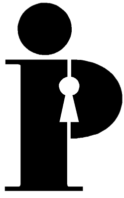
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

Reconsideration Order R-980012

Appeal P_9700149

Order P-1482

Ministry of the Attorney General

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This order supercedes Order P-1482 which was rescinded on March 11, 1998.

BACKGROUND AND NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of records relating to "all instances in which the Attorney General has been asked to order an investigation into an alleged hate crime or to consent to a prosecution under the hate law of the Criminal Code".

The Ministry located 269 records, totalling approximately 2968 pages, which were responsive to the request. The Ministry granted partial access to approximately 920 pages, claiming exemptions pursuant to sections 14(1)(a), (b), 19 and 21 of the Act for the undisclosed information. The Ministry denied access in full to 48 pages pursuant to section 21 of the Act and approximately 1400 pages pursuant to both sections 20 and 21 of the Act. In addition, 200 of the 1400 pages to which access was denied under section 20 of the Act were also denied pursuant to sections 14(1)(a) and (b). Finally, the Ministry denied access to approximately 600 pages pursuant to section 22(a) of the Act and informed the appellant that it would indicate where this information was publicly available. The appellant appealed the Ministry's decision to deny access.

During mediation, the Ministry provided the appellant with information with respect to the location of the 600 pages of publicly available records. In addition, the appellant advised the Appeals Officer that she did not require:

(1) any personal information, with the exception of the personal identifiers of individuals who appeared to be acting in their professional or employment capacities at the time the records were created (Records 3 to 4, 14, 21, 30 to 31, 34, 37, 60, 62 to 64, 68, 70, 72 to73, 76 to 79, 87, 91 to 92, 99, 111, 145, 159 to 160, 166, 172, 174 to175, 177, 178 to180, 185, 197 to198, 202, 205 to 207, 210, 221, 224, 228 to 229, 233, 250 and 255);

(2) any records which were currently the subject of an ongoing law enforcement matter or investigation for which the section 14(1)(a) and (b) exemptions had been claimed; and

(3) the records to which section 19 of the Act had been applied, except Records 224 and 245.

The 48 records to which access was denied in full pursuant to section 21 of the Act are handwritten letters or notes. The appellant agreed to the Ministry's offer to type these letters and notes and then sever personal identifiers from them for a fee. In addition to the records referred to in paragraph (1) above, the records, either in whole or in part, for which section 20 of the Act was claimed (Records 3 to 5, 15, 17 to 20, 23, 26 to 36, 40, 43 to 44, 48, 52, 87, 91 to 94, 98 to 99, 108, 141, 143, 155 to 156, 158, 162 to164, 176, 178, 180, 184 to 185, 187, 189, 197 to198, 200, 202 to 205, an unnumbered record which precedes Record 207, 207 to 210, 215, 219, 221,

223, 226, 231 to 232, 238, 244, 250 and 261 to264) remained at issue. As a result of the mediation efforts of all parties there remained 102 records at issue, either in whole or in part.

RECORDS AND EXEMPTIONS AT ISSUE

During mediation, as noted above, the appellant indicated that she was not interested in receiving records to which sections 14(1)(a) and (b) had been applied. In addition, she indicated that she was not pursuing those records to which section 19 had been applied except for Records 224 and 245. In its representations, the Ministry stated that the exemptions in sections 14(1)(a) and (b) had also been claimed for these two records. As the appellant was not interested in records to which section 14 has been applied, it would serve no useful purpose to adjudicate the section 19 claim. Accordingly, I found that these two records were not at issue in this appeal in accordance with the appellant's direction concerning section 14(1).

Therefore, the exemptions which remained at issue in the inquiry leading to Order P-1482, and the records to which they were applied, consisted of the following:

- danger to safety or health - section 20 (Records 3 to 5, 15, 17 to 20, 23, 26 to 36, 40, 43 to 44, 48, 52, 87, 91 to 94, 98 to 99, 108, 141, 143, 155 to 156, 158, 162 to 164, 176, 178, 180, 184 to185, 187, 189, 197 to 198, 200, 202 to 205, an unnumbered record which precedes Record 207, 207 to 210, 215, 219, 221, 223, 226, 231 to 232, 238, 244, 250 and 261 to 264); and

- invasion of privacy - section 21(1) (Records 3 to 4, 14, 21, 30 to 31, 34, 37, 60, 62 to 64, 68, 70, 72 to 73, 76 to 79, 87, 91 to 92, 99, 111, 145, 159 to 160, 166, 172, 174 to 175, 177, 178 to 180, 185, 197 to 198, 202, 205 to 207, 210, 221, 228 to 229, 233, 250 and 255).

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only.

Following my review of the representations and the records, I found that some of the records contained the personal information of members of the public who had written to the Ministry. As the appellant was not interested in receiving this category of information it was no longer at issue.

However, I found that the remaining information to which the Ministry had applied section 21(1) was not personal information but was, rather, information about individuals in their professional or employment capacity.

With respect to section 20, I found that, in the circumstances, the reasoning I had applied to similar types of records in Order P-1452 was equally applicable. Accordingly, I found that section 20 did not apply.

Shortly after I issued Order P-1482, the Ministry made an application to the Divisional Court for judicial review of the order. Upon receipt and review of the submissions of the Ministry set out in its factum as well as upon consideration of a recently issued decision of this office (Order P-

1538), I determined that I had failed to consider a prior line of decisions of this office holding that disclosure under the Act effectively constitutes disclosure to the world. I was also mindful of other alleged defects in my order raised by the Ministry regarding the definition of personal information. Consequently, I concluded that I failed to conduct an inquiry required of me under section 54(1) of the Act, and determined that this was an appropriate case to rescind and reconsider the decisions in the order in their entirety. It was agreed that the judicial review hearing would be adjourned to a later date.

In a letter dated March 11, 1998, I advised the parties that this appeal was to be reconsidered and advised them that they could rely on their original representations or could provide new or additional representations. In addition, Order P-1482 was made in the absence of notification of individuals whose interests might be affected by disclosure of the records (the affected persons). In order to fully canvass all of the issues in this appeal, I notified 59 affected persons. The original Notice of Inquiry was sent to all of the parties. Additional representations were received from the Ministry. The appellant submitted representations in response to this Notice. Representations were received from four affected persons. One affected person consented to the disclosure of any information in the records pertaining to her in her official capacity. The other three affected persons objected to disclosure of information pertaining to them. I have considered all of the representations, including those originally submitted by the Ministry.

As I indicated above, the exemptions at issue, and the records to which they have been applied, consist of the following:

- danger to safety or health - section 20 (Records 3 to 5, 15, 17 to 20, 23, 26 to 36, 40, 43 to 44, 48, 52, 87, 91 to 94, 98 to 99, 108, 141, 143, 155 to 156, 158, 162 to 164, 176, 178, 180, 184 to 185, 187, 189, 197 to 198, 200, 202 to 205, an unnumbered record which precedes Record 207, 207 to 210, 215, 219, 221, 223, 226, 231_232, 238, 244, 250 and 261 to 264); and

- invasion of privacy - section 21(1) (Records 3 to 4, 14, 21, 30 to 31, 34, 37, 60, 62 to 64, 68, 70, 72 to 73, 76 to 79, 87, 91 to 92, 99, 111, 145, 159 to 160, 166, 172, 174 to 175, 177, 178 to 180, 185, 197 to 198, 202, 205 to 207, 210, 221, 228 to 229, 233, 250 and 255).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry submits that the name, address and any information leading to the identification of individuals (other than those acting in an official capacity as government officials or those for whom consent has been obtained) mentioned in the records constitutes personal information. The Ministry submits further that the "official capacity" exception to the personal information exemption only applies to officials of institutions subject to the Act. Further, the Ministry argues that the capacity of an individual is irrelevant to a determination of whether information is "personal information". In this regard, the Ministry

submits that if recorded information about an identifiable individual acting in an official capacity is not personal information, there is no need for the exceptions to personal information in section 21(4) which refer to such things as salary range, classification and employment responsibilities of individuals employed by institutions. Finally, the Ministry submits that disclosing that an individual represents a particular religious or racial organization could indirectly provide information about that person's religious beliefs which is "undeniably of a personal nature".

In general, the Ministry is of the view that the sensitive and inflammatory nature of much of the information contained in the records mandates that a high degree of vigilance be exercised in ensuring that the privacy of named individuals is protected.

In a recent reconsideration Order (Order R-980015), Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> 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.

I agree fully with Adjudicator Hale's conclusions with respect to the distinction between information provided by individuals in their professional as opposed to personal capacity. In my view, they apply equally to the arguments put forth by the Ministry in the current appeal.

In regard to the Ministry's position that disclosure of their identities would indirectly provide information about these individuals' religious beliefs which is "undeniably of a personal nature", it may be the case that by working for a particular organization, an individual's religious or political beliefs **may** be revealed. However, in my view, the connection is too remote, in and of itself, to bring the information within the definition of personal information.

It is clear from the records that many of the individuals referred to in the records, other than Ministry or other government personnel, are acting in their professional capacities as an employee, elected official or spokesperson for an organization, and that their involvement in the records is in that capacity. In my view, the sensitivity of the subject matter in the circumstances of this appeal does not affect the nature of this capacity in such a way that the information should alter its characterization as personal information. Accordingly, I find that, with certain exceptions, the information pertaining to individuals in their professional capacity which has been withheld from Records 3 to 4, 14, 21, 30 to 31, 34, 37, 60, 62 to 64, 68, 70, 72 to 73, 76 to 79, 87, 91 to 92, 99, 111, 145, 159 to 160, 166, 172, 174 to 175, 177, 178 to 180, 185, 197 to 198, 202, 205 to 207, 210, 221, 228 to 229, 233, 250 and 255 does not qualify as personal information.

However, in reviewing the records again, along with the submissions of the affected persons who responded to the Notice of Inquiry, I find that my application of "professional capacity" was too broad. It is clear that, while many of the individuals are referred to in the records by their "official" titles, it is equally clear that their employment responsibilities would not normally entail communications of the nature identified in the records. Many of these individuals have expressed grave "personal" concern about correspondence received by them from sources outside the government. In these circumstances, I find that their identities in the records are not

a reflection of their "professional" or "employment" capacity but are, rather, about them personally and thus qualify as personal information.

Further, some of the records contain the names and addresses of members of the public who have written to the government, or identify individuals who have allegedly distributed hate propaganda. These portions of the records qualify as the personal information of the individuals to whom they relate.

Because the appellant has indicated that she is not interested in receiving personal information, I find that this information is not at issue. For complete clarity, I have highlighted the personal information on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. This information is found on the following records or pages of records: 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 37, 62, 63, 64, 68, 73, 87-1, 111, 145, 166, 177, 178 to 180, 185-1, 202-1, 205-1, 221-1, 228 and 233 and should not be disclosed.

As no other exemptions have been claimed for Records 14, 21, 60, 70, 72, 76, 79, 159 to 160, 172,174 to 175 and 206, and the non-highlighted information on Records 37, 62 to 64, 68, 73, 111, 145, 166, 177, 179, 228 to 229, 233 and 255, this information should be disclosed to the appellant. I will address the remaining records and parts of records for which section 21(1) was claimed (Records 91-1, 92-1, 99-1 and 250-1 to 250-2 and the non-highlighted portions of Records 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 87-1, 178-1, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 207-1, 210-1 and 221-1) below under the discussion "Danger to Safety or Health".

DANGER TO SAFETY OR HEALTH

Section 20 of the Act states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Ministry submits that the records exempted under section 20 of the Act are rife with offensive, inflammatory and hateful comments or images directed at identifiable groups. The Ministry believes that publication of such material can reasonably be expected to seriously threaten the health and/or safety of individuals targeted by such hate propaganda.

In Order P-1538, Adjudicator Donald Hale had occasion to consider almost identical representations submitted by the Ministry in that appeal (which concerned records in a similar vein to those at issue in the current appeal).

He said, at pages 6 and 7:

> The Ministry urges me to rely on the wording of the prohibitions against the dissemination of hate propaganda which are found in the Criminal Code to find that these records fall within the ambit of section 20. It indicates that it is reluctant to participate in the further dissemination of this type of material, particularly pursuant to a request under the Act. The Ministry also refers to a

decision of the Supreme Court of Canada, R v. Keegstra (1990), 61 C.C.C. (3d) 1, quoting former Chief Justice Brian Dickson at pp. 36-37 of the decision as follows:

> Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is the harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence.
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> ...
>
> The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance.
>
> ...
>
> The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society. With these dangers in mind, the Cohen Committee made clear in its conclusions that the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada.

Finally, the Ministry points out that the disclosure of information under the Act which is not "personal information" is considered to be disclosure to the world, and not just to the requester.

I am disturbed by the subject matter of these records and find abhorrent the messages which they convey. Records 3-22 and 3-36 to 3-37 state that they originated with the organization which is the subject of the request. Presumably, the appellant is aware of their content and may have even participated in their creation. I agree with the comments of the former Chief Justice of Canada with respect to the negative impact which hate propaganda such as that reflected in Records 3-22 and 3-36 to 3-37 has on the minorities targeted by such material and on Canadian society generally. I also acknowledge that the disclosure of this information to the appellant under the general access provisions of the Act may be considered to be disclosure to the world, as was recently reiterated by Assistant Commissioner Tom Mitchinson in Order P-1499 in the context of section 14(1)(e) of the Act.

In my view, the Act was not intended to assist individuals in the propagation and dissemination of hate propaganda, nor to put the government in the position of being required to do so, whether by disclosure to the individual or group

> responsible for creating it or to others seeking access as members of the general public.
>
> ...
>
> The Supreme Court of Canada in the Keegstra case recognized that harm to individuals and identifiable groups within Canadian society can reasonably be expected to flow from the dissemination of such material. In my view, the promotion of hatred against identifiable groups in Canadian society is the purpose behind the publication of information like Records 3-22 and 3-36 to 3-37 by groups such as that led by the appellant. Accordingly, I find that the disclosure of this information could reasonably be expected to result in precisely the type of harm contemplated by section 20 of the Act. Because of the scurrilous nature of the information contained in Records 3-22 and 3-36 to 3-37, I accept that its disclosure could reasonably be expected to seriously threaten the health or safety of the minority groups so cruelly maligned in these documents. They are, accordingly, exempt from disclosure under section 20.

The appellant urges me not to vary my decision in Order P-1482. She submits that the components of the section indicate that "an individual" must be threatened by the release of the records and that section 20 is not extendible to racial groups. She argues that this threat must be directed at a particular individual. The appellant submits that "individual" is defined in the dictionary (Funk & Wagnalls Standard College Dictionary) as meaning "a person", "a single human being as distinct from others". In this regard, she contends that Adjudicator Hale erred in finding that the health or safety of "minority groups" could reasonably be expected to be threatened. She stresses that the intention of the Act is that exemptions be construed narrowly and that such an expansive interpretations of this section is inconsistent with this intention.

I accept the appellant's definition of "an individual" and agree that section 20 contemplates that "an individual" must be threatened by disclosure of the records. However, in my view, a finding that a particular group is maligned and threatened by the content of the records is merely a preliminary step to finding that members of that group or "individuals" belonging to that group are equally maligned and threatened by the information contained in the records. Further, I do not accept the appellant's argument that the threat must be to a "particular" individual. In my view, an individual must be read to mean any individual, including any member of an identifiable group.

In retrospect, I find that my reasoning in Order P-1482 was flawed in that it took into consideration irrelevant factors and failed to consider those factors as identified above in Order P-1538. After considering the nature of the records and the reasoning referred to above, I conclude that disclosure of these records which contain hate propaganda could reasonably be expected to seriously threaten the health or safety of the individuals who belong to minority groups.

The Ministry has also exempted the names, addresses and affiliations of a number of individuals under section 20. The Ministry's representations do not directly address this issue. Nor do the representations submitted by the affected persons who responded to the Notice of Inquiry. Although the Ministry does not specifically address this information in its representations under

section 20, it makes a brief reference to its concerns regarding disclosure of this information in its discussion under section 21(1). In this regard, the Ministry submits:

> Given the inflammatory nature of much of the information and opinion in the responsive records, the Ministry submits that the identity of named individuals should not be disclosed so as to ensure their peace and future safety.

There has been no suggestion, nor is there any evidence in the representations or the records themselves to support an argument that the health or safety of any individual who has spoken out in their professional capacity against hate propaganda has or will be threatened by disclosure of these types of records. I find that I have not been provided with sufficient evidence to establish a reasonable expectation that disclosure of the identities of individuals in their official capacities could seriously threaten anyone's safety of health.

In conclusion, I find that the following records or parts of records are exempt from disclosure under section 20 of the Act: Records 3-2 to 3-9, 4-5 to 4-7, 5, 15, 17 to 20, 23, 26 to 29, 30-3 to 30-4, 31-2 to 31-3, 32, 33, 34-2 to 34-3, 35, 36, 40, 43, 44, 48, 52, 87-3 to 87-5, 91-2, 92-2, 93, 94, 98, 99-2 to 99-22, 108, 141, 143, 155, 156, 162 to 164, 176, 178-2 to 178-3, 184, 185-3 to 185-4, 187, 189, 197-2 to 197-5, 198-2 to 198-36, 200, 202-3 to 202-32, 203, 204, 205-2 to 205-3, the unnumbered page preceding Record 207, 207-2 to 207-3, 208, 209, 210-2, 215, 219, 221-2 to 221-4, 223, 226, 231, 232, 238, 244, 250-5 to 250-7 and 261 to 264.

As no other exemptions apply to the remaining records or parts of records (Records 91-1, 92-1, 99-1 and 250-1 to 250-2 and the non-highlighted portions of 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 87-1, 178-1, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 207-1, 210-1 and 221-1) they should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the following records and parts of records to the appellant by providing her with a copy of these records and parts of records by **February 2, 1999** but not before **January 28, 1999**: Records 14, 21, 60, 70, 72, 76, 79, 91-1, 92-1, 99-1, 159 to 160, 172, 174 to 175 and 250-1 to 250-2 and the non-highlighted portions of 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 37, 62 to 64, 68, 73, 87-1, 111, 145, 166, 177, 178-1, 179, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 206, 207-1, 210-1, 221-1, 228_229, 233 and 255.

2. I uphold the Ministry's decision to withhold the remaining records from disclosure.

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

Original signed by: December 29, 1998
Laurel Cropley
Adjudicator