



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

# ORDER 99

Appeal 890025

Ontario Human Rights Commission



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## O R D E R

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

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

1. On December 20, 1988, the Ontario Human Rights Commission (the "institution") received a request from the appellant for documents relating to the job competition for the position of Director of Policy and Research for the institution (Competition #MCZ-76/88).  
The appellant asked a number of questions and requested "where no documents exist, please indicate and provide me with what information you have".

The head responded to the request on January 20, 1989.

For ease of reference, the questions and the corresponding responses of the institution are listed below.

### PART ONE:

Question #1 - A copy of the requirements for the position.

**Response: Access is granted to the job description. Copy of said record is enclosed.**

Question #2 - The salary range.

**Response:** Access is granted to a copy of the salary range (AM-22).

Question #3 - Was the position advertised, where and at what cost?

**Response:** Access is granted to an External Advertising Request form and to the Advertising Cost Statements.

Question #4 - How many people applied for the position?

**Response:** Partial access is granted to the ratings of the applicants. Access to personal information however is denied in accordance with section 21 of the Act.

Question #5 - How many were visible minorities?

**Response:** No such record exists.

Question #6 - What was (sic) the criteria for shortlisting the candidates?

**Response:** Access is granted to the criteria for shortlisting the applicants. Copies of said records are enclosed.

Question #7 - How many people were shortlisted?

**Response:** Access is granted to the Interview Schedules for Competition No. 76/88. A review of the enclosed documentation reveals that seven individuals were shortlisted for interview purposes.

Question #8 - How many of those shortlisted were male and how many were female?

**Response:** No such record exists.

Question #9 - How many of those shortlisted were visible minorities?

**Response:** No such record exists.

Question #10 - Who chose the selection panel?

**Response:**           **No such record exists.**

Question #11 - Who sat on the selection panel?

**Response:**           **Kindly refer to the record provided in #7.**

Question #12 - How many of the selection panel were visible minorities?

**Response:**           **No such record exists.**

Question #13 - On what dates were those shortlisted interviewed?

**Response:**           **Kindly refer to the record provided in #7. (The Interview Schedule)**

Question #14 - Was [a named individual] an applicant?

**Response:**           **Refuse to confirm or deny the existence of the record in accordance with section 21(5) of the Act.**

Question #15 - On what date did she apply? (Please provide a copy of her application and any other solicited or required documentation provided by her).

**Response:**           **Refuse to confirm or deny the existence of a record in accordance with section 21(5) of the Act.**

Question #16 - Was [the named individual] one of the candidates shortlisted?

**Response:**           **Refuse to confirm or deny the existence of a record in accordance with section 21(5) of the Act.**

Question #17 - What percentage rating was she given in each of the criteria categories?

**Response:**           **Refuse to confirm or deny the existence of a record in accordance with section 21(5) of the Act.**

Question #18 - When was the competition cancelled?

**Response: No such record exists.**

Question #19 - For what reason?

**Response: No such record exists.**

Question #20 - Who authorized the cancellation - Chief Commissioner? Deputy Minister? Minister? (Please provide all memoranda or other documents relating to this decision).

**Response: No such record exists.**

Question #21 - Please provide a copy of the letter sent to those on the shortlist advising them the competition had been cancelled and the reasons why.

**Response: No such record exists.**

PART TWO:

"It is my understanding the position was filled by way of executive search within the government."

Question #1 - Who authorized the executive search?

**Response: Partial access is granted to a memorandum dated August 4, 1988 from the Executive Director, to the Chief Commissioner.**

Question #2 - On what grounds? (Please provide all documentation supporting the approval of this decision).

**Response: Kindly refer to Part 2, point 1. (Memorandum dated August 4, 1988 from [the Executive Director] to [the Chief Commissioner]).**

Question #3 - What were the specific requirements for the position?

**Response: Kindly refer to the record submitted under Part 1, point 1. (Job Description).**

Question #4 - How did they differ from the public competition?

**Response:** **Kindly refer to the records submitted under Part 1, point 1 (job description for the position).**

Question #5 - How many people were invited to apply?

**Response:** **No such record exists.**

Question #6 - How many were visible minorities?

**Response:** **No such record exists.**

Question #7 - How many did apply?

**Response:** **No such record exists.**

Question #8 - How many were visible minorities?

**Response:** **No such record exists.**

Question #9 - Who extended the invitation?

**Response:** **No such record exists.**

Question #10 - Were any of those shortlisted in the public competition invited to apply? If not, why not?

**Response:** **No such record exists.**

Question #11 - When was the deadline for submitting applications?

**Response:** **No such record exists.**

Question #12 - When were the candidates interviewed? Dates and times.

**Response:** **Access is granted to an action memo dated August 16, 1988 and to an Interview Schedule Sheet.**

Question #13 - Who sat on the selection panel?

**Response:** **Access is granted to an action memo dated August 16, 1988 and to an Interview Schedule Sheet.**

Question #14 - Who chose the selection panel?

**Response:** **No such record exists.**

Question #15 - How many on the selection panel were visible minorities?

**Response:**       **No such record exists.**

Question #16 - Was [the named individual] invited to apply?

**Response:**       **No such record exists.**

Question #17 - Who invited her to apply?

**Response:**       **No such record exists.**

Question #18 - When was she interviewed?

**Response:**       **Kindly refer to the record provided in point 12 above. (Action memo dated August 16 and an Interview Schedule Sheet).**

Question #19 - When was the decision made to appoint her to the position?

**Response:**       **Access is granted to a letter dated August 19, 1988 from Executive Director to [the named individual].**

Question #20 - Was it a unanimous decision of the panel?

**Response:**       **No such record exists.**

Question #21 - On what basis was she chosen?

**Response:**       **[the named individual] was deemed the most qualified candidate. Access is granted to a memorandum dated August 19, 1988 from the Executive Director, to all staff notifying them of [the named individual's] appointment as Director, Policy and Research.**

Question #22 - What was (sic) the selection criteria?

**Response:**       **Kindly refer to the records provided under Part 1, point 3 (The External Advertising Request form).**

Question #23 - What percentage rating was she given in each of the criteria categories?

**Response:** **Access is denied to the percentage ratings awarded to [the named individual] in accordance with section 21 of the Act.**

Question #24 - Where did she stand in rating with respect to the other applicants?

**Response:** **Kindly refer to point 21 above (memorandum dated August 19, 1988 from Mike Gage, Executive Director, to all staff).**

Question #25 - How did the selection criteria for the executive search differ from the public competition? Please provide documentation.

**Response:** **Kindly refer to the selection criteria submitted under Part 1 point 1 as well as the memorandum dated August 4, 1988 from Mike Gage to Raj Anand.**

Question #26 - Please provide copies of all documents submitted by [the named individual] with her application and before her selection panel interview.

**Response:** **Access is denied to [the named individual's] resume and supporting documentation in accordance with section 21 of the Act.**

Question #27 - Please provide full documented details of [the named individual's] academic background and work related experience that qualified her for this position.

**Response:** **Access is denied to [the named individual's] resume and supporting documentation in accordance with section 21 of the Act.**

Where the head decided not to give access to a record or a part of a record, the head cited subsections 21(1) and 21(3) of the Act. He stated that "section 21(1) prohibits disclosure of personal



information to any person other than the individual to whom the information relates ..." and "section 21(3) creates a statutory presumption that a disclosure of personal information constitutes an unjustified invasion of personal privacy". He also indicated that "having given due consideration to the criteria noted in section 21(2) and all the relevant circumstances there is nothing to rebut the statutory presumption of invasion of personal privacy".

Where the head decided to neither confirm or deny the existence of a record, the head cited section 21(5) of the Act which states: "the head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy".

Where the head decided "no such record exists", the head gave no reasons or explanations.

2. On February 16, 1989, the appellant wrote to me appealing the decision of the head. I gave notice of this appeal to the institution and the person affected by the appeal - the named individual - referred to as "the successful candidate" in this Order.
3. Between January 20, 1989 and May 23, 1989, the records relevant to this appeal were obtained and reviewed. The Appeals Officer examined the Competition File in the custody of the Human Resources Department of the Ministry of Citizenship as well as personnel and other related files held by the institution. Several meetings and telephone conversations were conducted with the Freedom of Information and Privacy Co-ordinator. The appellant, some members of the interview panel and officials who were involved in the processing of the job competition in question were interviewed. The person affected by this appeal (the "successful candidate") was contacted and advised of the appeal. She objected to the disclosure of any of the records withheld by the institution. Settlement was not achieved in this matter.

4. On June 7, 1989, notice that I was conducting an inquiry to review the decision of the head was sent to the institution, the appellant and the successful candidate. In accordance with my usual practice, the notice of inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officers Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appeared to the Appeals Officer, or any of the parties, to be relevant to the appeal. The sections of the Act paraphrased in the report include those exemption sections cited by the head in refusing access to a record or a part of the record. The report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.
  
5. Subsequent to the above inquiry letter, I received a request from Counsel for the institution to make an oral representation in the appeal. A meeting was scheduled for August 18, 1989 where all the parties attended, either personally or represented by Counsel. Prior to the attendance it was established that oral representations would be confined to the consideration of the application of section 23 of the Act to the circumstances of this appeal. I heard submissions from Counsel to the institution and the successful candidate as well as from the appellant on the applicability of section 23.

I have considered all of the written and oral representations in reaching my decision.

Before turning to the specifics of this appeal, the purposes of the Act as set out in section 1 should be noted. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information

should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in the Act lies with the head of the institution. In this case, the burden of proving the applicability of the section 21 exemption lies with both the head and the person affected by the appeal as they are the ones resisting disclosure.

The issues in this appeal are as follows:

- A. Whether there are any records in the custody or control of the institution that contain any information that would in any way be responsive to the appellant's questions #5, 8, 9, 10, 12, 18, 19, 20 and 21 in Part One and questions 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 20 in Part Two.
- B. Whether disclosure of any of the records withheld by the head under section 21 of the Act would constitute an unjustified invasion of the personal privacy of an individual.
- C. In respect of the head's response to neither confirm or deny the existence of a record under section 21(5) whether disclosure of the existence of a record would constitute an unjustified invasion of personal privacy.
- D. Whether there is a compelling public interest in the disclosure of the records exempted under section 21 that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

**ISSUE A: Whether there are any records in the custody or control of the institution that contain any information that would in any way be responsive to the appellant's questions 5, 8, 9, 10, 12, 18, 19, 20 and 21 in Part One and questions 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 20 in Part Two.**

As indicated above, the institution has advised the appellant that no records exist relative to his questions 5 , 8, 9, 10, 12, 18, 19, 20 and 21 in Part One and questions 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17 and 20 in Part Two. Although the appellant requested "where no documents exist, please indicate and provide me with what information you have", the institution did not provide him with answers or explanations as to why no records existed.

The Appeals Officer has examined the competition file, the personnel file of the successful candidate and other files in the custody or under the control of the institution with a view to identifying any records that might contain information in any way responsive to the appellant's questions listed above.

Records directly responsive to some of the applicant's questions were found as a result of the Appeals Officer's investigation. These were:

1. A form entitled "Requisitions and Recruitment Summary" - this record contains information directly relevant to appellant's question 8 in Part One (how many of those short-listed were male and how many were female?)
2. Six letters all dated August 4, 1988 and addressed to the candidates in the first interview - these records contain information relevant to appellant's question 21 in Part One (Please provide a copy of the letter sent to those on the short list advising them the competition had been cancelled and the reasons why.)
3. A letter dated August 4, 1988 from the Executive Director of the institution to the Human Resources Secretariat - this record contains information that would be partially responsive to questions 5 and 9 in Part Two (How many people were invited to apply? Who extended the invitation?)
4. An internal memo dated August 11, 1988 from the successful candidate to the Executive Director of the institution - this

record contains information responsive to appellant's questions 16 and 17 in Part Two (Was [the successful candidate] invited to apply? Who invited her to apply?)

In its submissions, the institution indicated that it was willing to disclose the Requisition and Recruitment Summary form in its entirety and the August 4, 1988 letters, (items # 2 and 3, above) after severing the names and addresses of individuals. The institution refused to disclose the August 11, 1989 internal memo on the ground that it would constitute an unjustified invasion of the personal privacy of the successful candidate under subsection 21(3)(g) of the Act.

Further, the institution indicated that it was prepared to disclose an additional record (an advertising cost statement) which would complete the institution's disclosure in response to question 3 in Part One. (Was the position advertised, where and at what cost?) This record was found by the institution subsequent to the commencement of the inquiry.

I requested and received an affidavit from the Freedom of Information and Privacy Co-ordinator setting out the steps taken and the reasons for deciding that no records existed. Based on the affidavit and the investigation of the Appeals Officer, I am satisfied that no records exist in the custody or under the control of the institution that would in any way be responsive to appellant's questions 5, 9, 10, 12, 18, 19 and 20 in Part One and questions 6, 7, 8, 10, 11, 14, 15, and 20 in Part Two. However, both the Appeals Officer's investigation and Co-ordinator's affidavit indicate that the institution could have provided accurate answers or explanations as to why no record or information exists relative to some of appellant's questions without fear of disclosing any information contrary to the Act. For example, the institution might have been able to advise the appellant why a record relative to questions 18, 19, 20 and 21 in Part One (regarding cancellation of the competition) did not exist. In its submissions, the institution explained that its response to these questions was that no record exists because "the competition was never cancelled. It was completed by the filling of the position in

August 19, 1989." Similarly, answers or explanations could have been provided to the appellant relative to questions, 5, 6, 7, 8, 9, 10, 11, 14, 15 and 20 in Part 2.

The institution's position, maintained throughout mediation and the inquiry, was that in the absence of a record relating to the question, it had no legal obligation to "create a record". The appellant on the other hand submitted that: "the Ontario Human Rights Commission's response that no such record exists may be accurate. But it should take little effort on the Commission's part to provide the answers ... the Commission knows exactly what information I am seeking but makes no effort to assist me in any way". The appellant pointed out as examples questions 9, 10, 12, 18 - 21 in Part One.

While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the Act is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the Act, it also enhances one of the major purposes of the Act i.e., to provide a right of access to information under the control of institutions. Although I do not have the statutory power to order the institution to reply to the questions in the absence of a record, and the institution has no obligation under the Act to "create" a record, in my view, the institution's handling of these questions was not in keeping with the spirit of the Act.

I believe that rather than taking a narrow and restrictive approach to the Act, an institution's co-ordinator should meet with a requester and offer assistance in reformulating a request so that information that a requester is entitled to can be provided. In this case, it would have been possible for the institution to provide answers to some of the questions that were asked and reasonable explanations when answers could not be provided. In my view, one of the purposes of the Act as set out in subsection 1(a) is not fulfilled when an institution responds in almost "rote" fashion that "no record exists" when at least some of the information that the requester is seeking is readily available.

However, as I have already indicated, other than making these comments, there is little that I can do when, in fact, no record exists.

**ISSUE B: Whether disclosure of any of the records withheld by the head under section 21 of the Act would constitute an unjustified invasion of the personal privacy of an individual.**

The records withheld by the institution under section 21 of the Act are as follows:

1. An internal memo, dated August 11, 1988 from the successful candidate to the Executive Director of the institution.
2. The successful candidate's resume.
3. Two letters of personal recommendation.
4. Notes of the interviewing panel (consisting of 17 handwritten pages).

These records were withheld by the head as their "disclosure is presumed to constitute an unjustified invasion of personal privacy, according to clauses 21(3) (d) and (g) of the Act".

Subsection 21(1) reads:

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

The subsection goes on to provide a number of exceptions to the rule of non-disclosure of this type of information. Specifically, subsection 21(1)(f) provides an exception to mandatory non-disclosure if "disclosure does not constitute an unjustified invasion of personal privacy."

Subsections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified

invasion of personal privacy. Subsection 21(2) sets out some criteria to be considered by the head.

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

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

Subsection 21(3) of the Act sets out a list of the types of personal information, disclosure of which is to be presumed to constitute an unjustified invasion of personal privacy.

In this case, the institution and the successful candidate have cited subsections 21(3) (d) and (g) to support the decision to withhold the records.

Subsections 21(3) (d) and 21(3) (g) state:



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

...

(d) relates to employment or educational history;

...

(g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Examination of the records in question indicates that they contain personal information about the successful candidate, as defined under subsection 2(1) of the Act. The resume of the successful candidate and the August 11, 1988 internal memo contain information that relates to employment and educational history of the candidate and therefore fall under subsection 21(3)(d) of the Act, while the interview notes and letters of recommendation contain her educational history and are the personal recommendations or evaluations, character references or personnel evaluations within the meaning of subsection 21(3)(d) and 21(3)(g) of the Act. I have, therefore, no difficulty in concluding that the records fall squarely under subsections 21(3)(d) and 21(3)(g) of the Act and their disclosure is presumed to constitute an unjustified invasion of the personal privacy of the successful candidate.

This type of personal information was clearly intended by the legislature not to be disclosed to someone other than the person to whom it relates, without an extremely strong and compelling reason. As I indicated in my Order # 20 in Appeal No. 880075, it is clear that the type of information listed in subsection 21(4), the application of section 11 or 23 of the Act may result in the disclosure of information which is otherwise presumed to be an invasion of personal privacy under subsection 21(3). I also stated in that appeal that while subsection 21(4), section 11 and section 23 can effectively rebut the presumptions set out in subsection 21(3), 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)." I indicated that in my view, such a case would be extremely unusual.

In his submissions the appellant stated:

The Ontario Human Rights Commission has chosen not to answer any of my questions relating to [the successful applicant's] qualifications to fill the position. The Commission claims that to do so would be an invasion of [the successful candidate's] privacy. The Commission refuses to disclose if [the successful candidate] even applied for the position, if so when, or under what circumstances she got the job.

The appellant submitted that the institution plays an extremely important role in the province and has enormous responsibilities in the area of investigating complaints from people who believe they have been denied employment or promotions as a result of discriminatory employment practices. He argued that both employers and employees must have complete confidence in the

institution and its staff if it is to fill its mandate effectively. For this reason, he submitted "the Commission's own hiring practices should be above reproach and wide open to public scrutiny. The position of Policy and Research is one of the most important positions in the Commission. The job specifications show the person filling the position must have "extensive senior management experience, a solid background in policy development and analysis and experience in communications, which includes authorship of major policy papers."

The appellant indicated that he was not asking the institution to disclose the identity or background of unsuccessful candidates; his contention was that "the right of complete privacy should not be extended to the person appointed to the position."

The following are some of the appellant's reasons for arguing that the records should be disclosed:

- (a) the public has a right to know if the initial public competition was conducted fairly;
- (b) there is a compelling public interest in knowing if [the successful candidate] is qualified to hold the position;
- (c) the public has a right to know if the Human Rights Commission, in light of its mandate has a fair and equitable employment policy;
- (d) the public has a right to know if the Human Rights Commission enforces one set of hiring standards on other employees but uses a different set of standards for the Commission;
- (e) the Commission is the agency people turn to when they believe they are the victims of discrimination but employees or outsiders who apply for employment at the Human Rights Commission have no place to turn if they suspect they are the victims of discrimination.

Counsel for the institution submitted:

The presumption under subsection 21(3) could, in an unusual case, be overridden by a compelling combination of factors in subsection 21(2). That is not the case here. [the appellant] has alluded to only one factor - the desirability of public scrutiny referred to in clause 21(2) (a)

...

The hiring method employed by [the institution] has been the subject of an internal audit the results of which were made public on June 2, 1989. The public interest to which [the appellant] makes reference is being addressed without having to override [the successful candidate's] right to personal privacy.

Like counsel for the institution, counsel for the successful candidate argued that there are no circumstances present in this appeal which outweigh the presumptions in subsection 21(3) of the Act. In her submissions she stated:

The Commissioner has stated in his Order in Appeal No. 880022 and in Order No. 20 and Order No. 43 that a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh the presumption under subsection 21(3). The Commissioner noted that 'such a case would be extremely unusual...' In this case, the only provision of subsection 21(2) that could possibly be invoked to rebut the presumption is paragraph 21(2)(a). It is submitted that any need to subject the activities of the institution to public scrutiny has been fulfilled by the publication of the "Report of a Review of Recent Staffing Practices for Senior Positions Within the Ontario Human Rights Commission."

As indicated earlier, a combination of the circumstances under subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). It should be pointed out that subsection 21(2) requires the head to consider all the relevant circumstances in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy. The subsection lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria. Counsel for the institution and the successful candidate agree that a presumption under subsection 21(3) may be rebutted by a combination of factors under subsection 21(2).

Therefore, the circumstances of each case have to be examined carefully

to identify any factors under subsection 21(2), listed or unlisted, that might be relevant in the determination of whether disclosure of personal information constitutes an unjustified invasion of personal privacy. It is only after determining that subsection 21(1)(f) does not apply to the case, that one should consider whether section 23 might apply.

In my view, the circumstances surrounding this appeal are extremely unusual. There is ample evidence that the institution's practices relating to the hiring, recruitment and termination of senior personnel has been the subject of considerable public discussion. There were allegations that some of the institution's job competitions have been discriminatory and failed to meet normal standards of the Ontario Public Service. It was alleged that in this particular competition the institution rejected all the applicants for the position of Director of Policy and Research, altered the qualifications of the job, extended the deadline, gave no public notification of these matters, interviewed a handful of people from within the civil service and then gave the job to the Chief Commissioner's special advisor, the successful candidate.

There were allegations made that the institution did not hire a single visible minority candidate when it created and filled seven management positions, including the position in question in this appeal. There were also allegations that the job competitions were "rigged" and unfair procedures were covered up by the institution staff. There were expressions of lack of confidence by some of the institution's constituents, largely arising out of the perception that the allegations might be true. As a result of these complaints, the Minister of Citizenship announced the creation of a committee to investigate these allegations. I have no difficulty concluding that these are extremely unusual circumstances.

The results of the Committee's investigations were announced on June 2, 1989. While the Committee found no evidence of discrimination, favouritism or competition rigging with regard to this competition, it concluded that a review of the documentation on file failed to indicate a reason for the decision that none of the six candidates interviewed

from the first set of applications was qualified. It stated that there was "a complete lack of evaluation material to support the decision." The Committee's report indicates that there was a "significant difference" between the qualifications advertised and those required by the institution to effectively discharge the position. The report made no comment whether the successful candidate possessed the requisite qualifications nor did it give the educational or employment history of the successful candidate. (It should be noted here that the institution's response to the appellant's question as to whether there was a change of the selection criteria [Questions 3 and 4 in Part 1 and questions 22 and 25 in Part 2] appears to be that they remained the same through the competition).

These events appear to have brought the very integrity of the institution and public confidence in its ability to discharge its mandate into question. This, in turn, led to low staff morale and resignations from the ranks of the senior management positions of the institution including the Director of Legal Services and the Chief Commissioner himself. There were debates in the Legislature, culminating in a government-sponsored motion authorizing the Standing Committee on Government Agencies to review the operations of the institution, including the internal committee's investigation report. This motion in the House received the unanimous agreement of all three parties. This review is expected to start in October 1989. The full text of the motion is as follows:

That in view of the fact that in 1985 the Standing Committee on Procedural Affairs and Agencies, Boards of Commissions reviewed the work of the Ontario Human Rights Commission and made proposals for reform; that following further reviews and amendments to the Ontario Human Rights Code, the government introduced major changes in the mandate and structure of the Commission and provided substantial added resources to the Commission to implement these changes; the report was prepared recently for the Ministry of Citizenship that reviewed and responded to allegations regarding certain staffing and financial decisions made by the Commission; that the Chief Commissioner resigned in May, 1989 and Catherine Frazee has been appointed as Acting Chief Commissioner; and that a new interim Executive Director has been appointed, the Standing Committee on government agencies

is authorized to review the operation of the Commission including the report prepared for the Ministry of Citizenship, taking into consideration its new mandate, structure and increased resources and to review and access the future mandate, role and structure of the Commission with a view to making the recommendations to strengthen the Commission's ability to carry out its mandate; And for the purposes of this Order the Committee has the power to retain the services of such staff as it may deem necessary and to adjourn from place to place in Ontario, subject to Bench 3 approval of the Board of Economy, and the Assembly doth command and compel the attendance before the said Committee of such persons and the production of such papers and things as the Committee may deem necessary for any of its proceedings and deliberations, for which the Speaker may issue his Warrant pursuant to section 35(2) of the Legislative Assembly's Act.

In a statement made in the Legislature on July 25, 1989, supporting the motion the Minister responsible for the institution stated:

There has been a cloud over the Ontario Human Rights Commission, and I think this inquiry in an open way will help to get certain matters out into the open where we can look at them and make some recommendations to ensure that that cloud disappears. There have been a number of irregularities - inadequate priority given to identifying candidates of visible minority groups in hiring; no employment equity program in place at the time at which certain important recruitments were conducted; a top-down approach in staffing - which I think the Committee will want to look at. Of equal importance is that there has been a very serious morale problem at the Human Rights Commission as a result of these series of revelations we have experienced.

As I indicated above, section 21(2) sets out a number of criteria that should be considered by the head in determining whether the disclosure of personal information would constitute an unjustified invasion of the privacy of the person to whom the information relates. This list is not exhaustive and the head is required to consider all the relevant circumstances (emphasis mine) in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy. One of the criteria, listed under subsection 21(2)(a), is whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

Having regard to the circumstances outlined above, in my view subsection 21(2) (a) applies in this case. In addition to the criterion identified in subsection 21(2) (a), in very unusual circumstances, disclosure could be desirable for the purpose of restoring public confidence in the integrity of so vital a government institution as the Ontario Human Rights Commission. Indeed, this could be considered as an additional unlisted circumstance to be taken into consideration under subsection 21(2).

Having carefully considered all the circumstances of this appeal I find that the presumption under subsection 21(3) has been rebutted. In my view, the desirability of subjecting the institution to public scrutiny and restoring public confidence in the integrity of the institution, outweighs any invasion of the privacy of the successful candidate which would be brought about by the disclosure of her employment history, educational background, or evaluations of her qualification for the position. There is no doubt that I consider the disclosure of this information to be an invasion of the successful candidate's privacy, but in the unusual circumstances of this case, I believe that it may be characterized as a justified, rather than an unjustified invasion.

Notwithstanding that the oral submissions were confined to Issue D, it is not necessary for me to deal with issues C and D. I have decided that subsection 21(1) does not apply to the records at issue in this appeal.

My Order in this matter is that the head disclose to the appellant the following records - with severances as indicated hereunder. (The severances refer to personal information not requested by the appellant).

1. the Requisition and Recruitment Summary in its entirety;
2. the six letters dated August 4, 1988 to candidates in the first interview with the names and addresses of the individuals severed;



3. the letter dated August 4, 1988 from the Executive Director of the institution to the Human Resources Secretariat, in its entirety;
4. the internal memo dated August 11, 1988, from the successful candidate to the Executive Director of the institution in its entirety;
5. the successful candidate's resume - with her telephone number, address and personal interests deleted;
6. the two recommendation letters - with personal information severed;
7. seventeen pages of interviewers' notes - with personal information about other candidates deleted; and
8. the Advertising cost statement for the Globe and Mail.

I also order the institution not to release the records under items 4, 5, 6 and 7 above until 30 days following the date of the issuance of the Order. This time delay is necessary in order to give the successful candidate sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided that notice of an application for judicial review has not been served on the institution within this 30 day period, I order that the record be released within 35 days of the date of this Order.

Original signed by:  
Sidney B. Linden  
Commissioner

October 3, 1989  
Date