



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER P-1506**

**Appeal P-9700145**

**Ministry of Citizenship, Culture and Recreation**



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## **NATURE OF THE APPEAL:**

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Archives of Ontario. The request was for access to records relating to the McMichael Canadian Art Collection (the Collection). Specifically, the appellant sought access to a draft audit report dated June 30, 1980 and the rest of the file in which the audit report resides. Subsequently, the Archives of Ontario transferred the request to the Ministry of Citizenship, Culture and Recreation (the Ministry) in accordance with section 25 of the Act, as the Ministry had a greater interest in the responsive records.

The Ministry identified 52 records which were responsive to the request and determined that the interests of two third parties would be affected by disclosure of the information. The Ministry notified the third parties pursuant to section 28 of the Act, and requested representations with respect to release of the information. One third party did not reply to the notice, and one agreed to disclosure of the information contained in the records. The Ministry subsequently denied access to the records, in part, based on the following exemptions:

- solicitor-client privilege - sections 19
- invasion of privacy - section 21.

The appellant appealed the denial of access.

During the mediation of this appeal, the appellant agreed that 22 records would be at issue in the appeal, as outlined in Appendix "A" of this order.

As the appellant raised the question of "public interest" in his letter of appeal, section 23 of the Act is also at issue.

A Notice of Inquiry was sent to the Ministry, the appellant and thirteen individuals whose interests could be affected by the outcome of this appeal (the affected parties). Representations were received from the Ministry, the appellant and six of the affected parties.

In their representations, the Ministry withdrew its application of section 19 of the Act and raised the application of section 65(6) of the Act to the records at issue. As section 65(6) deals with the jurisdiction of the Act, a supplemental Notice of Inquiry was sent to the appellant and one of the affected parties asking for representations on this issue. Supplemental representations were received from the appellant only.

## **RECORDS:**

The 22 records at issue in this appeal consist of the draft audit report, notes, internal memoranda, and letters (as outlined in Appendix "A").

## DISCUSSION:

### JURISDICTION

In this appeal, the first issue to be decided is the interpretation of sections 65(6) and (7) of the Act. If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding records from the scope of the Act, which removes such records from the Commissioner's jurisdiction.

The appellant submits that section 65(6) cannot apply, as the records were prepared at a time when there was no reasonable prospect of any legal proceedings.

In Order P-1258, Assistant Commissioner Tom Mitchinson considered the timing criteria for the application of 65(6) and (7) of the Act. In this discussion, he found that the relevant factor was the date upon which the request was submitted. The Assistant Commissioner stated:

... if the appellant made her requests prior to November 10, 1995, they would be subject to the law in effect prior to the enactment of Bill 7. On the other hand, if the requests were not made until after this date, they would be subject to the new provisions creating sections 65(6) and (7).

I agree with this interpretation, which is consistent with the law in relation to the retroactive application of statutes. Additionally, in my view, whether legal proceedings were contemplated at the time records were created is not determinative of whether these sections apply to his request. Rather, the question is, if the request was submitted after the amendments came into force, had the record been collected, prepared, maintained or used by the institution in the manner contemplated by section 65(6)?

In this case, the request was submitted after Bill 7 became law, and therefore, I find that sections 65(6) and (7) have potential application in the circumstances of this appeal, whether or not legal proceedings were contemplated at the time of their creation.

The Ministry claims that some of the records fall outside the scope of the Act because of the operation of sections 65(6)1 and 3.

In order to fall within the scope of paragraph 3 of section 65(6), the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

I agree that the records at issue, with the exception of Records 24A, 24C, 26, 26A and 26B, were prepared, maintained or used by the Ministry within the meaning of the first requirement of section 65(6)3. I also find that this preparation, maintenance and usage was in relation to meetings, discussions or communications, thereby satisfying the second requirement as well. Finally, I agree that the communications were about employment-related matters, specifically the Ministry's management of the former Director's resignation and reassignment. The Ministry is currently involved in on-going litigation concerning the Collection. A key issue in the case is the scope of the former Director's continued role and authority with respect to the Collection. In my view, the litigation has the potential to affect the Ministry's legal rights and/or obligations, and for this reason I find that the matter is properly characterized as one "in which the institution has an interest".

In summary, I find that the records at issue in this appeal, with the exception of Records 24A, 24C, 26, 26A and 26B, were prepared, maintained and/or used by the Ministry in relation to meetings, discussions and communications about employment-related matters in which the Ministry has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by the Ministry. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal, and I find that Records 6, 16, 21, 22, 23, 24, 25, 27, 28, 29, 31, 37, 42, 44, 46a, 47 and 50 fall within the parameters of this section, and therefore are excluded from the scope of the Act.

## **INVASION OF PRIVACY**

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

Record 24A contains the personal information of individuals who were loaned various pieces of artwork from the Collection. Record 24C is a list of individuals who have purchased artwork from the Collection. Records 26, 26A and 26B concern the Collection's acquisition of paintings by a specific artist. Records 26 and 26A are memoranda about the transaction, and Record 26B is the agreement between the artist and the Collection, along with an appendix which lists the artwork, size and price.

Having reviewed these records, I find that they each contain the personal information of the individuals identified therein.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, sections 21(1)(a) and (f) of the Act read as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

One of the affected parties has consented to the disclosure of his personal information, which is found on the second last line of Record 24C. Accordingly, this part of the record does not qualify for exemption under section 21.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

The Ministry submits that sections 21(3)(f) applies. This section states:

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

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

Having reviewed the records remaining at issue, I find that each describes an individual's assets and/or financial activities, and section 21(3)(f) applies. As section 21(4) has no application in the circumstances of this appeal, Records 24A, 24C, 26, 26A and 26B are exempt under section 21.

## **PUBLIC INTEREST IN DISCLOSURE**

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The Ministry submits that the public interest element in this matter falls short of compelling and that the burden of establishing otherwise falls on the requester, who cannot succeed by advancing a mere private interest.

The only records which section 23 can apply to are the five records which I have found to be exempt under section 21. In my view, any public interest in the disclosure of these records, which contain the personal information of individuals who were loaned or had purchased artwork from the collection or relate to the Collection's acquisition of paintings by a specific artist, cannot reasonably be described as "compelling", as contemplated by section 23. For this reason, I find that the public interest override in section 23 has no application to the present circumstances.

**ORDER:**

1. I order the Ministry to disclose the second last line of Record 24C to the appellant by sending him a copy by **January 26, 1998** but not earlier than **January 21, 1998**.
2. I uphold the Ministry's decision not to disclose the remaining parts of Record 24C and all of Records 24A, 26, 26A and 26B.
3. I dismiss this appeal as it relates to the remaining records.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ December 22, 1997

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
6	MCR Briefing Note, McMCC, with Ministry Funding of the McMCC (Non-Capital) from 1976/77 to 1979/80, 05.03.80	21
16	MCR internal memorandum from Arts Officer to Director, Arts Services Branch, 22.05.80	21
21	McMCC draft "Financial Statements and Report on the Audit for the year ended March 31, 1980", 30.06.80	21
22	McMCC draft "Report on the Audit for the year ended March 31, 1980", 30.06.80	21
23	MCR Deputy Minister's hand-written note, 22.07.80	21
24	McMCC internal memorandum from Administrative Director to Director, 24.07.80	21
24A	McMCC internal memo re "Loans - not in collection", 31.03.80	21
24C	McMCC document entitled "DE-ACCESSIONS OF WORKS OF ART FROM THE COLLECTION", Fiscal 1979-1980	21
25	MCR Deputy Minister's hand-written note, 25.07.80	21
26	McMCC internal memorandum from Administrative Director to Director, with two attachments, identified as 26A and 26B, 30.07.80	21
26A	McMCC internal memorandum, 11.06.79	21
26B	McMCC Agreement with an individual, 08.06.79	21
27	MCR Deputy Minister's hand-written notes, 03.08.80 to 15.08.80	21
28	MCR Deputy Minister's hand-written notes, undated	21
29	McMCC internal letter from Director to Chairman, 19.08.80	21
31	MCR Deputy Minister's hand-written notes, 26.08.80 to 28.08.80	21
37	MCR internal memorandum from Assistant Deputy Minister, Culture Division, to Minister and Deputy Minister, 10.09.80	21
42	McMCC Agreement between Director and Chairman, with Appendix attached, 07.10.80	21
44	MCR internal memorandum from Assistant Deputy Minister to Minister, 28.10.80	21, 19

<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>
46a	McMCC letter from Chairman to Provincial Auditor, 04.11.80	21
47	MCR Deputy Minister's hand-written note, 05.11.80	21
50	MCR Deputy Minister's hand-written note, 05.07.80	21