ORDER PO-2280-I

Appeal PA-020382-2

Ministry of Health and Long-Term Care

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Health and Long-Term Care (the Ministry) made pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request for the following information:

1. All documents being held by the offices of [the Premier, the Minister of Health and Long-Term Care, three named Ministry employees and one other named individual], and anyone else who was involved in issues involving my daughter […]. I request all documents which contain my daughter's name […] or my name […], which include, but are not restricted to housebook notes, briefing notes, correspondence, e-mail messages, memos, letters, telephone logs, internal communications etc. dated from May 1, 2002, to the present.

2. Documents of all communication between the government and [a named health care centre (the centre), a named hospital (the hospital), a named charitable organization], and any other organization or person concerning my daughter […] or myself […], dated from May 1, 2002, to the present.

By way of background, the appellant's daughter was severely physically challenged since birth with cerebral palsy. She had been a patient of the centre until she was admitted to the hospital for a surgical procedure where she died.

The Ministry granted access in whole or in part to 22 records it identified as responsive to the appellant's request. The Ministry also provided an index showing that it is relying upon sections 19 (solicitor-client privilege) and 21 (invasion of privacy) to exempt certain records or parts of records. With respect to the section 21 exemption claim the Ministry indicated that it was relying upon sections 21(3)(a), 21(3)(d) and 21(3)(g) to support its position.

The appellant appealed the Ministry's decision to deny access to records or parts of records and also indicated that she believes that more records exist.

During the mediation stage, the appellant provided the mediator with information to support her belief that more records responsive to her request exist. The mediator forwarded this information to the Ministry and asked it to conduct a further search for records. The Ministry conducted a further search and located some additional responsive records.

With respect to the appellant's request for records being held in the Premier's Office, the mediator advised the appellant that this part of her request can be transferred to that office or she can submit a request directly to that office.

With respect to the records at issue in this appeal, the appellant advised the mediator that she already had copies of some of the responsive information, namely, the attachments to record 1 and record 21. Accordingly, this information is no longer at issue.

In addition, after the completion of the mediation stage and the delivery of the Mediator's Report, the Ministry issued a supplementary decision letter informing the appellant of the results of additional searches. The Ministry indicated that it had located 22 additional responsive records. It included a new index with its supplementary decision. The Ministry provided the appellant with full access to 19 of the 22 records and partial access to three (records 7a, 8a and 14a). With respect to records 7a and 8a the Ministry denied access, in part, on the basis that those parts were not responsive to the appellant's request. With respect to record 14a, the Ministry denied access under section 21 and claimed the application of section 66(a) (access by a personal representative of a deceased individual). I note that the Ministry has raised the application of section 66(a) even though the Mediator's Report indicates that the appellant is not seeking access to the records for the purpose of administering her daughter's estate. The Ministry also indicated in its letter that consent had been granted to disclose the remaining portion of record 1.

Prior to seeking representations from the parties this office confirmed with the appellant that she was not interested in the non-responsive information in records 7a and 8a. Accordingly, these records are no longer at issue. With respect record 14a, the appellant indicated that she is interested in the severed information. Therefore, this record remains at issue. The appellant also confirmed that she had received an unsevered copy of record 1. Accordingly, this record and the application of section 19 are no longer at issue.

The appellant has advised this office that in spite of the Ministry's additional search efforts, she believes there are additional responsive records. Accordingly, reasonable search remains an issue in this appeal.

Prior to issuing a Notice of Inquiry, I determined that some of the information at issue contained both the appellant's and other people's personal information. Accordingly, I decided to seek representations on the application of section 49(b), read in conjunction with section 21, in respect of these records.

I first sought and received representations from the Ministry. The Ministry agreed to share its representations in their entirety with the appellant. I then sought representations from the appellant who submitted representations in response. I then sought reply representations from the Ministry on the reasonable search issue and the application of section 21(1)(a) (consent to disclosure) on the invasion of privacy exemption claim. The Ministry submitted additional representations

RECORDS:

The six records described in the following table are at issue in this appeal. I have distinguished between the two indexes by designating those records that come under the second index with the letter "a".

RECORD #	DESCRIPTION	DENIED IN PART OR DENIED IN FULL	EXEMPTION
13	October 8, 2002 internal Ministry e-mail (1 page)	Denied in full	21[21(3)(a), 21(3)(g)]
14	October 9, 2002 fax from [the centre] to two Ministry staff containing a draft letter for their review (2 pages)	Denied in full	49/21[21(3)(a)]
14a	October 10, 2002 exchange of internal Ministry emails (1 page)	Denied in part	21[21(3)]
16	October 15, 2002 internal Ministry e-mail exchange (1 page)	Denied in part	49/21[21(3)(a)]
17	October 15, 2002 internal Ministry e-mail (1 page)	Denied in part	49/21[21(3)(a)]
19	October 15, 2002 internal Ministry e-mail exchange (1 page)	Denied in part	49/21[21(3)(a)]

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Introduction

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Parties' representations

The Ministry states:

> In response to the original request, the Ministry's FOI Program Advisor asked for a search of records through the Program Area Contacts [(PAC)] in the Health Care Programs Division and the Deputy Minister's Office as per the normal process. Searches are conducted through the PACs because the Ministry is large, and PACs have expertise in the records holdings in their respective areas. [T]he PACs in the Deputy's Office work with the Minister's Office staff to complete searches involving the Minister's Office and the Health Care Program Division was the program dealing with this case.
>
> As a result of the searches at the request stage, 22 records were identified as responsive and the requester was provided with a detailed index of those records and the access decision on each along with the decision letter.
>
> . . . . .
>
> During the mediation phase of the appeal, the Ministry, in an effort to resolve this issue agreed to conduct a further search. The Ministry asked, through the Mediator, for information relating to the basis of the appellant's assertion that further records should exist. In response the appellant provided a list of phone calls she had placed and received from various Ministry staff and officials and included a couple of letters and a fax.
>
> Using this documentation the Ministry conducted another search, through the PACs […]. The request for searches of records included the list of telephone calls and documentation and explained that the search should also specifically focus on the records relating to this documentation, and the offices of those named […]. A few additional records were found as a result of this additional search.
>
> In June the appellant was provided with a letter detailing the results of the additional search. The appellant was informed in this letter that searches were conducted in the Minister's Office, Communication and Information Branch, Acute Services Division (new name for Health Care Programs due to reorganization) and the Regional Director's Office.
>
> The Ministry has conducted two searches in response to the request […]. [T]he Ministry respectfully submits that it has fulfilled its obligation for reasonable search for the responsive records.

The appellant asserts that more responsive records should exist in the form of internal Ministry communication, particularly email correspondence. She is surprised that the Ministry's searches

did not produce more communication, including directives and feedback, up and down the chain of command between senior staff in the Ministry's Health Care Programs Division and the Minister's Office. She has this view based on the belief that letters she sent to the Premier's Office would have been passed on to the Minister's Office and then down the chain of command to the Health Care Programs Division. She believes that anything coming out of that office would have been signed by the Toronto Regional Director.

To support her position, the appellant reviews several records to which she was provided either full or partial access and infers from the language used in them that additional internal communication should exist in regard to such things as updating information, clarifying instructions and decision making affecting her daughter.

The appellant also suggests that media coverage of her daughter's struggle to move into the community had been widely covered in the press, on television and even in the Legislature by two members of provincial parliament (MPPs). As a result, the issue of her daughter's discharge from the centre could be embarrassing to the Ministry and the centre. In light of these circumstances, the appellant suggests that there must have been "much discussion and prompt action resulting from these calls and the possible media attention the situation invited." The appellant speculates that there must have been additional information as a result of this level of interest.

In addition, the appellant indicates that several letters regarding her daughter's circumstances were sent to the Premier's Office, with copies sent to the Minister's Office and, in some cases, other MPPs. The appellant states that copies of these letters and the action they prompted have not been shared with her.

In reply, the Ministry provides comprehensive representations in response to those submitted by the appellant.

The Ministry provides further details regarding its initial search conducted by PACs. The Ministry states that the PACs are appointed by officials in their areas based on their knowledge of the program areas and record holdings. Their duties include assisting with record searches and preparation of records. The Ministry submits that in this case the searches were carried out by three experienced and knowledgeable PACs who were familiar with this matter: The three were from the Deputy Minister's Office, Acute Services and Community Health Divisions (formerly Health Care Programs) and the Communications and Information Branch. Following this initial search, the search was expanded to include the Minister's Office, coordinated through the Deputy's Office.

The Ministry states that during the mediation stage it agreed to conduct another search after the appellant provided a list of phone calls and emails to assist in locating records she sought. The Ministry states that the appellant's list of phone calls and emails were provided to the individuals conducting the searches to assist them. Additional searches were conducted in the Communication's Branch, Deputy and Minister's Offices, Health Care Programs and the

Community Health Division. The Ministry has provided memoranda issued from each of the above four areas documenting the results of these additional searches. As a result of these searches the Ministry states that three additional records were located. With respect to the search of the Minister's Office, the Ministry indicates that the appellant was provided with a decision and detailed index on the records found as a result of the search of the minister's Office.

The Ministry notes that much of the appellant's submissions focus on her position that additional records should exist from correspondence with the Premier's Office and Minister's Office. The Ministry points out that it is only responsible for searches of Ministry records. Any searches of the Premier's Office would be the responsibility of Cabinet Office.

The Ministry also notes that in her communication with the Ministry regarding correspondence from private individuals in support of her position, the names of the authors of these documents have been severed in order to protect their privacy. The Ministry states that correspondence from these individuals would be filed under the name of the author and so the Ministry would not be able to search for records relating to these authors without their names.

With regard to the appellant's assertion that there should be extensive records of emails and telephone calls, the Ministry states that where phone logs exist the appellant has been provided with copies. However, the Ministry draws a distinction between "transitionary" and official records. The Ministry states that under the *Archives Act* there is no long-term obligation to keep "transitionary" records for extensive periods of time. While the Ministry does not expressly say so, it would appear that the Ministry includes phone logs in this "transitionary" category. The Ministry relies on a fact sheet issued by the Archives of Ontario to substantiate this distinction between "transitionary" and official records.

Findings

Having carefully considered both the appellant's and the Ministry's representations, I am satisfied that the Ministry has conducted a reasonable search for responsive records.

The Ministry has provided detailed representations on the searches it conducted. Initially, searches were conducted by experienced and knowledgeable Ministry staff in the Minister's Office, the Deputy Minister's Office and the Health Care Division. When, during the mediation stage, the appellant provided further information regarding additional records, the Ministry again enlisted experienced and knowledgeable staff familiar with this matter to conduct further searches of the Communication's Branch, Deputy and Minister's Offices, Health Care Programs and the Community Health Division.

The Ministry has demonstrated that it used a comprehensive and systematic approach to conduct its searches. Further, I am satisfied that the Ministry made a genuine and sincere attempt to locate all records responsive to the appellant's request using the information provided by the appellant to the Ministry. While the appellant is adamant that further records should exist, she

has not provided a reasonable basis for reaching this conclusion. Therefore, I will dismiss this part of the appellant's appeal.

DESTROYED RECORDS

Although I find that the Ministry has acted reasonably in making efforts to locate responsive records, I have concerns regarding the Ministry's possible destruction of telephone logs and perhaps other information that the Ministry has labelled as "transitionary" in apparent reliance upon a fact sheet issued by the Archives of Ontario.

Based on the limited information the Ministry has provided, this "transitionary" information appears to have been created by Ministry employees during the course of, and for the purpose of, their employment responsibilities. Since the notes also could have contained personal information of the appellant and/or the appellant's daughter (and possibly others), it is possible that the Ministry breached its duty to retain personal information as set out in Regulation 459, section 5 under the *Act*. That provision states:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom it relates consents to its earlier disposal.

The *Act* and its regulations prevail over any conflicting provision in the *Archives Act* or its regulations (see section 67 of the *Act*).

Although this issue is outside the scope of this appeal, it is an issue that may warrant further consideration by this office.

RECORDS IN THE CUSTODY AND CONTROL OF THE PREMIER'S OFFICE

The appellant contends that additional responsive records should be in the possession of the Premier's Office.

As stated above, during the mediation stage the mediator advised the appellant that this part of her request could be transferred to the Premier's Office or she could submit a request directly to that office. It does not appear that the appellant gave the mediator a response on this point. In the circumstances, I have decided to make no order regarding these records, but the appellant is free to make a request for them directly to the Premier's Office.

In the future, the Ministry should be aware of its responsibility, under section 25(1) of the *Act*, to forward a request within days after receiving it where it determines that another institution has custody or control of the record. Section 25(1) states:

> Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Section 66(a) states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

Under this section, the appellant can exercise the rights of the deceased under the *Act* if she can demonstrate that

- she is the personal representative of the deceased, and
- the right she wishes to exercise relates to the administration of the deceased's estate.

If the appellant meets the requirements of this section, then she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased herself (see, for instance, Orders M-927 and MO-1315).

The appellant indicates in her representations that she does not require the information at issue to settle her daughter's estate. Accordingly, I find that section 66(a) does not apply.

PERSONAL INFORMATION

The Ministry has relied on section 49(b), read in conjunction with section 21, or section 21 alone to deny access to the records at issue. In order to assess whether these provisions apply, it is first necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual, including information relating to the medical history of an individual [paragraph (b)], any identifying number assigned to the individual [paragraph (c)], the address of the individual [paragraph (d)], the opinions or views of the individual [paragraph (e)], views or opinions of another individual about the individual [paragraph (g)], and the individual's name if 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 [paragraph (h)].

To qualify as personal information, the information must be about the individual in a personal capacity. Previous decisions of this office have held that information "about" an individual in his or her professional or employment capacity does not constitute that individual's personal information (Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225).

The Board submits that the records contain the personal information of the appellant's daughter, in particular, information relating to her medical history [section 2(1)(b)] and the daughter's name together with other personal information about her [section 2(1)(h)]. The appellant does not dispute that the records contain her daughter's personal information.

I concur with the Ministry's submissions. I find that all of the records contain information about the appellant's daughter's medical history as well as additional information about her including details relating to her discharge from the centre and admission to hospital for a surgical procedure.

I also find that some of the records contain the personal information of other individuals, including the appellant. In particular, records 14, 16, 17 and 19 contain the personal information of the appellant, her daughter and other individuals. Records 16, 17 and 19 are email transmissions that contain the same severed information with one minor exception. Record 19 also contains the personal email address of a Ministry employee.

Having found that records 14, 16, 17 and 19 contain the personal information of the appellant and other individuals, I will consider the application of the section 49(b)/21 exemption to these records.

On the other hand, records 13 and 14a contain only the personal information of the appellant's daughter. Therefore, I will consider the application of the section 21 exemption to these records.

DISCRETION TO REFUSE ACCESS TO APPELLANT'S INFORMATION/INVASION OF PRIVACY

Introduction

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access.

Section 49(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this case I have determined that records 14, 16, 17 and 19 contain the personal information of both the appellant and other individuals. As a result, I will consider whether the disclosure of this personal information would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Where, however, a record only contains the personal information of another individual (as is the case with records 13 and 14a), and the release of this information would constitute an unjustified invasion of the personal privacy of that individual, section 21of the *Act* prohibits an institution from releasing this information unless one of the exemptions set out in that section applies. Accordingly, I will also consider whether the disclosure of portions of records 13 and 14a would be an unjustified invasion of personal privacy under section 21.

In both these situations (where the records contain the personal information of the appellant and of others, and where the records contain the personal information of another individual only), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be applied or relied upon to argue in favour of disclosure.

Unjustified invasion of another individual's personal privacy

Introduction

For all of the records with the exception of record 14a, the Ministry has submitted that the presumption in section 21(3)(a) applies. For record 14a, the Ministry has not specified the paragraphs under section 21(2) or (3) upon which it is relying. In addition, with respect to record 13 the Ministry has also claimed the application of section 21(3)(g).

Sections 21(3)(a) and (g) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations

Representations

The Ministry submits that all of the records relate to the appellant's daughter's "medical diagnosis, condition, treatment or evaluation". The Ministry states that records 13 and 14 contain information about the appellant's daughter's medical condition, treatment and evaluation; record 14a contains information about her medical condition and treatment; and records 16, 17 and 19 describe her medical history. The Ministry submits that none of the

exceptions in section 21(1) apply and disclosure of this information is presumed to constitute an unjustified invasion of the deceased's personal privacy under section 21(3)(a).

The appellant relies on section 21(1)(a) to justify access to her daughter's personal information. She states that her daughter signed a consent giving the appellant "permission to represent [her daughter] in all matters." The appellant includes a copy of a document with her representations that is signed by the appellant's daughter that gives the appellant "permission […] to represent [her daughter], and to act on [her] behalf in all matters." The appellant also states she and her daughter had jointly initiated another request and appeal before her death and that had her daughter survived she "most likely" would have pursued this appeal herself.

In reply, the Ministry characterizes the "consent" as an "authorization" and states that it "is not sufficiently specific to operate as a consent to the disclosure of the daughter's personal health information to her mother under section 21(1)(a) of the *Act*." The Ministry acknowledges that the intent of the authorization is to convey the daughter's consent to the appellant acting on her behalf on all matters. However, the Ministry submits that the "authorization is more in the nature of a 'power of attorney' than a consent for a specific purpose." The Ministry further submits that even if the authorization were considered a formal power of attorney, it is no longer operative since the appellant's daughter is deceased and a power of attorney is terminated when the grantor dies.

Findings

Consent issue

Dealing first with consent under section 21(1)(a), I do not accept the appellant's position on this point. Section 21(1)(a) requires that consent be provided under the *Act*, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request (Order PO-1723). In order for consent to operate as an exception to the mandatory section 21(1) exemption, it must be in writing, and provided to the institution that has custody and control of the records containing the individual's personal information. The individual can provide this consent either directly to the institution or indirectly through this office on appeal (Order PO-2033-I). I find that the document the appellant relies upon to establish consent does not meet the requirements of the *Act*. The consent is not framed in the context of an access request under the *Act*. It is not addressed to the Ministry in regard to an access to information request for information in its custody and control. It is best characterized as an open-ended authorization pertaining to the appellant's daughter's care. Accordingly, I find that section 21(1)(a) does not apply in the circumstances of this appeal

Records 14, 16, 17 and 19

Based on the submissions of the Ministry and my review of these records, I find that the personal information contained in these records relates to the medical history, diagnosis, condition, treatment or evaluation of the appellant's daughter. Therefore, I find that, to the extent that these

records contain the personal information of individuals other than the appellant, disclosure of this personal information must be presumed to constitute an unjustified invasion of the personal privacy of those individuals. Having found that section 21(3)(a) applies I am precluded from considering any of the factors weighing for or against disclosure under section 21(2). Therefore, the personal information contained in these records is exempt under section 49(b)/21.

Records 13 and 14a

I also find that the personal information contained in these records relates to the medical history, diagnosis, condition, treatment or evaluation of the appellant's daughter. Under section 21(3)(a), the disclosure of this personal information is, therefore, deemed to constitute an unjustified invasion of the personal privacy of this individual. As a result, these records qualify for exemption under section 21 of the *Act*.

Again, with regard to this finding, I am precluded from considering the application of the factors under section 21(2).

SEVERANCE

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt.

The parties did not submit representations on severance.

The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

The Ministry has provided the appellant with some non-exempt information including, for the most part, the appellant's personal information. However, I note that portions of records 13 and 14 contain information that is non-personal in nature and not exempt. In my view, the Ministry should have disclosed this information to the appellant. Accordingly, I will order the Ministry to do so.

There are also some instances where the Ministry has severed the appellant's personal information where it appears together with the personal information of others. In my view, no useful purpose would be served by the severance of this information where the exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible or of no value. A head is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance is not considered "reasonable" where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)].

EXERCISE OF DISCRETION

The section 49(b) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that they could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

In this case, the Ministry has failed to make representations that address its reasons, under section 49(b) for withholding information from records that contain the appellant's personal information.

Accordingly, I will include a provision in this interim order returning the matter to the Ministry for a proper exercise of discretion under section 49(b) of the *Act* with respect to all of the withheld information in records 14, 16, 17 and 19.

ORDER:

1. I uphold the Ministry's decision that all of the severed portions of records 14a, 16, 17 and 19 and some of the severed portions of record 14 qualify for exemption under the *Act*.

2. I order the Ministry to disclose portions of records 13 and 14 no later than **June 2, 2004**, in accordance with the highlighted versions of these records included with the Ministry's copy of this order. To be clear, the Ministry should not disclose the highlighted portions of these records.

3. I order the Ministry to exercise its discretion under section 49(b) of the *Act*, in respect of the withheld information in records 14, 16, 17 and 19, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.

4. I order the Ministry to provide me and the appellant with representations on its exercise of discretion no later than **June 2, 2004**.

5. The appellant may submit responding representations on the exercise of discretion issue no later than **June 16, 2004**.

6. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other outstanding issues.

Original signed by: May 11, 2004
Bernard Morrow
Adjudicator