



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 154

Appeal 880341

Ministry of Community and Social Services



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On September 26, 1988, the Ministry of Community and Social Services (the "institution") received a request for access to "all documentation in possession of your office and specifically any other department in the Ministry of Community & Social Services pertaining to the Second Base Youth Shelter, proposed for the Scarborough area".
2. After reviewing the request, the institution gave notice, pursuant to section 28 of the Act, to Second Base (Scarborough) Youth Shelter (the "affected party") of its intention to release certain records. The affected party was given an opportunity to make representations as to why the records should not be disclosed.
3. The affected party responded by objecting to the disclosure of the records and made representations that were later identified to relate to sections 17 and 21 of the Act.

4. On November 17, 1988, the institution wrote to the requester and the affected party and advised them that it intended to grant partial access to the requested records. The institution raised subsections 13(1), 17(1)(a) and (c), 18(1)(e) and (g) and 21(1) as the grounds for denying access to certain of the requested records. This letter informed both the requester and the affected party that they had 30 days in which to appeal the decision.
5. By letter dated November 30, 1988, the affected party appealed the institution's decision to grant access to certain of the requested records. The disposition of that appeal is the subject of my Order 138 (Appeal Number 880335), dated December 28, 1989.
6. By letter dated December 9, 1988, the requester appealed the institution's decision to deny access to certain of the requested records. This appeal is dealt with by this Order.
7. The relevant records were obtained and reviewed by the Appeals Officer assigned to this case. The Appeals Officer undertook settlement negotiations with the institution, the appellant and the affected party. These negotiations resulted in the release of some additional records to the appellant. However, mediation efforts related to other records were not successful. Also, during the course of mediation the institution raised subsection 12(1) and sections 15 and 19 of the Act as additional grounds for exempting certain records.

8. By letters dated August 31, 1989, I notified the institution, the appellant and the affected party that I was conducting an inquiry to review the decision of the institution. In accordance with my usual practice, the Notice of Inquiry was accompanied by a Report prepared by the Appeals Officer. This Report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This Report indicates that the parties, in making their representations to me, need not limit themselves to the questions set out in the Report.
9. Written representations were received from the institution and the affected party. In its representations, the institution withdrew its claim for exemption under section 15 of the Act. The appellant chose to rely on representations previously made to this Office. I have considered the representations of all parties in making this Order.

The following is a list of records at issue in this appeal, together with the appropriate reference in the Appeals Officer's Report:

<u>Record Description</u>	<u>Number in Appeals Officer's Report</u>
#1 Memo January 21, 1986 (two pages)	List A, document 1

#2	Memo December 23, 1985 (one page)	List A, document 2
#3	Memo September 19, 1988 (one page)))
#4	Memo September 1, 1988 (two pages)) Shown together under) List A, as document 4
#5	Memo August 29, 1988 (one page)))
#6	Memo October 11, 1988 (one page. Severances only at issue)	List A, document 5
#7	Memo September 15, 1988 (one page)	List A, document 6
#8	Memo July 15, 1988 (one page)	List A, document 7
#9	Notes July 18, 1988 (two pages)	List A, document 8
#10	Memo July 12, 1988 (two pages)	List A, document 9
#11	Memo June 20, 1988 (one page)	List A, document 10
#12	Letter June 24, 1988 (four pages including attachments)	List A, document 11
#13	Memo June 20, 1988 (two pages)	List A, document 12
#14	Assistance application (one page)	List A, document 14
#15	Memo dated May 30, 1988 (one page)	List A, document 15
#16	Memo May 30, 1988 (four pages)	List A, document 16
#17	Notes dated March 24, 1988 (four pages)	List A, document 17
#18	Memo dated June 20, 1988 (two pages)	List A, document 19
#19	Internal memoranda (19 pages)	List A, document 20
#20	Notes and correspondence (16 pages. Severances only at issue)	List A, document 23
#21	MB-20 Cabinet document (33 Pages)	List A, document 24
#22	Letter June 1, 1988 (three pages)	List B, document 1
#23	List of names and addresses (one page)	List B, document 2

#24	Board directory (three pages)	List B, document 3
#25	Minutes of meeting March 6, 1986 with attachements (eight pages)	List B, document 4
#26	Statement of Intent (76 pages)	List B, document 5
#27	Ground lease (30 pages)	List B, document 6
#28	Architectural drawings (6 pages)	List B, document 7
#29	Letter March 29, 1988 (one page)	List C, document 1
#30	Letter June 26, 1987 (two pages)	List C, document 2
#31	Letter June 20, 1988 (three pages)	List C, document 3
#32	Letter August 9, 1988 (one page)	List C, document 4
#33	Notes of Meeting Oct. 18, 1988 (three pages. Severances only at issue)	List D, document 2

Clarification with respect to some of these records and their status in this appeal is necessary.

Firstly, the appellant advised the Appeals Officer that the lists of names, addresses and phone numbers of members of the board and staff of the affected party were not required. Therefore, Records #23 and 24 and pages nine and ten of Record #26, which contain this information, do not fall within the scope of this appeal.

Secondly, after a careful review of Records #1, 2, 25, and the last nine pages of Record #19, the institution concluded that these records did not respond to the appellant's request. I have reviewed these records and I agree with the institution that they do not contain information which responds to the appellant's request. Presumably, these records were included in

the list of relevant records in error. Records #1, 2, 25 and the last nine pages of Record #19, therefore, do not fall within the scope of this appeal and are not the subject of this Order.

Finally, although the Appeals Officer's Report identified a letter dated November 3, 1988 which the institution claimed was an exempt record, this letter was subsequently disclosed to the appellant in its entirety and, therefore, is no longer the subject of this appeal.

Preliminary Issue

Before addressing the substantive issues raised in this appeal, I would like to respond briefly to a concern raised by the appellant during the course of the appeal.

The appellant expressed the concern that the section 26 notice received from the institution, denying access to certain records, did not clearly identify how many and which records were being withheld from disclosure. The appellant suggested that if the pages of the various records had been numbered sequentially, it would have been possible for her to determine how many pages of records were at issue in this appeal.

I have reviewed the institution's section 26 written notice to the appellant, and I am of the view that the appellant's concern is a legitimate one. The notice does not contain a clear general description of the records responding to the request, nor does it include a reference to the specific section or sections of the Act being used to exempt each record or specific portions of each record.

When the Appeals Officer prepared his Report, he included in the Report a list of the records responding to the request and the specific section or sections of the Act being used to exempt each record or specific portions of each record. The Appeals Officer's Report was forwarded to the parties on August 31, 1989. I trust that this action by the Appeals Officer has addressed the appellant's concerns with respect to the institution's section 26 written notice.

It is my view that the information contained in the Appeals Officer's Report is clearly the type of information that should have been included by the institution in its section 26 notice. In Order 81 (Appeal Numbers 880117, 880118, 880119, 880120 and 880121), dated July 26, 1989, I outlined the requirements of a written notice given by an institution, under section 26 of the Act. At page 11 of Order 81, I stated:

...the provisions of subsection 29(1)(b) of the Act require that the head provide the requester [in the section 26 notice] with a general description of the records responding to the request, and with respect to all records withheld by the institution, the head should clearly identify the specific sections or subsections of the Act used to exempt specific portions of each record.

It is essential that the institution observe the requirements outlined above when dealing with future requests.

The issues arising in this appeal are as follows:

- A. Whether any of the records are properly exempt from disclosure pursuant to subsection 12(1)(b) of the Act.
- B. Whether any of the records are properly exempt from disclosure pursuant to subsections 18(1)(e) and (g) of the Act.

- C. Whether any of the records are properly exempt from disclosure pursuant to section 13 of the Act.
- D. Whether any of the records are properly exempt from disclosure pursuant to subsections 17(1)(a) and (c) of the Act.
- E. Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.
- F. Whether any of the requested information is personal information as defined in subsection 2(1) of the Act.
- G. If the answer to Issue F is in the affirmative, whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.
- H. If any of Issues A, B, C, D, E or G are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that, information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that where a head of an institution refuses access to a record or part of a record, the burden of proof that the record or a part of the record falls within one of the specified exemptions in the Act lies upon the head of the institution. In this appeal, the affected party has

relied on the exemption under section 17 of the Act, to prevent disclosure of certain records. The affected party, therefore, shares with the institution the burden of proving that this exemption applies to these records.

By way of a background, the affected party is an organization established for the purpose of creating a shelter for homeless youth. It is well-documented in the press that the shelter project proposed by the affected party has met with considerable resistance at the local level. Accordingly, the representations made by both the affected party and the institution in this appeal, for the most part, centred around the possibility that the records at issue or specific portions of the records at issue, if released, could be misused or perhaps even deliberately misinterpreted in order to strengthen resistance to the proposed shelter.

The representations made by the appellant, on the other hand, emphasized the right of the public to access to information, particularly in view of proposed public financing of the project.

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsection 12(1)(b) of the Act.

The institution relied on the mandatory exemption under subsection 12(1)(b) of the Act to deny access to a thirty-three page record - Record #21. This record was identified by the institution to be a submission, made by the institution, to the Management Board of Cabinet.

Subsection 12(1)(b) of the Act provides as follows:

12.--(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

...

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees

...

In its representations, the institution advised that this record was submitted by the institution to the Management Board of Cabinet on December 1, 1987.

After reviewing Record #21, I find that it contains "policy options and recommendations submitted... to the Executive Council or its committees", and, therefore, falls squarely within the exemption under subsection 12(1)(b) of the Act.

On the question of whether the institution should seek to obtain the consent of the Executive Council (the Cabinet) for which, or in respect of which, the record has been prepared, in accordance with subsection 12(2)(b) of the Act, the institution, in its representations, advised that the head had considered but rejected the idea of seeking Cabinet consent to the disclosure of this record under subsection 12(2)(b).

In a previous Order - Order 24 (Appeal Number 880006), dated October 21, 1988, I stated, at page 11, that, in my view, subsection 12(2)(b) does not impose a mandatory requirement on the head of an institution to seek the consent of Cabinet in all

instances where the exemption under subsection 12(1) of the Act has been claimed. However, in that Order, I also stated that it was my view that in all instances where the exemption has been claimed, the head must direct his or her mind to the question of whether or not the consent of the Cabinet should be sought.

In this appeal, I find that the head has properly exercised his discretion in deciding not to seek the consent of Cabinet, with respect to the disclosure of Record #21. Accordingly, I uphold the institution's decision not to disclose Record #21.

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to subsections 18(1)(e) and (g) of the Act.

The institution, initially, claimed the whole of section 18 as the basis for exempting certain records. In its written representations, however, the institution relied on subsections 18(1)(e) and (g) of the Act to exempt the records. Specifically, the institution relied on subsections 18(1)(e) and (g) to exempt from disclosure the following records: a portion of Record #6, Records #7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and portions of Records #19 and #20.

Subsections 18(1)(e) and (g) of the Act provide as follows:

18.--(1) A head may refuse to disclose a record that contains,

...

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

...

- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

In its representations, the institution submitted that each of these records contains "positions, plans, procedures, criteria or instructions" to be applied to ongoing negotiations involving the affected party's efforts to establish a youth shelter in Scarborough. The institution argued that the premature release of the information contained in these records could seriously undermine these negotiations. According to the institution, therefore, the records are exempt from disclosure as they fall within the exemption under subsection 18(1) (e) of the Act.

In the alternative, the institution submitted that each of these records contains information which includes "proposed plans, policies or projects of an institution" and that premature disclosure of this information could undermine the financial and public support for the proposed youth shelter. It argued that the disclosure of the information would, therefore, result in "undue financial benefit or loss to a person", namely the affected party. According to the institution, therefore, the records are exempt from disclosure as they fall within the exemption under subsection 18(1) (g) of the Act.

The Application of subsection 18(1) (g)

I will address, first, the institution's claim for exemption of these records under subsection 18(1) (g) of the Act. In support

of its submission that the release of these records could reasonably be expected to result in undue financial loss to the affected party, pursuant to subsection 18(1)(g), the institution submitted evidence to show that there is strong resistance to the establishment of the proposed youth centre within the community. The institution argued that adverse comments, if any, and other information contained in the records, related to the developmental stages of the project, could be taken out of context and distributed in the community. This could have a negative impact on fund raising within the community, which would, in turn, result in undue financial loss to the affected party.

The affected party, in its representations, generally supported the institution's position regarding the non-disclosure of these records.

On the other hand, the appellant, in her representations, emphasized the public's right of access to the information contained in these records.

After reviewing the records, the evidence presented to me by the institution and the affected party, and the parties' representations, I am of the view that any harm that may accrue to the affected party could not be claimed to be a result of the disclosure of the records themselves; rather any potential for harm would be a result of the information in the records being misused. Thus, while the institution and the affected party, in their representations, have attempted to underscore the community resistance to the proposed youth shelter, I am not convinced, based on the evidence presented to me, that disclosure of the records "could reasonably be expected to

result in "undue financial loss" to the affected party. Accordingly, the records do not fall within the exemption under subsection 18(1)(g) of the Act.

The Application of subsection 18(1)(e)

As I stated in Order 87 (Appeal Number 880082), dated August 24, 1989, the test for exemption under subsection 18(1)(e) is as follows:

1. the record contains positions, plans, procedures, criteria or instructions; and
2. the record is intended to be applied to negotiations; and
3. these negotiations are being carried on or will be carried on in the future; and
4. these negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

In considering the institution's claim for exemption under subsection 18(1)(e) of the Act, I am mindful of the background to this appeal. I understand that the steps that are being taken in an effort to establish the proposed youth shelter involve complicated negotiations between the institution, the affected party, the Ministry of Housing and the regional municipality. These negotiations have been ongoing for some time.

In its representations relating to the application of subsection 18(1)(e) to the records in question, the institution referred to The Report of the Commission on Freedom of Information and Individual Privacy/ 1980 entitled "Public Government for Private

People" Volume 2 where, at page 323, the Commission recognized that "(t)he ability of the Government to effectively negotiate with other parties must be protected". The institution argued that disclosure of the records in question would reveal the substance of discussions outlining "positions, plans, procedures, criteria or instructions" to be applied to the negotiations with the affected party.

In her representations, the appellant emphasized the right of the public to access to information contained in these records in order to ensure public accountability.

As indicated earlier, the institution relied on the exemption under subsection 18(1)(e) of the Act, to refuse disclosure to the following records: a portion of Record #6, Records #7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and certain portions of Records #19 and 20. I have reviewed each of these records with a view to determining whether or not each, in whole or in part, meets the test for exemption under subsection 18(1)(e).

I have determined that the following records contain positions and/or criteria intended to be applied by an institution to ongoing negotiations surrounding the establishment of the proposed youth shelter: the severed portion of Record #6, Records #8, 9, 10, 13, 15, 16, 17 and 18. The disclosure of each of these records or a part(s) thereof would, in my view, undermine the ability of the institution and/or the Ministry of Housing to effectively negotiate with the other parties, including the affected party, with respect to the establishment of the youth shelter. Accordingly, these records are exempt from disclosure under subsection 18(1)(e) of the Act.

With respect to the application of subsection 18(1)(e) to Record #19, as noted earlier in this Order, the last nine (9) pages of this record do not respond to the appellant's request and, therefore, I will not be considering the application of the exemption to this portion of the record. The balance of the record can be divided as follows: (i) Contentious Issue Note, dated June 24, 1988 (2 pages); (ii) Contentious Issue Note, dated September 15, 1988 (2 pages); (iii) Briefing Notes, dated May 13, 1988 and (iv) Memorandum, dated March 24, 1988.

(i) Contentious Issue Note, dated June 24, 1988 (2 pages)

This Issue Note is divided into four sections: Issue, Background, Current and Ministry Position. After reviewing this Issue Note, it is my view that the information contained in the first four "bullet points" under the "Current" section of the Issue Note (page 1) and in the third and fourth "bullet points" under the "Ministry Position" section of the Issue Note (page 2) meets the test for exemption under subsection 18(1)(e) of the Act. This information contains the positions and/or criteria intended to be applied to the negotiations carried on or to be carried on by an institution. The balance of the information in the Note does not, in my view, fall within the exemption under subsection 18(1)(e) of the Act.

(ii) Contentious Issue Note, dated September 15, 1988 (2 pages)

This Issue Note is divided into four sections: Issue, Background/History, Ministry Position and Update/Current Status. After reviewing this Issue Note, it is my view that the information contained in the last "bullet point" under the "Background/History" section of the Issue Note (page 1), the

third "bullet point" under the "Ministry Position" section of the Issue Note (page 2) and the first, fourth and fifth "bullet points" (page 2) under the "Update/Current Status" section of the Issue Note meets the test for exemption under subsection 18(1)(e) of the Act. The information contains positions and/or criteria intended to be applied to the negotiations carried on or to be carried on by an institution. The balance of the information in the Issue Note does not, in my view, fall within the exemption under subsection 18(1)(e) of the Act.

(iii) Briefing Notes, dated May 13, 1988

These Briefing Notes are divided into three sections: Issue, Response and Background. After reviewing these Notes, it is my view that the information contained under the "Response" section of the Notes and the information contained in "bullet points" #7 - 13 (inclusive) under the "Background" section of the Notes meets the test for exemption under subsection 18(1)(e) of the Act. The information contains positions and/or criteria intended to be applied to the negotiations carried on or to be carried on by an institution. The balance of the information in the Issue Note does not, in my view, fall within the exemption under subsection 18(1)(e) of the Act.

(iv) Memorandum, dated March 24, 1988

After reviewing this Memorandum, it is my view that the information contained in the last sentence of the first "bullet point" (page 1) and the last "bullet point" (page 2) of the Memorandum meets the test for exemption under subsection 18(1)(e) of the Act.

While it is my view that the balance of the information contained in this Memorandum does not fall within the exemption under subsection 18(1)(e) of the Act, there is information in the balance of the Memorandum which may fall within the mandatory exemption under subsection 17(1) of the Act. The application of subsection 17(1) to this information will be considered under Issue D (infra).

Records #7, 11, 12, 14 and the withheld portions of Record #20 do not, in my view, contain any "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario", and, therefore, do not meet the test for exemption under subsection 18(1)(e) of the Act.

Record #11 is a record prepared for the institution's solicitor, by an employee of the institution. While this record does not, in my view, meet the test for exemption under subsection 18(1)(e), it may fall within the exemption under section 19 of the Act. The application of section 19 to this record will be considered under Issue E (infra).

Record #14 is a form entitled "Request for Approval - Capital Assistance". The form includes the name and address of the applicant requesting capital assistance, the estimated capital cost of the proposed facility and the financing of such cost. While this record does not, in my view, meet the test for exemption under subsection 18(1)(e), it contains financial information and the record may fall within the mandatory exemption under subsection 17(1) of the Act. The application of subsection 17(1) to this record will be considered under Issue D (infra).

Record #20 is a sixteen page record which contains the following: a memorandum, three "action requests", a covering letter with petition attached, a second covering letter from the same individual enclosing additional signatures for the petition and a letter from the head of the institution to the author of the covering letters. The institution did not withhold the entire record. The portions of the record which it withheld are the two covering letters and attached petitions, the names and addresses of the individuals who signed the petition and the name and address of the recipient of the letter from the head (the author of the covering letters). While the portions of this record which have been withheld by the institution do not, in my view, fall within the exemption under subsection 18(1)(e), they may fall under the exemption under subsection 21(1) of the Act. The application of subsection 21(1) to portions of Record #20 will be considered under Issues F and G (infra).

The exemption under section 18 of the Act is discretionary. In all cases where a discretionary exemption has been claimed, it is my responsibility as Commissioner to ensure that the head of an institution has properly exercised his or her discretion in deciding whether or not to release an exempt record. The appellant, in this case, made representations which, although not directed at the exercise of discretion by the head under a particular section of the Act, centred around the need for public accountability. Specifically, the appellant argued that public accountability requires the disclosure of the records at issue in this appeal, particularly because the affected party is an intended recipient of public funds.

I have reviewed all representations relevant to the exercise of the head's discretion in this case. In addition, I have noted

the records or portions thereof which have been released to the appellant. I have found nothing to indicate that the head's exercise of discretion in favour of refusing to disclose the records or portions thereof which are exempt under subsection 18(1)(e), was improper. Accordingly, there is no reason for me to disturb the head's decision on appeal.

In summary, with respect to the application of the exemption under subsection 18(1)(e), I find that the severed portion of Record #6 and Records #8, 9, 10, 13, 15, 16, 17 and 18 are properly exempt from disclosure under this provision. In addition, I find that the following portions of Record #19 are exempt from disclosure under subsection 18(1)(e): Contentious Issue Note, dated June 24, 1988 - the first four "bullet points" under the "Current" section and the third and fourth "bullet points" under the "Ministry Position" section; Contentious Issue Note, dated September 15, 1988 - the last "bullet point" under the "Background/History" section, the third "bullet point" under the "Ministry Position" section and the first, fourth and fifth bullet points under the "Update/Current Status" section; Briefing Notes, dated May 13, 1988 - the "Response" section and "bullet points" #7 - 13 (inclusive) under the "Background" section and Memorandum, dated March 24, 1988 - the last sentence of the first "bullet point" and the last "bullet point" of the Memorandum.

I also find that Records #7, 11, 12, 14 and the withheld portions of Record #20 do not qualify for exemption under subsections 18(1)(g) and (e). I order the institution to release Records #7 and 12 to the appellant in their entirety. The application of section 19 to Record #11, the application of subsection 17(1) to Record #14 and a portion of Record #19 (a

portion of the Memorandum of March 24, 1988) and the application of subsection 21(1) to the withheld portions of Record #20 will be considered below.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to section 13 of the Act.

The institution originally claimed section 13 of the Act as the basis for exempting the following records: portions of Records #9 and 13, Records #11, 15, 16, 19, 20 and 22. However, during the course of this appeal the institution dropped its section 13 claim with respect to Records #11, 15, 20 and 22 by not referring to section 13 in its representations at the inquiry stage of the appeal. This change in the institution's position was subsequently confirmed by the Appeals Officer.

The section 13 exemption remains at issue, therefore, only with respect to Records #16 and #19 and portions of Records #9 and #13. I have examined these records, and while I am satisfied that the disclosure of certain portions of these records would reveal "advice" or "recommendations" of a public servant, I am also satisfied that the portions of the records containing such advice or recommendations have already been exempted from disclosure under 18(1)(e) (supra). Therefore, it is not necessary for me to discuss the application of subsection 13(1) to these records.

ISSUE D: Whether any of the records are properly exempt from disclosure pursuant to subsections 17(1)(a) and (c) of the Act.

The institution relied, in part, on subsection 17(1)(a) and (c) to exempt from disclosure the following records: Records #14,

22, 26, 27, 28 and 33. In addition, the affected party claimed that the following records are also exempt from disclosure under subsection 17(1) of the Act: Records #29, 30, 31 and 32. The institution did not object to the disclosure of Records #29, 30, 31 and 32, at this stage of the appeal.

As indicated earlier, pages nine and ten of Record #26 contain the names, addresses and phone numbers of members of the board and staff of the affected party. The appellant advised the Appeals Officer that this information is not required. Therefore, I will not be considering the application of subsection 17(1) to that portion of Record #26.

Subsection 17(1) of the Act provides as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute.

I have considered the proper interpretation of subsection 17(1) of the Act in a number of previous Orders. As I indicated in Order 36 (Appeal Number 880030), dated December 28, 1988, in order for a record to qualify for exemption under subsection 17(1), the record must meet the following three-part test:

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. The information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- *3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

- * On January 1, 1990, a subsection (d) was added to subsection 17(1) by virtue of the coming into force of the Freedom of Information and Protection of Privacy Amendment Act, 1989. This new subsection is not relevant to this appeal.

After reviewing the records at issue in this appeal, I find that Records #14, 22, 26, 27, 28 and 33 meet the first part of the three-part test. Record #27 contains commercial information and Records #14, 22, 26, 28 and 33 contain financial information.

On the other hand, I find that the following records do not contain any of the types of information enumerated in the first part of the test: Records #29, 30, 31 and 32.

I find that only Record #14 meets the second part of the three-part test. It is my view, based on evidence submitted to me by the institution and a consideration of the circumstances under which the information contained in this record was submitted by the affected party to the institution, that the information contained in this record was implicitly supplied to the institution in confidence.

I have reviewed Records #22, 26, 27, 28 and 33 and the representations of the institution and affected party regarding the application of the second part of the test to these records and I am unable to conclude that the information contained in these records was supplied in confidence implicitly or explicitly.

Since I have determined that Records #22, 26, 27, 28, 29, 30, 31, 32 and 33 fail to meet either the second or both the first and second parts of the test under subsection 17(1) of the Act, it is not necessary for me to consider the application of the third part of the test to these records.

With respect to the application of the third part of the test to Record #14, the institution argued, first of all, that the disclosure of this record could "interfere significantly with the contractual or other negotiations" of the affected party. The institution pointed, once again, to the difficulties being faced by the proponents of the youth shelter, and argued that revealing confidential financial information such as that contained in Record #14 would interfere with the affected party's negotiations. According to the institution, therefore, the disclosure of Record #14 would be contrary to subsection 17(1) (a) of the Act.

In addition, the institution argued that if groups opposed to the proposed shelter were given access to the information in Record #14, this disclosure could also result in undue loss to the affected party. According to the institution, therefore, the disclosure of this record would also be contrary to subsection 17(1)(c) of the Act.

Having reviewed the evidence presented by the institution and the affected party, the representations made by the parties and the record itself, I am not convinced by the institution's representations with respect to the application of subsection 17(1)(c). However, I am of the view that the disclosure of the information contained in record #14 "could reasonably be expected to, ...interfere significantly with the ... negotiations" of the affected party pursuant to subsection 17(1)(a). Therefore, Record #14 satisfies all three requirements of the test under subsection 17(1) of the Act and is exempt from disclosure.

While the institution did not claim the exemption under subsection 17(1) of the Act to exempt from disclosure Record #19 or portions thereof, in certain instances, I feel that I have a duty to consider unclaimed exemptions provided by the Act in order to prevent possible unfairness to third parties who have not been given a chance to make representations and/or might be adversely affected by the release of information. This is one such instance. In this case, the nature of Record #19 is such that the record was not provided to the affected party for comment.

It is evident from my discussion of Record #19 under Issue B (supra), that this record is lengthy and contains many parts. In the portion of the record that is comprised of a Memorandum, dated March 24, 1988, I find that the information contained in the fourth "bullet point" (which extends from the bottom of page 1 to the top of page 2) meets the three-part test, under subsection 17(1) of the Act. Firstly, the information contained in the fourth "bullet point", in my view, is financial information. Secondly, a consideration of the circumstances under which this information was obtained, and a review of the information, itself indicates to me that this information was supplied in confidence, implicitly. Finally, in light of the background of the appeal and a review of the information in question, I find that the information satisfies the third part of the three part test, i.e., disclosure of this information could reasonably be expected to interfere significantly with the negotiations of the affected party.

In summary, I find that Record #14 is exempt from disclosure under subsection 17(1)(a) of the Act. I also find that the fourth "bullet point" (pages 1 and 2) of the Memorandum, dated March 24, 1988 in Record #19, is exempt from disclosure under subsection 17(1)(a) of the Act.

ISSUE E: Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

The institution relied on section 19 to exempt from disclosure the following records: Records #3, 4, 5 and 11.

Section 19 of the Act provides as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

I have considered the proper interpretation of section 19 of the Act in a number of my previous Orders. At page 12 of Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989, I stated:

This section provides an institution with a discretionary exemption covering two possible situations:

- (1) a head may refuse to disclose a record that is subject to the common law solicitor-client privilege; or
- (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

In order to qualify for exemption under the second branch of the section 19 exemption, the institution must satisfy the following two requirements:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

I have examined Records #3, 4, 5 and 11, and, in my view, each of these records satisfies the requirements for exemption under the second branch of section 19 of the Act. Records #3 and 11

are records prepared for Crown counsel for use in giving legal advice. Records #4 and 5 are records prepared by Crown counsel in giving legal advice.

I have reviewed the institution's representations regarding the exercise of the head's discretion in deciding not to release these records. I see nothing improper in the exercise of discretion and, therefore, there is no reason for me to interfere with the head's decision on appeal. Accordingly, I uphold the decision of the institution to exempt Records #3, 4, 5 and 11 under section 19 of the Act.

ISSUE F: Whether any of the requested information is personal information as defined in subsection 2(1) of the Act.

The affected party argued that Record #20 should not be disclosed because it contains personal information. The institution, initially, sought to rely on the exemption under subsection 21(1) of the Act to exempt from disclosure certain portions of Record #20. The institution subsequently indicated that it would not be taking any position regarding the application of this exemption to Record #20.

As indicated earlier, Record #20 is a sixteen page record which contains the following:

- a. a memorandum;
- b. three "action requests";
- c. a covering letter with petition attached;
- d. a second covering letter from the same individual enclosing additional signatures for the petition; and

- e. a letter from the head of the institution to the author of the covering letters.

Also, as indicated earlier in this Order, the portions of Record #20 which were withheld by the institution are: the two covering letters and attached petitions; the names and addresses of the individuals who signed the petition; and the name and address of the recipient of the letter from the head of the institution (i.e., the author of the covering letters).

In all cases where a request may involve access to personal information, it is my responsibility, at the outset, before deciding whether the section 21 exemption applies to the information, to determine whether the information contained in the record falls within the definition of "personal information" under subsection 2(1) of the Act. "Personal information" is defined, under subsection 2(1), in part, as follows:

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

...

- (e) the personal opinions or views of an individual except where they relate to another individual,

...

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

After applying this definition to the information contained in Record #20, I am of the view that certain portions of the record which were withheld by the institution contain "personal

information" as defined in subsection 2(1). The name and address of the author of the covering letters, the name and address of the recipient (the author of the covering letters) of the letter from the head of the institution and the body of the petition, which essentially indicates opposition to the establishment of the proposed youth shelter together with the names and addresses of signatories of the petition, fall within the definition of "personal information" in subsection 2(1) of the Act.

The information contained in the covering letters other than the name and address of the author of these letters is not, in my view, personal information. Accordingly, this information does not qualify for consideration under subsection 21(1) of the Act.

ISSUE G: If the answer to Issue F is in the affirmative, whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Once it has been determined that a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances. One such circumstance is found in subsection 21(1)(a) of the Act.

Subsection 21(1)(a) provides:

21.--(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

...

After reviewing the portions of Record #20 which contain "personal information" as defined in subsection 2(1) of the Act, and taking into consideration the circumstances surrounding the creation of this information, it is my view that the author of the covering letters and the signatories of the petition can be found to have consented to the release of their personal information. While the consent of these individuals is not explicit, it can, in my view, reasonably be implied in the circumstances of this case. It is significant that the individuals who signed the petition voluntarily lent their support to a matter of public concern. Petitions as a general rule are not intended to be kept secret, and it would appear from the face of this record that the personal information contained in the record has already been provided to a number of recipients, including the mayor and members of the Scarborough City Council. In my view, it is clear from the actions of those involved with the petition that they have consciously decided to forego some element of their personal privacy by taking a public stand on an issue of importance to them. Accordingly, I find that the portions of the record which contain "personal information" are not exempt from disclosure under subsection 21(1), because the information falls within the exception contained in subsection 21(1)(a) of the Act.

Having found that an exception to the non-disclosure of personal information applies in this case, it is not necessary for me to consider whether or not the disclosure of the personal information would constitute an unjustified invasion of personal privacy, pursuant to subsection 21(1)(f) of the Act.

In summary, I find that the portions of Record #20 which were withheld by the institution, are not exempt from disclosure under subsection 21(1) of the Act.

ISSUE H: If any of Issues A, B, C, D, E or G are answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

Under my discussion of Issues A, B and E, I have found that Records #3, 4, 5, a portion of Record #6, Records #8, 9, 10, 11, 13, 14, 15, 16, 17, 18, certain portions of Record #19 and Record #21 are properly exempt under subsections 12(1)(b), 17(1)(a), 18(1)(e) or section 19 of the Act. I am now required to determine whether the severability requirements under subsection 10(2) of the Act apply to any of these records.

Subsection 10(2) provides as follows:

Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I addressed the issue of severance in Order 24 (Appeal Number 880006), dated October 21, 1988. At page 13 of that Order I stated:

The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific." (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not

parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. As I also stated in Order 24:

...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I would like to refer to my earlier discussion with respect to the application of the exemption under subsection 18(1)(e) of the Act to Record #19 and to my discussion with respect to the application of the exemption under subsection 17(1)(a) of the Act to Record #19. Having reviewed Record #19 in its entirety, I order the head to disclose to the appellant all portions of Record #19 that have not been found to be exempt under either subsection 18(1)(e) or subsection 17(1)(a). In my view, this information can be disclosed to the appellant while at the same time protecting the confidentiality of the portions of the record which are exempt from disclosure under subsection 18(1)(e) or subsection 17(1)(a). For the purposes of clarity, the following portions of record #19 are not to be disclosed:

- The first four "bullet points" under the section marked "Current" in the Contentious Issue Note, dated June 24, 1988;
- The third and fourth "bullet points" under the section marked "Ministry Position" in the Contentious Issue Note, dated June 24, 1988;

- The last "bullet point" under the section marked "Background/History" in the Contentious Issue Note, dated September 15, 1988.
- The third "bullet point" under the section marked "Ministry Position" in the Contentious Issue Note, dated September 15, 1988;
- The first, fourth and fifth "bullet points" under the section marked "Update/Current Status" of the Contentious Issue Note dated September 15, 1988;
- The "Response" section of the Briefing Notes, dated May 13 1988;
- "Bullet points" seven to thirteen (inclusive) under the section marked "Background" of the Briefing Notes, dated May 13, 1988;
- The last sentence of the first "bullet point" of the Memorandum, dated March 24, 1988.
- The fourth "bullet point" of the Memorandum, dated March 24, 1988.
- The last "bullet point" of the Memorandum, dated March 24, 1988.

I reiterate that the last nine pages of Record #19 are not responsive to the appellant's request and, therefore, are not the subject of this Order.

I have reviewed all the other records which I have found qualify for exemption in this appeal and, in my view, no information that is in any way responsive to the request could be severed from these records and provided to the appellant without disclosing information that legitimately falls under the exemptions contained in subsection 12(1)(b), 17(1)(a), 18(1)(e) or section 19 of the Act.

In summary, my Order is as follows:

1. I order the institution to release Records #7, 12, 20, 22, 26 (except pages 9 and 10 which do not fall within the scope of this appeal), 27, 28, 29, 30, 31, 32 and 33 to the appellant in their entirety. I also order the institution to release those portions of Record #19 that do not qualify for exemption under the Act (except for the last 9 pages of the record which do not fall within the scope of this appeal).

I order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the parties to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution within this 30-day period, I order the institution to release the records within 35 days of the date of this Order. Further, I order the head to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made.

2. I uphold the decision of the head to deny access to Records #3, 4, 5, a portion of Record #6 to which access has been denied, Records #8, 9, 10, 11, 13, 14, 15, 16, 17, 18, portions of Record #19 that I have ordered not to be disclosed (supra) and Record #21.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ March 7, 1990
Date