



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-352

Appeal M-9200268

Municipality of Metropolitan Toronto



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Municipality of Metropolitan Toronto (the Municipality). Specifically, the request was for access to the appellant's file maintained by the Social Services Division of the Municipality's Community Services Department.

One entire record and parts of several others were not disclosed and are at issue in this appeal. The record withheld in its entirety consists of the Minutes of Settlement in an action before the Provincial Court (Family Division). The information withheld from disclosure in the other records at issue includes the Social Insurance Number and OHIP number of an individual other than the appellant. The records are described in more detail in Appendix "A" to this order.

The Municipality relies on the following exemption to deny access to information which has been withheld:

- invasion of privacy - section 14(1).

A Notice of Inquiry was provided to the Municipality, the appellant, and two individuals named in the portions of the records which are at issue (the affected persons). Because it appeared that some of the records which the Municipality had partially withheld from disclosure contained the personal information of the appellant as well as other individuals, the Appeals Officer asked for representations on the possible application of section 38(b). That section provides a discretionary exemption in situations where an individual has requested access to his or her own personal information, and disclosure would constitute an unjustified invasion of the personal privacy of another individual or individuals.

In response to the Notice of Inquiry, representations were received from the Municipality and the appellant only.

PRELIMINARY ISSUES:

The appellant has raised two arguments based on several provisions of the Canadian Charter of Rights and Freedoms (the Charter). These may be summarized as follows:

- the appellant does not have the same level of access to legislation, past orders and related materials as the Municipality and the Appeals Officer who handled his case at the Commissioner's office, and this difference has deprived him of equality before the law, contrary to section 15(1) of the Charter;
- the notification requirement found in section 39(3) of the Act deprives the appellant of equality before the law, contrary to section 15(1) of the Charter, and deprives him of his right to security of the person, contrary to section 7 of the Charter.

In his representations, the appellant quotes from a letter he sent to the Appeals Officer prior to the commencement of the inquiry process in this appeal, in which he comments on one of these Charter issues as follows:

This sort of issue has not been addressed by the courts to my best knowledge. I feel that it is incumbent on the Commissioner to seek the direction of the court in this regard prior to making a ruling ...

This comment suggests that the Commissioner does not have the authority to make rulings on issues raised with respect to the Charter. However, previous orders have established that the Commissioner does have this authority.

In Order P-254, Commissioner Tom Wright considered various decisions of the Supreme Court of Canada made after the issuance of Order 106 (i.e., Tetreault-Gadoury v. Canada (Canada Employment and Immigration Commission [1991] 2 S.C.R. 22, 126 N.R. 1, 81 D.L.R. (4th) 358 (S.C.C.), Cuddy Chicks Limited v. Ontario (Labour Relations Board), [1991], 2 S.C.R. 5, 122 N.R. 361, 81 D.L.R. (4th) 121 (S.C.C.), and Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3. S.C.R. 570, 118 N.R. 340, 77 D.L.R. (4th) 94), and concluded that he had the jurisdiction to determine Charter issues. Therefore, I have assumed that I have jurisdiction to determine issues raised with respect to the Charter in matters properly before me.

In Order 106, former Commissioner Sidney B. Linden considered whether section 14(3) of the provincial Freedom of Information and Protection of Privacy Act was in conflict with a Charter right. In addressing this issue, he stated as follows:

In my view, even if I were to conclude that I have the jurisdiction to hear and determine a Charter challenge to the validity of provisions of the Act, I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.

I agree with former Commissioner Linden's view as expressed in Order 106 that I would have to be convinced by a clear and compelling argument that the sections which the appellant seeks to impugn are, in fact, inconsistent with the Charter.

ACCESS TO LEGISLATION AND ORDERS

As previously noted, the appellant contends that he does not have the same level of access to legislation, orders and related materials as the Appeals Officer or the Municipality, and that, in the context of the appeals process under the Act, this infringes section 15(1) of the Charter. That section states:

Every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In order to establish that section 15(1) of the Charter has been violated, the appellant would have to demonstrate that he has suffered "discrimination based on race, national or ethnic origin, colour, religion, [IPC Order M-352/July 14,1994]

sex, age or mental or physical disability" or an analogous ground (Andrews v. Law Society of British Columbia (1989) 56 D.L.R. (4th) 1). The Court in the Andrews case made the following observations about what must be established in order to be successful in a charter challenge under this section:

A complainant under s. 15 (1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by the law but, in addition, must show that the legislative impact of the law is discriminatory.

In my view, the appellant's representations on this subject do not indicate what parts of the Act he alleges to be discriminatory (other than section 15 of the Act, which was never claimed by the Municipality and is not at issue in this appeal), nor do they establish that the legislative impact of any part of the Act is discriminatory in any way.

In my view, the appellant's challenge under the Charter regarding access to copies of legislation, orders and related materials has not been substantiated.

The appellant's arguments on this subject appear at times to relate to a request he made to receive by-laws and related documents from the Municipality. That request is not under consideration in this appeal. It was not part of the request which led to this appeal, having been submitted at a later date.

NOTIFICATION OF AFFECTED PERSONS

The appellant also contends that the scheme in the Act established for the notification of affected persons violates both section 7 and section 15(1) of the Charter.

The requirement that the Commissioner's office provide notification to affected persons is found in section 39(3) of the Act, which states as follows:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned **and any other affected person** of the notice of appeal. (emphasis added)

With regard to section 15(1) of the Charter, the appellant has not demonstrated that the requirement to notify affected persons is discriminatory. This is particularly so since the plain meaning of section 39(3) indicates that it applies equally in all cases where there are affected persons.

As noted, the appellant also relies on section 7 of the Charter in challenging the validity of this provision. That section states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The appellant contends that notification of the affected persons in this appeal threatened the security of his person. He has not presented any credible evidence to substantiate this view. Even if I accepted the appellant's evidence on this point, in my view section 39(3) of the Act is consistent with the principles of fundamental justice. This is the case because the purpose of this provision is to provide individuals and other entities with an opportunity to make representations to the Commissioner's office on the issue of whether their personal information (or other sensitive information) should be disclosed.

For these reasons, I do not accept the appellant's assertion that the requirement to notify under section 39(3) of the Act violates either section 7 or 15(1) of the Charter.

The appellant also contends that the requirement to notify is an invasion of his personal privacy. I do not accept this argument. The Act authorizes disclosure of personal information in certain instances and precludes its disclosure in others. One of the most important purposes of the Act is to protect the personal privacy of individuals. Notification is mandated by the Act in the interest of fairness towards affected parties. Therefore, carrying out this requirement cannot be characterized as an unjustified invasion of the appellant's personal privacy.

DISCUSSION OF PERSONAL INFORMATION ISSUES:

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

I have reviewed the information in the records. In my view, with the exception of the Minutes of Settlement (Record 29), all of the records contain the personal information of the appellant and other individuals (including, but not limited to, his estranged spouse). Record 29 contains only the personal information of individuals other than the appellant.

As previously noted, the Municipality claimed section 14(1) for these records. The Notice of Inquiry raised the possible application of section 38(b), because some of the records appeared to contain the personal information of the appellant and other individuals. In its representations, the Municipality objected to the inclusion of this exemption in the Notice of Inquiry, and maintained that section 14(1) is the correct exemption to apply.

Before examining the Municipality's arguments in detail, it will be helpful to review the statutory context of this discussion. The legislative scheme established by the Act contains different procedures for processing requests for personal information, depending on whether the request is for an individual's **own** personal information, or the personal information **of others**. In the former situation, requests would be processed under Part II of the Act. In the latter case, requests would be treated in the same way as other requests for general records under Part I of the Act.

I will now summarize the sections which set out the different access procedures and exemption schemes for these two situations.

Requester's Own Personal Information

As I have just indicated, this type of request falls under Part II of the Act. Part II sets out a complete set of procedures regarding requests for an individual's own personal information. These are contained in sections 36, 37 and 38 of the Act.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. That section states as follows:

Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Section 37(1) sets out the access procedure applicable to requests for an individual's own personal information. It states as follows:

An individual seeking access to personal information about the individual shall make a request for access in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

Section 38 provides a number of exceptions to this general right of access. It provides a complete list of exemptions to be applied where an individual has requested access to his or her own personal information. All of the exemptions in section 38 are discretionary. Section 38 states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) if section 6, 7, 8, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information;
- (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

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- (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by an institution if the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
- (d) that is medical information if the disclosure could reasonably be expected to prejudice the mental or physical health of the individual; or
- (e) that is a research or statistical record.

As noted, the discretionary exemption in section 38(b) has potential relevance in the circumstances of this appeal. This is the case because: (1) the records which have been partially withheld from disclosure contain the personal information of the appellant and other individuals, and (2) the Municipality denied access to this information on the basis that disclosure would constitute an unjustified invasion of the personal privacy of the other individuals.

General Records (Including Requests for Another Individual's Personal Information)

Requests for access to the personal information of individuals other than the person making the request fall under Part I of the Act, which applies to requests for general records. Part I contains a similar set of provisions to those just quoted from Part II, providing a right of access, an access procedure, and a series of exemptions which may apply to this type of request.

The right of access is provided by section 4(1), which states:

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 part falls within one of the exemptions under sections 6 to 15.

The access procedure is specified in section 17(1) of the Act, which states:

A person seeking access to a record shall make a request for access in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

Part I also contains a complete set of exemptions, which are set out in sections 6 through 15. In requests which fall under Part I, where disclosure of the personal information of an individual or individuals other than
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the requester would be an unjustified invasion of personal privacy, the disclosure is prohibited by the mandatory exemption in section 14(1).

Relationship between Parts I and II of the Act

The Commissioner's office has taken the view that, because Part II of the Act (in particular, sections 36, 37 and 38) sets out a complete procedure to deal with requests for an individual's own personal information, the provisions of Part I do not apply to records which contain the requester's own personal information.

This position is based on the scheme of the Act as a whole, and gives effect to the intent of Part II of the Act, which is to confer a higher right of access on an individual seeking his or her own personal information.

The fact that the Act accords greater rights to an individual who seeks access to a document containing his or her personal information is made clear by the different wording found in sections 14(1) and 38(b) of the Act.

The exemption provided by section 14(1) (in Part I of the Act) is **mandatory**; if disclosure of a record containing only the personal information of an individual or individuals other than the requester would be an unjustified invasion of personal privacy, it **must not** be disclosed unless certain limited exceptions apply.

On the other hand, the exemption provided by section 38(b) (in Part II of the Act) is **discretionary**; if disclosure of a record containing the personal information of the requester and another individual or individuals would be an unjustified invasion of the personal privacy of that other individual or individuals, the institution **may** refuse disclosure. However, in this situation (in contrast to the absolute prohibition against disclosure in section 14), the institution has the power to grant access in appropriate circumstances.

This distinction emphasizes the special nature of requests for one's own personal information, and the desire of the legislature to give institutions the power to grant access in situations where responsive records also contain the personal information of another individual or individuals.

In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the Act applies. In that approach, the unit of analysis is the **record**, rather than individual paragraphs, sentences or words contained in a record.

This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of *IPC Practices* entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:

Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal Act oblige[s] institutions to **consider** whether

records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.

In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.

It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the Act. For records which do not contain the requester's own personal information, the decision would be under Part I.

As noted, the Municipality has taken issue with this approach. In particular, the Municipality argues that:

- Order P-257 (which discusses the circumstances under which an affected person may raise discretionary exemptions not claimed by an institution) does not contemplate the Commissioner's office raising a discretionary exemption of its own accord;
- the Act does not give the Commissioner's office the power to raise a discretionary exemption which has not been raised by an institution;
- the application by the Commissioner's office of a discretionary exemption is inconsistent with the wording of section 42 of the Act, which specifies that the burden of proving the applicability of exemptions lies upon the institution;
- the preamble of section 38 assumes that the personal information being withheld under that section is the personal information **of the requester**;
- a record-by-record approach to the determination of whether to proceed under Part I or Part II of the Act is inappropriate because:
 - the provisions of the Act apply to information, and it is inappropriate to assess which part of the Act should be applied based on the contents of an entire record;
 - a record-by-record approach erodes the principle of severability;
 - a record-by-record approach weakens privacy protection by requiring the use of a discretionary exemption instead of a mandatory one with regard to the personal information of individuals other than the requester.

I will deal with each of these arguments in turn.

Order P-257

In my view, Order P-257 is not applicable in the circumstances of this appeal. This order dealt with the issue of whether an affected person was entitled to raise a discretionary exemption not raised by the government organization which had custody of the record. It is not appropriate to make an analogy between the rights of affected persons, who are parties to an appeal, and the powers of the Commissioner's office, which has the authority and responsibility to determine the correct procedure for resolving appeals.

Commissioner's Authority to Raise a Discretionary Exemption

As noted, the Act has created two separate schemes for responding to requests for information, depending on the nature of the information requested. These two schemes are expressly recognized in the context of appeals by section 39(1) of the Act, which states, in part, as follows:

A person may appeal any decision of a head under this Act to the Commissioner if,

- (a) the person has made a request for access to a record under subsection 17(1);
- (b) the person has made a request for access to personal information under subsection 37(1);

...

The Commissioner's role in reviewing access decisions is defined, in part, by sections 43(1) and (3) of the Act. Those sections state as follows:

- (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.
- (3) The Commissioner's order may contain any conditions the Commissioner considers appropriate.

In my view, these sections authorize the Commissioner to consider the overall scheme of the Act and, as part of that authority, to determine whether a request or a particular record ought to have been reviewed by an institution under Part I or Part II of the Act, and to make an order consistent with that determination. This authority is further supported by the importance which the Act places on personal information, and the difference in the nature of the exemptions available under each part, as outlined above.

Furthermore, an essential component of the Act is the balance between the right of access to information and the right of individuals to have their privacy protected. In circumstances where an individual has requested access to his or her own personal information and the privacy rights of other individuals may be affected by disclosure, this balance is achieved by applying the provisions of section 38(b).

Where the Commissioner's office may issue an order based on a part of the Act which an institution has not referred to in its decision, the principles of administrative fairness require that the parties be advised of this possibility, and be given the opportunity to make representations. That is why section 38(b) was referred to in the Notice of Inquiry.

Section 42

Section 42 states as follows:

If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

The Municipality argues that, by raising section 38(b) in the Notice of Inquiry, the Commissioner's office has inappropriately placed on the Municipality the burden of proving the application of an exemption which the Municipality did not claim.

I do not accept this view. As previously noted, the Municipality relies upon the exemption in section 14(1) to exempt the withheld material from disclosure. This exemption applies to records which fall under Part I of the Act in circumstances where disclosure would constitute an unjustified invasion of personal privacy. Section 38(b) serves the same function with regard to records which fall under Part II.

Notwithstanding the important differences between sections 14(1) and 38(b) outlined earlier in this order, the two exemptions are very similar. For instance, in assessing the possible application of section 38(b), the factors set out in section 14(2), (3) and (4) would be considered.

In my view, a request to consider the possible application of section 38(b) places no significant additional burden of proof on the Municipality. The only additional explanation required under section 38(b) relates to the institution's exercise of discretion against disclosure. This would only require the Municipality to demonstrate that its exercise of discretion was in accordance with accepted legal principles. In my opinion, this is not a significant added burden.

Section 38

The Municipality argues that because of the wording of the preamble of section 38, the only "personal information" which may be exempted under that section is the personal information of the requester. As a result, according to this argument, section 38 cannot apply to the information at issue in this appeal because that information relates solely to other individuals. The preamble of section 38 reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information, ...

However, in my view, this interpretation of the preamble is at odds with the wording of section 38(b), which states that the exemption created by the preamble applies

if the disclosure would constitute an unjustified invasion of **another individual's** personal privacy; (emphasis added)

In my view, because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.

The Record-by-Record Approach - Which Part of the Act Should Apply

The Municipality argues that it is inappropriate to decide which part of the Act should apply based upon a record-by-record approach for several reasons, as outlined above.

As I have indicated, the record-by-record approach is consistent with the intention of the legislature that individuals should have a higher right of access to their own personal information.

By contrast, the approach advocated by the Municipality (that the analysis should depend on the nature of the **information** being considered) would require switching back and forth from Part I to Part II of the Act based upon a word-by-word, line-by-line or paragraph-by-paragraph analysis. This would mean that records containing a requester's own personal information could, in part, be analyzed under Part I of the Act, which works against the higher right of access conferred under Part II of the Act.

In addition, this approach virtually guarantees a lack of uniformity in the way institutions respond to access requests for individuals' own personal information. Seen from a broad perspective, the lack of a uniform approach would mean that different institutions would apply different criteria for determining whether records or parts thereof should be evaluated under Part I or Part II of the Act.

For all these reasons, I am of the view that the record-by-record approach to the determination of which part of the Act should apply is most consistent with the purposes of the Act, and most conducive to the uniform administration of the legislation.

I will now turn to the Municipality's argument that the record-by-record approach erodes the principle of severability established in section 4(2) of the Act. I see no basis to support this view. Section 4(2) applies equally to mandatory and discretionary exemptions and severances can be accomplished as easily under section 38(b) as under section 14(1).

The Municipality has also argued that the record-by-record approach weakens privacy protection by requiring institutions to consider section 38(b), a discretionary exemption, when dealing with records which

contain the requester's personal information as well as that of other individuals. The Municipality argues that section 14(1) offers greater protection for the personal privacy of individuals other than the requester because it is a mandatory exemption.

In my view, the legislature has built in a number of safeguards to protect personal privacy even if the discretionary exemption provided by section 38(b) is being applied rather than the mandatory exemption in section 14(1).

While it is true that the discretionary nature of section 38(b) permits disclosure if the head sees fit, the exemption can still be applied to preclude access where disclosure would be an unjustified invasion of personal privacy. The decision as to whether or not the exemption should be applied rests with the institution. Disclosure is **not** required. From a practical perspective, even under section 38(b), it would be a rare case where an institution would decide to disclose the personal information of an individual other than the requester, in circumstances where that would constitute an unjustified invasion of personal privacy.

Furthermore, in such a case, the institution would be required to notify the affected person of the intended disclosure under section 21 of the Act, which is also applicable to Part II requests because of the provisions of section 37(2). The notification scheme under section 21 requires the institution to give the affected person an opportunity to comment on the proposed disclosure before it occurs. If the institution then decides to disclose the personal information, the affected person must be advised of this fact and be given an opportunity to appeal this decision to the Commissioner's office, again prior to disclosure.

Based on all these considerations, I find that, in the context of appeals under the Act, the requirement to apply Part II of the Act to records which contain the requester's own personal information is consistent with the purposes of the Act and within the authority of the Commissioner's office.

I will now turn to the disposition of the records at issue.

INVASION OF PRIVACY - SECTION 14(1)

The Municipality has claimed section 14(1) to exempt all the undisclosed information at issue in this appeal. I have previously found that, with the exception of Record 29, all the records of which parts are at issue contain the personal information of the appellant and other individuals (including, but not limited to, his estranged spouse).

Based upon the preceding analysis, I find that the records which contain the personal information of both the appellant and any other individual ought to be dealt with under Part II of the Act. Since the exemption provided by section 14(1) is in Part I, it does not apply to those records or any portion of them.

Record 29, which consists of Minutes of Settlement between the appellant's estranged spouse and her previous husband, contains only the personal information of individuals other than the appellant. Therefore, it is appropriate to consider this record under Part I and accordingly, I will determine whether section 14(1) properly applies to it.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way in which such a presumption against disclosure can be overcome is if the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other circumstances that are relevant.

The Municipality contends that the following consideration supports its view that the disclosure of the record would be an unjustified invasion of personal privacy:

- disclosure of the record would be a presumed unjustified invasion of personal privacy under section 14(3)(f) because it describes the income, assets and liabilities of two individuals.

The appellant contends that the following factors favour disclosure of all the information at issue in this appeal (including Record 29):

- the information was provided by him;
- the information was already in his possession when he supplied it;
- the information is seriously out of date (an apparent reference to section 14(2)(g) - the personal information is unlikely to be accurate or reliable);
- the information is relevant to a fair determination of his rights - section 14(2)(d);

- there is a compelling public interest in disclosure (which relates to the possible application of section 16 of the Act).

The Municipality does not concede that Record 29 was provided to it by the appellant. Although the Municipality cannot say with certainty who supplied Record 29, its representations indicate that it was likely provided by the appellant's estranged spouse.

Having reviewed the evidence before me, I have made the following findings:

- (1) Record 29 contains information which describes the income, assets and liabilities of individuals other than the appellant and the presumption in section 14(3)(f) applies to most of the record.
- (2) Based upon the evidence presented, the appellant has not proven that he provided Record 29 to the Municipality, nor that he has it in his possession.
- (3) In the circumstances of this appeal, the age of the information in the record is not a relevant factor. Its only possible relevance might be to support an argument that the information is unlikely to be accurate or reliable within the meaning of section 14(2)(g). However, in my view, section 14(2)(g) is a factor favouring **non**-disclosure, rather than disclosure. I find that section 14(2)(g) does not apply to Record 29.
- (4) I find that section 14(2)(d) is not a relevant factor because the appellant has not provided any evidence to support its application to Record 29 in the circumstances of this appeal.
- (5) I find that Record 29 does not contain any information to which section 14(4) applies.
- (6) I find that the "public interest override" in section 16 does not apply, because in my view, there is no interest of a public (as opposed to private) nature, relating to the disclosure of this record.
- (7) Because most of the record meets the requirements for the presumed unjustified invasion of privacy in section 14(3)(f), and no factors favouring disclosure have been established with respect to the remainder of it, I find that the exemption in section 14(1) applies to Record 29 in its entirety.

INVASION OF PRIVACY - SECTION 38(b)

I have previously found that, with the exception of Record 29, all of the records of which portions are at issue contain the personal information of the appellant and one or more other individuals. I have also found that these records ought to be considered under Part II of the Act, not Part I. Accordingly, since the Municipality has taken the position that disclosure of the withheld parts of these records would be an unjustified invasion of personal privacy, I will consider whether the exemption provided by section 38(b) applies to them.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the disclosure of the information would constitute an unjustified invasion of another

individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In considering the possible application of section 38(b), sections 14(2), (3) and (4) of the Act once again provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions in section 14(3) applies to the personal information found in a record, the only way in which such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Municipality contends that the following considerations support its view that the disclosure of the withheld portions of these records would be an unjustified invasion of personal privacy:

- some of the information which was withheld relates to eligibility for social assistance, and disclosure of this information would be a presumed unjustified invasion of personal privacy under section 14(3)(c);
- some of the information which was withheld relates to employment or educational history of a person other than the appellant, and disclosure of this information would be a presumed unjustified invasion of personal privacy under section 14(3)(d).

The appellant's statements about what factors favour disclosure are directed towards all of the information at issue. I have listed them in the discussion of section 14, above, and will consider them here again.

One of the appellant's arguments is that he provided the Municipality with the information which has been withheld from disclosure. Beyond the appellant's assertion that this is so, no evidence has been provided to support this position. In my view, the source of the information is not obvious from reviewing the records. The Municipality's representations indicate that most of the information was obtained by the case worker, either from previous records or directly from the appellant's estranged spouse.

Having reviewed the evidence before me, I have made the following findings:

- (1) One of the withheld portions of Record 1 contains information relating to the eligibility for social assistance of an individual other than the appellant, and the presumption in section 14(3)(c) applies to that information.
- (2) One of the withheld portions of Record 41 (page 1) contains information relating to the employment history of an individual other than the appellant, and the presumption in section 14(3)(d) applies to that information.

- (3) Based upon the evidence presented, the appellant has not proven that he provided any of the withheld information in the records to the Municipality, nor that he has it in his possession.
- (4) In the circumstances of this appeal, the age of the information in the records is not a relevant factor. Its only possible relevance might be to support an argument that the information is unlikely to be accurate or reliable within the meaning of section 14(2)(g). However, in my view, section 14(2)(g) is a factor favouring **non**-disclosure, rather than disclosure. I find that section 14(2)(g) does not apply to the records.
- (5) I find that section 14(2)(d) is not a relevant factor because the appellant has not provided any evidence to support its application to the records in the circumstances of this appeal.
- (6) I find that the records do not contain any information to which section 14(4) applies.
- (7) I find that the "public interest override" in section 16 does not apply, because in my view, there is no interest of a public (as opposed to private) nature, relating to the disclosure of these records.
- (8) In balancing the interests of the appellant in disclosure of the withheld information in these records against the privacy interests of other individuals, I find that, because of the nature of the information, its disclosure would be an unjustified invasion of the personal privacy of other individuals and the exemption in section 38(b) applies to it.

As indicated previously, the Municipality claimed section 14(1) for these records. It did not claim section 38(b). I have found that section 14(1) does not apply. For the reasons outlined in this order, I have considered the possible application of section 38(b) to these records and found that it does apply. Since section 38(b) is a discretionary exemption, the Municipality has the discretion to apply it and withhold the information from disclosure. Alternatively, the Municipality may decide to disclose the information. Accordingly, I will order the Municipality to consider whether it will deny access to the undisclosed information in these records under section 38(b).

ORDER:

1. I uphold the Municipality's decision to deny access to Record 29.
2. I order the Municipality to determine whether it will exercise its discretion to deny access to the withheld portions of the other records at issue under section 38(b) of the Act within twenty-one (21) days after the date of this order and to issue a decision in that regard to the parties to this appeal within the same time period, and to forward a copy of that decision to me.
3. If the Municipality decides to deny access in its decision letter issued pursuant to Provision 2, I order the Municipality to provide representations to me indicating what factors it took into account in reaching that decision, within twenty-one (21) days after the date of this order.

4. For the purpose of complying with the requirements in Provisions 2 and 3 to forward materials to me, these materials should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
 John Higgins
 Inquiry Officer

July 14, 1994

APPENDIX "A"

DESCRIPTION OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION	LOCATION OF UNDISCLOSED INFORMATION	DESCRIPTION OF UNDISCLOSED INFORMATION
1	Income Maintenance/Eligibility Record	Page 8 (part)	Addresses and other information
2	Income Maintenance/Eligibility Record	Page 9 (part)	Drivers Licence number
12	Declaration Support/Maintenance	Page 1 (part)	OHIP and Social Insurance numbers
17	Family Court Appointment Sheet	Page 1 (part)	Names and addresses
29	Minutes of Settlement, Provincial Court (Family Division)	Whole document (10 pages)	Minutes of Settlement, Provincial Court (Family Division)
35	Declaration Support/Maintenance	Page 1 (part)	Address, telephone number, OHIP and

RECORD NUMBER	DESCRIPTION	LOCATION OF UNDISCLOSED INFORMATION	DESCRIPTION OF UNDISCLOSED INFORMATION
			Social Insurance numbers
39	Request for information	Page 1 (part)	Social Insurance number
41	Application for Assistance	Page 1 (part)	Summary of employment
41	Application for Assistance	Page 4 (part)	Employment Identification number
43	Application for Assistance	Page 1 (part)	Drivers Licence number and Social Insurance number
43	Application for Assistance	Page 2 (part)	Summary of employment