



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

# **ORDER P-547**

## **Appeal P-9200695**

### **Ministry of the Solicitor General and Correctional Services**



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## ORDER

On September 20, 1993, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

### BACKGROUND:

The Ministry of the Solicitor General (now the Ministry of the Solicitor General and Correctional Services) (the Ministry) received a request from a local organization for access to all reports arising from an audit of that organization and to copies of any complaints against the organization received since January 1, 1992. The Ministry provided partial access to the records. Access was, however, denied in full to three records pursuant to sections 13(1), 14(1)(a) and (b), and 21 of the Freedom of Information and Protection of Privacy Act (the Act). The requester, represented by counsel, appealed the Ministry's decision to deny access.

Mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Written representations were received from both parties.

The records remaining at issue in this appeal are: a draft "Status Report" (Record 1); an internal memorandum dated May 14, 1992 to the then Deputy Solicitor General from the Director, Internal Audit Branch (Record 2); and a letter addressed to the then Solicitor General of Ontario from named individuals (Record 3).

The Notice of Inquiry stated in its background section that the Ministry had denied access to four records. In the records section of the Notice only three records were identified. In fact, the Ministry denied access to only three records, as described above.

### PRELIMINARY ISSUE:

#### Section 29 of the Act

In his representations, the appellant states that the Ministry has not complied with section 29(1)(b) of the Act because, in its decision letter, it failed to include reasons for the application of the exemptions claimed. The Ministry's decision letter simply repeats the wording of sections 13(1), 14(1)(a) and (b), and 21(1) without further explanation for applying the exemptions.

Section 29(1)(b) of the Act reads as follows:

Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

where there is such a record,

- (i) the specific provision of this Act under which access is refused,
- (ii) the reason the provision applies to the record,
- (iii) the name and position of the person responsible for making the decision, and
- (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

A number of past orders have commented on the degree of particularity which should be contained in a decision letter (Orders 158, P-298, P-324, P-482 and P-537). In addition, in June, 1992, the Commissioner's office devoted an edition of "IPC Practices" to outlining the requirements of a proper decision letter.

In Order P-537, Inquiry Officer Anita Fineberg delineated the test to be met by an institution when providing notice to a requester that access is being denied to requested information. She stated, at page 4 of the order, that:

In providing a notice of refusal under section 29, the extent to which an institution describes a record in its decision letter will have an impact on the amount of detail required under section 29(b)(ii). For example, should an institution merely describe a record as a "memo", more detailed reasons for denying access would be required than if a more expansive description of the record had been provided. Whichever approach is taken, the key requirement is that the requester must be put in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324).

In my view, the notice of refusal issued by the Ministry in this appeal did not satisfy the requirements of section 29(1)(b) of the Act because it did not provide the appellant with sufficient information about the nature of the records at issue. In particular, it neither provided a description of the individual records at issue nor an explanation of why section 52(9) applied to those records to which the Ministry was denying access.

I agree with the approach outlined by Inquiry Officer Fineberg and adopt it for the purposes of this appeal. I find that the content of the Ministry's decision letter is not sufficient to satisfy the

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requirements of section 29(1)(b)(ii) of the Act. The appellant was not provided with sufficient information about the nature of the records at issue and the reasons why the Ministry applied the exemptions claimed to the requested information. However, I do not see that any purpose would be served in ordering the Ministry to provide a proper notice of refusal letter at this stage of the appeal. Accordingly, I will proceed to dispose of the issue of access as it relates to the three records. I remind the Ministry, however, of the importance of issuing proper and comprehensive notice of refusal letters when responding to requests under the Act.

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the discretionary exemptions provided by sections 14(1)(a) and 14(1)(b) of the Act apply to the records.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 1.
- C. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether the records qualify for exemption pursuant to the mandatory exemption provided by section 21 of the Act.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the discretionary exemptions provided by sections 14(1)(a) and 14(1)(b) of the Act apply to the records.**

The Ministry has claimed sections 14(1)(a) and (b) in respect of Records 1, 2 and 3.

Sections 14(1)(a) and (b) read as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The Ministry submits that sections 14(1)(a) and (b) apply to all three records because the information contained in the records "pertains to a law enforcement investigation conducted by the Barrie Police Service and to the conduct of proceedings as a result of this investigation."

I shall first consider the application of section 14(1)(a).

The words "law enforcement" are defined in section 2(1) of the Act as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

I agree that investigations undertaken by the Barrie Police Service would fall within the meaning of law enforcement as defined by the Act. However, that is not sufficient to satisfy the requirements for exemption under sections 14(1)(a) and/or (b). The Ministry must also establish that release of the records **could reasonably be expected to** result in specified types of harms listed in these sections.

The purpose of sections 14(1)(a) and (b) is to provide the Ministry with the discretion to preclude access to records in circumstances where the disclosure of the records could reasonably be expected to interfere with an on-going law enforcement matter or investigation. The Ministry bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) and, in my view, the Ministry discharges this onus by establishing a clear and direct linkage between the disclosure of the specific information and the harm alleged (Orders 188 and P-537).

The word "interfere" in sections 14(1)(a) and (b) contemplates a situation where the particular investigation or law enforcement matter is still ongoing (Orders P-285, P-316, P-403 and P-449).

The Ministry submits that:

[T]he information contained in the records has been used by Barrie Police in their investigation and will constitute a portion of the evidence used by Crown Counsel in the prosecution of charges against [a named individual] of the [local organization]. [A named individual] has been charged with fraud exceeding \$1,000 contrary to Section 380(1)(a) of the Criminal Code of Canada.

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Concerning the potential harm resulting from disclosure of the records, the Ministry submits that:

... evidence gathered pertaining to a law enforcement investigation should not be disclosed prior to the prosecution of the charges ... the information contained in the records is central to the allegations and is central to the upcoming proceedings. This information is vital to both the prosecution of the charges by Crown Counsel and the defence of the accused. Disclosure of this information could reasonably be expected to deprive Crown Counsel of the right to present the case in a fair and equitable manner as well as deprive the accused of the right to a fair and impartial trial.

The appellant submits that the organization he represents is not involved in any ongoing law enforcement matter or investigation. He also states "We are at a loss to understand how the distribution of any records could possibly affect an investigation which by this time should have been completed."

In my view, the forthcoming trial of the named individual is a "law enforcement matter" within the meaning of the Act and any record, whose disclosure could reasonably be expected to interfere with the preparation for or conduct of that proceeding, is properly exempt under section 14(1)(a) of the Act. The fact that the appellant is not the subject of the legal proceedings does not negate the applicability of section 14(1)(a).

In my opinion, the Ministry has provided sufficient evidence to establish that the disclosure of those portions of the record concerning specific allegations of fraud against the named individual could reasonably be expected to interfere with a law enforcement matter pursuant to section 14(1)(a) of the Act. The Ministry has established a clear and direct linkage between the disclosure of the records and interference with a law enforcement matter. In my view, premature disclosure of that information could reasonably be expected to interfere with the preparation and/or conduct of the matter for trial.

Having reviewed Record 1, I find that portions of pages numbered 6, 7, 9, 10, 11 and 14, and all of pages 12 and 13 qualify for exemption under section 14(1)(a) of the Act.

The remainder of Record 1 contains information which relates to the audit process generally and the operating procedures and structure of the local organization, and are not sufficiently connected to the law enforcement investigation or proceeding to satisfy the requirement for exemption under sections 14(1)(a) or (b) of the Act.

Record 2 is an internal memorandum dated May 14, 1992 directed to the then Deputy Solicitor General. It appears to be a transmittal letter which accompanied Record 1. In my view, there is no information contained in Record 2 which, if disclosed, could reasonably be expected to interfere with a law enforcement investigation or proceedings. Therefore, Record 2 does not qualify for exemption pursuant to sections 14(1)(a) or (b) of the Act.

Record 3 is a letter addressed to a former Solicitor General from named individuals. It contains their description of events which allegedly occurred at the organization and describes the actions of those named individuals in relation to those events. It also contains criticisms directed at the organization and the Ministry. Record 3 does not contain any specific information concerning alleged fraudulent activities. In my opinion there is no information contained in Record 3 which is clearly and directly linked to the law enforcement investigation or proceeding such as to satisfy the requirement for exemption under sections 14(1)(a) or (b) of the Act.

**ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 1.**

Although the Ministry originally claimed section 13(1) for all of the records at issue, the representations submitted by the Ministry have not addressed the application of this section to Records 2 or 3. Therefore, I shall consider the application of section 13(1) only to those portions of Record 1 which I found did not qualify for exemption under sections 14(1)(a) or (b) of the Act.

Section 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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356, P-402, P-463, P-508 and P-529).

The Ministry characterizes Record 1 as a draft interim report prepared to advise the Deputy Solicitor General of the initial audit findings regarding the local organization. Further audit work was halted when the financial records of the local organization were seized in the course of a law enforcement investigation being conducted by the Barrie Police. The draft report was circulated for comment and discussion. According to the Ministry, at some point, portions of the status report will be incorporated into a final report which will include the audit reports of a number of other similar organizations. This final report will make recommendations commenting on the administration and management of grants from the Ministry to certain programs administered by various local organizations.

The Ministry submits that:

[I]t would defeat the purpose of the exemption if information contained in all of the earlier draft versions which may or may not evolve into the final report were subject to disclosure.

Having reviewed the record, I am not persuaded that the remaining information in Record 1 qualifies for exemption under section 13(1) of the Act. While certain passages in this record discuss a number of issues and raise a number of potential problems, there is no advice or recommendation provided which sets forth an approach which may be adopted by the recipient of the report.

Therefore, I find that the remaining portions of Record 1 do not qualify for exemption under section 13(1) of the Act.

**ISSUE C: Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act states, in part:

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

...

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

...

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

(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,

...

(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 his representations, the appellant submits that the information contained in Record 3 is the personal information of the local organization itself.

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Record 3 is a letter authored by four named individuals. It sets out the named individuals' version of events which allegedly occurred at the local organization and describes the impact of those events upon the named individuals and other unidentified individuals. The letter describes the actions taken by the named individuals, the named individuals' opinions and views respecting those events and their opinions and views concerning the conduct of the local organization and the Ministry.

Personal information is defined in section 2(1) of the Act as information about an "identifiable individual". In Order 16, former Commissioner Sidney B. Linden considered the meaning of personal information as it relates to business entities. He stated that:

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear. The types of information enumerated under subsection 2(1) of the Act as "personal information" when read in their entirety, lend further support to my conclusion that the term "personal information" relates only to natural persons.

I agree with the distinction made by Commissioner Linden. In my opinion, even though Record 3 contains information about the local organization, that information is not the local organization's "personal information" as defined in the Act as the organization is not a natural person.

I have also reviewed Record 2 and the remaining portions of Record 1 and I find that they do not contain any personal information whatsoever.

**ISSUE D: If the answer to Issue C is yes, whether the records qualify for exemption pursuant to the mandatory exemption provided by section 21 of the Act.**

In Issue C, I found that Record 3 contains the personal information of the authors of the letter and other persons.

Once it has been determined that a record contains personal information, section 21 of the Act provides a general rule of non-disclosure of the personal information to any person other than the individual to whom the personal information relates. Section 21(1) provides some exceptions to this general rule of non-disclosure. In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), 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,

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if the disclosure does not constitute an unjustified invasion of personal privacy.

In order for section 21(1)(f) to apply, I must find that the release of the personal information at issue would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Ministry submits that all of the personal information contained in Record 3 is identifiable as part of an investigation into a possible violation of law in accordance with section 21(3)(b) of the Act. Section 21(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I have reviewed the record and the circumstances under which the information was created and compiled. I am not satisfied that the personal information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law. Rather, it was prepared as a response by its authors to certain actions taken by the local organization by the Ministry. Therefore, section 21(3)(b) has no application in the circumstances of this appeal.

Section 21(2) lists a number of circumstances the Ministry must consider in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy.

In their representations, the Ministry submits that sections 21(2)(f) and (i) of the Act are relevant considerations in the circumstances of this appeal.

These sections of the Act 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,

(f) the personal information is highly sensitive;

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- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The Ministry states that the information contained in Record 3 is "highly sensitive" as it pertains to the actions of a named individual and the information is central to the prosecution of that person on charges of fraud.

In order for this information to properly be considered "highly sensitive", the Ministry must establish that release of the information would cause excessive personal distress to persons other than the appellant (Order P-434).

Given that Record 3 does not contain specific allegations pertaining to the actions of the named individual, I cannot agree with the reasons submitted by the Ministry in support of the application of this section.

However, I am prepared to accept that the personal information of other named individuals contained in Record 3 is "highly sensitive".

The Ministry also submits that disclosure of the information contained in Record 3 could unfairly damage the reputation of a named individual who has plead not guilty to the fraud charges.

The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order 256).

Given that Record 3 does not contain any specific information or allegations concerning the activities of the named individual, I cannot agree that this section has any application in the circumstances of this appeal.

The appellant has not made reference to the application of any of the circumstances listed in section 21(2) which weigh in favour of disclosure. Having reviewed the records, it is my opinion that none of the factors set forth in section 21(2) favouring disclosure are present with respect to Record 3, nor are there any other circumstances present which favour disclosure.

Therefore, it is my view that the disclosure of Record 3 to the appellant would constitute an unjustified invasion of the personal privacy of other individuals whose personal information is contained in Record 3. Accordingly, Record 3 qualifies for exemption from disclosure under section 21(1) of the Act.

## **ORDER:**

1. I uphold the Ministry's decision not to disclose Record 3.

2. I order the Ministry to disclose Record 2 to the appellant in its entirety and to disclose Record 1 to the appellant in accordance with the highlighted copy of Record 1, which I have provided with a copy of this order. The highlighted portions identify the parts of Record 1 which should **not** be disclosed.
3. I order the Ministry to disclose the records referred to in Provision 2 within 15 days of the date of this order.
4. In order to verify compliance with Provision 2 of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

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