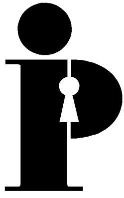

ORDER P-1320

Appeal P_9600335

Public Guardian and Trustee

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NATURE OF THE APPEAL:

The Public Guardian and Trustee (the Public Guardian) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a letter which initiated an investigation into the competence of the requester. The request was made on behalf of the requester by her counsel, however, all references in this order will be to the requester.

The Ministry denied access to a two-page letter and facsimile cover sheet on the basis of the exemption in section 21(1) of the Act (invasion of privacy). The requester appealed this decision.

During mediation, the Public Guardian advised that it was no longer relying on the mandatory exemption in section 21(1) to exempt the information in the record. Rather, it now relies on the discretionary exemption in section 49(b) of the Act. This section applies where a record is found to contain the personal information of the requester and another identifiable individual.

This office provided a Notice of Inquiry to the Public Guardian, the requester (now the appellant), and the authors of the letter (the affected persons). Representations were received from all parties.

PRELIMINARY MATTER:

In her representations, the appellant objected to the fact that she is unable to have access to the representations of the parties who are resisting disclosure. The appellant argues that she is entitled to know the affected persons' reasons for objecting to disclosure, the relationship between the affected persons and the Public Guardian, and the facts and circumstances relied on by the parties resisting disclosure under section 49(b) of the Act. The appellant argues that in order to make proper submissions to the Commissioner's office, she requires full and complete disclosure to "know the case against her", which, she argues, is to obtain the record.

Accordingly, the appellant requests an opportunity to review the representations of the other parties before being required to submit her representations. I note that, in the event that this request is denied, the appellant has submitted representations on the issues in this appeal.

The Notice of Inquiry was sent to the parties on October 10, 1996. The parties were asked to respond to this office by November 1, 1996. The appellant submitted her representations on November 6, at which time this request was made. I note that the appellant did not take the opportunity prior to this date to make this request.

Section 52 of the Act establishes the Commissioner's authority to hold an inquiry into the issues in an appeal under the Act, and sets out the procedures to be followed. Section 52(13) of the Act provides:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order M-796, Inquiry Holly Big Canoe dealt extensively with this issue in the context of a request made under the municipal Act. I have set out her comments on this issue in their entirety.

> The issue of access to representations has been addressed by both former Commissioner Sidney B. Linden in Order 164 and by Commissioner Tom Wright in Orders 207 and P-345. In Order 164, former Commissioner Linden stated that section 52(13) of the provincial Freedom of Information and Protection of Privacy Act, which is similar in wording to section 41(13) of the Act, does not confer a right on a party to an appeal to obtain access to the other party's representations. He noted that while section 52(13) does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be an extremely unusual case where such an order would be issued.
>
> Former Commissioner Linden also stated that since the Statutory Powers Procedures Act does not apply to an inquiry under the Act, the only statutory procedural guidelines that govern inquiries under the Act are those which appear in the Act. He went on to discuss the procedures respecting inquiries:
>
> > ... while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
> > ...
> >
> > Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.
>
> In Order 207, Commissioner Wright adopted the reasoning of former Commissioner Linden and noted that:

> If an appellant were provided with access to the [representations] or other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant.

Access to representations and section 52(13) of the provincial Act were the subject of further discussion by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 16, 1991, in the context of an application for judicial review of Order 167. At pages 11 and 12 of his decision, Mr. Justice Isaac commented:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the provincial Act. The latter provision prohibits the Commissioner and his staff from disclosing information which comes to their knowledge in the performance of their duties.

In the circumstances, I conclude that the appellant has no right of access to the records which were sent to the IPC during the inquiry stage of the appeals process.

I agree fully with these comments. I find that this is not the "extremely unusual case" where an order for the exchange of representations should be issued. In my view, an exchange of representations in the circumstances of this appeal would provide the appellant with the very information she is seeking in her access request, the protection of which is at issue in this appeal.

The appellant has been provided with a copy of the Notice of Inquiry which describes the record at issue, and explains the exemption which has been relied on and the onus requirements under the Act. In my view, the appellant has been provided with sufficient information to enable her to address the issues in this appeal. Accordingly, I will not order the parties to exchange their representations in the circumstances.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the record and the submissions of the parties and find that the record contains the personal information of the appellant, the affected persons and other identifiable individuals. I find that the record contains information which qualifies as the personal information of the affected persons as it represents

correspondence sent to the Public Guardian by them that is implicitly of a private or confidential nature, and as it contains direct references to them.

In addition, the views and opinions of the affected persons about the appellant and other individuals are also contained in the record. For this reason, the information also qualifies as the personal information of the appellant and these other individuals.

INVASION OF PRIVACY

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution and the appellant, therefore, has a general right of access to those records which contain her personal information.

Section 49 sets out exceptions to this right. Where a record contains the personal information of both the appellant and another individual, section 49(b) of the Act allows the Public Guardian to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

Sections 27 and 62 of the Substitute Decisions Act (the SDA) require that the Public Guardian investigate allegations that a person is incapable of managing property or incapable of personal care and that serious adverse effects are occurring as a result of this incapacity. The Public Guardian indicates that allegations are received in a variety of ways, including correspondence, telephone calls and interviews, and that each allegation must be fully investigated. It states that its office tries to maintain the confidentiality of individuals who bring these allegations to its attention wherever possible. The Public Guardian indicates that in the present case, the authors of the letter requested that their identities be kept confidential.

The Public Guardian submits that sections 21(2)(f), (g) and (h) are relevant in determining that disclosure of the record would constitute an unjustified invasion of privacy. The affected persons claim that sections 21(2)(e) and (h) apply. These sections provide:

> 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,
>
> (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.

The appellant does not specifically refer to the application of any of the factors enumerated in section 21(2). However, in her representations, the appellant details the background to this appeal and outlines her concerns regarding the manner in which the Public Guardian's attention was obtained and the impact of the resultant investigation on her. In this regard, the appellant states:

> The problem in these circumstances is that the appellant is not afforded an equal balance on the scales of justice. The affected person can make statements whether true or not, with complete impunity. The appellant on the other hand, must accept that a complaint has been made, without proof thereof and, submit to an investigation which is highly invasive of her personal privacy, whether she wants to or not.

The appellant refers to the penalty provisions of the Criminal Code and the SDA for persons who deliberately pass false information to government officials, as well as civil remedies for those who deliberately harass, annoy and create damage. The appellant argues that she should be able to know the identities of the authors to determine whether they should be "prosecuted to the fullest extent of the law".

In the above, the appellant has raised a number of considerations which are relevant and which favour disclosure of the personal information in the record. In my view, she has also implicitly argued that disclosure of the records is relevant to a fair determination of her rights (section 21(2)(d)).

In reviewing the record at issue and the submissions of the parties, I find that the information contained in the record may properly be characterized as "highly sensitive" within the meaning of section 21(2)(f), and that this is a significant consideration favouring the non-disclosure of the record to the appellant.

I also find that the authors provided the information to the Public Guardian in confidence. Section 21(2)(h) is, therefore, a relevant consideration in the circumstances of this appeal, weighing against the disclosure of the information in the record.

Based on the representations of the parties, I am satisfied that the factor in section 21(2)(d) is relevant. However, I find that disclosure of the record will expose a number of individuals referred to in it to harm. I am also persuaded that this harm would be unfair in the circumstances of this appeal. I therefore find that the factor which favours non-disclosure of the personal information found in section 21(2)(e) has greater relevance in the circumstances of this case.

I find that the considerations which favour disclosure raised by the appellant are also relevant in the circumstances of this appeal and I have placed considerable weight on them in determining the issues in this appeal.

Finally, I do not have sufficient evidence before me to make a determination as to whether the information may or may not be accurate or reliable. Accordingly, I am unable to determine that the factor in section 21(2)(g) is relevant in the circumstances.

I have weighed the considerations in favour of the disclosure of the information in the record against the factors favouring privacy protection in the circumstances of this appeal. Although I am sympathetic to the appellant's concerns with respect to the Public Guardian's investigation, I find that on balance, the factors favouring the protection of privacy of the affected persons outweigh those favouring the disclosure of the appellant's information.

Section 21(4) has no application in the circumstances.

I have reviewed the Public Guardian's exercise of discretion under section 49(b) in refusing to disclose the information in the record. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this case. Accordingly, I find that the record qualifies for exemption under section 49(b).

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there is a compelling public interest in the disclosure of the records which outweighs the purpose of the section 49(b) exemption. This raises the possible application of section 23 of the Act, which 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.

Section 23 does not refer specifically to the exemption in section 49(b). This matter has been previously considered in Order P-541, where Inquiry Officer Anita Fineberg made the following comments:

> 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 agree, and accordingly, I will consider the possible application of section 23 to the record.

There are two requirements contained in section 23 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; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant submits that there is a compelling public interest in being able to determine whether the affected persons submitted information about the appellant which was deliberately false or misleading. Moreover, the appellant argues that it is in the public interest to know whether the Public Guardian is attempting to defeat the Act in promising confidentiality to informants, as well as to determine whether the Public Guardian respected her own statute in investigating the allegations in this case.

In my view, there is no public (as opposed to private) interest in disclosure of any information in the record. Accordingly, section 23 has no application in the circumstances of this appeal.

ORDER:

I uphold the decision of the Public Guardian.

Original signed by: December 19, 1996
Laurel Cropley
Inquiry Officer