



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

# **ORDER P-629**

**Appeal P-9300197**

**Ministry of Consumer and Commercial Relations**



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## ORDER

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for "an actual copy of the examination that [the requester] wrote on December 14, 1992 entitled PRINCIPLES OF MORTGAGE FINANCING".

The Ministry responded to the requester by indicating that:

"the [Act] applies only to information under the custody and control of provincial institutions. The record requested, a copy of an examination administered by the Ontario Real Estate Association [OREA], is not maintained by the Ministry. Any requests for information held by OREA should be addressed to that organization."

The requester appealed the Ministry's decision to the Commissioner's office.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties. The Commissioner's office recognized that the Ontario Real Estate Association (the Association), which is not an "institution" for the purposes of the Act, had an interest in the outcome of the appeal and, accordingly, representations were also solicited and received from that Association. As the nominee of the Registrar of Real Estate and Business Brokers, the Association conducts and administers training programs for real estate brokers and salespersons. The responsibilities of this agency include the testing of examinees according to a course of studies approved by the Registrar.

In its representations, the Association indicates that, with the agreement of the Office of the Registrar of Real Estate and Business Brokers, it retains copies of those examinations for which students have not received a passing grade for a period of six months from the date that the examination is written. The examinations are then shredded pursuant to the Association's record retention schedule. The appellant's examination, written on December 14, 1992, would have been destroyed, therefore, on or about June 14, 1993.

The question of whether the Ministry exercises custody or has control over this particular record has, accordingly, been rendered moot by the destruction of this document by the Association. I am satisfied that the Ministry does not have in its possession a copy of the requested record, nor would the Ministry be able to exercise control over the record by requesting a copy from the Association. Should I decide to order the Ministry to disclose the record to the appellant, such a decision will have no practical effect in that the record no longer exists.

I will, however, address the issue of whether, in the circumstances of this appeal, the Ministry exercised the requisite degree of control over the record at the time the request was made as required by section 10(1) of the Act. Section 10(1) states that:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

Under section 10(1), a person has a right of access only to those records which are in the custody of or under the control of the Ministry. The circumstances under which the record was created and maintained must be examined to determine the extent to which the record, which was in the physical possession of the Association, fell within the "control" of the Ministry.

Section 16(c) of Ontario Regulation 986/92, promulgated pursuant to the Real Estate and Business Brokers Act (REBBA), provides that the Registrar, or his or her nominee, when requested to do so by an examinee who has failed to achieve a passing grade, shall review the examination paper and make such changes in the mark as the Registrar or his or her nominee considers proper. Section 16(d) further provides that should an examinee not be satisfied with the review undertaken by Registrar's nominee, the examinee may apply to the Registrar to review the examination and make any changes he or she considers proper. It follows implicitly that the Registrar would have a statutory right to compel the production of a copy of an examination from the Association in the limited circumstances described in these sections. Accordingly, it is my view that, for the purpose of reviewing the marking of an examination, the Registrar (and thus the Ministry) exercise control over records of this nature.

In this appeal, the request was made by an examinee for a copy of the examination which she had written because she was dissatisfied with the test result achieved. Although the appellant did not complete the two step process prescribed by the Regulations in seeking a review of her mark, I am satisfied that, based on her representations, the appellant's request under the Act was aimed at achieving a similar result.

In summary, the Ministry exercises the requisite degree of control over records pertaining to examinations which are administered by the Association for the purpose of conducting marking reviews. The appellant's representations indicate that she seeks a review by the Registrar of a similar nature. In the circumstances of this appeal, I am of the view that, at the time of the request, the Ministry exercised the requisite degree of control over the requested examination within the meaning of section 10(1) of the Act.

However, as no practical purpose would be served by issuing an order requiring the disclosure of the record in this appeal, my decision is to conclude this appeal and close the file.

## **ORDER:**

I order that this appeal be discontinued and that the appeal file be closed.

## **POSTSCRIPT:**

At the time that the Ministry received the request, it ought to have advised the Association to retain a copy of the examination until the request had been satisfied or the Ministry confirmed with the Commissioner's office that an appeal had not been received.

In light of the difficulties caused by the Association's six month records retention schedule for examinations, I would encourage the Registrar of Real Estate and Business Brokers, in consultation with the Association, to consider extending the time for the maintenance of examinations to a period of one year, to make this practice consistent with the obligations placed on institutions pursuant to section 5(1) of Ontario Regulation 460/92.

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

\_\_\_\_\_ February 11, 1994