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

ORDER P-658

Appeal P-9300324

Ministry of the Attorney General

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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the complete investigation report into the activities of the Legal Services Branch of the Pension Commission of Ontario (the PCO).

The Ministry disclosed portions of the record to the requester, but denied access to the balance of the document pursuant to the exemptions contained in sections 13(1), 18(1)(f), 21(1) and 49(b) of the Act. The requester appealed the decision of the Ministry.

During the mediation stage of the appeal, eight individuals consented to the disclosure of their personal information contained in the record. However, because the Ministry also claimed that sections 13(1) and 18(1)(f) of the Act applied to the record, it did not disclose to the appellant those portions of the record containing the personal information of these individuals.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant and six individuals whose interests might be affected by disclosure of the balance of the record (the affected persons). Representations were received from the Ministry, the appellant and five of the affected persons.

Of the five affected persons who responded to the Commissioner's office, four objected to the disclosure of their personal information, while the fifth consented.

In its representations, the Ministry raised the application of sections 18(1)(g) and 19 of the Act.

THE RECORD:

The record at issue consists of those portions of a report entitled "Management Review of Pension Commission of Ontario Legal Branch", which were not previously disclosed to the appellant. The record is dated February 2, 1993 and was co-authored by the Deputy Official Guardian and the Manager, Information Planning and Court Statistics, Program Development Branch of the Ministry. The report was submitted to the Assistant Deputy Attorney General, Civil Law Division by the individuals who conducted the review.

The report itself contains some 43 pages. Attached to the report are 13 appendices comprising an additional 85 pages.

In its representations, the Ministry provided a copy of page 45A which it had initially neglected to forward to the Commissioner's office. It also confirmed that the record in the custody of the Ministry does not contain pages 24-28 of that part of Appendix F entitled "Options Regarding the Delivery of Legal Services to Ministry of Financial Institutions and Pension Commission of Ontario". Consequently those pages are not at issue in this appeal.

PRELIMINARY ISSUES:

The Raising of New Discretionary Exemptions Late in the Appeals Process

On July 15, 1993, the Commissioner's office provided the Ministry with a Notice of Inquiry which indicated that an appeal from the Ministry's decision had been received. This notice also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of this correspondence to raise any new discretionary exemptions not originally claimed in the decision letter. No additional exemptions were raised during this period.

On November 10, 1993, the Ministry and the other parties to this appeal were provided with an Inquiry Status Report which set out the exemptions claimed by the Ministry and which invited the parties to make representations on the issues raised. This document indicated that because the appeal could not be resolved through mediation, the representations would be used by the Commissioner's office to issue a binding order in this case.

It was not until December 1993, that the Ministry raised, for the first time, the application of the discretionary exemptions provided by sections 18(1)(g) and 19 of the Act in its representations.

In these circumstances, and based on the policy established by the Commissioner's office on this subject, I must decide whether to consider these exemptions in adjudicating the present appeal.

The statutory procedures that govern inquiries under the Act are those which appear in sections 52 and 54 of the Act. These provisions, however, do not address the full spectrum of issues which might reasonably arise during the course of an inquiry.

Previous orders issued by the Commissioner's office have determined that the Commissioner has the power to control the process by which the inquiry process is undertaken (Orders 164, 207, P-345, P-373 and P-537).

These orders have considered such matters as the exchange of representations between the parties (Orders 164, 207 and P-345), disclosure of correspondence between a Ministry and the Commissioner's office (P-537) and the reasonableness of the time period allowed by the Commissioner's office for submitting representations (Order P-373). The conclusion reached in all of these orders is that, based on the general scheme of the Act, case law and academic sources dealing with questions of procedure before administrative tribunals, these matters fall within the authority of the Commissioner's office to control its own process.

The facts in Order P-373 are most analogous to those in the present appeal. In that case, some of the parties which had been notified as "affected persons" claimed that the time period allowed for submitting written representations was unreasonable. They also claimed that the Commissioner's office did not properly define "affected persons" in the context of the appeals. All the parties to the appeals were initially given three weeks to submit written representations. Those who asked for more time were granted additional extensions.

In addressing the concerns which had been raised, former Assistant Commissioner Tom Mitchinson made the following general statement:

> In my view, the authority to set time limits for the receipt of representations and to implement procedures for identifying and notifying affected persons is included in the implied power to develop rules and procedures for the parties to an appeal. In my view, the procedures followed for setting time limits for the receipt of their representation and the identification of parties was appropriate, in the circumstances of these appeals.

By analogy, I am of the view that the Commissioner's office has the authority to set a limit on the time during which it will allow an institution to rely upon new discretionary exemptions not originally raised in its decision letter.

There are several reasons why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process:

(1) Unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively try to achieve a mediated settlement of the matter under appeal pursuant to section 51 of the Act.

(2) Where a new discretionary exemption is raised after the Inquiry Status Report is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the exemptions raised. The processing of the appeal will, therefore, be further delayed.

(3) In many cases, the value of information which is the subject of an access request diminishes with time. In these cases, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

> The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.

> Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Notice of Inquiry sent to the Ministry when this appeal was filed, indicated that the institution had 35 days from the date of the Notice (until August 19, 1993) to claim any additional discretionary exemptions. It chose not to do so. As I have indicated, it was not until the Ministry submitted its representations in December 1993, that it raised the application of sections 18(1)(g) and 19 of the Act.

During the inquiry process, the Ministry was unable to provide any explanation as to why these new exemptions had been raised four months after the original decision letter had been issued. Nor has the Ministry advanced any extenuating circumstances to take this case outside the parameters of the policy.

Based on the analysis which has been presented, I conclude that I have the authority to decline to consider discretionary exemptions which are raised late in the appeals process. In the present case, the Ministry was advised of the policy of the Commissioner's office on this subject yet chose to advance new discretionary exemptions four months after the Notice of Inquiry was issued. Since the Ministry has failed to advance any arguments to indicate why this policy should not apply in the present appeal I will not consider the application of sections 18(1)(g) and 19 in the present appeal.

Collection, Retention, Use and Disclosure of Personal Information

During this appeal, concerns were expressed by various individuals about whether the Ministry's collection, retention, use and disclosure of the personal information contained in the record was authorized by the relevant provisions in Part III of the Act.

In these circumstances, I believe that the interests of all the parties would be best served by having these concerns investigated more fully by the Compliance Branch of the Commissioner's office. Accordingly, I have referred this matter to the Compliance Branch of this office to conduct an independent investigation into the circumstances of the collection, retention, use and disclosure of the personal information which appears in the report in question.

ISSUES:

The issues which remain to be determined in this appeal are:

A. Whether the discretionary exemption provided by section 13(1) of the Act applies.

B. Whether the discretionary exemption provided by section 18(1)(f) of the Act applies.

C. Whether the record contains "personal information" as defined in section 2(1) of the Act.

D. If the answer to Issue C is yes, and the personal information relates solely to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies.

E. If the answer to Issue C is yes, and the personal information relates to the appellant and other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

F. Whether section 23 of the Act applies to any exempt portions of the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies.

The Ministry claims that section 13(1) applies to exempt the entire record from disclosure. That section states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356, P-529 and P-597). Recommendations should be viewed in the same vein.

Much of the report contains what may be characterized as "background information" in the context of section 13(1). That is, a description of the purpose of the review, how the investigation was conducted, various issues identified during the course of the investigation, summaries of information received from the individuals who were interviewed, supporting documentation, etc. Accordingly, I do not accept the Ministry's position that the **entire record** relates to a suggested course of action.

In the alternative, the Ministry submits that the following portions of the report should be exempt pursuant to section 13(1):

Page 12: paragraph 1

Page 15: last paragraph

Pages 35-43: section entitled "Recommendations"

Pages 68-105: part of Appendix F

Pages 110-121: Appendix H

Pages 122-125: part of Appendix I

Pages 126-130: Appendix J

I will now address this argument.

Pages 91-103 of the record describe seven options put forth by the author regarding the delivery of legal services to the Ministry and the PCO. The pros and cons of each option are listed but no single option is recommended as the preferred method of resolving the situation. The same is true of the information contained in pages 117-118 of the record.

Orders P-398 and P-632 have held that, where a record identifies an option in circumstances where it is unclear whether this alternative has been recommended, section 13(1) of the Act will not apply to exempt the option from disclosure. Most of the other pages referred to above contain purely factual material which would similarly not be protected under section 13(1).

I find, however, that there is a small portion of the information in the pages for which the Ministry has claimed the section 13(1) exemption that does meet the requirements of the section.

Section 13(2) of the Act lists certain exceptions to the 13(1) exemption. Specifically, section 13(2)(f) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

The Ministry submits that this section only applies to reports on the performance or efficiency of an institution **as a whole** but is not applicable to report concerning **part** of a Ministry, as is the case in the present appeal.

In Orders P-348 and P-603 Inquiry Officer Holly Big Canoe adopted a broader interpretation of this section in order to not restrict access to those reports and studies which focus on one or more discrete program areas within an institution, rather than the institution as a whole. This interpretation is consistent with the general principle of providing requesters with a general right of access to government information and accords with the plain meaning of this exception. I therefore adopt this broader approach for the purposes of this appeal.

The record in the present appeal is clearly a report in that it consists of a formal statement or account of the results of the collation and consideration of information. Furthermore, the document involves the study of a number of issues and concerns relating to management issues, the relationship between the PCO and the legal branch of another institution, workloads and delegation, administration, workplace environment and professional relationships.

The portion which meets the requirements of section 13(1) sets out the investigators' advice and recommendations for dealing with these issues. These corrective recommendations are designed to assist the institution to deal efficiently with existing and future problems and to improve the performance and operations of the PCO. In my view, these portions of the record fit squarely within the section 13(2)(f) mandatory exception. In the result, I find that none of the information found in the record is subject to protection under section 13(1) of the Act.

ISSUE B: Whether the discretionary exemption provided by section 18(1)(f) of the Act applies.

The Ministry submits that section 18(1)(f) applies to exempt the entire record from disclosure. In the alternative, it maintains that this provision applies only to Pages 14, 35-43, 49-52 and 68-105 of the record.

Section 18(1)(f) of the Act states:

> A head may refuse to disclose a record that contains,
>
> > plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

In order for a record to qualify for exemption under this section of the Act, the Ministry must establish that the record satisfies each element of the following three-part test:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
   (i) the management of personnel or

(ii) the administration of an institution, **and**

3. the plan or plans must not yet have been put into operation **or** made public.

[Order P-229]

In previous orders, the word "plan" has been defined as "a formulated and especially detailed method by which a thing is to be done; a design or a scheme" (Orders M-77 and P-229). I adopt the above test, as well as the definition of a plan.

I do not accept the Ministry's position that, because the entire record outlines management problems which require attention and how these should be addressed, the document constitutes a plan or detailed scheme for the revamping of the legal branch of the PCO.

Rather, the record is a review of the management practices within the legal branch of the PCO, including observations and recommendations for change. The record does not contain the sort of detailed methods, schemes or designs that are characteristic of a plan. It appears to be a document which provides some advice and recommendations which, if adopted and implemented by the Ministry, might involve the formulation of a detailed plan. In summary, neither the record itself, nor the specific pages referred to by the Ministry, constitute a plan or proposed plan.

Therefore, the first requirement of the test for exemption under section 18(1)(f) has not been satisfied. Accordingly, the exemption found in section 18(1)(f) does not apply to the record or to any of its component parts.

ISSUE C: Whether the record contains "personal information" as defined in section 2(1) of the Act.

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual".

The Ministry has provided me with a copy of the record in which it has highlighted those portions which it characterizes as personal information. I also have copies of those portions of the record which the Ministry previously disclosed to the affected persons on the basis that those portions contain the personal information of these individuals.

In their representations, some of the affected persons dispute the Ministry's identification of their "personal information". In some cases, these individuals contend that more of the record circumscribes personal information; in other cases they cannot understand how certain parts of the record could be characterized as containing their "personal information". I will address these issues in due course.

One of the affected persons maintains that the entire record constitutes her personal information because of her position at the PCO at the time at which the review was conducted.

I disagree with this contention. In my view, generalized assertions about the working conditions at the PCO Legal Branch cannot be considered to be "recorded information about an **identifiable** individual ...", namely this affected person. There are several reasons, many of which are enumerated in the record, why the investigators characterized the situation at the PCO Legal Branch as they did. In some cases, there are specific references in the record to the actions of this affected person which the investigators relate to their conclusions about the workplace. In these cases, where appropriate, I have considered the information to be that of this affected person. In other instances, I have determined that global statements about the office are not the personal information of this individual.

I have independently reviewed the record and identified those portions of the document which, in my view, constitute personal information of identifiable individuals as defined in section 2(1) of the Act. The information so identified excludes that information provided by an individual in his or her professional or employment capacity which does not constitute "personal information" for the purpose of section 2(1) (Orders P-257, P-326 and P-369).

The majority of the personal information in the record relates to individuals other than the appellant. I will analyze this category of information shortly in Issue D.

There are certain passages which contain the personal information of both the appellant and other identifiable individuals. These are the following:

Page 23:	the first complete paragraph; sentences 6 and 7 of the second complete paragraph;
Page 24:	the second complete sentence; sentences 2, 3 and 4 of the last paragraph;
Page 27:	the last sentence continuing to page 28;
Page 28:	the end of the first complete sentence and the second and third sentences;
Page 136:	the second and third complete sentences; the second sentence of the second complete paragraph; and
Page 137:	the first three lines on the page.

This information will be addressed in Issue E.

ISSUE D: If the answer to Issue C is yes, and the personal information relates solely to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies.

In Issue C, I found that most of the personal information found in the record relates to individuals other than the appellant. Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of the personal information to any person other than the individual to whom the information relates, except in the circumstances listed in sections 21(1)(a) through (f) of the Act.

The exception in section 21(1)(a) of the Act applies to the personal information of those nine individuals who have consented to the disclosure of their personal information. Thus, this information should be disclosed to the appellant.

The only other exception which has potential application is section 21(1)(f). This section 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.

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.

Sections 21(2), (3) and (4) provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

The appellant submits that section 21(2)(d) is a relevant consideration which weighs in favour of disclosure. That section states:

> 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,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request;

In order for section 21(2)(d) of the Act to apply to the facts of the case, 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 to which the appellant is seeking access 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]

I adopt this test for the purposes of this order.

The appellant states that she requires the report in order to ensure that her personnel file at the Ministry contains "balanced information respecting her performance" while she was employed at the PCO. She states:

> ... the information in the Report [the record] is therefore unavailable to any MAG [Ministry] employee who may be asked to respond to a reference check made by a future employer, who may be asked to provide the Appellant with a letter of reference. Also, should the Appellant wish to apply for a position with MAG in the future, her success in obtaining such a position will be severely compromised unless her personnel file contains the Report and its contents can be disclosed.
>
> Finally, the Appellant submits that her reputation has been badly damaged, and that as a matter of fairness she should be given complete access to the Report to assess how to re-establish her previously excellent professional standing.

In these representations, the appellant has not identified the **legal** right which she is seeking to establish. At the very most, the appellant is making an argument based on considerations of fairness. The appellant has also not indicated how the personal information has some bearing on or is significant to the determination of a legal right. For these reasons, I find that the test for the application of section 21(2)(d) has not been satisfied.

In my view, none of the other arguments made by the appellant weigh in favour of disclosure of the personal information of the other individuals identified in the record. Accordingly, the mandatory exemption provided by section 21 of the Act applies to exempt this information from disclosure.

ISSUE E: If the answer to Issue C is yes and the personal information relates to the appellant and other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

In Issue C, I found that certain portions of pages 23, 24, 27, 28, 136 and 137 of the record contain both the personal information of the appellant and other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of

access is not absolute. Section 49 provides a number of exceptions to this general right of access. One such exception is found in section 49(b) of the Act, which reads:

> 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 or her personal information against the rights of other individuals to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester 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 personal information **would** constitute an unjustified invasion of another individual's privacy.

As I have indicated in my discussion of Issue D, sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy.
Section 21(3) lists the type of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Ministry submits that the presumptions in sections 21(3)(d) and (g) of the Act apply to the personal information at issue in this appeal.

I am of the view that neither of these presumptions applies in the present circumstances. This personal information has no connection to those characteristics of an individual's work situation which are normally associated with a person's employment history so as to fall within the section 21(3)(d) presumption (Order P-256). Nor does this personal information contain any assessments which would constitute "personal evaluations" or "personnel evaluations" for the purpose of section 21(3)(g) of the Act. I also find that none of the other presumptions are relevant in the circumstances of this appeal.

I have also considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision.

Section 21(2) of the Act provides some criteria for the Ministry to consider in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. The Ministry has claimed that the considerations in sections 21(2)(e), (f) and (i) favour the privacy protection of the affected persons. The affected persons refer to these provisions as well as to sections 21(2)(h) and (g) of the Act in support of their position in favour of non-disclosure of their personal information.

These sections state:

> 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,
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> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (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.

I will first consider section 21(2)(f).

In order to properly be considered "highly sensitive", the Ministry and the affected persons resisting disclosure must establish that release of the information would cause excessive personal distress to the affected persons (Order P-434). The affected persons who resist disclosure of their personal information have outlined in some detail their concerns about the impact that such disclosure would have on them both personally and professionally. In these circumstances, I find that section 21(2)(f) is a relevant factor to consider when balancing the appellant's right to disclosure against the affected persons' right to privacy protection.

Under Issue D, I concluded that there were no factors listed under section 21(2) of the Act which weigh in favour of releasing the personal information contained in the record. I have considered all the circumstances of this appeal and find that the disclosure of those portions of the record containing both the personal information of the appellant and the affected persons would constitute an unjustified invasion of personal privacy of the affected persons. Therefore, section 49(b) of the Act applies and the personal information should not be released.

I have reviewed the Ministry's exercise of discretion under section 49(b) in refusing to disclose this information. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this appeal.

ISSUE F: Whether section 23 of the Act applies to any exempt portions of the record.

The appellant submits that section 23 of the Act applies in the circumstances of this appeal. This section states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

Under Issue D, I found that certain information contained in the record is exempt pursuant to section 21 of the Act. In Issue E, I concluded that to disclose some of the personal information of the appellant would result in the unjustified invasion of the personal privacy of other individuals under section 49(b).

This section is not referred to in section 23. However, in my discussion of the application of section 49(b), I necessarily made reference to the provisions of sections 21(2), (3) and (4) which provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of an individual's personal privacy.
In Order P-541 I stated:

> In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

I adopt this approach for the purposes of this appeal.

Accordingly, I will consider the application of section 23 of the Act to all of the information I have found exempt pursuant to sections 21 and 49(b) of the Act.

There are certain requirements in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure of the record; and this compelling public interest must **clearly** outweigh the purpose of the exemption, as distinct from the value of the disclosure of the particular record in question (Order 16).

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect to section 23. Where the application of section 23 has been raised by an appellant it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making his or her submissions in support of a contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant.

The Ministry submits that there is no public interest at issue in this appeal. It maintains that the appellant's interest is of a private nature only.

The appellant's submissions relate particularly to the personal information of other individuals. She maintains that disclosure of this information is necessary to ascertain if any of the lawyers employed by the PCO were in breach of the Code of Conduct published under section 20(1) of

Regulation 780 under The Law Society Act for either violating the Code of Conduct themselves or for failure to report any such violations. She states:

> MAG [the Ministry] should not, as a matter of public policy, be permitted to maintain that information respecting a lawyer's professional conduct is an invasion of any lawyer's personal privacy, or to refuse disclosure of the existence of or the contents of a report which may serve as the basis for a complaint to the Law Society.

I have carefully reviewed the record and the personal information at issue. There is no suggestion in any portions of the record that the **professional** conduct of the PCO lawyers qua lawyers was ever at issue or a concern of the investigators or Ministry officials. As I have noted, the record is entitled "Management Review". It documents what the individuals interviewed perceive to be the management practices of the PCO and the concerns they have about the manner in which staff, issues and problems are managed. It is clear from the record itself that the quality of service being provided by the Legal department of the PCO was never assessed.

In my view, the rationale which the appellant advances for the application of section 23 of the Act is not connected with the actual information contained in the report.

Therefore, I find that there does not exist a compelling public interest in the disclosure of those portions of the record I have found to be exempt under sections 21 and 49(b) of the Act. Accordingly, section 23 has no application in the circumstances of this appeal.

In Issues D and E, I have found that portions of the record are exempt pursuant to sections 21 and 49(b) of the Act, respectively. I have highlighted these portions of the record on the copy provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose to the appellant those portions of the record that are **not** highlighted on the copy I have provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Ministry with this order.

2. I order the Ministry to disclose those portions of the record referred to in Provision 1 to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of those portions of the record disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: April 19, 1994
Anita Fineberg
Inquiry Officer