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

# ORDER 164

## Appeal 890056

## Ontario Human Rights Commission

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

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

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

# 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 Commissioner.

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

1. On January 9, 1989, a request was made to the Ontario Human Rights Commission (the "institution") for the following record:

> AIDS_Related Discrimination and the Human Rights Code (August, 1988), by [name of appellant], Research_ Policy Officer. Unit for the Handicapped, Ont. Human Rights Commission.
>
> This report was submitted to the Commission in October, 1988. Copies of the report were disseminated to all senior staff members employed by the Commission.

2. By letter to the requester dated February 15, 1989, the institution extended the time for making its decision on access to the record by five days to February 20, 1989.

3. On February 20, 1989, the institution wrote to the requester responding to his request as follows:

> I am replying to your request for access under the Freedom of Information and Protection of Privacy Act (hereinafter referred to as the Act)

dated January 1, 1989 and received January 4, 1989. Your access request for the paper, "AIDS Related Discrimination and the Human Rights Code 1981" contains both factual material and advice and recommendations to government.

Pursuant to Section 13(1) of the Act, the head of the Ontario Human Rights Commission retains the discretion to exempt those parts of the work that constitute advice and/or recommendations to government.

This is a unique situation as you are the author of the work and are therefore aware of the entire text in its draft form. It is our understanding that you have a copy of the requested record.

Consequently the full text of the "Aids Related Discrimination and the Human Rights Code, 1981" and the accompanying Appendix are being released to you as author of the work for your interest only and not pursuant to the Act.

Although we are under no obligation to release the entire text to you, we are doing so on the following express conditions:

(a) that the documents, paper and appendix were prepared by you while you were in the employ of the Ontario Human Rights Commission and as such remain the property of the Ontario government.

(b) that it is a draft document and as such is confidential and is not to be duplicated or distributed in any fashion (the copies sent to you have been stamped DRAFT and CONFIDENTIAL).

I would remind you of your oath of secrecy taken pursuant to Section 10(1) of the Public Service Act which reads as follows:

> I.....do swear that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and except

> as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.
>
> So help me God.

4. On February 28, 1989, the requester wrote to me appealing the head's decision, and the extension of time for making a decision. I gave notice of the appeal to the institution.

5. On March 31, 1989, the appellant received a letter from the Ontario Human Rights Commission which stated:

> Further to our letter to you of February 20, 1989, your request for access to the paper "AIDS Related Discrimination and the Human Rights Code, 1981" is denied.
>
> First, the request is denied since we understand that you had a copy of the document when your request was made. We therefore take the position that your request had no bona fide basis and constitutes an abuse of the process of the Freedom of Information and Protection of Privacy Act.
>
> The "anonymous" delivery of a copy of the document in question to the Toronto Star shortly after our letter to you on February 20, 1989 is consistent with our concern as to the bona fides of your request.
>
> Second, should your request be considered as other than an abuse of process, the head of the Ontario Human Rights Commission will retain the discretion pursuant to subsection 13(1) of the Act to delete those parts of the work that constitute advice and/or recommendations to government. Any portion of the document which is simply factual material would be disclosed to you pursuant to clause 13(2)(a) of the Act.

6. The record at issue, which is a policy paper entitled "AIDS _ Related discrimination and the Ontario Human Rights Code" and the Appendix thereto was obtained and examined by the Appeals Officer assigned to the case, and efforts were made by the Appeals Officer to mediate a settlement. However, mediation efforts were not successful, and the parties indicated that they were content to proceed to an inquiry.

7. By letter dated October 19, 1989, I notified the institution and the appellant that I was conducting an inquiry to review the decision of the head.

In accordance with the usual practice of this office, 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 appear to the Appeals Officer, or any of the parties, to be relevant to the appeal.

The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.

8. I have received representations from the institution and the appellant and have considered the representations of both parties in reaching my decision in this appeal.

The issues arising in this appeal are as follows:

A. Whether the appellant was given access to the record for the purposes of the Freedom of Information and Protection of Privacy Act, 1987.

B. Whether the appellant's request for access to the record under the Freedom of Information and Protection of Privacy Act, 1987 was an abuse of process.

C. Whether the record is properly exempt from disclosure pursuant to subsection 13(1) of the Act.

D. If Issue C is answered in the affirmative, whether the exempt record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

E. If Issue C is answered in the affirmative, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.

F. Whether the Information and Privacy Commissioner has the jurisdiction to order the exchange of representations submitted during the course of an inquiry under section 52 of the Act.

G. Whether the institution properly applied the provisions of section 27 of the Act in extending the time limit for responding to the appellant's request.

H. Whether the provisions of subsections 24(3), (4) and (5) of the Act apply in the circumstances of this appeal.

It is important to note at the outset that the purposes of the Act, as outlined in subsections 1(a) and (b) are as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,

> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions lies with the head of the institution.

**ISSUE A: Whether the appellant was given access to the record for the purposes of the Freedom of Information and Protection of Privacy Act, 1987.**

Subsection 30(1) of the Act provides as follows:

> Subject to subsection (2), a person who is given access to a record or part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.

The institution gave a copy of the requested record to the appellant, in response to his request. However, the head, in a covering letter, made it clear that the record was not being given to the appellant unconditionally, but that it was intended to be for the appellant's use only, and the appellant was enjoined from sharing the record with other members of the public.

Subsection 21(1)(e) (access to personal information for research purposes) is the only provision of the Freedom of Information and Protection of Privacy Act, 1987 where the granting of conditional access to a record by a head is explicitly contemplated. Conditional access may, of course, be negotiated by agreement and pursuant to subsection 54(3), the Commissioner's Order may contain any terms and conditions the Commissioner considers appropriate.

However, nowhere in the Act other than in subsection 21(1)(e) can there be found any provision which authorizes the head to grant conditional access to a record, in an official decision responding to a request under the Act.

The Act contemplates that where access is given to a requester, it is access to the world, and there are no limitations (subject to the limitations imposed by other laws, such as those pertaining to libel and slander) on the use to which the requester may put the record. That being so, it is my view that the head had no authority to grant conditional access to the requester in the circumstances of this appeal.

A decision maker must be able to demonstrate that his or her actions fall squarely within the power granted to him or her by the legislation. Where a decision maker acts outside his or her statutory authority, his or her actions are ultra vires, and the actions are a nullity. In this appeal, I find that the head's actions in attempting to grant conditional access are a nullity, and access was not given for the purposes of the Freedom of Information and Protection of Privacy Act, 1987.

**ISSUE B: Whether the appellant's request for access to the record under the Freedom of Information and Protection of Privacy Act, 1987 was an abuse of process.**

The institution claims that the appellant's request for the records under the Freedom of Information and Protection of Privacy Act, 1987 was an abuse of process. The head submits as follows:

> On the issue of whether the appellant's insistance in having a second access without conditions and expressly under the Act would constitute "abuse of process".
>
> Having already obtained copies of the documents when he left the OHRC, and before his request under the Act, appellant's insistance on a second access certainly abuses the process. Surely the Act was not designed to give a member of the public the same document or record a second time around. But over and above this was the sense that the appellant was simply utilizing the Act to harass the OHRC. Consider the following:
>
> 1. As the author of the draft documents, appellant already had a copy of them while still employed by the OHRC.
>
> 2. In response to his request for access, he was provided with copies thereof;
>
> 3. On at least one occasion, appellant called a press conference to make unfounded charges and level unfair criticisms against the OHRC relating to these draft documents;
>
> 4. Shortly after copies of the documents were delivered to him, the report "anonymously" arrived at the Toronto Star;
>
> 5. During all this time, about five identically worded requests for the same documents were received by the OHRC, all making a reference to the "blue cover". When tested by a request for

> processing and copying fees, two did not proceed and three appealed the fee.

The institution goes on to claim that the subsequent requesters made their request with the object of supporting the original requester's (the appellant) "manifest intention to embarrass the OHRC":

> [It] is our position that the office of the Privacy Commissioner has the jurisdiction to find that where a process is launched for a purpose other than that for which it is designed to serve, there is a misuse of process. A tribunal should deny a party a remedy of the enforcement of a right where it is being sought for a collateral or ulterior purpose that is clearly extraneous to the action.

I find no merit in the institution's argument. I have been provided with no independent evidence to show that the appellant had a copy of the requested record in his possession at the time of the request. However, even had it been proven to my satisfaction that he had indeed a copy of the record, this fact would not have been dispositive of the issue.

A major purpose of the Act is to provide public access to records within the custody or under the control of institutions. As I have stated in Issue A above, the Act contemplates that this access, when provided under the Act, will be unconditional, and for all purposes. Thus, a requester may well have a copy of the requested record in his or her possession at the time of making a request, but may be prohibited from using it publicly, or from revealing its existence to other interested members of the public. For this reason, it is appropriate for a person in the appellant's position, as a former employee of an institution, to obtain a response from an institution under the

Act when he or she is unsure whether a government record may be disclosed to other members of the public.

The institution argues that even though the appellant already had a copy of the record, he was given access to the record in response to his request. However, the institution's response shows that the access was clearly conditional, the record was for his own use only, and as I have found in Issue A above, no access was given for the purposes of the Act.

In my view, the appellant's request was an attempt to obtain access to the record as a public record under the Act and was perfectly consonant with the purposes of the Act. I find nothing improper in the requests by other members of the public for the same record.

The appellant's actions subsequent to his request and appeal do not remove his right to be treated as any other member of the public in making a request under the Act. Further, I find that these subsequent actions do not demonstrate that the appellant did not wish to have access to the record as a public record pursuant to the Freedom of Information and Protection of Privacy Act, 1987. I must remind the institution that subsection 10(1) of the Act reads as follows:

> 10.__(1) Every person has a right of access to a record or 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 section 12 to 22. (emphasis added)

The Act contemplates that all persons have this right of access, and it does not allow for a differential response to particular persons who make requests under the Act, with the exception of those who request personal information.

In summary, I find that while the actions of the appellant subsequent to his request and appeal may be regrettable from the point of view of the institution, his request and appeal of the institution's decision do not constitute an abuse of process.

**ISSUE C: Whether the record is properly exempt from disclosure pursuant to subsection 13 (1) of the Act.**

Subsection 13(1) of the Act provides:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In developing the parameters of the section 13 exemption I have enunciated the following principles:

> ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations.
>
> ...I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making. (Order 94, (Appeal Number 880137), dated September 22, 1989)

I examined the kind of information which would qualify as advice in Order 118, (Appeal Number 890172), dated November 15, 1989, when I stated that:

> In my view "advice", for the purposes of subsection 13(1) of the Act, must contain more than mere

> information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have been provided with a severed copy of the record by the institution, wherein it has indicated which sections of the record contain, in its opinion, advice or recommendations.

The institution has indicated in its submissions that "if the Information and Privacy Commissioner does not find a case of abuse of process, we are willing to delete only the recommendation/advice portions [of the records at issue] and release those portions containing factual materials."

Accordingly, I do not consider those parts of the record which the institution has indicated that it is willing to release to be the subject of this appeal.

The appendix to the policy paper has not been severed by the institution. Examination of the appendix reveals that it does

not contain advice or recommendations. With the exception of one minor severance, to which I shall return later, I order disclosure of the appendix to the appellant.

In order for a record to be protected from disclosure under subsection 13(1), it must contain the advice of a public servant or any other person employed by an institution, or of a consultant retained by an institution. The person who prepared the record which is the subject of this appeal is the appellant. It is acknowledged that he was employed on contract by the institution in order to produce the record at issue, and that

the record was in fact prepared by him during the course of his employment with the institution.

The severed portions of the record contain sections which clearly recommend or suggest a particular course of action, and I find these sections to be exempt from disclosure under the Act. The record also contains some material which would reveal the advice given, and I find that this material is exempt from disclosure pursuant to subsection 13(1).

However, examination of the severed portions of the record also reveals paragraphs containing opinion or fact, disclosure of which would not necessarily reveal the course of action which is suggested in those recommendations which I have found to be exempt from disclosure. Where the opinion or factual material would not reveal the recommended course of action, I find that this material is not covered by the exemption, and I order its disclosure.

Having decided that parts of the institution's severances of the paper entitled "AIDS Related Discrimination and the Human Rights Code, 1981" meet the requirements for exemption under subsection 13(1), I must now determine whether any of the exceptions outlined in subsection 13(2) apply to cause parts of the severances in issue to be disclosed.

The appellant claims that the record contains information which falls under the following exceptions to the subsection 13(1) exemption, which are contained in subsection 13(2) as follows:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

...

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee, task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

I have examined the severed portions of the record at issue, and I do not agree with the appellant's contention that these exceptions to the exemption under subsection 13(1) apply.

The record at issue is not a "report or study on the performance or efficiency of an institution" (ss. 13(2)(f)), nor is it a final plan or proposal to change a program of an institution, or for the establishment of a new program (ss. 13(2)(i)). It has been made clear by the institution that the record is not considered anything other than a draft document, and has never been finally approved.

The record is not the work of a committee, council, task force, similar or other body, but was prepared solely by the appellant, who was employed as a contract researcher and writer by the institution (ss. 13(2)(j) and (k)). The record does not contain the "results of field research", but is rather a compilation of research from otherwise publicly available material, and recommendations as to suggested courses of action (ss. 13(2)(h)).

I see nothing in the record which would lead me to believe that it is "a feasibility study or other technical study" (ss. 13(2)(g)).

The only exception to the subsection 13(1) exemption which might, in my view, have some relevance to this record is to be found in subsection 13(2)(a) _ factual material. However, the factual information contained in the severances which I find to qualify for exemption under subsection 13(1) is so intertwined with the advice given, that it is not possible to disclose the factual material without also disclosing the exempt material. I should like to note that the institution has indicated that it is willing to release most of the factual material contained in the record. I find, therefore, that the exceptions provided by subsection 13(2) are not available with respect to the record.

The appellant has also raised the application of subsection 13(3) to the record in issue. Subsection 13(3) provides as follows:

> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

The appellant contends that the institution has publicly cited the record as the basis for formulating a policy or making a decision.

On January 14, 1990, comment was made on the television program, "W5", regarding the institution's position on the segregation and treatment of inmates of the prison system who have AIDS. In response to those comments, Alan Shefman, Director of Communications and Education at the Ontario Human Rights Commission wrote to the Executive Producer of "W5". In a letter dated January 17, 1990, Mr. Shefman wrote as follows:

> The Commission hired him [the appellant] on a contract basis to work on several projects in our Unit for the Handicapped, one project being to prepare an information report on the application of the Ontario Human Rights Code to the issue of AIDS.
>
> During his research [the appellant] noted some policies and practices of the Ministry of Corrections which he felt were of concern.
>
> The Commission subsequently met with the Ministry and presented some of these matters (as well as others). The Commission's consultation with the Ministry has resulted in a substantial change in the policy in Ontario jails relating to people with AIDS.

> The policy of the Ministry is consistent with the Ontario Human Rights Code at this time....his findings were not the result of the type of thorough investigation demanded by the Human Rights Code. Also, as noted above, the Commission brought these concerns to the attention of the Ministry and significant change took place.... It would be greatly appreciated if you could ensure that your audience receives a clarification of the above points.

Portions of this letter were read on the air during a subsequent "W5" program. While Mr. Shefman is not the "head" of the institution, I am prepared to find that on this occasion he was speaking on behalf of the institution, and it is clear that the letter or its contents were intended to be made public.

One of the chapters of the record entitled "Accommodation" contains material relating to policies and practices in the treatment of prisoners with AIDS in Ontario jails. It is to this material that Mr. Shefman referred in his letter, when he mentioned the research conducted by the appellant. It would appear that Mr. Shefman publicly cited that portion of the record as the basis of a decision by the institution to approach the Ministry of Corrections with a view to voicing concerns regarding the Ministry's policies and programs in this area.

I find, therefore, that those portions of the record severed by the institution dealing with the treatment of prisoners in the chapter entitled "Accommodation" fall within the exception provided by subsection 13(3) of the Act, and I order their disclosure.

I have highlighted a copy of the record entitled "AIDS_Related Discrimination and the Human Rights Code", to enable the head to

determine which severances I find to be "advice", and therefore subject to exemption under subsection 13(1), and which material is not advice or falls under the exception provided by subsection 13(3), and which must be disclosed to the appellant.

Section 13 is one of several discretionary exemptions contained in the Act. After deciding that a record or part thereof falls within the scope of this exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. I have reviewed the institution's representations with respect to the

head's exercise of discretion under subsection 13(1) and I find that the exercise of discretion in favour of non_disclosure of the relevant portions of the record should not be interfered with on appeal.

I wish to return to a point which I raised earlier respecting the appendix to the policy paper. The appendix has not been severed by the institution. However, I note that it contains a report of a case under the Ontario Human Rights Code which report identifies a complainant who is an AIDS victim. I find that the identifying information relating to this person is personal information as defined under subsection 2(1) of the Act, and further, that the disclosure of this identifying information would constitute an unjustified invasion of the personal privacy of the complainant pursuant to section 21 of the Act. Accordingly, I order its severance from the record .

**ISSUE D: If Issue C is answered in the affirmative, whether the exempt record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.**

In my discussion under Issue C I found that parts of the paper entitled "AIDS Related Discrimination and Ontario Human Rights Code" qualify for exemption under subsection 13(1) of the Act. I must now determine whether the severability requirements of subsection 10(2) apply to these parts of the record.

Subsection 10(2) reads 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 have reviewed the severed portions of the record, and find that no parts of the record which I have found to be subject to exemption under subsection 13(1) could reasonably be severed without disclosing the exempt information.

**ISSUE E: If Issue C is answered in the affirmative, whether there is compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.**

Section 23 of the Act provides:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

As I have stated in a number of previous Orders, two requirements contained in section 23 must be satisfied in order to invoke the application of what has been referred to as the "public interest override": there must be a compelling public

interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The Act is silent as to who bears the burden of proof in respect to section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies falls on the appellant.

The appellant submits that there exists a compelling public interest in the disclosure of the record:

> The press coverage documented in my letter to [the Appeals Officer] dated July 10, 1989, testifies to the compelling public interest at stake which clearly outweighs the purpose of the exemption claimed under s.13(1) of the Act. Further evidence supporting my position is contained in the Affidavit [of the Executive Director of the AIDS Committee of Toronto], dated October 19, 1989, a copy of which is attached with this letter.

The appellant also contends that the compelling nature of the public interest is demonstrated by the number of requests for the record from various organizations. He states that newspaper articles indicate "that AIDS related concerns are at the top of Canada's social agenda." In supplementary representations, the appellant argues that further support for his argument is contained in my Order 24 at page 15:

> The purpose of the section 13 exemption is to ensure that persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure.

The appellant argues that "as the record at issue was designed to be released to the public, with primary authorship attributed to me, it is submitted that the statutory purpose in this matter is not a relevant consideration."

I disagree with this contention. The record is in draft form and is therefore clearly not "designed" in its present state for public release by the institution. In any case, the wording of the statutory exception under section 23 does not provide for an "override" decision which ignores the purpose of the cited exemption.

In an affidavit in support of the appellant's appeal, the Executive Director of the AIDS Committee of Toronto sets out a moving scenario of the plight of AIDS victims in Ontario, and of the necessity for public education to address and overcome the unfortunate discriminatory behaviour suffered by AIDS victims. He states "I verily believe that the prevention of AIDS_related infection is the most significant social issue facing Canadians. As a result, there is no question that AIDS has a primary place on the agenda of public health problems.[sic]." I agree with the appellant that there is a public interest in addressing the discrimination faced by victims of this dreadful disease.

However, having reviewed the contents of the record which I have found to be exempt from disclosure, and the representations of the appellant, I have reached the conclusion that the circumstances in this case are not sufficient to trigger the override provisions of section 23.

Most of the record is being released, and those few portions which I have found to be exempt from disclosure contain recommendations respecting issues which are currently being addressed by the institution in its policy processes. In my view, the public's interest will be adequately served by the degree of disclosure which I have ordered in this decision.

**ISSUE F: Whether the Information and Privacy Commissioner has the jurisdiction to order the exchange of representations submitted during the course of an inquiry under section 52 of the Act.**

During the course of the inquiry, the appellant requested the opportunity to make oral representations to me, and to be permitted to comment on the representations of the institution. I considered the appellant's request, and having reviewed the representations of both parties, I was not convinced that oral representations were necessary in the circumstances of this appeal. It is my usual practice to proceed by way of written representations.

I also considered whether the exchange of representations of the parties would be a way of responding to the appellant's request.

The institution has raised the question of my jurisdiction under the Freedom of Information and Protection of Privacy Act, 1987 to order the exchange of representations made by the parties, and offered submissions on the issue.

The institution's position is that by virtue of subsection 52(13) of the Act I am without the authority to order the exchange of the representations by the parties. Subsection 52(13) provides as follows:

> The person who requested the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to, or to comment on representations made to the Commissioner by any other person. (emphasis added)

Counsel for the institution addressed the meaning of the word "entitled" as it appears in subsection 52(13) and stated that "entitled" means "to have the right". He further stated that this view of the meaning of the word "entitled" was reinforced by the meaning of the French version of the subsection: ".....nul n'a le droit d'etre present lors de la presentation faite par une autre personne, d'avoir acces a ces observations ou de les commenter." "Nul n'a le droit" means "nobody has the right".

Counsel for the institution argued that a plain and literal reading of subsection 52(13) indicates that appellants are not entitled to receive the representations of other parties. Counsel argued that this is borne out by the fact that there is no conflict between the French and English versions of the Act.

Counsel for the institution also looked at subsection 52(13) in the context of the Act as a whole. Subsection 52(2) provides that the Statutory Powers Procedure Act R.S.O. 1980, c.484 does not apply to an inquiry under the Freedom of Information and Protection of Privacy Act, 1987. Counsel for the institution submitted that this means that the normal trappings of a hearing are not present, such as the right to hear the evidence of the other side, and the right to cross examine witnesses. These rights are not there as a matter of law, and cannot be insisted

upon. Subsection 52(3) provides that the inquiry may be conducted in private. Subsection 52(5) provides that the Commissioner may not retain any information obtained from a record. This is unlike a normal court of record, where such records would be kept as court records. Subsection 52(9)

provides a wide privilege in that anything said, any information supplied or any documents produced in the course of an inquiry are privileged, as if they were produced in a court of law. Under subsection 52(10), statements and answers given in the course of an inquiry are not admissible as evidence in any court or other proceedings. Counsel contends that all of these provisions mean that an inquiry like no other is contemplated by the Act.

Counsel for the institution next looked at the Commissioner's discretion as it appears in various sections of the Act. Subsection 4(1) provides that:

> (1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this Act.

Counsel for the institution went on to refer to sections 8, 9, 51, 52, 54, 56 and 59 of the Act which explicitly grant to the Commissioner powers and duties to operate an office, conduct appeals and inquiries, to require production of records, to summon and examine on oath, to include conditions in orders, to delegate certain powers, to undertake certain duties respecting the collection, retention and disclosure of personal information, and to perform a public education and research function respecting the purposes of the Act. Counsel for the

institution argues that these express grants of authority constitute the limits to the Commissioner's discretion, and that I may not arrogate to myself any power not explicitly given.

I am grateful for counsel's helpful submissions, and agree with them in part. I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the right to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from

ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.

Counsel for the institution is correct when he states that the Statutory Powers Procedure Act does not apply to an inquiry under the Freedom of Information and Protection of Privacy Act, 1987. Thus, the only statutory procedural guidelines that govern inquiries under the Freedom of Information and Protection of Privacy Act, 1987 are those which appear in that Act. However, while the Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

In fact, it would be an extremely unusual case in which I would order the exchange of representations. This is because, in the vast majority of cases, an institution cannot make adequate representations as to why a statutory exemption applies to a record, and why the head's discretion was exercised as it was, without alluding to the contents of the record. (In fact, I have in previous appeals ordered disclosure of a record or remitted the matter to the head for reconsideration, precisely because of such deficiencies in representations).

Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme,

disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

I have reviewed the representations of the parties in the present appeal, and agree with the institution that its representations refer to the record with some particularity, and would reveal the contents of the record if disclosed. I am therefore of the view that this is not an appropriate case in which to order the exchange of representations.

**ISSUE G: Whether the institution properly applied the provisions of section 27 of the Act in extending the time limit for responding to the appellant's request.**

Subsection 27(1) of the Act reads as follows:

> A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
>
> (b) consultations that cannot reasonably be completed within the time limit are necessary to comply with the request.

The appellant has raised the question of the extension of the time taken by the head to respond to his request. This extension was for an additional five days after the expiry of the original thirty day period after his request was received by the institution. The institution was requested to provide information as to what consultations were necessary to comply with the request, and why those consultations could not have been completed within the thirty day period. In its

representations, the institution stated that the Freedom of Information and Privacy Co_ordinator at the institution had to read and review "a rather thick document" and consult with the Director of Policy and Research as well as with legal counsel. The institution went on to say:

> The consultations could not be completed within the thirty day period because the Co_ordinator of Freedom of Information did not receive the document until 3 weeks after the request....the review of the documents...exhausted the remaining time.

It is clear that the institution is relying on subsection 27(1)(b) to justify its delay in responding to the appellant.

The consultations which took place were between officials of the institution. However, in Order 104 (Appeal Numbers 890079, 890080, 890081), dated October 19, 1989, I canvassed the question of what kind of consultations would justify an extension under subsection 27(1)(b). In that Order I found that "consultations" in subsection 27(1)(b) are restricted to consultations with a person or persons outside the institution. As I stated at page 4:

> ....it is my view that the intent of section 27(1)(b) of the Freedom of Information and Protection of Privacy Act, 1987, was to allow for external consultations... By determining that internal consultations are not consistent with the intent of the section, I find that the extension of time is not reasonable in the circumstances of this appeal.

In reviewing the facts of this appeal, and given that the consultations were internal rather than external, I find that the institution did not properly extend the time for responding to the request. However, in the circumstances of this appeal, I do not propose to make any Order with respect to this issue.

**ISSUE H: Whether the provisions of subsections 24(3), (4) and (5) of the Act apply in the circumstances of this case.**

Subsections 24(3), (4) and (5) read as follows:

> (3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.
>
> (4) When a request is to continue to have effect is granted, the institution shall provide the applicant with,
>
> (a) a schedule showing dates in the specified period on which the request shall be deemed to have been

> received again, and explaining why those dates were chosen; and
>
> (b) a statement that the applicant may ask the Commissioner to review the schedule.
>
> (5) This Act applies as if a new request were being made on each of the dates shown in the schedule.

The appellant requested ongoing access to the requested record for a period of two years from the date the request is granted. The institution did not respond to this part of the request. The appellant submits as follows:

> It is submitted that s. 24(3)'s continuing access provision, in effect, also contemplates a form of permitting ongoing access to a record. Through such a grant, or order, subsequent applicants can then be assured of receiving the record automatically; up to two years from the date of disclosure.

I disagree with the appellant's interpretation of subsections 24(3) and (4). It is clear from a reading of the section that it does not contemplate automatic disclosure of a record upon the scheduled dates, but rather that upon each such date, the request shall be deemed to have been received again, and a new decision respecting disclosure must be made. It is also clear from the words "the institution shall provide the applicant with" (emphasis added) that the section refers only to the original applicant, and does not preserve access for subsequent requesters, (who may make their own requests for the information).

I am of the view that subsections 24(3) and (4) are intended by the Legislature to apply to the kind of record which is likely to be produced and/or issued in series; for example, the results

of public opinion polls which are conducted by an institution on a regular basis. These subsections are not intended to provide ongoing access to the kind of record of which only one edition is produced, as in the present case. I find, therefore, that these subsections providing for continuing access do not apply in the circumstances of this appeal.

In summary, my Order in this appeal is as follows:

1. I find that the appellant was not given access to the requested record for the purposes of the Freedom of Information and Protection of Privacy Act, 1987.

2. I find that the appellant's request and appeal do not constitute an abuse of process.

3. I find that the portions of the copy of the record I have highlighted qualify for exemption under subsection 13(1) of the Act, and I uphold the decision of the head not to disclose them.

4. I find that disclosure the name of the complainant and all identifying information about him in the report of the Human Rights Code case contained in the Appendix to the policy paper would be an unjustified invasion of the personal privacy of the complainant, and I order the head to sever all such information from the Appendix.

5. I find that the unsevered portions of the policy paper and the Appendix thereto do not qualify for exemption under

subsection 13(1) of the Act, and I order the head to release them to the appellant within twenty (20) days of the date of this Order and to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

6. I find that the circumstances of this appeal are not such as to trigger the application of section 23 to the exempt portion of the record at issue.

7. I find that it is within my jurisdiction to order the exchange of representations between the parties in a proper case. I further find that it would not be appropriate to so order in the circumstances of this appeal.

8. I find that subsections 24(3), (4) and (5) of the Act do not apply to provide for continuous access to the requested record in the circumstances of this appeal.

Original signed by: April 24, 1990
Sidney B. Linden Date
Commissioner