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

ORDER PO-1747

Appeal PA-980336-1

Ministry of Health

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Health (now the Ministry of Health and Long-Term Care) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the following information:

- the number of obstetricians/gynaecologists billing the Ontario Health Insurance Plan (OHIP) in each of 1993, 1994, 1995, 1996 and 1997;
- the number of obstetricians/gynaecologists billing OHIP for one or more therapeutic abortions in each of the years listed above; and
- the number of therapeutic abortions billed to OHIP in each of the years listed above.

The Ministry located three records, each one responsive to one part of the request. The Ministry described the records as follows:

Record 1	Distribution of Ontario Licensed Physicians By OHIP Payment Level and Specialty
Record 2	Obstetricians/Gynaecologists Billing Fee Schedule Codes S752 and S785
Record 3	Fee Schedule Code Analysis of S752 and S785 "Therapeutic Abortion" Codes.

The Ministry has further explained that Record 2 is a report which lists, by the requested fiscal years, the number of Obstetricians/Gynaecologists who billed OHIP under two "therapeutic abortion" codes, and Record 3 is a report which states the total number of "therapeutic abortion" claims paid in each of the requested fiscal years.

The Ministry granted partial access to Record 1, stating that the remaining portions of the record were not responsive to the request since they relate to specialties other than Obstetrics/Gynaecology. The Ministry denied access in full to Records 2 and 3 on the basis of the exemptions at section 14 (law enforcement) and 20 (danger to safety or health) of the Act.

With respect to section 14, the Ministry stated:

> ... Clauses 14(1)(e) [danger to life or physical safety] and 14(1)(i) [danger to security of a building] have been used to support [the section 14] exemption ... In exercising the discretion to exempt this portion of the record the possibility that the disclosure of abortion related statistics may endanger the safety of service providers was considered.

With respect to section 20, the Ministry stated:

> ... As mentioned above, the disclosure of abortion related statistics may endanger the safety of service providers.

The requester, now the appellant, appealed the Ministry's decision to deny access to Records 2 and 3. The appellant does not take issue with the Ministry's decision regarding Record 1. In his letter of appeal, the appellant stated:

> ... The access request was specifically framed to avoid such situations by not requesting information for individual communities but rather the entire province as a whole, and not requesting information which could identify any individual. No information is sought other than raw historical statistical information and the ministry's suggestion that province-wide numbers could lead to harm to an individual is absurd.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant and the Ministry. I received representations from both parties.

DISCUSSION:

INTRODUCTION

The Ministry provides background information relating generally to the abortion issue before providing specific representations on the section 14(1) and 20 exemptions:

> Few issues have the staying power of the debate on abortion. In what has been termed "the increasingly deadly abortion debate", both sides, Pro Life and Pro Choice, continue to polarize society with noisy and intimidating public protests, sometimes requiring the forceful separation by police of opposite sides in abortion demonstrations. Attached to these representations are a number of recent media reports that illustrate the frightening context in which the providers of therapeutic abortion services must pursue their work. The fear generated by opponents of abortion extends to the families of providers, as well as to their patients, their staff and co-workers. Hospitals and free-standing clinics themselves are under threat, requiring constant security measures to be in place.
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> The government's and the ministry's position is that abortion services are medically necessary and must continue to be as equally accessible as possible for women across the province. This accords with the principles of the Canada Health Act, and requires that the provision of abortions services must be defended from any threatened disruption.

The violent acts in which the more extreme participants in the abortion debate increasingly engage include emotional and physical harassment, death threats, and attempted and realized murder. Such acts have forced many physicians to stop providing abortion services because of concerns for their physical safety and that of their families. This in turn has placed in serious jeopardy fulfilment of the goal of providing access to abortions sufficient to meet demand. The ministry therefore views with grave concern the disclosure of any information which could result in individual physicians and/or medical facilities declining to provide abortion services. It is equally concerned when information is disclosed that could result in harassment and intimidation of women seeking abortion services, services which are their right.

In years past the ministry's annual statistics on total numbers of abortions provided in the province, or numbers of providers, would have been, and were, disclosed as routinely as statistics on many other OHIP-insured services. Today, even such overall indications of how few or how many abortions are being performed are enough to inflame passions on one or other side of the abortion debate. Pro Choice groups use the figures to argue for an increase in the availability of abortion services, and this stance in itself draws the anger of the Pro Life groups. Pro Life groups see a decrease in the number of abortion providers, or abortions performed, as evidence that their harassment techniques are "successful". An increase in the numbers in either of these categories of statistics serves as a call to this group to step up its efforts to prevent abortions from taking place. Thus, regardless of what the statistics show, one group or the other may use them to advance its own ends, with the resulting violence that occurs.

Reports in the Toronto media on the clash between opposing sides in the debate that occurred on July 10, 1998 outside the Queen's Park legislature are proof of the threat to law and order that such polarization produces. With public discussion of abortion escalating into such violent reactions and worse, including murder, it is understandable that many physicians' fears drive them to withdraw their services in this highly controversial and volatile field.

In the past, the ministry has disclosed statistics on abortion provided no individual patient or provider could be identified, its main concern then being the violation of individual privacy. However, with the increasing polarization of views on the treatment itself, it is clear that the individuals involved in providing or receiving this service are not the only ones who need protection. Reluctantly, the ministry has been forced to rethink its position on open access to abortion statistics of any kind, even where personal privacy is not at issue.

What abortion-related statistics now too often contribute to is uncontrolled passion, be it expressed by a mob or by a lone individual who stalks and is willing to kill, such as the one suspected of fatally shooting Buffalo gynaecologist Dr. Barnett Slepian on October 23, 1998. Dr. Slepian was the third U.S. abortion provider to have been murdered since

> 1993. In Canada, three abortion providers have been wounded since 1995. The ministry is now facing up to an inescapable reality: even minimal statistics on abortion pour fuel on the flames of searing disagreement in this area of public debate. The resulting atmosphere of hatred and fear is not conducive to the maintenance, let alone the improvement, of health services such as abortion, as well as related counselling and other services in the field of family planning.
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> ... [W]hile it may be difficult to anticipate with certainty the consequences of any particular disclosure of information of abortion-related statistics, there is increasing evidence that the public debate on abortion, in which such information is used by either side, can no longer be guaranteed to remain peaceful. From the bombing of the Morgentaler clinic in Toronto in 1992, to the violent clash of demonstrators at Queen's Park in July of 1998 and the shooting of the Buffalo abortion provider in October of that same year, there is no sign of any diminution of the potential for public violence. The tense demonstrations on Parliament Hill by supporters on both sides of the abortion debate a mere three weeks ago, on May 14, 1999, to mark the 30th anniversary of the decriminalization of abortion in Canada provides further evidence of this fact.
>
> Although the ministry has no evidence of a direct "cause and effect" relationship between the release of abortion statistics and the escalation of violent acts, it believes that such disclosure "could reasonably be expected" to result in such harms.

The appellant also provides a general summary of his position, prior to making specific representations on the issues under the relevant exemptions:

> Despite identical requests made by the appellant to other Canadian jurisdictions having all been complied with, ... the [Ministry] is still refusing to release the information.
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> . . . . .
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> ... [T]he disclosure of information containing general, aggregated statistics relating to the performance of abortions in Ontario could not reasonably be expected to endanger the lives of any individual(s). This appeal can be significantly distinguished from the decision of P-1499 in that the appellant is not seeking information that reveals the identity of clinics, or individuals involved in the performance of abortions in Ontario; nor does it seek information that would reveal the areas within the province where abortion activity is or is not taking place.

DANGER TO LIFE, PHYSICAL SAFETY OR SECURITY OF A BUILDING

Introduction

The Ministry claims that the exemptions contained in sections 14(1)(e) and (i) apply to Records 2 and 3. These sections read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> (e) endanger the life or physical safety of a law enforcement officer or any other person;
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> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In Ontario (Minister of Labour), the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety . . . Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

Ministry's representations

The Ministry submits:

> ... [B]ased on past and continuing events, there is ample evidence to support a reasonable expectation that disclosure of the requested information could endanger the life or physical safety of various individuals as well as endangering the security of the facilities where abortions are performed, and, in the course of violent demonstrations, the security of public buildings such as the Queen's Park legislative or other government buildings.
>
> Harassment has been, and remains, a reality in Ontario for those involved in the abortion debate from a Pro Choice perspective. Since 1991, this harassment of patients, providers, staff and their family members and neighbours by Pro Life activists has, in some instances, escalated into violence.

The Ministry went on to refer to several violent incidents involving abortion service providers and facilities in the United States and Canada which took place during the 1990s. The Ministry continued:

> ... the context in which these and other violent events have occurred is one liable to be fed by the slightest provocation. Even data reflecting merely the total number of abortions performed in Ontario on an annual basis, or the total number of providers performing them, is at risk of being manipulated and presented to the public in the most inflammatory way possible.
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> The ministry is not suggesting that the appellant may manipulate the data in this way. We are merely pointing to the realistic conclusion that "disclosure to the world" (see Order M-96 and others), by whatever means, is much more than hypothetical in the circumstances of this Appeal. It cannot be ignored that the appellant is a member of the media, from whom wide public circulation of the requested information can be expected. The eventual recipients of the information would doubtless include many individuals and groups on both sides of the abortion debate, a number of whom may elect to employ acts of harassment, vandalism and/or physical violence against persons with whom they disagree or of whose behaviour they deeply disapprove. This is why disclosure of the particular records in this Appeal, unlike those at issue in Order P-1545, would alter the current situation in a way sufficient to raise the reasonable expectation of the harms in clause 14(1)(e) and (i).

Appellant's representations

The appellant refers to previous decisions of this office (Orders 188, P-948, P-1499) and submits that they support his position that sections 14(1)(e) and (i) are not applicable. The appellant states:

> In this appeal, the identity of individual clinics or individuals associated with the clinics performing abortions in Ontario is not sought. Instead, the information being sought is of a general nature and could not serve to identify clinics or individuals associated therewith.
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> It is interesting to note that in P-1499, the Ministry of Health did in fact grant access to records that contained information identical to or similar to that being sought in this appeal. Order P-1499 indicates that the Ministry granted access to records containing information disclosing the number of abortions performed in Ontario without revealing the identity of individual clinics (records described as 5 and 6 in the Order).
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> Orders P-252 and P-557 concern requests for information relating to the use of animal testing at various research facilities in Ontario. The information requested contained the identities of individual research facilities. The respective Commissioners denied access and concluded that it was reasonable to expect that those facilities revealed in the records would be subject to violence or harassment. However, it is significant that in both cases the Ministry had provided information disclosing general statistics on the number and species of animals used in testing without disclosing the individual clinics.
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> In fact, in Order P-1392, Inquiry Officer A. Fineberg ordered the disclosure of information revealing general statistics concerning the number and species of animals being used in testing since individual research facilities would not be revealed.

Analysis

While it is important to take a cautious approach to the issue of disclosure of information relating to abortion services, it does not follow that the disclosure of all such information would give rise to a reasonable expectation of harm (Order PO-1695).

In Order PO-1695, Assistant Commissioner Tom Mitchinson found that:

> ... disclosure of the overall funding levels could [not] reasonably be expected to result in any of the harms outlined in section 17(1)(c). The name of the facility is known to the appellant and others, and disclosing the overall funding level would provide no new or additional identifying information. Funding of this and other independent health facilities is permitted by the [Independent Health Facilities Act], and it is public knowledge that operating costs for independent health facilities are funded by the Ministry [emphasis added].

In two other cases, the Assistant Commissioner found that information which could identify either specific facilities or individuals as being involved in the provision of abortion services should not be disclosed. In Order P-1635, the Assistant Commissioner found personal information which could be used to identify individual providers and particular clinics to be "highly sensitive":

The Ministry [submits]:

> [Anyone who obtains access to the requested information] could compile a list of all [College of Physicians and Surgeons of Ontario] members in active practice with a specialty in obstetrics and [gynaecology] along with their addresses. It is a simple matter to discover which address represents the locations of abortion clinics. It is also a simple matter to match the residential addresses of these individuals. One could then create a website for posting on the Internet of the names, residential and business addresses of [College] members performing abortions.
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> . . . . .
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> ... [P]roviding the bulk data requested could facilitate the compilation, presentation and dissemination of such information concerning, for example, abortion providers, and result in the names of relevant [College] physicians appearing on the U.S. website, or a comparable Canadian one ... [D]isclosure of the requested information could result in an unjustified invasion of the personal privacy of these individuals.

As this example illustrates, information which would arguably be non-controversial when available on a one-off basis can accurately be characterized as highly sensitive (section 21(2)(f)) when considered in bulk format, as in this appeal. This is particularly true when one recognizes that disclosure under the Act is not restricted to the specific requester, but is in effect "disclosure to the world." In my view, this factor alone is sufficient to outweigh the factor favouring disclosure described above.

Therefore, I find that disclosure of the records would result in an unjustified invasion of the personal privacy of the registrants, and that the records are exempt under section 21(1) of the Act.

In Order P-1499, the requester sought access to a record revealing the number of abortions performed by hospital and clinic. The Assistant Commissioner found that the record could serve to identify facilities and individuals involved in providing abortion services, and that disclosure could reasonably be expected to lead to the harms described in sections 14(1)(e):

> ... the Ministry and affected parties have provided sufficient evidence to establish that disclosure of the record could reasonably be expected to endanger the life or physical safety of individuals associated with the abortion facilities. My decision is not based on the identity of the appellant's organization or its activities, but rather on the principle that disclosure of the record must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the pro life movement, including those who may elect to use acts of harassment and violence to promote their cause. Although I acknowledge that similar information has

> previously been disclosed, I also accept the Ministry's position that the more abortion-related information that is made available, such as the numbers associated with each facility, the more likely specific individuals will be targeted for harassment and violence.

This office has also issued a line of decisions in cases involving requests for information concerning animal experiments taking place in registered research facilities (see Orders 169, P-252, P-557, P-1537). The records at issue in these cases can generally be described as statistical reports identifying the numbers and species of animals used by each identified facility. In these cases, the Ministry of Agriculture and Food (and, in some cases, affected persons) claimed that the sections 14(1)(e) and (i) applied, based on serious concerns that disclosure of the records could reasonably be expected to result in employees and facilities being targeted for threats and acts of violence by extremists in the animal rights movement. In each case, this office upheld the Ministry's section 14(1)(i) exemption claim. This office made no findings in these cases on the issue of whether non-identifying, province-wide statistical information is exempt. However, there are indications in these orders that this type of information is made available to the public.

I recognize that the animal experimentation cases present a different context from those involving abortion services. However, the two types of cases are similar to the extent that they both involve concerns that upon disclosure of information, members of extremist groups could reasonably be expected to threaten the health or safety of individuals or commit acts of violence against individuals or facilities. On this basis, the principles derived from the animal experimentation cases are relevant to this appeal.

In both the animal experimentation and abortion cases, information associated with individuals or facilities has been found to meet the "harm" threshold in section 14, while more generalized information which cannot be linked to specific individuals or facilities, or which would not reveal new or additional identifying information, has been considered accessible under the Act.

The British Columbia Information and Privacy Commissioner recently issued an order which reinforces the approach in the Ontario cases described above. In Order No. 323-1999, a requester sought access to "the amount of abortions performed [at Vancouver General Hospital and Health Sciences Centre] during the calendar years 1997 and 1998." The hospital refused access on the basis of section 19 of the B.C. Freedom of Information and Protection of Privacy Act, which contains very similar wording to sections 14(1)(e) and 20 of the Act. Commissioner David Loukidelis found that this information was not exempt. He stated:

> This is not the first time requests for access to records involving abortion services have been the subject of an inquiry under the Act. Order No. 7-1994 and Order No. 18-1994 focussed on s. 19(1) of the Act and the safety of individuals involved in providing abortion services to the public. In those cases, however, my predecessor was faced with requests for the names of individuals. Based on the evidence in those cases, it was decided that s. 19(1) authorized refusal of access to the requested personal information.
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> . . . . .

> ... it is relevant to my decision that it is already publicly known that VGH offers abortion services. The material submitted to me by both parties clearly establishes this.
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> Having reviewed all of VGH's material with care, I am unable to agree that it supports the "inextricable sequence" articulated by VGH, i.e., by which release of the requested information as to numbers of abortions performed can logically be connected to a harm identified in s. 19(1). Again, s. 19(1) requires there to be a "reasonable expectation" that disclosure of the information in issue is likelier than not to lead to the identified harm. I cannot conclude there is such a reasonable expectation of harm, in the particular circumstances of this case, flowing from disclosure of the requested information. VGH's materials attest to the general context in which abortion services are provided, i.e., a climate where violence, intimidation and threats do occur. But the materials do not, in my view, support the position advanced by VGH respecting release of this statistical information.
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> This is not to say the s. 19(1) test can never be met in cases involving such information. The situation might be different if, unlike the case here, it is not publicly known that a particular hospital or clinic provides abortion services. If public confirmation of that fact alone could, in the circumstances, be reasonably expected to threaten anyone else's health or safety, s. 19(1) could well apply. This result may be even more likely if the hospital or clinic is in a small community and has minimal security arrangements available to it. The evidence in such cases would, of course, be determinative.

In the United States, generalized, statistical information similar in nature to the requested information regarding numbers of abortions is widely available, mainly on the basis of statutory requirements. Constitutional challenges to these requirements have been dismissed by the Supreme Court of the United States [Planned Parenthhood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)].

In the state of Connecticut, the Freedom of Information Commission considered a request for access to abortion figures under that state's Freedom of Information Act (Docket #FIC 1997-092). In upholding a denial of access on the basis of an exclusion for "morbidity and mortality" information, the Commission stated:

> The Commission notes that the very broad language of [the exclusion] precludes its ordering disclosure of the raw data information which was requested in this case. The Commission notes its concern when as in this case raw data or statistical information is barred from disclosure where no reasonable risk of identifying the subject of an abortion or the individual performing such abortion exists.

Pursuant to a request under a freedom of information statute, the Supreme Court of Illinois in Family Life League v. Department of Public Aid, 112 Ill. 2d 449 (1986) ordered disclosure of (among other information) the numbers of abortions performed by providers, rejecting arguments that disclosure would

lead to threats and harassment.

Like the B.C. and Ontario cases, the U.S. authorities suggest that generalized statistical data regarding abortion services should be accessible under freedom of information legislation.

The information at issue in this appeal consists of general statistical information on a province-wide basis. This information cannot be linked to any individual facility or person involved in the provision of abortion services. I do not accept that the sequence of events, from disclosure to the harms outlined in sections 14(1)(e) and (i), could reasonably be expected to occur. While I accept the Ministry's submission, supported by ample evidence, that individuals and groups on both sides of the abortion debate have been subjected to threats, intimidation, and acts of violence, in my view, any link between disclosure and the harms in these sections is exaggerated. The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person, or to the security of a building, vehicle or system or procedure established for the protection of items within the meaning of sections 14(1)(e) and (i) of the Act.

This finding is in keeping with a fundamental purpose of the Act, as recognized by the Supreme Court of Canada:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry . . . Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable . . . [Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 at 403, per La Forest J. (dissenting on other grounds)].

In my view, to deny access to generalized, non-identifying statistics regarding an important public policy issue such as the provision of abortion services would have the effect of hindering citizens' ability to participate meaningfully in the democratic process and undermine the government's accountability to the public.

Conclusion

I find that the requested information is not exempt under section 14(1)(e) or (i) of the Act.

DANGER TO SAFETY OR HEALTH

Regarding section 20, the Ministry submits:

> ... the factual information and arguments [the Ministry] has used to support its application of clauses 14(1)(e) and 14(1)(i) ... also support its application of this section of the Act. The individuals it views to be at risk, should disclosure of the records at issue in the current Appeal occur, include abortion providers, their patients, staff and family members, as well as supporters/members of both Pro Life and Pro Choice organizations and innocent bystanders at demonstrations where such organizations clash.

For the reasons set out in my analysis under sections 14(1)(e) and (i), I find that section 20 also does not apply in the circumstances of this appeal.

ORDER

1. I do not uphold the Ministry's decision to deny access to Records 2 and 3 under sections 14(1)(e), 14(1)(i) and 20.

2. I order the Ministry to disclose Records 2 and 3 to the appellant no later than **February 16, 2000**.

Original signed by: January 26, 2000
David Goodis
Senior Adjudicator