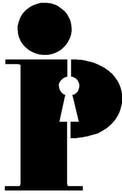

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-965

Appeals P-9400294, P-9400297, P-9400298 and P-9400299

Ministry of Community and Social Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant filed a series of requests with the Ministry of Community and Social Services (COMSOC) under the Freedom of Information and Protection of Privacy Act (the Act) where he sought information on the funding provided to the Grandview Survivors Support Group (the GSSG) and/or individual members of that group. The GSSG is an organization of women who had previously been wards of the Grandview Training School for Girls. This group has been involved in negotiations with the provincial government to receive compensation for incidents which occurred while its members were detained at Grandview.

COMSOC located over 300 records which were responsive to the requests. It decided not to release any of these documents to the appellant based on the application of seven exemptions contained in the Act. COMSOC took the position that these exemptions applied to each of the records at issue. The appellant appealed this decision to the Commissioner's office.

A Notice of Inquiry was sent to the appellant, COMSOC and the GSSG. Representations were received from COMSOC only.

On April 10, 1995, Inquiry Officer Anita Fineberg issued Order P-902 where she considered the issues raised in these appeals. Before applying the exemptions claimed to the records at issue, Inquiry officer Fineberg offered some general comments about the quality of COMSOC's representations. She observed that:

(1) The submissions lacked particularity in that they did not refer specifically to any of the over 500 pages of records.

(2) COMSOC had not established any link or clear connection between the application of the exemptions claimed and any of the records, either in whole or in part.

(3) There was no tangible evidence provided with respect to those exemptions which require that the record in question be prepared for a particular purpose.

(4) In most instances, the submissions were simply restatements of the language of the exemptions contained in the Act.

On this basis, Inquiry Officer Fineberg indicated that she would dispose of the issues raised in the appeals based on the representations of COMSOC, her own assessment as to whether the exemptions claimed by COMSOC applied and a consideration of any mandatory exemptions.

Inquiry Officer Fineberg upheld COMSOC's decision to withhold 30 of the records at issue, either in whole or in part. She directed, however, that COMSOC disclose the remaining documents to the appellant no later than May 10, 1995.

DISCUSSION:

THE PROPER PARTIES TO THE APPEAL

In its representations, COMSOC suggested that there might be additional parties whose views should be sought before an order was issued. In the context of the application of the law enforcement exemptions, COMSOC stated that it was:

> ... not able to make more complete representations on this issue but can only proceed with the knowledge that release of the documents could affect the interests of a fair trial or any prosecutions, based upon the fact that there is an ongoing investigation. It may be appropriate to seek further submissions on this issue from the appropriate parties.

Then, with respect to the application of section 18(1)(g) of the Act (proposed plans of an institution), COMSOC indicated that:

> ... As the matter [of compensation packages] is being handled by the Attorney General, it may be appropriate to seek further submissions.

Inquiry Officer Fineberg treated this matter as a preliminary issue. In her analysis, she first discussed the manner in which government organizations are required to process access requests under the Act:

> The procedural scheme established by the Act clearly contemplates that the government will speak with one voice with respect to requests for access to government records. The legislation contains various provisions which contemplate that the institution which receives the request may canvass other government institutions, if necessary.
>
> For example, when a request for access to a record is made, the institution which receives the request is required to determine whether or not the record requested falls within its custody or control (section 25 of the Act). In the event that the institution to which the request is directed does not have custody or control, the request must then be transferred to the institution that does have custody or control of the record.
>
> Where an institution receives a request for access to a record and the institution considers that another institution has a greater interest in the record, then the request and, if necessary, the record may be transferred to the institution with the "greater interest in the record". In the circumstances where the record affects the interests of more than one institution, the Act expressly contemplates and allows for consultations between government institutions, including municipal institutions, before the institution with custody or control of the document makes an access decision. This consultation is facilitated by means of a time extension (section 27 of the Act). These provisions are available to allow an institution to consider all viewpoints so that the institution can express the government's position as a whole.

Inquiry Officer Fineberg then applied these statutory provisions to the facts of the appeals before her:

In this case, the Ministry received the requests on January 31, 1994. On March 2, 1994, it issued decision letters extending the time for a response for an additional 90 days until May 31, 1994. The time extension was claimed pursuant to section 27(1)(b) of the Act for the purpose of consultations with a person outside the Ministry, which the Ministry has identified as the Ministry of the Attorney General. In fact, the actual decision letters were issued on May 4, 1994.

Thus, in my view, the Ministry had the opportunity to seek the views of the Ministry of the Attorney General on the exemptions which should apply to the documents and why.

As far as submissions from "other appropriate parties" are concerned, I have not been provided with sufficient information to explain who these individuals or organizations might be, why I should consider seeking submissions from them and why the Ministry has not done so. Nor have I been approached by any other government institution which has expressed the desire to make submissions in this appeal. On this basis, there is no evidence before me to suggest why I should depart from the usual position of treating an institution's submissions as representing the government's position as a whole.

Therefore, I will dispose of the issues in these appeals based on the representations of the Ministry and my own assessment as to whether the exemptions claimed by the Ministry, and any mandatory exemptions, have been established.

THE RECONSIDERATION REQUEST

On May 10, 1995, the Ministry of the Attorney General (the Attorney General) asked the Commissioner's Office to reconsider the decision made in Order P-902. In its representations, the Attorney General indicated that, at no time during the processing of these appeals did personnel from either the FOI Office or the Legal Services Department of COMSOC contact the Crown Law Office, Civil of the Attorney General to obtain assistance in preparing the representations to be provided to the Commissioner's office.

The Attorney General argued that it had a substantial interest in the records at issue and, for this reason, should be treated as an affected party to these appeals. That meant that the Attorney General should be afforded the opportunity to make representations with respect to the disclosure of the records.

The Attorney General went on to submit that, pursuant to section 54(1) of the Act, the Inquiry Officer had not considered all of the evidence prior to issuing her order. The result was that there had been a lack of procedural fairness and, hence, a fundamental defect in the adjudication process.

Upon receipt of this request, Inquiry Officer Fineberg stayed the application of Order P-902 and issued a further Notice of Inquiry to the original parties to the appeal and to the Attorney General. In that notice, the sections of the Act which dealt with the subject of notification were summarized. In addition, COMSOC and the Attorney General were asked to provide details about any communications or exchanges of information which may have occurred between them during the course of these appeals. Finally, the Notice

of Inquiry invited the parties to make submissions on whether the order should be reconsidered. Representations were received from the Attorney General and the appellant only.

Initially by telephone and later in its submissions, the Attorney General corrected an inaccuracy contained in its letter of May 10, 1995. The Attorney General indicated that a COMSOC official had, in fact, advised three separate employees of the Attorney General's office that COMSOC was a party to several Grandview related appeals and that the deadline for the provision of representations was approaching. The COMSOC official also asked whether these individuals wished to make any comments on the submissions to be made. Based on the evidence before me, the Attorney General did not take any specific steps to respond to these communications. COMSOC subsequently confirmed to the Commissioner's office that the Attorney General would not become involved in preparing the representations.

The Attorney General takes the position that the failure of the Commissioner's office to notify it of the appeals and to provide the Attorney General with the opportunity to make representations constituted a fundamental defect in the appeals process. In the Attorney General's view, this defect can only be remedied by reopening the appeals and providing it with the opportunity to make submissions to the decision maker.

The Attorney General points out that, under sections 50(3) and 52(13) of the Act, the Commissioner's office has the obligation to inform an affected person that an appeal has been filed and to allow that party to make representations should the appeal proceed to inquiry. The Attorney General then submits that, where an appeal involving Ministry (X) would specifically affect the interests of Ministry (Y), Ministry (Y) should be treated as an affected party to the appeal notwithstanding that Ministry (Y) did not make the original access decision.

The Attorney General advances a number of legal arguments to support this proposition. The key aspects of these submissions are:

(1) The Act makes each ministry a statutory entity called an "institution" and, in this respect, a ministry should not be treated solely as an emanation of the Crown. The head of one institution does not, therefore, automatically act on behalf of or represent all other institutions in matters concerning the Act. In these circumstances, the doctrine of the indivisibility of the Crown has no application.

(2) Sections 25 and 27 of the Act (which contemplate that requests can be forwarded and transferred among different institutions and which allow an institution to consult with a person outside the institution in certain circumstances) demonstrate the independence of institutions from one another. The wording of these provisions reinforces the notion that institutions and their heads are not emanations of a single entity -- the Crown.

(3) Depending on the circumstances, an appeal can affect institutions other than the institution whose head made the decision under appeal. For instance, the disclosure of records held by one institution in connection with a program operated by that institution could impact on a prosecution conducted by the Attorney General. The effect of the appeal on the program may be quite different from the

effect on the prosecution.

(4) The requirement contained in the Act to notify affected parties and provide them with the opportunity to make representations exists to guarantee the fairness of the appeal proceedings. Where another institution will be specifically affected by a decision in an appeal, the head of the institution should be entitled, as a matter of fairness, to be treated as an affected party.

(5) The term "affected party" is not defined in the Act. Moreover, the wording of the statute does not preclude the head of an institution from being considered as an affected party for the purposes of sections 50(3) and 52(13) of the Act.

(6) The head(s) who should be treated as affected parties can ordinarily be identified and notified without significant difficulty and without causing significant delay in the processing of an appeal.

With respect to the present appeals, the Attorney General argues that it has a special interest in the records at issue. This is the case because (1) the Attorney General has primary responsibility for addressing all matters relating to allegations of abuse at Grandview for which legal liability may arise and (2) the disclosure of some of the records in these appeals could impact on certain programs co-ordinated by the Attorney General.

The appellant approaches this reconsideration request from a different perspective. In his representations, he expresses frustration with the manner in which COMSOC has processed his access requests and subsequent appeals. He notes that COMSOC (1) originally sought a 90 day time extension to process his requests, (2) denied access to over 300 records in an indiscriminate fashion and (3) took several months to provide its representations to the Commissioner's office. The appellant regards these delays as inexcusable and views the present application by the Attorney General as another tactic to delay the disclosure of information to him.

To resolve this reconsideration request, I must first determine whether the Attorney General should be treated as an affected party to these appeals notwithstanding that COMSOC issued the original access decisions.

In Order P-395, former Assistant Commissioner Tom Mitchinson was called upon to address a similar issue. In that appeal, which also involved Grandview records, the Archives of Ontario (the Archives) requested that the Commissioner's office add the Waterloo Regional Police and the Ministry of the Solicitor General (the Solicitor General) to the appeal as affected parties. The Archives stated that, since these two policing bodies had undertaken a joint investigation at Grandview, only those institutions could satisfactorily identify the harms which could result by disclosing the records at issue. After concluding that the Archives had the greater interest in the records under section 25(2) of the Act and that it had consulted with the other two institutions, the Assistant Commissioner denied this application.

The Solicitor General subsequently challenged this decision and argued that it should be treated as an affected party for the purposes of the appeal. The Solicitor General submitted that a particular ministry may have its own reasons for making certain submissions based on its own mandate and the nature of its client

groups. It also argued that it is not reasonable to assume that ministries will be able to craft their submissions in concert and obtain consensus on the position to be taken. On this basis, the Solicitor General submitted that each provincial institution should have a general right to make separate submissions during the course of individual appeals.

Assistant Commissioner Mitchinson approached these arguments in the following fashion:

> I do not accept the Solicitor General's position. For the reasons set out in my November 6, 1992 letter to the Archives (quoted above), sections 25-27 of the Act provide a scheme to address the situation where more than one institution has an interest in certain requested records. These sections permit inter-institution consultations and the transfer of a request from one institution to another. There is no statutory right for an institution other than the one which has responded to an access request to be a party to an appeal; rather, it is the responsibility of the Commissioner or his delegate to consider the circumstances of a particular appeal and determine if any other person should be given the status of an "affected party", based on the necessity or desirability of having those persons participate.

In the result, the Assistant Commissioner confirmed his original decision not to receive representations from the Solicitor General and proceeded to adjudicate the appeal based on the materials before him.

This matter was also canvassed by the Ontario Divisional Court in its judicial review of Order P-270. Once again, the records at issue related to the Grandview investigations. In this appeal, the Archives had custody of the responsive records and made representations to the Commissioner's office on behalf of the provincial government.

Once the order was issued, however, the Solicitor General and the Attorney General (among others) brought an application for judicial review. In the style of cause, the Archives was added as a respondent. During the hearing, counsel for the Commissioner's office argued that, based on the doctrine of the indivisibility of the Crown, the two ministries did not have standing to bring the judicial review, and that the only proper applicant was the Archives. In its decision [Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner) (1993), 102 D.L.R. (4th) 602], the Divisional Court approached this matter as follows (at p. 604):

> If an issue arises between ministries, that is for the Cabinet, not the courts, to resolve. While we see substantial merit to the argument, again a resolution was reached that did not necessitate deciding the question of standing. The archivist, a respondent in the original application, was plucked to the side of the applicants to validate the problem of standing. We proceeded with the archivist as the applicant. This accommodation avoids recasting the proceeding another day at great expense and inconvenience. We believe the archivist to be the proper applicant.

Although the comments of the court are obiter dicta, they support the proposition that, when appeals are filed under the Act, the provincial government must speak with one voice. It should be noted that, while the Divisional Court's decision was overturned on appeal [Ontario (Solicitor General) v. Ontario (Assistant

Information and Privacy Commissioner) (1993), 107 D.L.R. (4th) 454], the Court of Appeal did not comment on the issue of standing.

I have carefully reflected on whether the Attorney General should be treated as an affected party to the present appeals notwithstanding that COMSOC issued the original access decisions. I have concluded that the approach set out in Order P-395 and supported by the Ontario (Solicitor General) decision is the proper one to follow. In practical terms, this means that where a ministry has assumed the responsibility of processing an access request, it is that ministry which should speak for and represent the interests of the provincial government as a whole.

I consider this approach to be the correct one for several reasons. First, there is a long line of judicial authority which endorses the proposition that the Crown is one and indivisible [see, for example, Re Caisse de Depot et Placement du Quebec and Ontario Securities Commission 42 O.R. (2d), 561 (Ont. Div. Ct) and Alberta v. Canada (Canadian Transportation Commission (1977) 75 D.L.R. (3d) 257 (S.C.C.)] Second, the scheme of the Act as set out in sections 25 and 27 of the statute contemplates that there will be a lead ministry which will be responsible for dealing with a request. In this respect, the Act provides specific mechanisms to ensure that the collective position of the provincial government is advanced. Third, I have not found any wording in either section 50(3) or 52(13) of the Act which would lead me to believe that the Commissioner must notify one emanation of the Crown where another is already participating in an appeal.

In its representations, the Attorney General submits that the Commissioners' office could ordinarily identify those ministries to be treated as affected parties "without significant difficulty and without causing significant delay in the processing of an appeal". I cannot agree with this statement. In my view, it is the ministry which decides to respond to an access request, rather than the Commissioner's office, which has the most detailed knowledge of the relevant record holdings and the possible interests of other ministries in the documents at issue. Second, if the Commissioner's office were required to routinely deal with several ministries in processing appeals, the mediation and issue definition stages of the process would become unworkable. Third, the delays which could arise in notifying other affected ministries and seeking their representations could significantly lengthen the appeals process. All of these considerations point to the wisdom of having the provincial government approach the appeals process with one voice.

On this basis, I find that the decision of Inquiry Officer Fineberg not to notify the Attorney General of the appeals and to provide it with the opportunity to make representations was consistent with the wording and intent of the Act. I also find, based on the facts of this case, that staff within the Attorney General were afforded several opportunities to consult with COMSOC on the nature of the representations to be provided to the Commissioner's office but declined to accept these invitations.

The result is that the failure to treat the Attorney General as an affected party cannot be construed as a lack of procedural fairness and, hence, constitute a fundamental defect in the adjudication process. On this basis, I am not prepared to direct that Order P-902 be reconsidered for the specific reasons which the Attorney General has advanced.

There are, however, a number of practical considerations which I must take into account in approaching this

issue. Based on historical experience, it is clear that the provincial government regards records relating to the Grandview investigations and subsequent settlement discussions to be extremely sensitive. I have no doubt, therefore, that should I not permit the government to advance additional arguments pertaining to the disclosure of the records in these appeals, the Attorney General will seek to have this Order judicially reviewed.

I would also predict that the grounds for this application would be that I should have found that the Attorney General was an affected party to these appeals and, thereby, permitted it to make representations to the Commissioner's office. Should the Divisional Court accept this argument, and taking into account the volume of records at issue, I would expect that the matter would be remitted back to the Commissioner's office in order to obtain further submissions and then to reconsider the appeal on its merits. Should a new order be issued in this scenario, the Attorney General would then have yet another opportunity to launch a judicial review application. In my view, a chain of events such as the one that I have outlined would not serve the interests of any party -- including the appellant.

Having reflected on the available options, I am prepared to allow COMSOC a further opportunity to provide the Commissioner's office with representations on whether the records in these appeals (which have not already been withheld from disclosure under Order P-902), should be disclosed to the appellant. In developing these submissions, COMSOC would be free to consult with the Attorney General. Given the lengthy delays that have accompanied the processing of these appeals, I have determined that these representations must be received in the Commissioner's office no later than August 18, 1995. Should these submissions not be provided by that date, I will consider the reconsideration request to be abandoned and I will confirm the decision in Order P-902.

While I have reached this result with some difficulty, I hope that this approach will avoid recasting the proceeding another day at great expense and inconvenience -- to borrow the words of the Divisional Court in the Ontario (Solicitor General) decision . I also wish to indicate to both COMSOC and the Attorney General that I have granted this extension based on the unique circumstances of the case and that I would be extremely reluctant to extend a similar indulgence in the future.

ORDER:

1. I order that Order Provisions 1, 2, 3 and 4 contained in Order P-902 be further stayed pending the receipt of supplementary representations from the Ministry of Community and Social Services respecting the records which remain at issue in these appeals. These representations should be sent to the attention of the Registrar of Appeals, Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, 17th Floor, Toronto, Ontario, M5S 2V1.

2. In the event that these representations are received on or before August 18, 1995, I will direct that Order P-902 be reconsidered based on the new representations that are received.

3. In the event that these representations are not received by August 18, 1995, I order that COMSOC comply with Provisions 1, 2, 3 and 4 of Order P-902 no later than August 28, 1995.

Original signed by: July 27, 1995 Irwin Glasberg
Assistant Commissioner

POSTSCRIPT:

I feel compelled to point out that the interests of the appellant in knowing whether or not he will obtain access to the documents that he seeks have been prejudiced by the manner in which COMSOC has processed these files and by the Attorney General's failure to communicate its views on these appeals to COMSOC. I would encourage the head of COMSOC to take this consideration into account in determining whether to claim any discretionary exemptions which might otherwise apply to the records at issue.