



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

# **ORDER P-469**

**Appeal P-9200688**

**Ministry of Housing**



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# ORDER

On May 10, 1993, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and to make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

## BACKGROUND:

The Ministry of Housing (the Ministry) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to certain correspondence relating to the operation of the Rent Review Hearings Board (the Board). The Ministry initially identified four records as being responsive to the request. The Ministry granted access in full to one record, partial access to another and denied access in total to the two remaining records. Access was denied in whole or in part pursuant to sections 21(2)(f), (g), (h) and (i) of the Act.

The requester appealed. During mediation, the Ministry located an additional one-page record which was responsive to the request. The Ministry denied access to it in total, claiming the exemptions described above.

Further mediation of the appeal was not possible and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from the appellant and the Ministry.

The records at issue in this appeal may be described as follows:

1. Three pages and part of a fourth page of a five-page letter. (This letter contains no address, signature or date.)
2. An unsigned hard copy of an electronically transmitted communication dated March 19, 1991 addressed to the Premier of Ontario.
3. An unsigned hard copy of an electronically transmitted communication dated March 20, 1991 addressed to the Minister of Housing.
4. A signed one-page letter dated January 24, 1991 addressed to the Minister of Housing.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) applies to Record 1.
- C. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 applies to Records 2, 3 and 4.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: 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,

- (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,
- (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

Record 1 sets out the unidentified author's opinions on a wide range of topics related to various members and staff of the Board. I find that this record contains the personal information of the appellant and a number of other individuals.

Records 2 and 3 contain references to an unnamed Board member or members. As the definition of "personal information" extends only to information concerning **identifiable** individuals, I must first determine if the information contained in these records is about identifiable individuals.

In Order P-230, Commissioner Tom Wright stated:

If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

I agree with this approach and adopt it for the purposes of this appeal.

In my view, based on the information provided by the appellant about his knowledge of the matters which lead to the creation of these records, there is a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. However, with the exception of two lines in Record 2 and portions of Record 3, I do not believe that these records contain the personal information of these individuals. The information is factual in nature.

Record 4 is a copy of a letter which purports to bring to the attention of the Minister of Housing certain problems concerning the Board. It is stamped "Confidential" on its face. In my view it contains the personal information of the author of the letter as well as of the several individuals named in the body of the document.

In summary, therefore, I find that Record 1 contains the personal information of the appellant and other persons. Two lines of Record 2 and portions of Record 3 contain the personal information of another identifiable individual or individuals. Record 4 contains the personal information of its author and other named individuals, but not the appellant.

**ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) applies to Record 1.**

In Issue A, I found that Record 1 contains the personal information of the appellant and other persons. Accordingly, consideration must be given to the application of section 49(b) to the information at issue.

Section 49(b) provides an exception to an individual's general right of access to any personal information of the individual in the custody or under the control of an institution. Section 49(b) of the Act states:

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

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

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his/her own personal information against other

individuals' right to the protection of his/her privacy. If the Ministry determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, section 49(b) gives the Ministry the discretion to deny access to the personal information of the requester.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of the personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. The Ministry has not claimed the application of any of the presumptions of an unjustified invasion of personal privacy as set forth in section 21(3). I have reviewed the record and, in my view, none of the presumptions apply.

Section 21(2) lists a number of circumstances the Ministry must consider in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy.

The Ministry submits that sections 21(2)(f), (g), (h) and (i) of the Act are relevant considerations in the circumstances of this appeal. While the appellant has not specifically raised the application of section 21(2)(d), in my view, he is implicitly making this argument.

These sections of the Act read as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Because some of the personal information in this record relates to the appellant, it is my view that the onus should not be on the appellant to prove that disclosure of personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated

that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Accordingly, I will first examine those factors which the Ministry claims support the position that disclosure of the information in this record would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

#### **Section 21(2)(f)**

Dealing first with section 21(2)(f), the Ministry states that the information contained in Record 1 is "highly sensitive". It does not elaborate further.

In this case, in order for this information to properly be considered "highly sensitive", the Ministry must establish that release of the information would cause excessive personal distress to persons other than the appellant (Order P-434).

Given the nature of the comments contained in this record, I am prepared to accept that the personal information is "highly sensitive".

#### **Section 21(2)(g)**

The Ministry has also claimed that the personal information contained in Record 1 is "unlikely to be accurate or reliable". In the absence of any evidence, I am unable to determine by examining the record whether the information contained in the document is "unlikely to be accurate or reliable". Accordingly, I find that section 21(2)(g) is not applicable to Record 1.

#### **Section 21(2)(h)**

As Record 1 was supplied to the Ministry in anonymous form, I am unable to agree that it had been supplied in confidence by its author. The nature of an anonymous communication indicates that the supplier of it does not wish his or her identity known and, accordingly, would not be submitting the information with an expectation of confidentiality.

#### **Section 21(2)(i)**

The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order 256).

Record 1 is a communication in the nature of a "poison pen" letter in which the author cannot be challenged or contradicted by the parties whose personal information is contained in the document.

Much of the information is in the nature of hearsay or second-hand information, and its release could, by its very nature, harm the appellant and the other persons named. I find that because of the unsubstantiated nature of the comments contained in this anonymous communication, the

damage or harm to the individuals involved would be unfair within the meaning of section 21(2)(i).

**Section 21(2)(d)**

In order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

In my opinion, the appellant has not satisfied the above criteria to establish the relevance of section 21(2)(d). I have no indication that the appellant has commenced a legal proceeding, nor that one is contemplated. His arguments in favour of disclosure centre more on a moral or ethical right to access to the record, rather than a legal one.

In summary, I have found that sections 21(2)(f) and (i) are relevant considerations in the circumstances of this appeal. Both weigh in favour of privacy protection. None of the factors set forth in section 21(2) favouring disclosure are present insofar as Record 1 is concerned, nor are any other factors present favouring disclosure of the record.

I would note that two individuals named in the record have provided written consent to the disclosure of their personal information. However, as their personal information is so intertwined with that of other individuals who have not consented to such disclosure, in my view, it is not possible to give effect to these consents as the record cannot reasonably be severed without disclosing the personal information of the other individuals.

Therefore, it is my view that the disclosure of the record to the appellant would constitute an unjustified invasion of the personal privacy of the other individuals whose personal information is contained in Record 1. Accordingly, the exemption under section 49(b) of the Act applies. Section 49(b) is a discretionary exemption giving the Ministry the discretion to refuse to disclose personal information to the person to whom it relates. The Ministry has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of

this appeal. I find nothing improper in the Ministry's exercise of discretion and would not alter it on appeal.

**ISSUE C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 applies to Records 2, 3 and 4.**

In my analysis under Issue A, I found that two lines of Record 2, portions of Record 3 and all of Record 4 contain the personal information of individuals other than the appellant.

Once it has been determined that a record contains personal information, section 21 of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f), reads:

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.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

In my discussion of Issue B, I did not find any factors which weigh in favour of disclosure of Record 1. Similarly, I have not been provided with any representations which weigh in favour of finding that the section 21(1)(f) exception does not apply to Records 2, 3 and 4. In the absence of any evidence or argument to the contrary, I find that the exception provided by this section is not present, and that the mandatory exemption provided by section 21(1) of the Act applies.

**ORDER:**

1. I uphold the Ministry's decision not to disclose Records 1 and 4.
2. I order the Ministry to disclose Records 2 and 3 to the appellant in accordance with the highlighted copy of these records, which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The highlighted portions identify the parts of these records which should **not** be disclosed.
3. I order the Ministry to disclose the records referred to in Provision 3 within 15 days of the date of this order.
4. In order to verify compliance with Provision 2 of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 3, **only** upon my request.



Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ June 4, 1993