, by way of subsection 49(a) of the Act.
2. I uphold the head's decision to withhold the severances on pages 9 and 10 of Record 6 pursuant to subsection 49(b) of the Act.
3. I do not uphold the head's decision to exempt from disclosure, whether in whole or in part, any of the records at issue in this appeal pursuant to subsection 49(a), by way of section 14, or subsection 49(c) of the Act.
4. I order that Records 1, 2 and 6 (pages 7 and 8 only) be disclosed to the appellant in accordance with the highlighted copy provided to the institution only.
5. I order that Records 7 and 8 be disclosed to the appellant in their entirety.
6. I also order that the institution not release these records until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on this office and/or the institution within this thirty (30) day period, I order that the records be released to the appellant within thirty_five (35) days of the date of this Order. The institution is further ordered to advise me in writing

within five (5) days of the date on which disclosure was made. The said notices should be forwarded to the attention of Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom A. Wright
Assistant Commissioner

August 22, 1990
Date