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

ORDER P-233

Appeal P-890280

Ministry of Labour

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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, as amended (the "Act"), which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head to the Information and Privacy Commissioner.

BACKGROUND:

The appellant is a former employee of the Ministry of Labour (the "institution"). She was dismissed from her job after 10 years service and subsequently filed a number of grievances against her former employer. She seeks access to copies of all her personal information spanning a 10-year period at the institution as she is currently involved in proceedings with the institution at the Public Service Grievance Board.

On April 24, 1989, the appellant made the following request for personal information:

> Detailed description of personal information:
> copy of any and all files, correspondence, documentation, reports etc. including memoranda, notes, notes of telephone conversations with or about [the appellant], records of meetings, investigations, hearings, etc. regarding [the appellant] at which she was or was not present, transcripts, electromagnetic recordings, photostatic recordings, facsimile transmissions, performance appraisals, position descriptions, grievances, medical records, etc. held in any location pertaining to [the appellant].

The appellant went on to provide examples of locations and file categories within the institution that her request was to encompass including, but not limited to, the institution's Finance and

Administration Division, the Minister's Office, the Deputy Minister's Office, the Occupational Health and Safety Division, the Industrial Relations Division, and the Public Service Grievance Board.

On May 24, 1989, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to the appellant to inform her that the statutory 30 day time limit for responding to her request had been extended for a period of 21 days for the following reasons: her request involved a search through a large number of records and "consultations between various branches of this Ministry as well as with other Ministries" were necessary to respond to the request.

The appellant appealed the head's decision regarding the time extension by letter dated May 30, 1989 and a file was opened under Appeal Number 890176. Notice of the appeal was sent to the appellant and the institution.

On July 14, 1989, the institution advised the appellant that a fee would be charged for providing copies of the largest portion of her personal information:

> If you feel that you are entitled to receive copies of all documents already provided to you, then the Ministry would be inclined to charge for copying these documents. It is general government policy not to assess fees for requests for personal information, except in unusual circumstances. It is our view that a request for copies of thousands of pages of documents that you already have, or were provided with, would constitute "unusual circumstances."

On July 24, 1989, the appellant wrote to this office and objected to paying a fee for copies of her personal information. She stated that "Such a charge would be unfair and would add greatly to the financial hardship that I am incurring with respect to ongoing

legal proceedings initiated against me by some officials of the Ministry." This issue was incorporated into the appellant's file dealing with the time extension issue under Appeal Number 890176.

In a letter dated August 4, 1989, the institution provided its decision:

> ... the Ministry is not prepared to provide you with copies of each and every document about you. The reason is simple; you have already seen, or received copies of, the vast majority of documents that are in our files.
>
> In my July 14th letter, I mentioned that there are thousands of pages of documentation in the files you have requested. Having now completed a review of every document, I would estimate that there are approximately four thousand documents in all of the files. We have decided to provide you with copies of those documents that you may not have already seen; there are just over seven hundred pages being provided to you. With respect to those documents which you have sent to us, received from us, or have otherwise seen, we will insist that they be viewed at the Ministry. In our view, section 48(3) of the Freedom of Information and Protection of Privacy Act permits us to insist on this arrangement. Of course, if there are any documents that you may not have seen, we will provide you with copies.
>
> Apart from the records that I am sending you, there are nine documents which are not being released. [The institution cited subsections 13(1), 49(b) and section 19 of the Act for withholding these documents as well as parts of five other documents.]

On August 25, 1989, the appellant appealed the decision of August 4, 1989 and a new file was opened under Appeal Number 890280. The appellant appealed the following matters:

(1) the head's decision requiring that she examine approximately 4,000 documents at the institution;

(2) the unsatisfactory condition of some of the copies she received; and,

(3) the head's decision to deny access to nine documents and to make severances to five other documents under subsection 13(1), section 19 and subsection 49(b) of the Act.

On September 6, 1989, notice of Appeal Number 890280 was given to the institution and the appellant.

On November 2, 1989, the Appeals Officer wrote to both parties indicating that, as the institution had made a decision in response to the request, the issues raised in both appeals (Appeal Number 890176 and Appeal Number 890280) would be dealt with under Appeal Number 890280.

On November 8, 1989, the appellant wrote appealing the institution's fee estimate of $640.00 (as quoted to the Appeals Officer) on the basis of financial hardship. This matter was incorporated into Appeal Number 890280.

The institution originally relied on subsection 49(b) to exempt the information contained in the severances made to certain records. During mediation, the institution took the position that the appellant had received all of her personal information contained in these records (described under Issue H as Records 10, 12 and 13) and that the severed information did not relate to the appellant and did not respond to her access request. Thus, the institution is now relying on section 21 to exempt the severed information from disclosure.

As settlement of the appeal was not achieved, notice that an inquiry was being conducted to review the decisions of the head was sent to the appellant and the institution. Enclosed with this notice was a copy of a report prepared by the Appeals Officer, 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. The Appeals Officer's Report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Representations were received from the appellant and the institution. I have considered all representations in making my Order.

PURPOSES OF THE ACT/BURDEN OF PROOF:

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. This 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.

Furthermore, 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 in the Act lies with the head of the institution.

ISSUES/DISCUSSION:

The issues arising in this appeal are:

A. Whether the institution's decision to extend the time under section 27 of the Act was reasonable in the circumstances.

B. Whether the information contained in the records at issue qualifies as "personal information" as defined in subsection 2(1) of the Act.

C. Whether the method of access to the records proposed by the institution is in accordance with the Act.

D. Whether the head's decision to charge a fee is in accordance with subsection 57(1) of the Act.

E. Whether any of the records in question qualify for exemption under subsection 13(1) of the Act.

F. Whether any of the records in question qualify for exemption under section 19 of the Act.

G. If the answer to either Issue E or F is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies.

H. Whether any of the information contained in the records falls within the scope of the mandatory exemption provided by section 21 of the Act.

ISSUE A: Whether the institution's decision to extend the time under section 27 of the Act was reasonable in the circumstances.

The institution argues the necessity for the 21 day time extension based on subsections 27(1)(a) and (b) of the Act.

Subsection 27(1) of the Act states 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 with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

The appellant submitted that the time extension was unreasonable as "a search would be facilitated by the fact that the Ministry of Labour has already referred to, used, and/or perused records of my personal information in its previous legal proceedings against me."

In its representations, the institution indicated that the records consist of 4,670 pages. The Appeals Officer viewed the records and I am satisfied that the request was for a large number of records and/or that the request necessitated a search through a large number of records. Further, the institution's representations regarding the size and location of the records have satisfied me that meeting the statutory 30 day time limit to respond to the request would have unreasonably interfered with the operations of the institution. Therefore, it is my view that the 21 day time extension was reasonable on the basis of subsection 27(1)(a) of the Act.

As indicated, the institution did not make its decision on how to respond to the request until August 4, 1989. The appellant feels that the institution should have issued its decision before the expiry of the extended time period and that the delay is contrary to the provisions of the Act.

Subsection 29(4) of the Act states:

> A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Subsection 29(4) enables a requester to appeal a "deemed refusal" without waiting for the institution's actual decision. As the appellant appealed the institution's decision of August 4, 1989, I do not intend to make a remedial order regarding the delayed response of the institution.

ISSUE B: Whether the information contained in the records at issue qualifies as "personal information" as defined in subsection 2(1) of the Act.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" as set out in subsection 2(1) of the Act and to determine whether this information relates to the appellant, another individual or both.

"Personal information" is defined as follows:

> In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

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

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(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;

In my view, all of the information contained in the records falls within the definition of personal information under subsection 2(1) of the Act. The information contained in Records 2, 3, 4, 5, 7, 8, 9, 11 and 14 is the personal information of the appellant only. However, in my opinion, the information severed from Records 10, 12 and 13 is not personal information about the appellant, but is the personal information of other individuals.

ISSUE C: Whether the method of access to the records proposed by the institution is in accordance with the Act.

The institution identified over four thousand pages as being responsive to the request. The institution sent the appellant copies of seven hundred pages of the records and requested that the appellant attend at the institution's premises to examine the balance of the records. The institution relied on the wording of subsection 48(3) of the Act for deciding that it would not provide copies of the other records. The institution indicated that the appellant was already in possession of a large number of the records since she was the author of many of the records or had received copies from the institution or had otherwise seen the records. The institution offered to provide the appellant, following examination, with copies of any records which she did not have or had not previously seen.

The appellant objected to the method of access proposed by the institution. She stated that she did not want to attend at the institution to view the records. She argued that the institution is required to provide her with copies of the records if she so chooses. She objected to the institution's use of subsection 48(3) to decide what method of access she should have. She also felt that the institution could not choose to give copies of some of the records and require her to view others.

The appellant also indicated that she was concerned about the quality of the copies of the records that were sent to her. She stated that a number of the copies she received were illegible. She wanted the institution to send her legible copies.

I will first deal with the appellant's objection to attending at the institution's premises to examine the records.

Subsection 48(3) states:

> Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

> (a) permit the individual to examine the personal information; or
>
> (b) provide the individual with a copy thereof.

The appellant argues that paragraphs (a) and (b) of subsection 48(3) are mutually exclusive. She states that the head arbitrarily interpreted the conjunction "or" in subsection 48(3)(a) to mean "and". She said that the head may choose one or the other method but not both, in giving access.

In its representations, the institution stated that subsection 48(3):

> ... actually provides a minimum requirement with respect to access while ensuring that the institution retains some flexibility. As long as the institution provides access in one form or the other, it is not precluded from expanding upon the requester's right of access. Moreover, this is entirely in keeping with the general spirit of the Act.

The institution has submitted that it may choose to rely on either paragraph (a) or (b) or a combination of both when providing access to personal information. In explaining its reasons for deciding on the particular method of access in this case, the institution indicated that:

> ... the privacy implications of requests for personal information impose some limitations on the ability of an institution to reproduce large volumes of documents quickly. Documents such as these should not be casually shipped around in an institution for reproduction. It was felt that the reproduction would have to be done by the co-ordinators office but this was a major imposition
>
> on its resources. Therefore, it was decided that asking the requester to view the balance of the documents with the option to copy ones she had not seen or did not have would achieve the most satisfactory result for all concerned.

The institution submitted that "section 48(3) clearly places the decision on manner of access in the hands of the institution, in contrast to the access provisions of general records set out in section 30." In this case, the institution submitted that this was "an entirely appropriate exercise of discretion by the head."

I do not accept the institution's argument that "section 48(3) clearly places the decision on manner of access in the hands of the institution, in contrast to the access provisions of general records set out in section 30". If the institution's argument were accepted, then a requester seeking access to personal information would have no choice as to the manner in which access is provided. The institution would have the absolute right to decide in all cases how a requester would be given access. In my view, it would be contrary to the spirit of the Act and inconsistent with other provisions of the Act to interpret subsection 48(3) in such a way as to accord to the institution an unfettered right to decide which method of access to choose.

In considering this issue, I have reviewed section 30 of the Act which outlines the provisions which apply when responding to a request for access to a general record, rather than a request for access to one's own personal information. Section 30 states:

> (1) Subject to subsection (2), a person who is given access to a record or a 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.
>
> (2) Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.
>
> (3) Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature. [emphasis added]

It is clear, under section 30, that a head cannot refuse to give a requester a copy of the record "unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature." I also note that section 23 of the Municipal Freedom of Information and Protection of Privacy Act, 1989, the equivalent of section 30 of the provincial Act, applies with

necessary modifications to a request for personal information under subsection 37(2) of the municipal Act.

While subsection 48(3) does not explicitly include any criteria for refusing to provide a preferred method of access, in my view, it would be inconsistent with the purposes and spirit of the Act to interpret this section in such a way as to accord a lesser right of access to a person making a request for personal information than for someone making a request for general records.

In my view, a person who is given access to his or her own personal information should not have a lesser right to access than the person who is given access to general information. In fact, given that personal information is involved, that right should, if anything, be a higher right. Accordingly, I am of the opinion that in applying subsection 48(3), the institution must use the same criteria as provided in section 30 when deciding whether to grant the method of access preferred by the requester. Where the person

who is given access to his or her own personal information requests a particular method of access, the head must establish why it would not be reasonably practicable to comply with the preferred method of access.

Applying this interpretation of subsection 48(3) to the facts of this appeal, I have considered whether copying all of the records would not be reasonably practicable by reason of their length or nature. In my view, in the circumstances of this appeal, the head has not established that it would not be reasonably practicable for the institution to provide the appellant with copies of the remainder of the records and I therefore order that these copies be provided.

Before continuing, I wish to state that I feel that the length of the record at issue in this appeal, some 4,000 pages, is approaching the upper threshold of reasonableness. I also feel that to some extent there is an obligation on a requester who is seeking copies of his/her own personal information to be as reasonable as circumstances permit. However, it is clear to me that in many cases, notably where there are restrictions on the times during which a record may be viewed or where the appellant is a distance away from the institution, it is not an easy matter for a requester

to attend at an institution to examine records. Therefore, in my view, any doubt as to the reasonableness of an institution's decision to require a requester to attend at an institution to examine his or her own personal information, as opposed to providing copies, should be resolved in accordance with one of the main purposes of the Act - that individuals should have access to their own personal information.

I will now consider the appellant's second concern. With respect to the approximately seven hundred pages that were provided to her, the appellant cited numerous examples of semi-legible records, records with portions "chopped off" and records with missing attachments.

The Appeals Officer asked the appellant whether she would be agreeable to viewing the original records so as to satisfy herself as to the contents and/or condition of the copies she received. In the alternative, the Appeals Officer asked the appellant to send her the copies she was not satisfied with so that the Appeals Officer could determine whether they were accurate copies. The appellant was not agreeable to viewing the original records and did not respond to the Appeals Officer's request to remit the poor or incomplete copies.

The Appeals Officer then provided the institution with a copy of the description that the appellant had prepared of the poor or incomplete records she had received. The institution, however, advised the Appeals Officer that it needed the actual copies in order to search its files and to ascertain whether the appellant received an accurate copy of the original records.

In my view, without the assistance of the appellant, there is no remedial order that can be made.

ISSUE D: Whether the head's decision to charge a fee is in accordance with subsection 57(1) of the Act.

The institution indicated in its letter of July 14, 1989, that a fee would be charged for providing copies of the bulk of the appellant's personal information which the institution felt that the

appellant already had in her possession. A fee estimate of $640.00 was later provided to the appellant.

On January 1, 1991, after the commencement of the inquiry, an amendment to the Act came into effect which prohibits institutions from charging a fee for providing access to personal information (ss. 57(1a)). Accordingly, at this time, an institution can no longer charge a fee for providing access to a requester's personal

information. While the decision to charge a fee may well have been appropriate at the time of the institution's response to the appellant's request, I am not prepared to uphold the head's decision in the presence of the amendment. Were the appellant to abandon her present request for personal information and submit an identical one at this time, in my view, the institution would be unable to require her to pay a fee for access to her own personal information.

ISSUE E: Whether any of the records in question qualify for exemption under subsection 13(1) of the Act.

The institution submitted that Records 2, 3, 4, 5, 8 and parts of Records 11 and 14, would fall within the exemption provided in subsection 13(1) of the Act which reads as follows:

> 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.

The following is a description of each record:

Record 2 is a memo dated November 17, 1987 from the Deputy Minister of Labour to the Deputy Minister of the Human Resources Secretariat.

Record 3 is a memo dated October 15, 1987 from the Director of the Human Resources Branch to the Assistant Deputy Minister, Occupational Health and Safety Division.

Record 4 is a memo dated September 15, 1987 from the Director of Human Resources to the Assistant Deputy Minister, Occupational Health and Safety Division.

Record 5 is a memo dated February 12, 1985 from the Staff Development Officer, Personnel Branch to the Executive Director, Occupational Health & Safety Division.

Record 8 is a memo dated July 27, 1982 from the Director of Personnel to the Executive Director of Finance and Administration. The memo summarizes the results of a meeting attended by four public servants.

Record 11 is a summary of the appellant's employment history from February 1979 to September 15, 1982 and consists of four pages. The information which was not disclosed to the appellant is contained in a severance on the fourth page.

Record 14 is a review of the appellant's personnel file from September 13, 1978 to January 7, 1982 and consists of 37 pages. The information which was not disclosed to the appellant is contained in a severance on page 23 which consists of two sentences which refer to Record 8.

The institution's representations regarding these records are as follows:

> [Record 2] satisfies the test set out by the Commissioner in Order #118. The memo consists of a recommended course of action presented by the Ministry's Deputy Minister to the Deputy Minister of the Human Resources Secretariat. In explicitly asking for Dr. Todres' support, the Ministry is implicitly asking for approval from the Secretariat, a body which is responsible at a corporate level for human resources policies across the government.
>
> [Record 3] falls squarely within section 13(1)...It deals exclusively with proposed options for handling the appellant's case and provides a recommended course of action....However, the handwritten notes at the bottom of the page [page 1] could be disclosed since this is really in the nature of a memo to file.
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> [Record 4] clearly provides advice and recommendations to the Assistant Deputy Minister on how to deal with the appellant's case.
>
> [Record 5] is a memo which deals exclusively with several recommended courses of action with respect to concerns about the appellant's work performance .... The

> memo not only makes recommendations but asks for a response with respect to those recommendations.

With respect to Record 8, and parts of Records 11 and 14, the institution submitted that a document exempted under subsection 13(1) does not, itself, have to be of an advisory nature. A document can be withheld if its disclosure would reveal advice or recommendations of a public servant. The institution stated that Record 8, if disclosed, would reveal the advice provided by the institution's solicitor, and parts of Records 11 and 14, if disclosed, would reveal the advice provided in Record 8.

The appellant, in her representations, stated that she is "... entitled to be informed as to the 'advice or recommendations' contained in the record or any part of the record of her personal information, in order to defend her professional and personal reputation at her ongoing appeal hearing at the [Public Service Grievance] Board."

At page 4 of Order 118, (Appeal Number 890172), dated November 15, 1989, former Information and Privacy Commissioner Sidney B. Linden stated the following:

> 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 reviewed Records 3, 4, 5 and 8, and the severance made to Record 11 and with the exception of the handwritten notes at the bottom of page 1 of Record 3, I am of the view that they all contain or would reveal advice and/or recommendations pertaining to the disposition of the appellant's employment status. I therefore find that these records or portions of records qualify for exemption under subsection 13(1) of the Act. With respect to the handwritten notes at the bottom of page 1 of Record 3, I order that these notes be disclosed to the appellant.

I do not agree with the institution's position that the information in Record 2 satisfies the test set out in Order 118 supra. In my view, it is clear from the institution's representations and from a

review of the record that the Deputy Minister of Labour was seeking advice, not offering it. I therefore order that Record 2 be disclosed to the appellant.

With the exception of the first sentence of the severed information, I find that Record 14 would reveal recommendations pertaining to the disposition of the appellant's employment status and therefore qualifies for exemption under subsection 13(1) of the Act. The first sentence of this severance only indicates that the memo referred to in the severance contains two options but it does not state what those options are. Therefore, this sentence does not qualify for exemption under subsection 13(1) of the Act.

The appellant has stated that subsections 13(2)(a) and 13(2)(l)(i) and (ii) should apply to Records 3, 4, 5, 8, 11 and 14. These subsections of the Act read as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
>
> (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
>
> (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

I have examined Records 3, 4, 5, 8, 11 and 14 and find that whatever facts are contained in these records are interwoven with the advice and/or recommendations in such a way that there is no discrete body of information that could be disclosed under subsection 13(2)(a). Subsection 13(2)(l) does not apply as reasons for a final decision are not contained in these records.

ISSUE F: Whether any of the records in question qualify for exemption under section 19 of the Act.

The institution initially withheld Records 1, 6, 7, 9, 11 and 14 pursuant to the exemption set out in section 19 of the Act. However, in its representations, the institution indicated that it had decided to release Records 1 and 6 and withdrew its section 19

claim regarding part of Record 11. Further, as I have already found that part of Record 14 qualifies for exemption under subsection 13(1) of the Act, it is only necessary for me to consider the application of section 19 to the first sentence of the severance in Record 14. Therefore, the records at issue under section 19 are Records 7 and 9 and the first sentence of the severance in Record 14.

Record 7 is a memo dated September 28, 1982 from the Ministry's Solicitor to the Director of the Personnel Branch and to the Chief of the Health Studies Service.

Record 9 is a memo dated July 28, 1982 from the Ministry's Solicitor to the Executive Director, Finance and Administration Division.

Subsection 19 of the Act reads 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.

The appellant posed a number of questions regarding the exemption cited under section 19 of the Act and submitted the following:

> Since the record would be prepared by a fellow government employee(s) of the Appellant, and would purport to be factual, then the Appellant requests that it be disclosed to her for the defence of her professional and personal reputation at her ongoing appeal hearing at the [Public Service Grievance] Board.

The institution submitted that Records 7 and 9 are "clearly legal advice provided by Ministry lawyer Hal Rolph in response to a request for advice .... As such, the memo(s) clearly satisfy the solicitor-client privilege portion of the section 19 exemption".

With respect to the severance in Record 14, the institution submitted that "disclosing these portions of the record would reveal, even in summary form, the advice provided by Hal Rolph in Record #9".

At page 12 of Order 218 (Appeal Number 890364), dated January 31, 1990, I stated:

> This section provides an institution with the discretion to refuse to disclose:
>
> (1) A record that is subject to the common law solicitor-client privilege; (Branch 1)
>
> (2) A record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. (Branch 2)

At page 13 of Order 218 supra, I stated:

> In order for a record to be subject to the common law solicitor-client privilege the institution must provide evidence that the record satisfies either of the following tests:
>
> 1. (a) There is a written or oral communication, and

(b) The communication must be of a confidential nature, and

(c) The communication must be between a client (or his agent) and a legal advisor, and

(d) The communication must be directly related to seeking, formulating or giving legal advice;

OR

2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

In the present appeal, it is not necessary for me to consider the application of "litigation privilege", because the institution's argument in favour of Branch 1 of the exemption does not relate to this part of the privilege.

I have reviewed Records 7 and 9, and, in my view, they contain legal advice provided by the institution's solicitor to his client. I am of the view that they satisfy the four criteria necessary to fall under the first branch of the solicitor-client privilege. Accordingly, these records meet the requirements for exemption under section 19 of the Act.

With respect to the first sentence of the severance in Record 14, I am of the opinion that it does not satisfy the four criteria necessary to fall under the first branch of the solicitor-client privilege. Accordingly, I order that the first sentence of the severance be disclosed to the appellant.

ISSUE G: If the answer to either Issue E or F is in the affirmative, whether the exemption provided by subsection 49(a) of the Act applies.

Under Issue B, I have found that the contents of the Records 2, 3, 4, 5, 7, 8, 9, 11 and 14 qualify as "personal information" about the appellant. Under Issues E and F, I have found that Records 3,

4, 5, 7, 8, 9, and part of Records 11 and 14 would qualify for exemption under subsection 13(1) and section 19.

Subsection 47(1) of the Act gives individuals a general right of access to personal information about themselves in the custody or under the control of an institution. However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Subsection 49(a) provides as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

In the circumstances of this appeal, subsection 49(a) of the Act provides the head with the discretion to refuse to disclose to the appellant her own personal information where sections 13 and 19 would apply.

In all cases where the head has exercised his/her discretion under subsection 49(a), I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In the circumstances of this appeal, I can find no basis on which to interfere with the head's exercise of discretion in favour of non-disclosure of Records 3, 4, 5, 7, 8, 9, and parts of Records 11 and 14 and I uphold the head's decision to exempt them from disclosure.

ISSUE H: Whether any of the information contained in the records falls within the scope of the mandatory exemption provided by section 21 of the Act.

The institution had initially cited subsection 49(b) of the Act to exempt Records 10, 12, and 13. The appellant has received all of her personal information contained in these records. As the remaining information contained in these records was not the personal information of the appellant but the personal information of a number of other individuals, the institution subsequently claimed exemption under section 21 of the Act in its representations.

Record 10 is a three-page financial statement from the Occupational Health Clinical Unit at St. Michael's Hospital. It lists individuals who attended the clinic, the dates attended, codes, charges, credits and balance owing. Only the part of the record relating to the appellant has been disclosed to her.

Record 12 is a form entitled "Management Grievance - General" which describes a person's grounds for appeal, another person's opinion of the grounds and suggested solutions for dealing with the grievances of the individuals, including the appellant. The part of the record relating to the appellant has been disclosed to her.

Record 13 is an employment record respecting sick days for three employees of the institution. The part of this record relating to the appellant has been disclosed to her.

Having found under Issue B that the information in Records 10, 12, and 13 qualifies as personal information related to individuals other than the appellant, section 21 of the Act prohibits the disclosure of this personal information to any person other than the individual to whom it relates, except in certain circumstances. One such circumstance is contained in subsection 21(1)(f) of the Act which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

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

Subsection 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The institution has cited subsections 21(3)(a) and (d) of the Act as the basis for denying access to the personal information of individuals other than the appellant. Subsections 21(3)(a) and (d) read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;

I agree with the institution's position that disclosure of the information in the severances in Records 10, 12 and 13 would constitute a presumed unjustified invasion of personal privacy under subsections 21(3)(a) and (d) of the Act.

The appellant posed a number of questions regarding the records exempted under section 21 of the Act. She wanted to know the content of the records, who created the records, and what was their purpose. She cited subsections 21(2)(a) and (d) as the basis for requesting access to personal information of individuals other than herself. Subsections 21(2)(a) and (d) read as follows:

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

Former Commissioner Linden stated in Order 20 (Appeal Number 880075), dated October 7, 1988, that:

> It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual.

I agree with Commissioner Linden's view and adopt it for the purposes of this appeal. It is my view that the presumed unjustified invasion of the personal privacy of individuals other than the appellant has not been rebutted. Accordingly, I uphold the head's decision to withhold the information in the severances made in Records 10, 12 and 13.

ORDER:

1. I uphold the head's decision not to disclose Records 3, 4, 5, 7, 8 and 9 and the severances in Records 11 and 14, with the exception of the first sentence of the severance to Record 14 and the handwritten notes at the bottom of page 1 of Record 3.

2. I order the head to disclose to the appellant Record 2, the handwritten note at the bottom of page 1 of Record 3 and the first sentence of the severance to Record 14 within twenty (20) days of the date of this Order. I further order the head to advise me in writing, within five (5) days of the date of disclosure of the records, of the date on which disclosure was made.

3. I order the head to provide the appellant with copies of the remaining requested records within thirty (30) days of the date of this Order. I further order the head to advise me in writing within five (5) days of the date on which copies of the records are sent to the appellant, of the date on which the copies were sent.

4. I order the head not to charge the appellant a fee for access to her own personal information.

5. The notice concerning disclosure of records and the sending of copies of the appellant's personal information should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario , M5S 2V1.

Original signed by: June 4, 1991
Tom A. Wright Date
Commissioner