



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

# **ORDER P-239**

**Appeal 890187**

**Ministry of Government Services**



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## O R D E R

### BACKGROUND :

This is an appeal of a decision made by the Ministry of Government Services (the "institution"). The events leading up to this appeal began when the requester wrote to the Ministry of Housing to request access to all documents relating to an investigation under the Ombudsman Act R.S.O. 1980, c. 325. The subject of the investigation was the "North Pickering Project", a 1972 project of the Ontario Government involving the planned acquisition of some 25,000 acres of property for the development of integrated service, transportation, recreation and community facilities near an airport which the federal government was proposing to build in the area.

Until 1974, the land acquisition for the project was undertaken by negotiation rather than by expropriation with the Ministry of Municipal Affairs and Housing appointing agents to act on its behalf in appraising and negotiating property purchases. The Ombudsman received complaints relating to the activities of some of these agents and the ministry generally. Part of the Ombudsman's investigation into the complaints was carried out by the holding of private hearings and the submission of a report on those hearings to the Ombudsman by the Ombudsman's appointed hearing officer, Mr. Justice Hoilett.

The institution obtained the records which were the subject matter of the request when it took over the real property matters formerly handled by the Ministry of Municipal Affairs and Housing. Accordingly, the Ministry of Housing's Freedom of

Information and Privacy Co-ordinator transferred the request to the institution pursuant to section 25 of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

The institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to the requester to advise him that, pursuant to section 57 of the Act, payment of a fee in the amount of \$1304.75 was required prior to proceeding with his request. The requester accepted the fee and forwarded a cheque for the full amount to the institution.

Following the requester's payment of the fee, the Co-ordinator contacted the requester by telephone to advise him that the records were being prepared for release. As the Co-ordinator and the requester agreed that the requester probably did not require copies of all of the records, arrangements were made for the requester to attend at the institution to examine the records and identify those records which he did require.

Subsequently, the Co-ordinator contacted the requester by telephone to advise him that the institution's Deputy Minister had decided: (1) to deny access to all of the records pursuant to section 21 of the Act; and, (2) to refund his fee payment. The requester appealed the head's decision.

Notice of the appeal was given to the institution and the appellant. The appeal was assigned to an Appeals Officer who obtained and reviewed the records at issue in this appeal. The Appeals Officer attempted mediation but a settlement was not achieved and the matter proceeded to an inquiry.

Notice that an inquiry was being conducted to review the decision of the head was sent to the institution and the appellant. The Notice of Inquiry was accompanied by an Appeals Officer's Report.

Following receipt of the Appeals Officer's Report and prior to submitting representations, a representative of the institution's legal department contacted the Appeals Officer to indicate that the institution was planning to meet with the appellant in an effort to

resolve the appeal. Mediation efforts resumed between the parties with the assistance of the Appeals Officer. The institution provided the appellant with an index of records relating to the request. The appellant identified those records which were of interest to him. The institution released a number of these records to the appellant; however, two of the records (The North Pickering Project Small Acreage Values Review & Analysis, and Cedarwood Update 14 & 15 Jan. 1974) could not be located by the institution.

A Compliance Investigator from this office was assigned to investigate the adequacy of the institution's search for these two records. Following his investigation, the Compliance Investigator concluded that the institution had conducted a reasonable search and that the records, if they still existed, were not within the custody or control of the institution. When informed of the Compliance Investigator's conclusions, the appellant indicated to the Appeals Officer that he was satisfied that the institution had made a thorough search for the records.

Despite the release of a number of records to the appellant, settlement of the appeal could not be effected in respect of four records:

- Record 1** - A 1981 report of a special further investigation of the Deputy Ombudsman on the acquisition of land in North Pickering;
- Record 2** - Three documents prepared by an Ontario Provincial Police Officer for the Director, Criminal Investigations Branch and entered as "Exhibit 2161" to the Hoilett hearings;
- Record 3** - Interview notes prepared by the Ombudsman's staff during the initial investigation and entered as "Exhibits 205, 206, 207 and 208" to the Hoilett hearings; and,
- Record 4** - A memorandum submitted to the Director of the North Pickering Land Acquisition and Management Branch of the Ministry of Housing detailing negotiations regarding the acquisition of a particular property and entered as "Exhibit 2516" to the Hoilett hearings.

During the course of the inquiry, representations were received from the institution and the appellant. Representations were also received from the office of the Ombudsman.

**ISSUES:**

The issues arising in the appeal are as follows:

- A. Whether Records 1 and 3 are subject to the Act.
- B. Whether the information contained in Record 2 qualifies for exemption under section 14(2)(a) of the Act.

- C. Whether the information contained in Records 1, 3 and 4 qualifies as "personal information" as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether the information at issue falls within the scope of the exemption provided by section 21(1) of the Act.

**SUBMISSIONS/CONCLUSION:**

**ISSUE A: Whether Records 1 and 3 are subject to the Act.**

The office of the Ombudsman made submissions concerning Records 1 and 3 as these records were originally sent by the Ombudsman to the Ministry of Municipal Affairs and Housing.

The Ombudsman's office submits that there was a clear legislative intent in the drafting of the Act to enable the Ombudsman to fulfil his/her duties unimpeded by the provisions of the Act. It submits that this intent is evident because the Ombudsman's office is not listed as an institution covered by the Act. The office of the Ombudsman submits that, accordingly, it would be inappropriate to construe the Act as applicable to records sent by the Ombudsman which might be found in the possession of institutions.

Although the Ombudsman's office is not listed among those entities which are to be considered "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated in the Ombudsman's office.

Section 10(1) of the Act provides as follows:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. [Emphasis added.]

It is my opinion that to remove information originating from non- institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act. Therefore, it is my view that the Act can apply to information which originated in the Ombudsman's office which is in the custody or under the control of an institution. I must now determine whether the records are in the custody or under the control of the institution.

In Order 120, dated November 22, 1989, former Commissioner Sidney B. Linden set out a number of factors that would assist in

determining whether an institution has custody or control of a record. Although this is not an exhaustive list, these factors include:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the

institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

Some of the factors listed in Order 120 are evidence of custody, some are evidence of control and some factors are evidence of both. In my opinion, there is an intended distinction between the concepts of custody and control. An institution that has control of a record may not have the record in its custody, alternatively, an institution with custody of a record may have very limited rights of control. In order to fall under the jurisdiction of the

Act an institution need only have custody or control of a record. In the circumstances of this appeal I will be considering the issue of whether the institution has custody of the records.

The office of the Ombudsman has submitted that as the institution does not have the power to govern the use of the records, the records are not in the custody or under the control



of the institution to the extent required to render them accessible under the Act. In my view, the fact that there may be limits on the institution's ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

In Order 120 supra, Commissioner Linden stated that:

In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

It is the position of the office of the Ombudsman that although the institution has possession of the records, it is bare possession which does not amount to custody for the purposes of the Act. I agree that bare possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

In the circumstances of this appeal, I note:

- (1) the records were created by the office of the Ombudsman for use by that office;
- (2) the institution currently has a copy of the records in its possession;

- (3) a copy of the records has been in the possession of the institution for over nine years;
- (4) the institution is responsible for the care and protection of its copy of the records;
- (5) the records relate to the institution's mandate and function;
- (6) the institution responded to the request and participated in mediation implying that it had the right to deal with the records; and,
- (7) the limitations placed on the institution by the Ombudsman do not limit the institution's custody of the records, rather they limit the institution's control of the records.

Having reviewed all of these circumstances, I am of the view that the institution has more than bare possession of Records 1 and 3. I am satisfied that, for the purposes of the Act, the institution has custody of the records.

The institution has argued that even if it has custody of Records 1 and 3, it cannot disclose the records as it is bound by a condition of confidentiality which was imposed by the Ombudsman. This condition was initially imposed when the Ombudsman, who at the time was Arthur Maloney, forwarded these records to the Ministry of Municipal Affairs and Housing. The Ministry of Municipal Affairs and Housing originally received a copy of the records pursuant to section 19(3) of the Ombudsman Act, which provides, in part, as follows:

... if at any time during the course of an investigation, it appears to the Ombudsman that there may be sufficient grounds for his making any report or recommendation that may adversely affect any governmental organization or person, he shall give to that organization or person an opportunity to make

representations respecting the adverse report or recommendation, either personally or by counsel.

The institution claims that the Ministry of Municipal Affairs and Housing received a copy of the records on the condition that it would not release their contents. In support of this argument, the institution has provided this office with a copy of the Ombudsman's letter to the Ministry of Municipal Affairs and Housing which accompanied the records. The institution submits that the Ombudsman lawfully imposed this condition of confidentiality as he was bound by sections 13(1) and 19(2) of the Ombudsman Act, which provide as follows:

13.-(1) Before commencing the duties of his office, the Ombudsman shall take an oath, to be administered by the Speaker of the Assembly, that he will faithfully and impartially exercise the functions of his office and that he will not, except in accordance with section (2), disclose any information received by him as Ombudsman.

19.-(2) Every investigation by the Ombudsman under this Act shall be conducted in private.

The institution submits that since the Ombudsman's request was a lawful requirement, disclosing the contents of the records would result in a violation of the Ombudsman Act and would constitute an offence under section 28(b) of the Ombudsman Act. Section 28(b) provides:

Every person who,

(b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful

requirement of the Ombudsman or any other person under this Act;

is guilty of an offence and liable on conviction to a fine of not more than \$500 or to imprisonment for a term of not more than three months, or to both.

The institution submits that a conflict of statutory provisions exists between the Ombudsman Act and the Act as disclosure of the contents of the records would constitute an offence. The institution further submits that since disclosure of the records would constitute an offence, the principles of statutory interpretation dictate that the Act cannot override the Ombudsman Act and, as such, the records cannot be released to the appellant. The institution submits that, as the Ombudsman Act is "earlier and special" legislation and the Act does not indicate a particular intention to alter or derogate from the Ombudsman Act, the institution is bound, in this particular situation, by the Ombudsman Act and not by the Act.

Although the Ombudsman Act is earlier legislation, the Act is special legislation dealing with access to information and protection of privacy. The Act indicates a particular intention to change the way in which records in the custody or control of institutions are handled. This is evident in section 70 of the Act which provides:

This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force.

This provision indicates that the Act was intended to apply to all records in the custody or under the control of an

institution regardless of whether they had been created prior to the Act coming into force. In this way the Act recognizes that although different requirements concerning the disclosure of records may have been imposed pursuant to earlier legislation, once the Act came into force, these records were also subject to the Act.

As indicated, the institution has argued that the Ombudsman imposed a lawful requirement of confidentiality and that therefore any disclosure of information would constitute an offence under section

28(b). However, the wording of section 28(b) of the Ombudsman Act is such that failure to comply with a lawful requirement of the Ombudsman is only an offence if it is done without lawful justification. In my view, in situations where records are disclosed in accordance with the Act, the records would be disclosed with lawful justification as the Act requires that institutions disclose records in their custody or control that do not fall within any of the exemptions.

As I have found that the institution has custody of the records, the institution is therefore required to disclose the records unless they fall within any of the exemptions under the Act. Such disclosure would be lawfully justified and would not constitute an offence under section 28(b) of the Ombudsman Act.

**ISSUE B: Whether the information contained in Record 2 qualifies for exemption under section 14(2)(a) of the Act.**

Record 2 was entered as "Exhibit 2161" to the Hoilett hearings. It consists of three documents prepared by an Ontario Provincial Police officer assigned to investigate an aspect of the land acquisition. The officer prepared the documents for the benefit of the Director of the Criminal Investigations Branch of the Ontario Provincial Police. The institution is relying on section 14(2)(a) of the Act to exempt this record in its entirety. This section states:

A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

At page 9 of Order 200, dated October 11, 1990, I set out the three part test that must be met in order for a record to qualify for exemption under section 14(2)(a):

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

In applying the first part of this test to Record 2, I must decide if this record is a "report". As stated in Order 200 supra, I consider a record which consists of "a formal statement or account of the results of the collation and consideration of information" to be a report for the purposes of this exemption.

The author of the three documents which form Record 2 was charged with the duty of collating and considering information relating to the land acquisition. The three documents were prepared for the benefit of a branch director, to whom the officer was obligated to provide a formal statement of the results of his work. Accordingly, I am satisfied that Record 2 is a report and therefore satisfies part one of the test.

With respect to the second part of the test, I am informed by the institution in its representations that the three documents were prepared as a result of allegations of criminal fraud in accordance with the provisions of the Criminal Code. The three documents also make reference to allegations of criminal fraud. As an Ontario Provincial Police officer's investigation of alleged fraud could clearly lead to proceedings in a court and the imposition of a penalty, such an investigation satisfies the definition of "law enforcement" contained in section 2(1) of the Act. A review of the

record reveals that all three documents were prepared in the course of the officer's investigation. In my view, the second part of the test has been satisfied for Record 2.

I am also satisfied that the third part of the test has been met for Record 2. Clearly, the Ontario Provincial Police is an agency which has the function of enforcing and regulating compliance with a law.

Former Commissioner Linden considered section 14(2)(a) of the Act in Order 38, dated February 9, 1989. At page 4 of that Order he stated:

Subsection 14(2)(a) is unusual in the context of the Freedom of Information and Protection of Privacy Act, 1987, in that it exempts a type of document, a report. The exemption does not require that the report meet additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.

Under subsection 14(2)(a) the head may exercise his or her discretion to deny access to an entire report.

I concur with Commissioner Linden's view of section 14(2)(a), and adopt it for the purposes of this appeal. In my view, Record 2 in its entirety qualifies for exemption under section 14(2)(a).

**ISSUE C: Whether the information contained in Records 1, 3, and 4 qualifies as "personal information" as defined in section 2(1) of the Act.**

The institution is relying on section 21 to exempt Records 1, 3 and 4 in their entirety. In all cases where an institution has claimed section 21 to exempt a record it is my responsibility, before deciding whether the exemption claimed by the institution applies,

to ensure that the information in question falls within the definition of "personal information" provided by section 2(1) of the Act.

"Personal information" is defined in part as follows:

"personal information" means recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological,



criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (e) the personal opinions or views of the individual except where they relate to another individual, [emphasis added]

Record 1

In my view, only parts of Record 1 contain personal information as defined in section 2(1) of the Act. Within pages I to XXXIV, 1 - 149, and 2633 - 2674 of Record 1, there are references to private citizens who had made complaints to the Ombudsman and various particulars of their complaints on pages 1 - 5 of the Index to Record 1, as well as on pages VII, VIII, 23, 48, 49, 50, 51, 73, 145, 2655, 2656, 2668, 2669, 2671, 2672 of Record 1. I find that this information is recorded information about an identifiable individual and includes the personal views of the individuals. Therefore it qualifies as personal information as defined by the Act.

Pages 150 - 2632 of Record 1 consist of summaries of the interviews conducted with private citizens. I find that this information is recorded information about identifiable individuals relating to financial transactions in which the individuals have been involved,

and includes the personal views of the individuals. This information therefore qualifies as personal information as defined by the Act.

I do note that within pages 150 - 2632 of Record 1 there are references to the municipal location and market value of the properties. Adopting an interpretation of the definition of personal information developed by former Commissioner Linden and applying it to Record 1, I find that the municipal location of a property and its estimated market value are information "about a property and not about an identifiable individual" [see Order 23, dated October 21, 1988] and therefore do not qualify as personal information under the definition contained in section 2(1) of the Act.

#### Record 3

In my view, the information contained in Record 3 consists of the personal opinions or views of the individuals interviewed regarding the acquisition of the land by the government and, therefore, qualifies as personal information under the definition contained in section 2(1) of the Act.

#### Record 4

Record 4 consists of a summary of an interview conducted with private citizens. I find that this information is recorded information about identifiable individuals relating to financial transactions in which the individuals have been involved, and includes the personal opinions or views of the individuals about the government's acquisition of the land. This information therefore qualifies as personal information as defined by the Act.

However, I note that Record 4 contains the municipal location of the property and estimates of the market value of the property. For the reasons previously discussed, this information does not

qualify as personal information under the definition contained in section 2(1) of the Act.

Personal information of the appellant is not contained in any of these records.

As I have found that part of Record 1 and part of Record 4 do not qualify as personal information as defined in the Act, section 21 of the Act cannot apply to exempt these parts of Record 1 and 4 from disclosure.

**ISSUE D: If the answer to Issue C is yes, whether the information at issue falls within the scope of the exemption provided by section 21(1) of the Act.**

Once it has been determined that a record or part of a record contains personal information, section 21(1) of the Act prohibits disclosure of this information except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Guidance is provided in sections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In particular, section 21(3)(f) provides:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (f) describes an individual's  
finances, income, assets,  
liabilities, net worth, bank  
balances, financial history or  
activities, or creditworthiness;  
[emphasis added]

While certain individual lines contained in the records would fall within the presumption under section 21(3)(f) as they describe an individual's assets or financial activities, this is a very small portion of the personal information being considered. The vast majority of the personal information must be looked at in the context of section 21(2). Therefore, I will begin by discussing the application of section 21(2).

Section 21(2) lists various criteria which must be considered in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(f).

Section 21(2) provides as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant has submitted that disclosure of the information is desirable for the purpose of subjecting the activities of the Government of Ontario to public scrutiny [s. 21(2) (a)]. He also indicated that the information is relevant to a fair

determination of his rights since he has an outstanding matter before the Ontario Municipal Board with respect to matters associated with this appeal [s. 21(2)(d)].

The institution submitted that the personal information was considered to be highly sensitive [s. 21(2)(f)] and that it was supplied by the individuals to whom it relates in confidence as the Hoilett hearings were conducted in private [s. 21(2)(h)]. The institution further claims that the goal of subjecting the Government Of Ontario to public scrutiny was addressed by the fact that the substance of the report was released by the Ombudsman in his report. Thus, the institution claims that the issues raised in the Hoilett report were canvassed thoroughly.

In the circumstances of this case, it is my view that the goal of section 21(2)(a), subjecting the activities of the Government of Ontario to public scrutiny, would not be furthered by the release of the personal information of the individuals involved.

Although I am aware of the appellant's desire to obtain the information to assist him in his hearing before the Ontario Municipal board, having considered all of the circumstances set out in section 21(2), I am of the view that concerns about sensitivity and confidentiality outweigh the appellant's concerns that the information is relevant to a fair determination of his rights. It is my opinion that the disclosure of the personal information contained on pages 1-5 of the Index to Record 1, as well as on pages VII, VIII, 23, 48, 49, 50, 51, 73, 145, 150 - 2532, 2655, 2656, 2668, 2669, 2671, 2672 of Record 1 would constitute an unjustified invasion of personal privacy. Similarly, I am of the view that the disclosure of the personal information contained in Records 3

and 4 would constitute an unjustified invasion of personal privacy.

**ORDER:**

1. I order the institution to disclose pages I to XXXIV, 1 - 149, and 2633 - 2674 of Record 1 with the exception of the names of complainants and particulars of their complaints found on pages 1-5 of the Index to Record 1, and pages VII, VIII, 23, 48, 49, 50, 51, 73, 145, 2655, 2656, 2668, 2669, 2671, 2672 of the Record. These portions are indicated on the highlighted pages of the Record which have been supplied to the institution by this office.
2. I uphold the institution's decision not to disclose pages 150 - 2632 of Record 1 and Record 4, with the exception of the municipal address and market value of the properties.
3. I uphold the institution's decision not to disclose Records 2, and 3.
4. I further order the institution not to disclose the parts of Record 1 described in provision 1 of this Order until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give the Ombudsman's office sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the institution or my office within this thirty (30) day period, I order that the part of Record 1 described in provision 1 of this Order be disclosed to the appellant within thirty-five (35) days

of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made.

5. The notice concerning disclosure should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

**POSTSCRIPT:**

In reaching the conclusion that Records 1 and 3 were in the custody of the institution I took into consideration the two main purposes of the Act as well as the potential implications this decision could have for the practices of the Ombudsman. In my view, the conclusion that these records are in the custody of the institution is in keeping with the two central purposes of the Act - access to information and protection of individual privacy. In saying this I note that the result of the application of the Act to these records is such that sensitive personal information has not been disclosed.

Original signed by: \_\_\_\_\_  
Tom Wright  
Commissioner

September 5, 1991  
Date