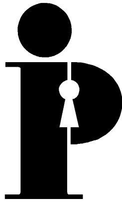

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

Reconsideration Order R-980015

Appeal P-9700328

Order P-1538

Ministry of the Attorney General

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BACKGROUND:

On March 5, 1998, I issued Order P-1538 which dealt with an appeal from a decision of the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act).

Order P-1538 provided that certain records, or parts of records, were to be disclosed by the Ministry and that other records, or parts of records, were properly exempt under various exemptions in the Act.

DISCUSSION:

THE RECONSIDERATION REQUEST

One of the affected persons to the appeal has requested that I reconsider my decision in Order P-1538 on the basis that there was a fundamental defect in the adjudication process which led to the issuance of the order. Specifically, the affected person submits that there was a fundamental defect in the inquiry because:

1. I failed to consider issues of personal safety with respect to records to which the Ministry had not applied the section 20 exemption.

2. The affected persons were not asked to comment on whether correspondence written in one's professional capacity could be properly characterized as the personal information of that individual.

3. The affected persons were not asked to comment on the application of exemptions to certain other records.

Prior to the date for compliance with Order P-1538, the Ministry filed and served the Commissioner's office with an Application of the Judicial Review of the order on the basis that the findings contained therein with respect to the definition of "personal information" were incorrect.

As a result, an interim stay of Order P-1538 was granted to allow me to address both the issues of a full stay and the reconsideration request. The appellant, the Ministry and the affected persons were then provided with a Supplementary Notice of Inquiry requesting their submissions on whether the request for reconsideration fits within the grounds set out in the Commissioner's policy statement with respect to the reconsideration of orders. In addition, submissions were solicited on the substantive issues raised in the reconsideration request. Pending the disposition of the issues raised in the Supplementary Notice of Inquiry, the operation of Order P-1538 was also stayed.

The records at issue in this reconsideration, and in the application for judicial review, are those documents which I ordered disclosed, in whole or in part, and are referred to in the order as Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34.

Representations were received from the Ministry, the appellant and from the affected person who initiated the reconsideration request. The other affected persons did not submit any representations. Neither the appellant nor the Ministry addressed the issue of whether the reconsideration request, as constituted, fits within the Commissioner's policy statement. The affected person has made extensive submissions on this issue.

Having considered the facts and processes leading to my decision in Order P-1538, I am prepared to accept that my failure to consider the possible application of section 20 to some of the records and the failure to consider whether information relating to an individual in his or her professional capacity could be considered "personal information", may amount to a fundamental defect in the inquiry.

Accordingly, the request for reconsideration falls within the IPC policy reconsideration statement, and I will reconsider the order.

PERSONAL INFORMATION

The records at issue consist of correspondence received by the Ministry from several organizations requesting that the Ministry take action against the activities of the organization represented by the appellant. The correspondence, and the subsequent internal Ministry responses, contain the names and titles of the individuals who wrote the letters on behalf of each organization, the dates of each letter, and the business address, telephone and facsimile numbers for each organization.

The affected persons, the appellant and the Ministry were requested to identify whether the information at issue in these records qualifies as personal information under section 2(1) of the Act. In addition, the parties were asked whether there are circumstances in which information that is written by, provided by or is associated with the name of an individual in his or her professional capacity would be considered to be that person's "personal information" within the meaning of section 2(1). If so, the Supplementary Notice of Inquiry asked the parties to address whether there are circumstances present in this case such that the information at issue qualifies as the personal information of the affected persons.

Attached to the Supplementary Notice were copies of Orders P-157, P-235, P-611, P-1180 and P-1409 which address the issue of whether information related to the professional capacity of individuals can qualify as personal information under the Act. The parties to the appeal were asked to consider the principles set out in these decisions in making their representations on this issue.

The definition of "personal information" and the parties' positions

Under section 2(1) of the Act, "personal information" is defined, in part, to mean

> ... 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

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The appellant submits that "A person who works for an organization or acts in a professional capacity is not acting in a personal capacity". She submits that those who work for an organization or act as its spokesman is furthering the objectives of the organization, as opposed to their own personal objectives. This would apply equally to someone working in a professional capacity, such as a lawyer. Finally, the appellant argues that the exemptions in the Act regarding the disclosure of personal information are meant to protect just that, personal information. The appellant adds that what one does in their work life is not a personal matter as most people would understand that information.

The affected person submits that in the circumstances of this appeal, bearing in mind his/her concerns regarding the nature of the organization which the appellant represents, the disclosure of the affected person's name and title constitutes the disclosure of this individual's personal information. The affected person also submits that the disclosure of his/her name and employment title together with the date of the letter would reveal his/her employment history and that, for this reason, this information also qualifies as his/her personal information. The affected person argues that the Act does not limit or restrict the definition of "personal information" contained in section 2(1) so as to disqualify information in the context of persons acting in their professional capacity. The affected person also refers to a number of the Commissioner's orders which, he/she submits, either support this position or can be distinguished from the case before me.

Like the affected person, the Ministry submits that the definition of personal information does not exclude information related to a person in a professional capacity. It argues that this position is consistent with that of the Supreme Court of Canada in Dagg v. Ministry of Finance, [1997] 2 S.C.R. 403. The Ministry also submits that the opinions of individuals in their professional capacities is their personal information within the meaning of the definition in section 2(1).

I will refer to these submissions in my discussion below of the personal versus professional capacity distinction developed by the Commissioner's office and by other jurisdictions where similar privacy protections are afforded to individuals.

Discussion

"Personal information" means recorded information about an "identifiable individual. The Commissioner has interpreted this term to mean a natural person; it does not apply to information about other entities such as corporations, partnerships, sole proprietorships or business organizations (Order 16). The Commissioner has also recognized that some information relating to a business entity may, in certain circumstances, be so closely related to the personal affairs of an identifiable individual as to constitute that individual's personal information (Orders 113, P-364, M-138). Nonetheless, in order to qualify as "personal information", the fundamental requirement is that the information must be "about an identifiable individual" and not simply associated with an individual by name or other identifier. It is apparent, therefore, that while the meaning of "personal information" may be broad, it is not without limits.

The words "about an identifiable individual" was first discussed in Order 13 by former Commissioner Sidney B. Linden. That case raised the question of whether a Ministry of Revenue record containing the municipal locations of certain properties and their estimated market values would constitute the property owners' personal information when associated with the names of the property owners. Former Commissioner Linden found that it did not. The location of a property and its estimated market value was found to be information about the property, not information about an identifiable individual. If the name of an individual property owner were added to this information, it could not be said that the individual's name "appear[ed] with other personal information relating to the individual" or "would reveal other personal information about the individual" within the meaning of paragraph (h) of the personal information definition in section 2(1) of the Act.

The distinction between personal information and other information associated with an identifiable individual has also been considered by the Commissioner in the context of information relating to an individual's professional, employment or official government capacity in both public and private sector settings. The Commissioner's orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual's personal information simply because his or her name appears on the document.

In Order P-1409, former Adjudicator John Higgins reviewed the history of the Commissioner's treatment of information associated with an individual's name in his or her employment, professional or official capacity. At page 26 of the order, he concisely summarized the rulings of this office as follows:

> To summarize the approach taken by this office in past decisions on this subject, information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context. When not excluded from the Act under section 65(6), other employment-related information, whether of an evaluative nature, or in relation to other human resources matters, has generally been found to qualify as personal information.

It is apparent from various provisions of the Act that certain employment and other work-related information is, indeed, intended to fall with the scope of the personal information definition. For example, paragraph (b) of the definition in section 2(1) specifically provides that an individual's employment and educational history is considered to be personal information. This is also reflected in the presumption against disclosure of such information set out at section 21(3)(d). Similarly, certain evaluative information in a personnel context is considered to be the personal information of the individual to whom it relates and is protected from disclosure by the presumption at section 21(3)(g) of the Act.

The presumptions at sections 21(4)(a) and 21(4)(b) of the Act indicate that certain government employment or work-related information was also intended to be encompassed by the definition of personal information. For example, while "the classification, salary range and benefits, or employment responsibilities of an individual who was or is an officer or employee of an institution or a member of the staff of a minister" would qualify as the personal information of the individual to whom it relates, section 21(4)(a) provides that the disclosure of such information is presumed not to constitute an unjustified invasion of personal privacy. In my view, these examples of personal information in a work-related context do not expand the definition beyond what would normally be considered to be recorded information about an identifiable individual. Rather, they reinforce the conclusion that, in order to qualify under the definition, the information must be about the individual per se, and not simply be associated with the name of an individual in a work-related context.

Official or Employment Capacity in a Public Sector Setting

Most of the Commissioner's decisions dealing with the personal versus professional capacity distinction have involved records generated in a government employment setting. In many cases, records will contain information specifically enumerated in the definition of personal information. Letters of application for employment with an institution and resumes containing educational and employment history are "about" the individual to whom they relate, and also fall within paragraph (b) of the definition (Orders 11 and M-7). Information may not fall clearly within an enumerated class under the definition, but will still be considered to be the personal information of an identifiable individual.

An early example is found in Order 20 where the issue was whether interview rating sheets and data entry test results for candidates in a job competition were considered personal information. The Commissioner did not accept the argument that the data entry test results reflected the "views or opinions of another individual about the individual" within the meaning of paragraph

(h) of the definition. Nevertheless, this was found to be "recorded information about an identifiable individual", and satisfied the opening words of the definition. A wide range of employment or work-related information is captured by the definition of personal information, including records relating to such things as job competitions (Orders 11, 20, 43, 97, 99, 159, 170, P-222, P-230, P-282, M-7, M-99 and M-135), information generated in the course of investigations of improper conduct or disciplinary proceedings (Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122), and specific details of individual employment arrangements with an institution (Orders 61, 170, 183, P-244, P-380, P-432, M-18, M-23, M-26, M-35, M-102, M-129 and M-141).

On the other hand, where it is clear that the government employee or official is acting in his or her official capacity, references to employees in records generated in the normal course of business have been found not to be about the individual and, therefore, did not qualify as personal information (Orders 139, P-157, P-257, P-326, P-377, 194, M-82, P-477 and P-470). In Order 139, for example, the name and professional affiliation of a welfare worker who had lodged a complaint in her official capacity about the eligibility of another individual to receive benefits was held not to constitute the welfare worker's personal information where this information appeared in a report of the complaint. In Order P-157, Commissioner Linden found that the names and addresses of individuals who, as Ministry and corporate representatives, had signed letters containing factual information about the appellant's previous employment, did not constitute the authors' personal information.

Likewise, in Order P-257, Assistant Commissioner Tom Mitchinson held that reports relating to a day care centre which were signed by a Ministry health inspector and a day care employee or director did not contain their personal information. He stated:

> In all instances the comments on the reports relate only to the day care centres and not to any identifiable individual. ... In my view, the comments about the day care centres in the body of the reports do not constitute "recorded information about any identifiable individual", as required by the Act. The names of the health inspector and day care employee or director are clearly included on the reports in their capacities as representatives of the MOH and the day care centres respectively, and do not constitute "personal information" as defined in section 2(1).

In Order P-326, a Ministry employee sought access to notes taken by his supervisor regarding an allegation made against him by another employee. The Ministry argued that the notes contained the supervisor's personal information. Assistant Commissioner Mitchinson found that the notes contained the appellant's personal information, but disagreed that they also contained the supervisor's personal information where this "person was acting in her official capacity as an employee of the institution and the appellant's supervisor when the notes were created". Similarly, in Order P-377, Assistant Commissioner Mitchinson held that memoranda, notes and correspondence about a community college decision to issue a trespass notice to a student did not contain personal information of the college staff or faculty who had provided the information "in their professional capacity or the execution of employment responsibilities".

Private Sector Professional or Employment Settings

The Commissioner's orders dealing with non-government employees, professionals and corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21(1) to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Commissioner Linden rejected the institution's submission:

> The institution submits that "... the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director or president, is personal information defined in section 2 of the *FIO/PPA*. ... All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

Similarly, in Order M-118, former Commissioner Tom Wright held that the names and addresses of persons identified in a representative or business capacity in a city mailing list did not constitute personal information for the purposes of the municipal Act.

This reasoning has been followed in many subsequent orders. Information found not to constitute an individual's personal information has included: correspondence written by a solicitor and the Executive Director of a business association acting in their professional capacities (Order 113); correspondence written by an individual on an organization's letterhead as spokesperson for the organization (Order P-300); the names of an M.P.P. and a newspaper reporter appearing as recipients of copies of a letter (Order 172); the name of a doctor who provided a medical opinion (Order P-259); names and business addresses of researchers hired by the Ontario Native Affairs Secretariat (Orders P-454 and P-463); a letter written on corporate letterhead in the author's professional capacity (Order P-478); and a summary of past account assignments undertaken by various individuals employed in an advertising agency (Orders P-418, P-419 and P-420).

The following information has been found to be personal information: the names, professional affiliations, addresses and telephone numbers of proponents of a Centre for Women's Health (Order 149); a university professor's name, title, department, university and signature on a student evaluation form (Order P-240); the names, titles, positions and signatures of individuals who had performed confidential drug reviews for the Drug Quality and Therapeutics Committee of the Ministry of Health (Order P-235); the names and addresses of the officers of a corporation appearing on corporate filings with the Ministry of Consumer and Commercial Relations (Orders P-318 and P-319); the names, addresses, telephone numbers and code numbers of home child care providers under contract with a municipality (Order M-109); a witness's place of employment and occupation (Order P-355); and a physician's hospital practice licence (Order P-244).

In all of these latter cases, the information at issue either fell within a specifically enumerated category under the definition of personal information or had some other personal, as opposed to professional or representative, quality about it such that it could be said to be "about" the identifiable individual in each case.

Opinions

Another issue pertinent to the question before me engages paragraphs (e) and (g) of the definition of "personal information" contained in section 2(1), which provide that personal information includes, respectively, "the personal opinions or views of the individual, except where they relate to another individual" and "the views or opinions of another individual about the individual. Paragraph (e) of the definition has been held in several orders to exclude opinions or views expressed by government officials in their professional capacities. In Order P-427, Adjudicator Holly Big Canoe rejected an institution's claim that views expressed by Ministry personnel and others in the course of a program review were their personal information. She stated:

> The Ministry submits that the names and titles of the individuals, combined with the fact that these people provided input to the consultants, constitute the personal opinions of those individuals for the purpose of section 2(e). The Ministry submits:
>
> > In this instance, individuals were not expressing the opinions of the Ministry nor were they explaining Ministry policies or practices within the context of their professional responsibilities. They were expressing their personal opinion concerning the Ministry's policies and practices. Their answers did not represent nor were they intended to represent the opinions or views of the Ministry.
>
> The Ministry employees were senior land management staff and policy officers. The members of the client groups and general interest groups were generally group presidents, managing directors, or their delegates. The employees of federal departments and provincial ministries were identified by the Ministry through discussions with each agency.
>
> Having reviewed the record, in my view, the views and opinions were expressed in each individual's professional or business capacity, and are not "personal" opinions or views. The names and titles or affiliations of these individuals cannot be categorized as "personal information" as defined in section 2(1).

(Orders M-113, M-114 and M-115)

If an individual's views or opinions, whether expressed in a professional or a personal capacity, relate to another individual, that information is the personal information of the other individual within the meaning of paragraph (g) of the definition, but is not the personal information of the

individual expressing the views or opinions. The rule in this respect was stated by Commissioner Wright in Order 194:

> [I]t is clear that individual A's recorded personal opinions or views about individual B constitutes the personal information of individual B only. All of the records at issue in this appeal contain the authors' opinions and comments about the appellant's work during her training period and therefore, these records contain only the personal information of the appellant and not the authors.

In Order M-82, a case involving records compiled during the course of a sexual harassment investigation, Adjudicator Big Canoe found that notes of meetings between the investigator and municipal officials contained the personal information of the complainant and the alleged harasser, but not of the officials themselves.

The Commissioner's orders have also determined that when an individual expresses an opinion in a representative capacity on behalf of a non-governmental organization, the opinion cannot be considered to be that individual's personal information because it is not "about" the individual. In Order P-473, it was held that the comments made by an official of Laurentian University during an investigation into a student's human rights complaint did not constitute the official's personal information. Since the comments were made by the official in his capacity as a representative of the university, they were not "about" him in his personal capacity.

The Rationale for the Personal/Professional Capacity Distinction

Apart from the Commissioner's interpretive approach to the meaning of personal information, the rationale for the distinction between personal information and information relates to a person's employment, professional and official government capacity also relates to the integrity of the regime establishing the public's rights of access and government's disclosure obligations. Without this distinction, the routine disclosure of information by government, whether pursuant to the access provisions of Part II of the Act or the protection of individual privacy provisions of Part III of the Act, could be greatly impeded as institutions sought to meet statutory notice and process obligations meant to apply only to "personal information" deserving of this kind of protection. This could, in turn, become an obstacle to access to information pertaining to the business of government which, of necessity, is conducted by individuals in the public service. As Adjudicator Higgins stated in Order P-1409:

> However, if this interpretation were adopted, the following list sets out several examples of categories of information that would likely be considered "personal information" of government employees, professional staff and officials:
>
> - recommendations made by public servants about matters of public or government policy during the deliberative process;
>
> - legal opinions of Crown counsel or other counsel retained by an institution;

> - letters written by members of the public service or government officials within the sphere of their employment, professional or official responsibilities, including letters to members of the public about government business;
>
> - all other recorded information subject to the Act and relating to the activities of public servants or other individuals in their employment, professional and/or official capacities.
>
> In my view, the broad scope of this proposed interpretation would frustrate the purpose of the Act expressed in section 1, namely, that information under the control of institutions under the Act "should be available to the public". In my opinion, this purpose is clearly relevant in relation to the types of information I have just described.

It is apparent from these examples that other exemptions, such as the advice and recommendations exemption at section 13 of the Act and the solicitor/client privilege exemption at section 19 of the Act, are specifically designed to protect government's institutional interests in maintaining the confidentiality of records containing the official views or opinions of public servants and consultants. The exemption at section 17 of the Act establishes the limits of protection available to private sector entities and groups who provide information to government in commercial and regulatory contexts. It would also be contrary to one of the fundamental purposes of the Act, that "necessary exemptions from the right of access should be limited and specific", to interpret personal information so broadly as to encompass records subject to other exemptions which have been carefully crafted to establish appropriate boundaries for protecting government's confidentiality interests and defining its disclosure obligations.

It should be noted that a broadened definition of the term "personal information" would necessitate that notifications given by an institution under section 28 of the Act in situations where it intends to disclose information would increase dramatically. If construed too broadly, this could, in my view, place an unreasonable burden on institutions and significantly affect their ability to process requests in a timely fashion.

Similarly, section 52(13) of the Act requires that affected parties to an appeal be notified by the Commissioner's office. A broadened definition of the term "personal information" would, in my view, unreasonably require this office to notify an even larger number of individuals of the fact that an appeal has been received than is currently the practice. The interests of these individuals in the matter may be remote and, again, would place an unreasonable burden on the Commissioner's office.

The Federal Access to Information Act and other Jurisdictions

The distinction between "personal information" and information related to an individual in a professional or employment capacity has been adopted in other jurisdictions, notably, in Canada (Information Commissioner v. Canada (Secretary of State) (1990), 64 D.L.R. (4th) 413 and Robertson v. Canada (Minister of Employment & Immigration) (1987), 42 D.L.R. (4th) 552 by the Federal Court of Canada (Trial Division), Galipeau v. Ministre de la Main-d'oeuver et de la

Securite du revenue du Quebec [1989] C.A.I. 1 by the Quebec Information and Privacy Commissioner, U.S. Department of State and Washington Post Co., 456 U.S. 595 by the United States Supreme Court, Greenpeace U.S.A. Inc. v. Environmental Protection Agency 735 F. Supp.13 by the U.S. District Court and Schell v. U.S. Department of Health and Human Services 845 F.2d 933 and Board of Trade for the City of Chicago v. Commodity Futures Trading Commission 627 F.2d 392 by the U.S. Court of Appeals.

In Robertson v. Canada (Minister of Employment and Immigration), for example, the Federal Court (Trial Division) held that the personal views contained in a letter written by a union official on the union's behalf were personal information within the meaning of s. 3(e) of the Privacy Act and therefore exempt from disclosure pursuant to section 19(1) of the federal Access to Information Act, but that other information written in an official capacity was not personal information. In this latter respect, the court said:

> I have examined the letter in question, including the excised portions, and have concluded that, in the context of making a required submission on behalf of the Union, *the author has responded by making general comments that are quite appropriate under the circumstances and should be made public. He has signed the letter as a union official* and has directed further inquiries on the union position to another union official whose name and telephone number he has provided. [Emphasis added] [at p.558]

In Robertson, the Federal Court recognized that a distinction exists between those portions of the letter which included the personal views of the author and those which were made on behalf of the union for the purpose of determining what constitutes "personal information" under the federal Access to Information Act.

The Ministry, however, has argued for a broad definition of personal information which encompasses information related to a person in a professional capacity. The Ministry argues that this position is consistent with the judgment of the Supreme Court of Canada in Dagg v. Ministry of Finance, dealing with the definition of personal information under the federal Access to Information Act.

The Court in Dagg examined whether the signatures, names and identification numbers of employees of the Department of Finance who had signed "sign-in sheets" indicating that they had been at the office outside of office hours were the personal information of those individuals under the federal Access to Information Act. In concluding that this was not personal information, the Court examined the definition set out in the federal Privacy Act, which is incorporated by reference into the Access to Information Act.

Section 3 of the federal Privacy Act contains a definition of "personal information" which is very similar to the definition in section 2(1) of the Ontario Freedom of Information and Protection of Privacy Act. The federal Act also states explicitly that certain information relating to the employment responsibilities of public servants is not personal information. Section 3(j) provides that:

> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> [enumerated classes of information]
> …
> but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> (i) the fact that the individual is or was an officer or employee of the government institution,
>
> (ii) the title, business address and telephone number of the individual,
>
> (iii) the classification, salary range and responsibilities of the position held by the individual,
>
> (iv) the name of the individual on a document prepared by the individual in the course of employment, and
>
> (v) the personal opinions or views of the individual given in the course of employment,
>
> ....

While the opening words of the personal information definition and the enumerated classes of information which follow in the federal statute are similar to the provincial definition, the legislative schemes under each regime are quite different.

Where a request for personal information is made under the federal Access to Information Act, there is a mandatory exemption from disclosure unless the individual consents to its release (s. 19(2)(a)), unless the information is publicly available (s. 19(2)(b)), or unless the disclosure would otherwise be in accordance with the disclosure provisions set out at section 8 of the Privacy Act (s. 19(2)(c)). Like section 42 of the provincial Act, section 8 describes circumstances in which disclosure may be made by an institution in the absence of a request. At section 8(2)(m)(i), this includes any case where the head of an institution is of the opinion that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. This latter exception to the federal exemption is roughly equivalent to section 23 of the provincial Act, which also makes the exemption of personal information subject to a public interest override.

However, unlike the provincial Act, the federal legislation has no equivalent to section 21(1)(f) of the provincial Act, which creates an exception from the mandatory exemption where "the disclosure does not constitute an unjustified invasion of personal privacy." Nor does the federal

legislation have any equivalent to section 21(2), which sets out a non-exhaustive list of factors to be considered by a head of an institution (and by this office on appeal from the decision of a head) in determining when disclosure would not constitute an unjustified invasion of privacy. Finally, the federal legislation does not contain any equivalent to sections 21(3) and (4) which set out types of information the disclosure of which is either presumed, or presumed not, to constitute an unjustified invasion of privacy.

Thus the federal regime only requires a balancing of competing interests in disclosure versus privacy under section 8(2)(m)(i) where it can be shown that there is a **public** interest in disclosure of the personal information and it can also be shown that this **public** interest clearly outweighs the privacy interest at stake. These requirements, while not insurmountable, are relatively significant hurdles to overcome where a head of an institution wishes to disclose, or a requester seeks to secure the disclosure of, another individual's personal information. In contrast, the provincial scheme requires a balancing of the competing interests in disclosure versus privacy, using the concept of an unjustified invasion of personal privacy at section 21(1)(f) as the balancing test. The provincial scheme, therefore, permits interests other than the public interest to be taken into the balance in weighing whether it is justified, or unjustified, that personal information be disclosed.

These differences in the two regimes suggest that each statute is intended to approach the protection of personal information differently. In particular, the federal statute's approach of specifically excluding certain government employment information from the definition of personal information, cannot be taken to mean that such information was intended to be specifically included in the definition of personal information where not specifically excluded under the provincial Act.

In this latter respect, this office has recently had occasion to consider the significance of the Dagg decision relied on by the Ministry, and to compare the provincial and federal access and privacy schemes in so far as they relate to the definition of personal information. In Order P-1621, Assistant Commissioner Mitchinson set out the reasons of Adjudicator Higgins in Order P-1412 for distinguishing the case before him from the outcome in the Dagg decision in the Federal Court of Appeal:

> As far as the Dagg decision is concerned, Adjudicator Higgins made the following comments:
>
> > The affected person then cites Dagg v. Canada (Ministry of Finance) (1995), 124 D.L.R. (4th) 553 (Fed. C.A.). In this case, which dealt with the definition of "personal information" in the federal Access to Information Act, the Court overturned earlier rulings which had found that the identities of individuals who had worked overtime were not personal information, on the basis of a "predominant characteristic" test. The Court stated:
> >
> > > ... the test is clearly not in accord with the plain language of the statutory definition which states simply that "personal information" means

> > information about an identifiable individual that is recorded in any form ...". Information in a record is either "personal information" or it is not. The injection of the "predominant characteristic test" is an unwarranted attempt by the Motions Judge to amend the definition of "personal information".
>
> ...
>
> With respect to the Dagg case, in my view, it is distinguishable on the facts. It is a very different thing to find that an individual's overtime hours are personal information than to make such a finding with respect to the identities of government employees or professional staff, or government officials, or their opinions in relation to proposed government policies or activities. Under the historical approach taken by this office, the former could well be considered personal information, while the latter would not be. Therefore, in my view, Dagg is not determinative of this issue as it presents itself in this appeal. Moreover, this office has never characterized the distinction in relation to an individual's professional or official capacity as a "predominant characteristic" test.

> While the Supreme Court of Canada reversed the Federal Court of Appeal, and held that the "overtime" information at issue in that case was not personal information, in my view, the court's judgment does not affect the validity of Adjudicator Higgins' conclusions on the applicability of the Dagg case to the present appeal (see Dagg v. Canada (Minister of Finance) (1977), 148 D.L.R. (4th) 385 (S.C.C.)).

In Order P-1621, Assistant Commissioner Mitchinson discussed his reasons for concluding that the Supreme Court of Canada judgment in Dagg does not affect the approach which this office has taken to the definition of personal information:

> The majority of the court in Dagg agreed with the approach taken by Mr. Justice LaForest, in dissent, that the definition of personal information under the federal Privacy Act (adopted by the federal Access to Information Act) is "deliberately broad", subject only to specific exceptions at section 3(j) relating to "information about an identifiable individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual." However, under both the federal access and privacy regime and the personal information definition at section 2(1) of the provincial Act, there is still the requirement that the information be "about an identifiable individual" in order to qualify as personal information. The mere association of an individual's name with other information, whether in an official government or employment capacity or not, does not automatically make that other information "about the individual". Under the provincial Act, this view is reinforced by the specifically enumerated category of personal information in paragraph (h) of section 2(1),

which defines personal information as including "the individual's name where it appears with **other personal information relating to the individual** or where the disclosure of the name would reveal **other personal information about the individual**" [emphasis added]. If the "other" information is not "personal" in the sense that it is "about" the identifiable individual, it does not qualify as that individual's personal information (see Orders P-257 and P-427).

While Mr. Justice LaForest was speaking in the context of the express exclusion from the definition of personal information under the federal regime [at section 3(j) of the federal Privacy Act], I believe that the following passage from his reasons for judgment captures the essence of the distinction which this office has drawn between an individual's personal and professional or official government capacity:

> The purpose of these provisions is clearly to exempt [i.e., from the definition of "personal information"] only information attaching to *positions* and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to carry out the tasks assigned to them is "personal information".
> ...
>
> The fact that persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy (at pp. 413, 415).

I am not obliged in this appeal to interpret and apply the provisions of the federal legislation; however, I do wish to make one additional comment on the representations of the affected person concerning the Dagg case, where it is submitted:

> ... it is clear that [the Supreme Court of Canada] analysed the issue commencing with the assumption that the information was "personal information" and then found that nonetheless, given the express exclusion as noted above in the Access to Information Act [i.e., s.3(j)], ... the information was accessible.

Because there is no express exclusion of information pertaining to government employees under the provincial Act, the affected person submits that I should

> apply the reasoning in the Dagg case to find that the information at issue qualifies as personal information.
>
> With respect, the approach taken under the federal access and privacy regimes and the provincial legislation is materially different. The federal scheme contains specific exclusions from the definition of personal information relating to government employees, while the provincial Act does not. On the other hand, section 21(1)(f) of the provincial Act permits the disclosure of personal information where this would not constitute an "unjustified invasion of personal privacy", a concept which is not present in the federal statute. In my view, it simply does not follow that information should necessarily be **included** within the definition of personal information under the provincial statute because the federal Parliament has seen fit to expressly **exclude** similar information from the definition of personal information under a federal enactment which accommodates privacy and disclosure interests in significantly different ways. As Order P-1412 demonstrates, the approach of this office has consistently been to find that information about normal activities undertaken by an individual in his or her employment, professional or official government capacity, including opinions developed or expressed in that capacity, is not information "about" that individual and is therefore not personal information. In my view, the court's judgment in the Dagg case in no way affects the validity of this approach.
>
> Any views or opinions of the affected person which may be reflected in the subject records are not "the **personal** opinions or views of the individual" within the meaning of subparagraph (e) of the definition of personal information, but, instead, clearly relate to the official capacity of this individual

In my view, the reasons given by Assistant Commissioner Mitchinson in Order P-1621 provide a complete answer to the submissions of the Ministry on the implications of the Dagg case to the appeal before me, and I adopt them in disposing of those submissions.

Employment History

The affected person also argues that the information contained in the records constitute his/her employment history, thus invoking the application of the presumption in section 21(3)(d).

The Commissioner's orders have consistently found that discrete pieces of information which might reveal information about a particular episode in a person's employment do not constitute "employment history" for the purposes of sections 2(1)(b) and 21(3)(d) of the Act. (Orders P-235, P-611 and P-1180). As explained by Inquiry Officer John McCamus in Order 170,

> The Ministry seeks a severance of references in this document identifying Ministry employees who were interviewed by the Office of the Ombudsman with respect to a complaint made by the requester. The Ministry seeks a severance on the basis that information relates to "employment history" within the meaning of subsection 21(3)(d). In my view, this gives the notion of employment history too broad a reading. The statutory notion of employment history appears to relate to

> what might be referred to as "personnel matters" and should not, in my view, be construed to include every action of an individual employee which might cumulatively be said to constitute that employee's "history". ... The mere fact that a named public servant has performed or undertaken a specific particular task is not "employment history" in the requisite sense.

The term "employment history" refers only to past employment and not to aspects of current employment such as an employee's current salary or job position (Orders 61 and P-399); it does not include information about an employee's expense claims (Order P-256); it does not include a person's name, without more (Order M-32); and it does not generically refer to all employment-related incidents (Orders P-360 and P-357).

Based on these principles, a letter written by a corporate officer or government representative containing the official's name, title and the date of the correspondence, together with information about a corporate or official position or stance could not be considered to constitute the author's employment history, and does not, therefore, constitute the author's personal information.

Findings

I will now apply the principles I have described above to the submissions of the affected person with respect to the issue of whether the information in the records constitutes his/her personal information, in the context of the Act.

I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.

In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.

In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the

subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

I cannot agree with the submissions of the affected person that the information in the records comprises his/her employment history, and therefore qualifies as his/her personal information. The fact that the records may reveal that on a given date an individual held a given position and performed certain employment-related functions is not sufficient, in my view, for that information to be characterized as constituting the "employment history" of that person. The term employment history does not refer to an individual's particular employment activities at a given point in time. It comprises instead a more comprehensive overview of the job or work activities which an individual has undertaken in the course of his or her professional life. This interpretation is in keeping with the previous orders of this office which address the application of the presumption in section 21(3)(d) [Orders 170, P-235, P-611 and P-1180].

The submissions of the affected person also point out that:

> the circumstances of each case must be viewed carefully when determining what is personal information under the Act. In our view, it may be too simplistic in certain cases to just repeat the usual position of the Commissioner's office with respect to defining personal information in the context of persons acting in their professional capacity. The Act does define *personal information* to mean *recorded information about an identifiable individual* [affected person's emphasis]. It lists examples which list is not exhaustive. Most importantly, the Act does not qualify that definition for persons acting in their professional capacity.

I agree that the circumstances of each case must be carefully reviewed when making a determination as to what is, and what is not, personal information for the purposes of the Act. However, my review of the distinction between information related to one's personal and professional capacity has effectively disposed of this submission. In my view, given the underlying rationale for the distinction set forth above, which is to protect the integrity of the statutory regime establishing the public's rights of access and government's disclosure obligations, the circumstances of the present case do not warrant a finding that the information in the records qualify as the personal information of the individuals whose names appear therein.

The affected person also makes reference to Order 157 where Commissioner Linden found that the names, addresses and telephone numbers of individuals contained in notes taken in the course of an employment-related investigation were the personal information of these persons. He found that this information had been provided in confidence (section 21(2)(h)) and could be properly characterized as "sensitive information" within the meaning of section 21(2)(f). Commissioner Linden ordered the disclosure of the actual substance of the statements made by the individuals but not their names, addresses and telephone numbers. The affected person in the present case urges that a similar approach be followed in this appeal.

In my view, the circumstances present in the appeal before me are quite different from those addressed by Commissioner Linden in Order 157. At Page 12 of that order, the former

Commissioner went on to make a distinction between information which had been provided in the course of the investigation by individuals in their professional capacity, excluding their names and telephone numbers did not constitute their personal information for the purposes of section 2(1). The former Commissioner clearly distinguished information which was provided in a professional or employment capacity from information which related to the individuals in their personal capacity. Accordingly, Order P-157 does not assist the affected person's argument.

The affected person has provided me with a large volume of information pertaining to the organization represented by the appellant to substantiate his/her concerns with respect to the disclosure of any of the information contained in Records 3-1 to 3-6. The affected person indicates that this organization has a history of violence and extremism, particularly towards those who may have publicly denounced its activities. The affected person has expressed clearly and cogently the reasons why he/she is reluctant to see any information which relates to him/her, whether of a personal nature or not, to the appellant and the organization which she represents. Essentially, the affected person has concerns for his/her safety should the information in the records be disclosed to the appellant. The affected person is concerned that he/she may become the target for revenge or other harassing behaviour by members of the organization. In my view, these concerns are more appropriately addressed in my discussion of the application of section 20 to the records, below.

Because I have found that the information does not qualify as the personal information of the affected persons under section 2(1), it follows that this information cannot be exempt under sections 21(1) or 49(b), as these exemptions apply only to personal information.

DANGER TO HEALTH OR SAFETY

As noted above, the affected person who initiated the reconsideration request has provided me with an assortment of information in support of his/her contention that the disclosure of the information contained in the records relating to him/her could reasonably be expected to seriously threaten his/her safety or health. For this reason, the affected person argues that this information is properly exempt under section 20 of the Act.

Section 20 is a discretionary exemption and was not claimed by the Ministry for the documents containing the names, positions and business address information of the affected persons, which were ordered disclosed in Order P-1538. The affected person who initiated the reconsideration request submits that the Commissioner's office has an inherent obligation to ensure that all persons potentially affected by an order of disclosure of information are made a party to the inquiry and are given the right to make submissions on disclosure. The affected person submits that in Order P-257, Assistant Commissioner Mitchinson was asked to consider whether an affected person ought to be entitled to rely on the application of a discretionary exemption which was not claimed by the institution. At Page 5 of that order, he held:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been

> released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the Act. In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it. [my emphasis]

The affected person goes on to submit that:

> The exemption under section 20 is one of those relatively rare instances where the person who is in the better position to make full and informed submissions is the affected party and not the head of the institution. Who is likely to have the most information and be better motivated to advance the arguments on danger to safety of an individual than the individual [his/her]self.

In view of the obvious concerns expressed by the affected person and the great care taken in preparing his/her submissions, I feel that it is appropriate to consider them in the present circumstances.

The Ministry in this case did not notify the affected persons in order to solicit their views on disclosure of the information and does not appear to have considered the possible application of section 20 to these records. I have not been provided with any evidence to indicate that the Ministry was aware of the personal safety concerns of the affected person. The Ministry appears to have considered only the application of section 21(1) to this information. Because it took the position that the information was exempt under this mandatory exemption and did not intend to disclose it, the Ministry chose not to notify any of the potential affected persons under section 28 of the Act.

The affected person submits that there exists a reasonable expectation of harm to him/her personally should the information contained in Records 3-1 to 3-6 be disclosed to the appellant. As noted above, the affected person submits that the organization on whose behalf the request was made is a violent and dangerous group with a history of reprisals and threats against individuals who have publicly denounced it.

The Ministry, the appellant and the remaining affected persons have not addressed the possible application of this exemption to the records, though each was requested to do so in the Supplementary Notice of Inquiry provided to them by this office.
In Order P-588, Adjudicator Holly Big Canoe had occasion to review the application of section 20 of the Act to records relating to a telephone conversation between the appellant and an affected person.. She determined that:

> Section 20 requires that there exist a reasonable expectation of serious harm. The mere possibility of harm is not sufficient. At a minimum, the Ministry must establish a clear and direct linkage between the disclosure of the information and the harm alleged.

Adjudicator Big Canoe went on to find that:

> the Ministry has not provided sufficient evidence to establish a clear and direct linkage between disclosure of the records and a **serious** threat to the safety or health of an individual.

I adopt the approach articulated in Order P-588 for the purposes of this appeal, and will objectively assess the connection between the disclosure of the information contained in the records and the threat to his/her health or safety which is suggested by the affected person.

The affected person has provided me with extensive evidence which he/she argues demonstrates that the organization represented by the appellant has in the past acted in a violent and threatening fashion against those who have spoken out against it. However, I find that none of this evidence would indicate that public officials, such as the affected person, who have taken a position opposed to the activities of the organization represented by the appellant have been the target of such reprisals. I am, therefore, unable to give a great deal of weight to this evidence with respect to the circumstances of the affected persons to this appeal.

Consistent with my finding in the discussion of personal information above, I note that the affected person's name appears in the records only in his/her capacity as an employee of a public body and the records do not contain his/her personal views on the issues addressed therein. As noted above, the affected person is referred to in the records only in his/her capacity as a senior public official and not in her personal capacity as a private individual. In addition, the records do not contain his/her personal views within the meaning of section 2(1)(e) of the definition of personal information. In my view, this is a significant factor weighing in favour of a finding that the information in the records does not qualify for exemption under section 20.

I also note that the remaining affected persons have not addressed the possible application of section 20 to the information in the records. During the initial inquiry which resulted in Order P-1538, I spoke on the telephone with two of these individuals about their views concerning the disclosure of the information. They indicated their reluctance to see the information disclosed as they did not wish to assist the appellant in any way. However, they acknowledged that the information related to them only in their professional capacity as officials with the organizations which they represent. At no time did they indicate any concerns for their personal health or safety which might result from the disclosure of the records, and they did not respond to the

Supplementary Notice of Inquiry soliciting their submissions on the application of section 20 to this information. In my view, this consideration is also noteworthy.

In addition, it is important to note that the information in the records which relate to the affected person who is resisting disclosure is similar in nature to that of the other affected persons. In my view, it would be inappropriate to treat the information which relates to one affected person in a different fashion from that relating to the others.

Less significant factors include the fact that the letters from the affected persons to the Ministry which comprise the majority of the records were written over seven years ago and that several of the affected persons no longer hold a position with the organization on whose behalf the letters were written.

Considered objectively, I find that the connection between the disclosure of the information relating to the affected persons which is contained in the records and the threat to their health or safety is too remote. In my view, the affected person resisting disclosure has not provided the kind of evidence necessary to establish a clear and direct linkage between the disclosure of the information in the records and a serious threat to his/her health or safety.

Based on my objective assessment of the reasonableness of the affected person's concerns for his/her health or safety, I find that there does not exist a reasonable likelihood of a serious threat to the personal health or safety of any of the affected persons. The information in Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 is, accordingly, not exempt from disclosure under section 20.

ORDER:

1. I order the Ministry to disclose Records 2-3, 3-1 to 3-6, 3-9 to 3-13, 3-15 to 3-19, 4-2 to 4-4, 4-9, 4-15 to 4-16 and 4-33 to 4-34 to the appellant by providing her with a copy by **January 25, 1999** but not before **January 18, 1999**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: December 17, 1998
Donald Hale
Adjudicator