



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

ORDER P-267

Appeal 890396

Office of the Premier



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/Téléco: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

BACKGROUND :

On October 10, 1989, Cabinet Office received a request for access to copies of records seized by the Ontario Provincial Police (the "OPP") from the office of a former employee of the Office of the Premier. The OPP were investigating allegations regarding the conduct of the employee. The requester indicated that she was interested in those records which had been identified by the OPP as being of special interest to the investigation.

Although the original request was made to Cabinet Office and all correspondence during the course of responding to the request and conducting the appeal was issued by Cabinet Office, the Freedom of Information and Privacy Co-ordinator for the Cabinet Office (who holds the same position in the Office of the Premier) has agreed that the "institution", for the purposes of this appeal, is the Office of the Premier.

Initially, the Co-ordinator advised the requester that the existence of the records would neither be confirmed nor denied in accordance with the provisions of section 14(3) of the Freedom of Information and Protection of Privacy Act (the "Act"). The requester appealed this decision and notice of the appeal was sent to the institution and the appellant.

During the course of mediation, the institution withdrew its claim for exemption under section 14(3) of the Act and advised the appellant that many of the requested records were not in the

custody or control of the institution and therefore were not subject to the Act. The Co-ordinator further advised that of those records which were in the custody or control of the institution, access was denied under sections 12, 13, 14, 17, 19 and 21 of the Act.

Attempts at further mediation of the appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the institution's decision was sent to the institution and the appellant. An Appeals Officer's Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeals, accompanied the Notice of Inquiry.

Following receipt of the Appeals Officer's Report, the institution released all but seven records to the appellant, and withdrew its claim for exemption under sections 12, 13, 17, and 19. Because the number of records and issues had been significantly reduced, a supplementary Appeals Officer's Report was sent to the institution and the appellant, providing the parties with an opportunity to make further representations with respect to the remaining records. Subsequently, the institution agreed to provide access to two other records and the appellant decided not to pursue the appeal with respect to one other record. Accordingly, four records remain at issue in this appeal. These records are as follows:

1. Letter dated December 5, 1986.
2. Note dated December 22 (no year).
3. Copy of donor response card from Liberal Party dated August 25, 1987 and personal cheque made out to the Ontario Liberal Party

dated August 20, 1987. (these are two separate documents but will be referred to as "record 3" because they have been photocopied onto one page)

4. Official receipt issued by Liberal Party of Ontario dated August 27, 1987.

Three persons whose interests could be affected by disclosure of the records (the "affected persons") were invited to submit representations. One of these affected persons is the author of

Records 1 and 2, and made the donation evidenced by Records 3 and 4 (the "primary affected person"). Another of the affected persons is the former employee of the institution and the recipient of Record 1 (the "secondary affected person"). The other affected person is the recipient of Record 2 (the "third affected person"). The Liberal Party of Ontario was also invited to submit representations, but chose to take no position with respect to disclosure of the records. The institution and the appellant were also invited to submit additional representations on these four records. Written representations were received from the institution and one of the affected persons.

In its final set of representations, the institution withdrew all exemption claims and restricted its submissions to the issue of whether the records are subject to the Act.

ISSUES:

- A. Whether the records are subject to the Act.

- B. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- C. If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records are subject to the Act.

The institution takes the position that the records are political party records and not government records and therefore are not subject to the Act.

In support of its position, the institution notes that the definition of institution in subsection 2(1) of the Act does not include political parties.

It is clear that political parties are not listed among those entities considered to be institutions for the purposes of the Act. However, it does not necessarily follow that political party records are not subject to the Act. As Commissioner Wright pointed out in Order P-239, dated September 5, 1991, the Act can indeed apply to records of non-institutions:

It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of

public access, and would be contrary to the stated purposes and intent of the Act. Therefore, it is my view that the Act can apply to information which originated in [a non-institution] which is in the custody or under the control of an institution.

I must now determine whether the records are in the custody or under the control of the institution. Section 10(1) of the Act reads as follows:

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 the record or the part of the record falls within one of the exemptions under sections 12 to 22.

In Order 120, dated November 22, 1989, former Commissioner Sidney B. Linden set out a number of factors that would assist in determining whether an institution has custody or control of a record. These are as follows:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the records used?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

In the circumstances of this appeal, I will be considering the issue of whether the institution has custody of the records. In my view, a crucial factor in this appeal is the evidence of physical possession by the institution. During the course of the inquiry the primary affected person advised this office that all of the records at issue were mailed directly to the Office of the Premier. There is no evidence that these records were ever located anywhere but the Office of the Premier up until the time they were removed by the OPP in the summer of 1989. As noted above, the institution was provided with copies of the records prior to their removal and

has retained these copies. The originals of the records were subsequently returned to the institution and then transferred to the Archives of Ontario in the spring of 1991.

The importance of evidence of physical possession has been commented upon in previous Orders. In Order 120, Commissioner Linden stated as follows:

In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

In Order P-239, Commissioner Wright stated as follows:

... mere possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

The institution acknowledges that the secondary affected person had possession of the records, but maintains that they were not held by him in his capacity as an employee of the institution. The institution further submits that the contents of the records do not relate to the mandate and functions of the institution; the records themselves were not part of the normal activities of the institution; and they were not produced by or for the institution.

In his representations, the secondary affected person recalled that the records were "... all related to the political responsibilities that the Office of the Premier is engaged in as support to the role the Premier plays as leader of the Liberal party". He explained that he or a designate would attend meetings of the Liberal Party

committees, including the fund-raising committee, as the Premier's representative and report back to him. Records associated with these and other such meetings were filed at the institution, and the secondary affected person acknowledged that he did not take any steps to separate these records from other records related to his position as an employee of the institution.

It is clear from the representations of the secondary affected person that the scope of his duties while employed with the institution encompassed Liberal Party of Ontario matters. The records at issue in this appeal are directly related to this Liberal Party of Ontario role. However, in my view, these records have been integrated into the operations of the institution in a manner which constitutes custody under the Act. The secondary affected person has acknowledged that no special steps were taken to separate the storage and maintenance of these records from other documents relating to his employment with the institution, and it would appear that these records were integrated with other files held by the institution. In my view, the secondary affected person assumed responsibility for the care of these records, and had control over their use.

In these circumstances, I am of the view that the institution has more than mere possession of the records. Therefore, I am satisfied that the institution has custody of the records for the purposes of the Act.

In reaching this decision, I am mindful of the fact that some employees of the Office of the Premier and the offices of other members of the Executive Council perform political party functions in addition to their roles as employees of the institution. In my view, this dual role imposes added

responsibilities to ensure that proper records management systems are in place to deal with records received and/or produced by these employees. In my opinion, it is not possible for an institution to remove records in its physical

possession from the purview of the Act by simply maintaining that they relate to political party activity. To do so would be inconsistent with the obligation of institutions to properly manage their record holdings in accordance with the intent of the Act.

ISSUE B: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part;

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

Records 1 and 2 relate to fund-raising activities for various members of the Liberal Party. Records 3 and 4 evidence a contribution made by the primary affected person to the Liberal Party of Ontario. In my view, the information contained in these records qualifies as personal information as defined in the Act.

ISSUE C: If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies.

I have found under Issue B that the four records contain personal information as defined in the Act. Once it has been

determined that a record or part of a record contains personal information, section 21 of the Act prohibits the disclosure of this information to any person other than the individual to whom it relates except in certain circumstances. One such circumstance is outlined in subsection 21(1)(f) of the Act which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) identifies types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The primary affected person did not make reference to any specific provisions of the Act, although it was clear that she objected to the release of the records at issue. The primary affected person's main reason for objecting to the release of the records is that release would "re-open old wounds unnecessarily" and expose her to possible unfair criticism and comment.

None of the parties have specifically raised any of the presumptions outlined in section 21(3). However, given the nature of the records, I am of the view that the presumption set out in section 21(3)(f) should be considered. That section provides as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness; (emphasis added)

Record 1 is a letter from the primary affected person to the secondary affected person describing various fund-raising activities. It refers to contributions made or planned for named individuals. Record 2 is a memorandum from the primary affected person to the third affected person, describing arrangements for a specific fund-raising event. Record 3 is a copy of a personal cheque made out to the Liberal Party of Ontario by the primary affected person, and a donor response card issued by the Liberal Party of Ontario to the primary affected person. Record 4 is an official receipt issued by the Liberal Party of Ontario to the primary affected person acknowledging the contribution evidenced by Record 3.

In the circumstances of this appeal, I am of the view that only the information contained in Record 1 satisfies the requirements of a presumed unjustified invasion of privacy of the named individuals under section 21(3)(f) of the Act.

The primary affected person has advised this office that she has no particular concerns about the release of Record 2, although she did not consent to its release. The third affected person has advised this office that he does not object to the release of Record 2. Upon reviewing this record and these

representations, I am of the view that the release of Record 2 would not constitute an unjustified invasion of the personal privacy of any individual, and therefore find that the exemption provided by section 21 does not apply to this record.

Although it could be argued that section 21(3)(f) might apply to Records 3 and 4, Record 4 is a document which is publicly available through the Commission on Election Finances. In these circumstances, I am of the view that the release of record 4 would not constitute an unjustified invasion of the personal privacy of the primary affected person. Further, because the information

contained in Record 3 relates to the same contribution and is essentially the same information as that contained in Record 4, I

am of the view that the release of Record 3 would not constitute an unjustified invasion of the personal privacy of the primary affected person, and therefore the exemption provided by section 21 of the Act does not apply.

I note that the primary affected person's bank account number appears on the face of the cheque that is part of Record 3. I am of the view that the release of this number would constitute an unjustified invasion of the primary affected person's personal privacy, and therefore this number should be severed from the record before it is disclosed.

Because I have determined that the requirements for a presumed unjustified invasion of personal privacy exist under section 21(3)(f) have been satisfied for Record 1, I must consider whether any provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances

which, if they exist, could operate to rebut a presumption under section 21(3). In my view, Record 1 does not contain any information that pertains to section 21(4), and therefore section 21(4) does not operate to rebut the presumed unjustified invasion of privacy under section 21(3).

In Order 20, Commissioner Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual".

Upon a review of the record and after having considered the representations received, it is my view that the circumstances are such that the presumption that disclosure of Record 1 would be an unjustified invasion of privacy has not been rebutted.

In addition, I have considered the severance requirement set out in section 10(2) and, in my view, no reasonable severance of record 1 is possible in the circumstances.

ORDER:

1. I order the head not to disclose Record 1.
2. I order the head to disclose Records 2, 3 (with the account number severed) and 4 to the appellant.
3. I order that the institution not disclose the records described in Provision 2 of this Order until thirty (30) days following the date of 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 disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the records listed in Provision 2 of this Order be disclosed within thirty-five (35) days of the date of this Order.

4. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom Mitchinson
Assistant Commissioner

February 4, 1992
Date