



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

ORDER PO-1725

Appeals PA-990117-1, PA-990118-1 and PA-990076-1

Cabinet Office



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Cabinet Office received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to electronic and hardcopy versions of the “appointment book or books, or scheduling book” of a named employee of the Premier’s Office, for the time period June 1995 to September 15, 1998. Cabinet Office is responsible for processing requests for access to records held by the Premier’s Office.

The requester then submitted the following second request to Cabinet Office:

I understand from [Cabinet Office] that [the named employee’s] scheduling diary (July 1995-December 1997) has been deleted from his computer ... I request that your office attempt to obtain the July 95-December 1997 scheduling diary from the government computer system. I believe you will find that either there is a system backup or that a secretary has a copy. Alternatively, I request that you search for paper records with a secretary or assistant to obtain a full or partial listing of 95-97 appointments.

With respect to the first request, Cabinet Office stated that records for the period June 1995 up to and including September 9, 1997 do not exist. However, Cabinet Office located responsive records for the time period September 10, 1997 to September 15, 1998, and granted partial access to them. For those parts of the records to which access was denied, Cabinet Office claimed exemptions pursuant to sections 12, 18, 19 and 21 of the Act.

With respect to the second request, Cabinet Office explained that records for the period September 10, 1997 to December 1997 had been dealt with in the first request, and added that it had attempted, unsuccessfully, to locate the computer system backup of records for July 1995 to September 9, 1997. Cabinet Office also stated that no assistant to the named employee had a separate electronic version of the appointment schedule because the employee had given his assistants proxy access to the same calendar management database. [A number of different calendar management databases were used by the Premier’s Office during the time period covered by the requests. Unless a specific database is relevant to a particular topic under discussion in this order, I will simply refer to these various databases as a single “database”.]

The Cabinet Office also located three additional pages of records through a search of the files of the named employee’s current and former secretaries, and provided the requester with partial access, claiming section 21 as the basis for denying access to the rest.

With respect to both requests, Cabinet Office stated that some information contained in the records was being withheld because its disclosure might reveal personal information of third parties. Cabinet Office notified 58 individuals (the affected persons), pursuant to section 28 of the Act, seeking representations concerning the possible disclosure of the information relating to them. Following consideration of the submissions received from 31 of the affected persons, Cabinet Office granted access in full to the information relating to 18 affected persons, access in part to information relating to one affected person, and denied access in full to the remainder pursuant to section 21(1) of the Act.

Cabinet Office also claimed that information contained in the records relating to activities conducted by the named employee in his personal capacity, and not as an employee, was not in the custody or under the control of the Premier's Office.

One individual appealed Cabinet Office's decision to grant access to certain pages of records, claiming that disclosure would be an unjustified invasion of personal privacy pursuant to section 21(1) of the Act; that the information on these pages was not in the custody or control of the Premier's Office; and that the request was frivolous, vexatious and an abuse of process (Appeal PA-990076-1).

The requester appealed Cabinet Office's decisions regarding custody or control and the denial of access, and also claimed that records should exist with respect to the time period of June 1995 to September 9, 1997. Appeal PA-990117-1 was assigned to Cabinet Office's response to the first request, Appeal PA-990118-1 to the second.

During mediation a number of events occurred:

1. Cabinet Office confirmed that during the time period September 10, 1997 to July 9, 1998, the particular calendar management database used by the Premier's Office allowed users to colour code entries and to individually designate meaning to each of the colours. This software also produced a legend which shows the particular colours and their meanings. Cabinet Office confirmed that some of the records at issue in these appeals have colours attributed to them. Cabinet Office also retrieved the relevant legend. The requester indicated that he wished to pursue access to the coloured records and the legend which would identify the meaning of each of the colours.
2. Cabinet Office also identified additional information relating to some of the appointments for the period September 10, 1997 to July 9, 1998. This information consists of supplementary or more in-depth details relating to some of the appointments.
3. Cabinet Office agreed to provide the requester with an access decision covering the coloured records, the legend and the additional information referred to in the preceding two paragraphs. However, because no decision had been made by Cabinet Office prior to the end of mediation, the issue of whether Cabinet Office was in a "deemed refusal" situation by not providing the appellant with a decision letter with respect to these records was included as an issue in this inquiry.
4. Cabinet Office claimed that an entry for October 24, 1997 is not responsive to the requests. The requester disagrees, so the question of whether this information is responsive is an issue in this inquiry.
5. Cabinet Office produced a copy of the records retention schedule for the Premier's Office. As a result, the requester abandoned the claim that Cabinet Office's search for records was not reasonable.

6. Cabinet Office clarified that before disclosing records to the requester, it identified one additional entry (Wednesday, November 26, 1997 for the time period 1:30 pm to 4:00 pm) that was being withheld for purposes of consistency. This page was added to the scope of Appeal PA-990076-1.
7. The requester claimed that there is a compelling public interest in the disclosure of all records in the three appeals, pursuant to section 23 of the Act.

The records which remain at issue in these appeals consist of 167 printed copies of the electronic appointment schedule of the named employee, in whole or in part.

I sent a Notice of Inquiry to Cabinet Office, the requester, the 40 parties who were notified by Cabinet Office at the request stage and did not consent to disclosure of their personal information, and 12 other individuals identified in the records who had not been notified at the request stage but who I felt should also be provided with a copy of the Notice in order to have the opportunity to make representations. Representations were received from Cabinet Office and 12 other parties, but not from the requester.

In its representations, Cabinet Office states that it is no longer relying on section 19 of the Act as an exemption claim. Because this is the only exemption which Cabinet Office applied to the 1:30 pm entry on Friday November 28, 1997, this part of the record should be disclosed. In addition, all objections to the disclosure of the entry for Thursday, November 27, 1997 from 8:00 am to 2:00 pm have been withdrawn, and this part of the record should also be disclosed. The claim that the request was frivolous and vexatious and an abuse of process has also been withdrawn.

Cabinet Office provided the requester with an access decision, dated August 31, 1999, with respect to the coloured records, the legend and the additional information relating to some of the appointments. Consequently, the "deemed refusal" issue has been removed from the scope of this inquiry.

PRELIMINARY MATTERS:

CHARACTERIZATION OF THE RECORDS

In the Notices of Inquiry sent to the parties, and in the foregoing discussion, I have referred to individual pages containing entries for a particular day as "records" for the purpose of these appeals. That was the format used by Cabinet Office in responding to the requests, and also the format submitted to me in the context of these appeals. However, this particular paper format merely represents one of many possible ways in which the information contained in the electronic calendar management database can be displayed.

The nature of an electronic calendar management database permits users to manipulate entries in ways that organize and/or display them either individually or together with other entries related by a common characteristic identified by the user. A "record" could be anything from a single entry up to and including the entire database. That determination must be made on the basis of the nature of the specific request and the circumstances of a particular appeal. In Order P-1281, I determined that an entire relational database containing corporate registration data should be treated as a single "record" for the purpose of addressing

the issues in that appeal. In the present appeals, because the entries are electronic, and are created and can be amended, classified or deleted one entry at a time, I find that each entry in its electronic format should be characterized as a separate "record". The individual printed pages of entries for each day - the form in which the material has been provided to me - merely represent a convenient way of organizing the entries in order to permit Cabinet Office to respond to the requests and to permit me to process these appeals.

For ease of reference, I will continue to refer to the paper documents before me as the "records", but my decisions will be made on an individual entry basis.

The two pages at issue in Appeal PA-990118 are individual paper records containing information about electronic records that no longer exist. I will also make my decisions for these pages on an entry-by-entry basis.

RAISING OF DISCRETIONARY EXEMPTIONS BY AFFECTED PARTIES

In their representations, two affected persons claimed that entries relating to them on two dates should be exempt under section 19 of the Act. Cabinet Office did not originally claim section 19 for these records, and has in fact withdrawn its section 19 exemption claim. Because of the way in which I will be disposing of the other issues in these appeals, it is not necessary for me to consider whether these affected parties should be permitted to raise this discretionary exemption claim.

Two other affected persons raised the application of section 12(1)(a) of the Act to information relating to them which appear on two dates. Because section 12 is a mandatory exemption claim, I will consider this issue, if necessary, in the discussion which follows.

RESPONSIVENESS OF AN ENTRY FOR OCTOBER 24, 1997

Cabinet Office claims that a reference to an 11:45 appointment on October 24, 1997 between two government officials that did not involve the named employee was included in the appointment schedule to explain the need for an earlier scheduled briefing of one of the government officials by the named employee. According to Cabinet Office, the named employee did not attend the 11:45 meeting nor was he intended to attend. Because the entry is not about the named employee's schedule, Cabinet Office submits that it is not responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request. As former Adjudicator Anita Fineberg stated in Order P-880:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is

“relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is reasonably related to the request.

(See also, for example, Orders P-1051, P-1591, PO-1645, PO-1698 and PO-1707)

The request is worded as follows:

Please release a copy of [the named employee’s] appointment book or books, or scheduling book from June 1995 to today’s date. If [the named employee] keeps his appointments electronically, please release an electronic copy. If he keeps track of his appointments in a day planner or some similar book, please release photocopies.

The request does not specify that it is limited to only the named employee’s appointments, and whether or not this entry forms part of the named employee’s own schedule has no bearing on its responsiveness. Because the record contains information related to the subject matter of the request, I consider it to be responsive. Cabinet Office will be required to provide the requester with a decision on access to this entry.

DISCUSSION:

CUSTODY OR CONTROL

Section 10(1) of the Act 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,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

It is clear from the wording of section 10(1) that in order to be subject to an access request under the Act, a record must either be in the custody **or** under the control of an institution (see, for example, Orders M-1078 or P-1397).

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issue of custody and control:

I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act].

I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

The Commissioner's orders dealing with issues of custody and control have turned on the particular circumstances of each appeal in relation to the principles enunciated by former Commissioner Linden in Order 120 (see, for example, Orders P-239, P-271, P-326, P-396, M-5, and more recently, Orders P-912, M-315, M-506, MO-1237 and MO-1242). These appeals must also be decided on the basis of their particular facts.

Cabinet Office advises that the records at issue in these appeals resided in the Premier's Office at the time of the request in either electronic or paper form, and that the author is an employee of the Premier's Office. Cabinet Office also states that the Premier's Office has the general authority to dispose of the database containing the records as part of a general replacement or updating of computer systems or applications or both, or to dispose of the records upon termination of employment. Cabinet Office submits, however, that the named employee did not always act in his professional or government capacity when entering items into the database. Where an entry relates to activities outside normal working hours and/or to personal or partisan matters, Cabinet Office submits that the named employee was not acting in his professional capacity and that this information, therefore, is not in the custody or under the control of the Premier's Office.

Cabinet Office relies on the following additional factors in support of its position that the above-noted information is not in the custody or under the control of the Premier's Office:

- the named employee intended to make use of the records collectively (both professional and personal) to organize his day;
- the Premier's Office only has possession in the sense that the records reside within the confines of the building where the Premier's Office is located, but access to the records is restricted by the named employee;
- the records are in the possession of the named employee and not the Premier's Office;
- the Premier's Office has no proprietary right to the personal and partisan information contained in the records, does not have a right to possess this information and, in the absence of any rules regarding the use of the electronic equipment, the fact that the information was recorded on this equipment does not affect its nature;
- the named employee has sole authority to determine who has access to his appointment schedule;
- there is no protocol in place, other than that described above, that would allow the Premier's Office to dispose of the appointment schedule during a staff member's employment without that individual's permission; and

- the Records Retention Schedule of the Premier's Office (a copy of which was provided) does not identify appointment schedules as the type of records which are required to be retained.

My discussion will focus on whether or not the Premier's Office has **custody** of these records. If I determine that the Premier's Office has lawful custody of the records, that finding is sufficient to bring the records within the scope of section 10(1)(a) and under the jurisdiction of the Act.

Two broad principles emerge from the Commissioner's orders dealing with the issue of custody. The first is that bare possession does not amount to custody, absent some right to deal with the records and some responsibility for their care and protection (Order P-239). The second principle is that "... physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession" (Order 41).

In my view, there are a number of facts and circumstances surrounding the creation, possession and maintenance of the records at issue in these appeals which support the conclusion that they are in the custody of the Premier's Office. All entries, whether they contain personal or professional information, were created and stored in the same database. This database is owned and maintained by the government on behalf of the Premier's Office. This factor alone gives the institution both a right to deal with the records and a responsibility for their care and protection, in order to ensure the integrity of the database as a whole and of the information entered into it.

In addition, it is clear that the purpose for which the database exists is for use by employees attending to the business of the Premier's Office. The capabilities of the database in permitting employees to make entries relating to personal matters, and to place certain restrictions on access to its contents (subject to systems management considerations), are normal features of most electronic calendar management databases and are not inconsistent with the institution's lawful custody of the database and its contents, or with its responsibilities in relation to its records management functions. If an employee of a government institution voluntarily chooses to place information, whether personal or professional in nature, into a government maintained database, it is difficult to conceive how the record containing that information would fall outside the institution's lawful custody, absent the most exceptional circumstances, which I do not find present here.

It is not enough for an institution to assert simply that the named employee has "sole authority" over access to the records, that there is no protocol in place governing their disposition during the employee's tenure, or that the retention schedule does not specifically deal with these types of records. As the Divisional Court noted in Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), affirmed November 1, 1999, Doc. C28685 (C.A.), for example, the absence of evidence that an institution has actually exercised control over particular records will not necessarily advance the institution's argument that it, in fact, has no control. If it were otherwise, government institutions would be in a position to abdicate their information management responsibilities under the Act by the simple device of failing to implement appropriate information management practices in respect of records in their lawful custody. So long as records are in an institution's

custody, that body must deal with them in accordance with all applicable laws, including the provisions of the Act.

Cabinet Office also advances various arguments to the effect that it has no proprietary interest in personal or partisan information contained in the records, and that the Act was not intended to make information relating to the personal activities of government employees accessible or open to public scrutiny. While these arguments may be relevant to the question of whether disclosure of information would be an unjustified invasion of personal privacy, they do not assist in dealing with the custody issue.

More specifically, Cabinet Office refers to past orders of this Office (Orders P-1574 and P-1532), as well as the Court of Appeal decision in Walmsley v. Ontario (Attorney General of Ontario) (1997), 34 O.R. (3d) 611 at 619, where it was found that personal records, such as diaries and notes, were not in the institution's custody or control. In my view, these authorities do not advance Cabinet Office's arguments. They involve cases where the individuals who created or came into possession of the records either were not employees of the institution or, if they were employees, the records had been created and kept by them completely separate from records created or kept by the institutions. In the present appeals the individual who created the records is an employee of the Premier's Office and kept all of the records, including those relating to personal or partisan matters, in the same government database and organized in essentially the same manner as entries relating to his official duties. There is more than a sufficient degree of integration of these records within the institution's information management systems to render the principles cited by Cabinet Office inapplicable here.

In any event, neither the personal character of the information nor the purported absence of any "proprietary" interest on the part of Cabinet Office has any bearing on the issue of custody. To illustrate this point, government institutions frequently have custody of records containing personal information or the trade secrets of third parties, or other proprietary information in the nature of copyright works, trade marks or patented materials, which may restrict the use to which government may put the information. Indeed there are mandatory exemptions under the Act specifically designed to restrict access to and/or use of certain kinds of personal and proprietary information of this nature (sections 21(1) and 17(1)). Nonetheless, government will still have lawful custody of records containing this kind of information if these records come into government's possession on a voluntary basis or through the normal regulatory processes of government, and the institution has some right to deal with the information or responsibility for its care.

As far as records containing information concerning an individual's partisan or political party activities are concerned, I made the following statements in Order P-267:

I am mindful of the fact that some employees of the Office of the Premier and the offices of other members of the Executive Council perform political party functions in addition to their roles as employees of the institution. In my view, this dual role imposes added responsibilities to ensure that proper records management systems are in place to deal with records received and/or produced by these employees. In my opinion, it is not possible for an institution to remove records in its physical possession from the purview of the Act by simply maintaining that they relate to political party activity. To do so would be inconsistent

with the obligation of institutions to properly manage their record holdings in accordance with the intent of the Act.

The principles reflected in this quotation are also applicable to the present appeals. In short, it is not possible for an institution to remove records otherwise in its lawful custody from the purview of the Act by demonstrating that they relate to personal or partisan activity.

In light of all of the circumstances under which the records at issue in these appeals were created and maintained, I find that the Premier's Office has both the right and responsibility to deal with the records, and that they are in the lawful custody of the Premier's Office. The database on which the information was created is owned and maintained by government on behalf of the Premier's Office; the individual who made use of this database is an employee of the Premier's Office; the Premier's Office has the authority to dispose of the database as part of its general replacement and updating of computer systems or applications; and the Premier's Office may dispose of the records upon termination of an employee's employment.

As former Commissioner Linden pointed out in Order P-120, a finding that a record is in the custody or under the control of an institution does not mean it is accessible under the Act. Rather, it simply means that Cabinet Office must apply the provisions of the Act and decide if the records, or any parts of them, should be disclosed. Since Cabinet Office has already turned its mind to this eventuality by claiming, in the alternative, that some of the records are also subject to exemptions, I will now proceed to consider these exemption claims as well as the other outstanding substantive issues.

CABINET RECORDS

Cabinet Office claims that 80 entries are exempt because their disclosure would reveal the substance of deliberations of Cabinet, and/or they fall within the scope of sections 12(1)(a), (b) and/or (d) of the Act. These sections read as follows:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

Cabinet Office submits that the entries in the appointment schedule for which this exemption has been claimed “reflect the developments of policy intended to be and/or actually discussed and considered by Cabinet or its Committees or by members of Cabinet individually or collectively”.

Cabinet Office further submits that:

In the absence of the protection afforded to the confidential nature of the Cabinet decision-making process, the disclosure of the entries involving matters which were intended for Cabinet decision would give rise to an accurate inference about what was in fact considered by Cabinet ... Such disclosure would render the protection of the mandatory exemption under s. 12(1) moot.

Cabinet Office goes on to explain the underlying details and background for each entry. For the great majority of these entries, Cabinet Office submits that they reflect policy options or other matters “being actively considered by the Premier’s Office, which in turn sets the priorities of Cabinet and its meeting agenda”. Cabinet Office also submits that some entries refer to specific policy initiatives or options under consideration by Cabinet or its committees at particular meetings, as well as consultations between the Premier and Cabinet Ministers. It is the submission of Cabinet Office that these entries meet the requirements of sections 12(1)(a), (b) and/or (d), as well as the introductory wording of section 12(1) as records which would reveal or permit accurate inferences to be drawn with respect to the substance of Cabinet deliberations.

It has been determined in a number of previous orders that the use of the term “including” in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1). It is also possible that a record which has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1). This result will occur where an institution establishes that the disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to the deliberations of Cabinet or its committees.

In my view, the submissions of Cabinet Office must be considered in light of the unique role occupied by the Premier in supervising the deliberative processes of Cabinet and its committees. In Order P-1390, former Adjudicator John Higgins described the constitutional conventions governing the deliberations of Cabinet and the role of the Premier in that setting:

An additional reason for reaching this conclusion arises from constitutional conventions about responsible government. According to these conventions, the Cabinet (or Executive Council) is the supreme executive authority, which formulates and carries out all executive policies, and is responsible for the administration of all the departments of government. In the provinces, including Ontario, the Premier presides over Cabinet. Although in most matters Cabinet is the supreme executive authority, the Premier has certain powers which

he does not share with the other members of Cabinet, including the power to select, promote, demote or dismiss cabinet ministers. In addition, as noted in P.W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992), at pages 9-10, the Premier “calls the meetings of cabinet, settles the agenda, and presides over the meetings”.

While the question before me is different from the one considered by former Adjudicator Higgins, this quoted passage makes it clear that the Commissioner’s Office is guided by the constitutional conventions and traditions surrounding the role of the Premier in matters pertaining to Cabinet deliberations.

In the chapter of Constitutional Law of Canada referred to in Order P-1390, Professor Hogg notes that constitutional convention gives the Prime Minister or Premier of a Province considerable latitude in setting the priorities of the Cabinet and even making certain decisions which are the traditional preserve of the whole cabinet (pp. 9-10):

No doubt the extent of a Prime Minister’s personal power varies from government to government, depending upon a number of factors. But in some governments a Prime Minister who chooses to take on his own initiative, or on the advice of a few ministers, decisions which would traditionally be the preserve of cabinet, is politically able to do so; and the extent to which the full cabinet plays a role in important decision-making may depend in large measure on the discretion of the Prime Minister. In this connection it is important to notice that the Prime Minister calls the meetings of cabinet, settles the agenda, and presides over the meetings.

In another authoritative text, Dussault & Borgeat, Administrative Law, A Treatise, 2nd, ed (Toronto: Carswell, 1985), the authors elaborate on the roles and relationship of Cabinet and the Prime Minister or provincial Premier (pp. 58-63):

On the one hand, the Cabinet possesses political power, both as a representative of the majority party in Parliament or a Legislature. By virtue of this fact, it is charged with implementing the major policy choices of the members of this party. Consequently, it is responsible for determining the ways and means of economic, social and cultural progress and is called upon to translate into legislation and into concrete programs the values underlying its rise to power or its remaining in power. Above all, therefore, it represents a centre for reflection and decision. By its very nature, the Cabinet is an institution for compromise, with respect to which its primary role is to determine priorities, to plan and to establish political strategy.

On the other hand, the Cabinet represents the supreme administrative body. In this capacity, the responsibility for co-ordinating the action of all Departments and agencies answerable to it is conferred upon the Cabinet and it has the power to supervise and control the execution of the administrative duties divided among the Departments and agencies of government. In this way, it is responsible for the application of laws and the distribution of services.

This dual responsibility, on the one hand, to determine policies and, on the other hand, to co-ordinate responsibilities and supervise administrative activity, confirms the fundamental importance of Cabinet in Canada ... However, the ultimate responsibility for decision-making, although ascribable to Cabinet members as a group, is conferred in particular upon the Prime Minister who dominates its activities. This results since he or she is the head of Cabinet and receives technical briefs and also since he or she has the power to determine the agenda for meetings and to exert control over the support staff. The Prime Minister has recently been termed "the guiding force, co-ordinator and arbitrator of the exercise of the executive decision-making process". Possessing, *inter alia*, such powers as the authority to appoint his or her colleagues, the Prime Minister dominates the administrative machinery ...

As leader of the government, the Prime Minister possesses several prerogatives. His role "like [that of] the Cabinet, reflects the development of constitutional usage and practices rather than statute". He determines not only the composition of the Cabinet but also determines the agenda for its meetings. He presides over the Cabinet and signs the text of decisions that are taken by it, as well as Bills before they are tabled in the House. Likewise he controls the composition of Cabinet committees and sees to the general organization of the government. In addition, he possesses the prerogative to recommend the convocation and dissolution of Parliament, as well as the appointment of Deputy Ministers and certain senior officials. ...

In short, it has been recognized that if all Ministers are equal, the Prime Minister is without doubt "a little more equal" than the others. Indeed, the Prime Minister benefits considerably from the increased authority which comes to him from the fact of having been elected leader of his party and having led the party to victory. His special status is "reinforced by his control over the organization of the political party in power" [Tr.]

...

In short, it may be observed that the Cabinet is the most centralized organ of the entire Administration ... This centralization, which constitutes the very essence of this body, is even more pronounced if the preponderant role of the Prime Minister at the heart of Cabinet is taken into account. Therefore, the Administration does not evade the recognized rule applicable to any modern bureaucratic organization: supreme decision-making power is conferred upon a single central body. The current necessities of socio-economic planning and co-ordination, moreover, demand that one brings important policy choices to this central body. However, in light of the complexity of tasks which have devolved upon it, the Cabinet has had to implement intermediate mechanisms between it and the administrative apparatus as such in order to ensure that its policies are adequately carried out.

The authors then discuss the role of Cabinet Committees and other executive agencies in the co-ordination, liaison and exercise of the authority of Cabinet. One of these auxiliary services is the Prime Minister's or Premier's Office (pp. 81-82):

Finally, it would be wrong to ignore the very active role presently played ... by the Prime Minister's Office. Although, like the Cabinet Secretariat it is not a strictly administrative body, though it relates both to politics and to the administration, this Office plays a dominant role within the central administration, performing tasks for which the Prime Minister himself is answerable and enabling him to study and solve various problems.

The Prime Minister is inevitably limited by time. He cannot be everywhere at once, nor be omniscient. He "hardly has the time to work out in detail himself the decisions which he makes. These decisions are prepared by those who assist him. They describe to him the problem to be solved, identify the possible solutions, make him aware of the advantages and disadvantages of each option and indicate to him the respective positions of those who will be affected by the decision." [Tr.]. The staff of the Prime Minister's Office is a *political staff* whom the Prime Minister chooses from among persons who have his confidence. Their duties are varied and extend to the role of secretary - such as preparing the agenda of the Prime Minister, answering his correspondence, etc. - to the role of political advisor to the head of government.

As explains Marc Lalonde, then principal secretary to former Prime Minister Trudeau: "It is not a mini-cabinet; it is not directly or indirectly a decision-making body - indeed it is not a body at all; members of the staff have no specific powers nor any special authority except that vested in them by the Prime Minister; they all are in a *staff* and not a *line* situation."

The influence exercised by the Prime Minister's Office is difficult to state clearly since it is not vested with any fixed mandate or official status. Its power arises out of the responsibilities delegated to it by the Prime Minister and basically depends upon the latter. Even if the "counsellors of the Prime Minister do not 'counsel' the Prime Minister in the strict sense of the term ..., the way that the problems are presented and the selection of information to transmit constitutes a form of influence that those who expect decisions are well aware of" [Tr.].

In summary, even if it is found at the fringes of the Cabinet, the Prime Minister's Office has become, over time, a privileged instrument in the articulation of political thought. It may therefore be distinguished from the Privy Council Office or the Cabinet Secretariat, the major role of which is found more at the administrative level, but all the while maintaining very close relations with this body. The Prime Minister's Office, responsible for promoting the personal activities of the head of Cabinet and presenting him with an overview of the problems which reflect upon his political action, co-operates in making the Prime Minister the dominant figure of the ... Cabinet. In some ways, it constitutes "one of the symptoms of the phenomenon of the personification of power which results ... in shifting the centre of power from the hands of the Cabinet and placing it more and more in the hands of the leader of the government" [Tr.].

Three broad principles emerge from this discussion. Firstly, by virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown, cannot be separated from the deliberations of Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes. To the extent that records reflect consultations bearing on the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, those records, by definition, may be seen as reflecting the substance of deliberations of the whole Cabinet.

Secondly, in our modern parliamentary democracy, the Premier functions by and large through the instrumentality of staff within his Office. Some of the more senior staff members assume responsibilities and perform delegated tasks for which the Premier himself is answerable. In so doing, they facilitate the Premier's priority-setting role by identifying problems and possible solutions, making the Premier aware of the pros and cons of various options, and conveying the positions of those affected by particular decisions. In a very real sense, the Premier's senior staff constitute his eyes and ears, and the information thus presented to them will often have a considerable influence over the decisions which the Premier must make.

Thirdly, the Premier's policy-making and priority setting functions do not occur in a vacuum, but within the political framework which brought the ruling party to power. Cabinet, and the Premier in his capacity as leader of the winning party, are charged with the task of prioritizing and implementing the major policy choices of party members by translating political party values into strategies for legislation and other programs. By virtue of his dual role as party leader and head of Cabinet, the Premier is at the apex of both the political and legislative policy-making functions. In the person of the Premier, Cabinet deliberations cannot be divorced from the consensus building process that must occur within the democratic political environment. To the extent that certain senior staff within the Premier's Office are integral to that process, they stand virtually in the same shoes as the Premier in assisting in his pre-eminent deliberative role within Cabinet.

The named employee whose appointment schedule is the subject matter of these appeals is one of the most senior staff members of the Premier's Office. His job title and employment responsibilities deal directly and primarily with policy formulation and the overall priority-setting and co-ordination of the government's policy agenda. Meetings and discussions undertaken by this employee in the context of issues under development or consideration by Cabinet relate directly to the Premier's functions in charting the deliberations of the Executive Council. The records which are subject to the Cabinet Office's section 12(1) exemption claim must be considered from this perspective.

The records contain numerous references to meetings dealing with various subjects having a policy-making dimension, whether in the form of references to particular Bills or pending legislation, or more generalized references to possible programs and initiatives. Frequently these entries appear with other references to particular cabinet committees, ministers of the Crown, Premier's Office, Cabinet Office or other government officials, or non-governmental individuals, groups or organizations. While many of these references consist of abbreviations, acronyms or initials, persons knowledgeable in the affairs of government would likely be in a position to identify most of these references both as to subject matter and the persons or entities involved.

The explanations contained in Cabinet Office's representations and supporting affidavit material provide additional context to many of the entries, which clearly place them within a class of items subject to policy consideration by the Premier and/or the named individual on the Premier's behalf. The dates of specific entries and/or their proximity in time to Cabinet and committee meetings, or other events, can be seen as reflecting the relative priority attached to the particular subject matter or policy initiative, whether or not it was later the subject to a specific cabinet discussion or meeting. Given the particular role of the named individual within the Premier's Office, it is not possible to separate the consideration and prioritization of these items from the central role of the Premier in identifying policy choices and initiatives, and establishing Cabinet's priorities. To the extent that the records reveal the issues and options upon which the Premier or the named individual is reflecting in formulating and establishing Cabinet's "agenda" - used here in its broadest sense - these records would tend to reveal the substance of this deliberative process and, therefore, the substance of the deliberations of Cabinet in the context of the Premier's unique role within that body.

I also want to comment on the important distinction between the term "agenda" as it appears in the exemption at section 12(1)(a) of the Act, and entries such as those appearing in the records at issue in these appeals. The word "agenda" in section 12(1)(a) refers to a specific record, created as an official document of Cabinet Office, which identifies the actual items to be considered at a particular meeting of Cabinet or one of its committees. In my view, an entry appearing in another record which describes the subject matter of an item considered or to be considered by Cabinet is not an "agenda" as this term is used at section 12(1)(a). Nor would such an entry, standing alone, normally be found to reveal the substance of Cabinet deliberations, unless either the context or other additional information would permit the reader to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting. Therefore, none of the entries in the records at issue in these appeals is an "agenda", nor could any of these records be said to reveal any part of a Cabinet agenda. It is only by virtue of the capacity of these entries to reflect the Premier's deliberations in establishing Cabinet's priorities that they fall within the introductory wording of section 12(1) by revealing the substance of that exercise. Accordingly, even though some of the entries may refer to the subject matter of items actually considered by Cabinet and/or appearing on a specific Cabinet agenda, this does not transform any particular entry or series of entries into a Cabinet "agenda" under section 12(1)(a).

For all of these reasons, I find that the following entries qualify for exemption pursuant to introductory wording of section 12(1) of the Act:

1997

10:30 a.m. September 11; 2:30 p.m. September 12; 4:00 p.m. September 19; 4:30 p.m. September 23; 3:15 p.m. September 26; 1:30 p.m. October 2; 11:30 a.m. October 6; 2:30 p.m. & 3:00 p.m. October 8; 11:00 a.m. October 9; 10:00 a.m. & 2:00 p.m. October 20; 12:00 p.m. October 21; 12:30 p.m. & 2:30 p.m. October 24; 9:00 October 28; 3:00 p.m. November 20; 12:30 p.m. November 24; 2:00 p.m. November 25; 2:00 p.m. (second entry) & 3:00 p.m. November 27; 10:45 a.m. December 2; 2:00 p.m. December 9; 8:30 a.m. December 17; and 1:30 p.m. December 18

1998

9:00 a.m. February 19; 2:45 p.m. March 4; 2:15 p.m. March 10; 1:00 p.m. March 16; 11:00 a.m. March 31; 2:00 p.m. April 27; 10:30 a.m. May 11; 4:00 p.m. May 19; 5:00 p.m. June 4; 2:00 p.m. June 9; 11:30 a.m. & 4:30 p.m. June 18; 4:00 p.m. (first entry) July 2; 6:00 p.m. July 20; 6:00 p.m. July 21; and 1:00 p.m. September 10

A number of other entries are similar to each other and relate to two series of meetings, one series held or scheduled to be held in February 1997, and the other series held or scheduled to be held over the course of the summer of 1998. The representations provided by the Cabinet Office explain that the first series of meetings were held on an individual ministry basis to discuss spending allocations for the upcoming fiscal year; and the second series were held for the purpose of discussing government priorities and plans for the upcoming year. The entries show the date and time of each meeting and identify the ministry involved in each meeting, but provide no further detail on their purpose, substance or outcome. Cabinet Office claims that these entries qualify for exemption under the introductory wording of section 12(1), but does not raise any of the specific heading at paragraphs (a) through (f).

The only information revealed by these entries is the fact that meetings with various ministries were scheduled to take place as part of the Cabinet's priority setting process. Neither the records themselves nor Cabinet Office's representations demonstrate any capacity for these entries to reveal information concerning the substance of Cabinet deliberations or, as part of those deliberations, the selection and prioritization by the Premier or senior staff within his Office, of specific government policies or legislative initiatives. In this respect, these entries are similar to others for which the section 12(1) exemption was not claimed, and simply identify that Cabinet or one of its committees may have met at a specific time and date, but do not reveal anything in the nature of the substance of such meetings. Unlike the other entries which I have found qualify for the section 12(1) exemption, the mere fact that the ministry meetings relate to the spending allocation process or the Cabinet priority setting function is not sufficient, in itself, to reveal any information concerning the substance of that function or the Premier's deliberations associated with it. Accordingly, I find that these entries do not qualify for exemption under section 12(1). These entries are as follows:

1998

12:00 p.m. & 1:15 p.m. February 17; 1:30 p.m., 2:30 p.m., 3:15 p.m. & 4:15 p.m. February 18; 1:00 p.m., 1:45 p.m., 2:30 p.m., 3:30 p.m. & 4:30 p.m. February 19; 11:00 a.m., 12:15 p.m., 1:00 p.m., 2:15 p.m. & 3:15 p.m. February 20; 3:00 p.m. June 3; 2:00 p.m. June 4; 1:00 p.m. June 8; 4:00 p.m. June 10; 3:30 p.m. June 17; 11:30 a.m. June 19; 12:00 p.m. June 23; 3:00 p.m. June 25; 10:00 a.m., 1:00 p.m. & 2:00 p.m. June 29; 11:00 a.m., 1:00 pm & 4:00 p.m. June 30; 11:00 a.m. July 3; 11:00 a.m. & 4:00 p.m. July 6; 11:00 a.m. July 8; 11:00 a.m. July 9; 2:00 p.m. July 13; 11:00 a.m. July 14; 11:00 a.m. August 4; and 11:00 a.m. August 11

As stated earlier, two affected persons claim that two entries relating to them qualify for exemption under section 12(1)(a). Cabinet Office did not exempt these entries under section 12(1). For the reasons outlined

earlier with respect to section 12(1)(a), I find that neither of these entries is an “agenda”. One of the entries refers to caucus activity, and the other consists of the name of a senior government official. I find that disclosure of these entries would not reveal the substance of Cabinet deliberations, either in a general sense or with respect to items subject to policy consideration by the Premier, nor would their context permit the requester or others to draw accurate inferences as to actual deliberations occurring at a specific Cabinet meeting. Therefore, I find that these two records do not qualify for exemption under section 12(1) of the Act.

PERSONAL INFORMATION

Cabinet Office claims that the substantial majority of the information severed from the records contains the personal information of the named employee and/or other identifiable individuals.

Personal information is defined broadly in section 2(1) of the Act to mean recorded information about an identifiable individual.

Cabinet Office submits that information relating to named individual, such as their addresses, telephone numbers, employment interviews, birthdays, vacations, social activities, recreational activities and/or medical appointments, is the personal information of those individuals.

Cabinet Office further submits that where an individual would be identifiable by virtue of public knowledge of their employment by the Premier’s Office or political affiliation, any meeting between the named employee and these identifiable individuals in respect of political or partisan purposes is the personal information of these individuals and the named employee.

Finally, where reference is made to identifiable individuals who have met with the named employee for business purposes, Cabinet Office submits that this information should also qualify as personal information because the meeting should be considered private and confidential and its disclosure may give rise to certain assumptions about an individual’s political association.

All parties who responded to the original section 28 notice provided by Cabinet Office and/or submitted representations to this Office in response to the Notice of Inquiry claim that any reference to them in the records should be considered their personal information.

GENERAL

Information relating to named and/or identifiable individuals, such as their personal addresses, telephone numbers, birthdays, vacation times, social activities, recreational activities and/or medical appointments, is clearly the personal information of those individuals pursuant to the provisions of section 2(1) of the Act. Information relating to individuals who met with the named employee in the context of employment interviews is also the personal information of those individuals (see, for example, Orders P-20, P-196, P-924 and P-1077 and Reconsideration Order R-980015).

The entries which include these types of personal information are the following:

1996

12:30 p.m. & 7:00 p.m. November 5; and 12:00 p.m. November 7

1997

2:00 p.m. September 24; 11:30 a.m. September 25; 2:00 p.m. September 30; 12:00 p.m. October 10; 11:00 a.m. October 14; 2:00 p.m. October 15; 2:00 p.m. October 31; 11:00 a.m. November 11; 7:30 a.m. November 14; 1:30 p.m. November 26; 4:30 p.m. December 2; 2:15 p.m. December 13; 10:30 a.m. December 16; 10:30 a.m. December 18; and 12:30 p.m. December 19

1998

4:15 p.m. February 4; 5:30 p.m. February 9; 3:00 p.m. February 13 (phone number only); 2:00 p.m. February 19; 3:00 p.m. March 16; 6:00 p.m. March 26; 12:00 p.m. March 30; 6:00 p.m. April 21; 10:00 a.m. & 3:30 p.m. April 27; 10:00 a.m. and 4:30 p.m. April 30; 2:00 p.m. May 2; 1:00 p.m. May 3; 12:00 p.m. May 10; 6:00 p.m. May 11; 3:30 p.m. May 12; 12:00 p.m. & 3:30 p.m. May 14; 12:15 p.m. May 27; 6:00 p.m. May 31; 12:00 p.m. June 4; 5:15 p.m. June 9; 7:00 p.m. June 17; 7:00 p.m. June 18; 1:00 p.m. & 4:00 p.m. June 23; 3:30 p.m. June 24; 1:45 p.m. June 25; 2:30 p.m. June 30; 4:00 p.m. (second entry) July 2; 12:15 p.m. & 2:15 p.m. July 6; 8:00 p.m. July 7; 2:00 p.m., 4:00 p.m. & 6:00 p.m. July 8; 6:00 p.m. (second entry) July 9; top reference July 10; 11:00 a.m. & 6:00 p.m. July 11; 12:00 p.m. & 3:30 p.m. July 16; 2:00 p.m. July 17; top reference July 18; 7:00 p.m. July 22; 7:00 p.m. July 23; 6:00 p.m. July 27; 6:00 p.m. July 28; 11:00 a.m. & 7:00 p.m. July 29; 7:00 p.m. July 30; top reference July 31; 7:00 p.m. August 6; 7:00 p.m. August 7; 1:00 p.m. August 9; 7:00 p.m. August 14; top reference, 3:00 p.m. & 7:00 p.m. August 15, 11:30 a.m. August 16; 10:00 a.m. August 18; 8:00 a.m. August 19; top reference August 20; top reference August 25; top reference August 26; top reference August 27; top reference August 28; top reference August 31; top reference & 6:00 p.m. September 1; top reference September 2; top reference September 3; top reference, 3:00 p.m. & 7:00 p.m. September 4; top reference September 8; top reference & 7:00 p.m. September 9; 7:00 p.m. September 11; 7:00 p.m. September 12; top reference September 14; and top reference September 15

RECORDS CONTAINING NO INFORMATION RELATING TO IDENTIFIABLE INDIVIDUALS

I find that pages which simply refer to a statutory holiday, with no additional information, do not contain the personal information of any identifiable individual, and do not satisfy the requirements of section 2(1). These entries are December 25, 1997 and December 26, 1997.

PUBLIC SECTOR OFFICIAL/EMPLOYMENT CAPACITY CONTEXT

Some entries include references to meetings the named employee had with:

- individuals employed by the Ontario Public Service;
- the Government Members Service office; and
- elected Members of Provincial Parliament (MPPs), either individually or collectively as part of the Progressive Conservative caucus

Individuals employed in the Ontario Public Service

The Commissioner has recognized a distinction between the personal and professional capacities in which information concerning the activities of government employees/officials are reflected in records. Sometimes records will contain information specifically enumerated in the definition of personal information at section 2(1) of the Act, in which case the proper characterization is straightforward. In other cases, where it is clear that a government employee/official is acting in a professional or official capacity, past orders of this Office have found that references to employees in records generated in the normal course of these professional/official activities are not “about” the individual and, therefore, do not qualify as personal information (see Orders 139, P-157, P-257, P-326, P-377, 194, M-82, P-477 and P-470 and Reconsideration Order R-980015). In Order 139, for example, the name and professional affiliation of a welfare worker who had lodged a complaint in her official capacity about the eligibility of another individual to receive benefits was held not to constitute the welfare worker’s personal information where this information appeared in a report of the complaint.

Cabinet Office appears to accept this distinction, and has disclosed a number of records which contain references to appointments made by/for the named employee with other employees in the Premier’s Office, Cabinet Office and ministries of the Ontario government. Having reviewed the remaining records, and considered the various representations submitted in response to the Notice of Inquiry, I find that other entries also relate to scheduled meetings between the named employee and other government employees in the normal course of their professional activities. In my view, the information contained in these entries is not “about” the named employee or other employees, and does not qualify as their personal information for the purposes of section 2(1). The entries in this category are:

1998

10:30 a.m. January 15; 3:30 p.m. January 16; 11:00 a.m. February 2; and 5:30 p.m.
June 25

The Government Members Services Office

One entry (2:30 p.m. June 10, 1998) refers to a meeting between the named employee and the Government Members Services office (the GMS). The GMS is an organization created to provide administrative, research and caucus support to Progressive Conservative MPPs. Although some services are provided to all MPPs belonging to that party, the GMS deals primarily with those MPPs who are not members of Cabinet. The operation of the GMS is funded by the Board of Internal Economy through the Estimates of the Office of the Legislative Assembly. Employees of the GMS are not civil servants, although their salaries and benefits are paid from public funds.

The Premier of Ontario has both a legislative and executive role. He is the leader of the Government, but also serves as an elected MPP for one of Ontario's 103 constituencies. In my view, there is an obvious need for some level of dealings between the Premier and the GMS, and it is not unpredictable that the named employee would have cause to meet with GMS staff on occasion. However, in my view, the named employee's reasons for meeting with the GMS are directly related to his professional responsibilities as an employee of the Premier's Office, and I find that these are professional rather than personal activities. Accordingly, the entry on 2:30 p.m. June 10, 1998 does not qualify as the personal information of the named employee and/or any GMS office employee.

MPPs and the Progressive Conservative Caucus

A number of entries relate to scheduled meetings between the named individual and particular MPPs, as well as meetings held with the caucus or one of the caucus committees. The subject matter of these meetings is described in the representations.

The Premier is the Leader of the Progressive Conservative caucus. The caucus consists of all MPPs elected under the party banner. The caucus meets on a weekly basis when the House is in session, and also has regular "retreats" throughout the year.

The relationship between the Premier and the government caucus derives from the constitutional custom, designed to ensure the stability of government, by which the leader of the party which gained the largest number of seats in the previous election, and which therefore has the "confidence" of the Legislative Assembly, is appointed Premier of the province (see Dussault & Borgeat, Administrative Law, A Treatise, *supra*, at page 57).

The role of the executive branch of government in parliamentary democracy is characterized by the ability of the Prime Minister or Premier, with the aid of Cabinet, to maintain the confidence and solidarity of the elected members of his or her party in Parliament or the Legislative Assembly. This principle brings the government of the day to power and is essential to its ongoing effectiveness and stability. Notwithstanding

their partisan connection, activities and records which reflect activities in furtherance of this role lie at the core of constitutional government activity and cannot in any sense be characterized as personal.

In my view, all of the appointments in this category relate to professional activities undertaken by the named individual in his role as an employee of the Premier's Office. They concern various aspects of the relationship between the executive and legislative branches of government, and the role played by the named employee is clearly in his capacity as a representative of the Premier. Therefore, I find that these entries as not "about" the named employee or MPPs in a personal sense, and do not meet the requirements of section 2(1). The entries which fall within this category are:

1997

7:45 a.m. October 16; 4:00 p.m. October 21; 11:30 a.m. October 24; and 4:00 p.m. November 25

1998

1:30 p.m. & 2:30 p.m. January 13; 1:00 p.m. January 15; 10:00 a.m. January 21; 1:00 p.m. & 2:30p.m. January 29; 11:00 a.m. February 12; 1:00 p.m. March 4; 1:00 p.m. March 5; 3:00 p.m. March 10; 1:00 p.m. April 23; 10:00 a.m. April 28; 10:00 a.m. May 5; 5:00 p.m. May 6; 10:00 a.m. May 12; 10:00 a.m. May 26; 10:00 a.m. June 2; 1:30 p.m. June 16; 5:00 p.m. June 24; 11:00 a.m. August 7; 12:30 p.m. August 10; and 10:00 a.m. August 21

PRIVATE SECTOR PROFESSIONAL/BUSINESS CONTEXT

Former Commissioner Linden originally elaborated on the interpretation of "personal information" in the business context in Order 80. In that case, a ministry relied on the personal information exemption claim as the basis for denying access to the names of officers of the Council on Mind Abuse (COMA) which appeared on funding-related correspondence sent by COMA to the Ministry. In rejecting the exemption claim, the former Commissioner stated:

All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, former Adjudicator Donald Hale reviewed the history of the Commissioner's approach to the issue of professional versus private capacity and the rationale for taking such an approach. He stated:

Information found not to constitute an individual's personal information has included: correspondence written by a solicitor and the Executive Director of a business association acting in their professional capacities (Order 113); correspondence written by an individual on an organization's letterhead as spokesperson for the organization (Order P-300); the names of an M.P.P. and a newspaper reporter appearing as recipients of copies of a letter (Order 172); the name of a doctor who provided a medical opinion (Order P-259); names and business addresses of researchers hired by the Ontario Native Affairs Secretariat (Orders P-454 and P-463); a letter written on corporate letterhead in the author's professional capacity (Order P-478); and a summary of past account assignments undertaken by various individuals employed in an advertising agency (Orders P-418, P-419 and P-420).

The following information has been found to be personal information: the names, professional affiliations, addresses and telephone numbers of proponents of a Centre for Women's Health (Order 149); a university professor's name, title, department, university and signature on a student evaluation form (Order P-240); the names, titles, positions and signatures of individuals who had performed confidential drug reviews for the Drug Quality and Therapeutics Committee of the Ministry of Health (Order P-235); the names and addresses of the officers of a corporation appearing on corporate filings with the Ministry of Consumer and Commercial Relations (Orders P-318 and P-319); the names, addresses, telephone numbers and code numbers of home child care providers under contract with a municipality (Order M-109); a witness's place of employment and occupation (Order P-355); and a physician's hospital practice licence (Order P-244).

In all of these latter cases, the information at issue either fell within a specifically enumerated category under the definition of personal information or had some other personal, as opposed to professional or representative, quality about it such that it could be said to be "about" the identifiable individual in each case.

Following his analysis, former Adjudicator Hale made the following findings:

I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore,

does not qualify as their “personal information” within the meaning of the opening words of the definition.

In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information “about” the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.

I adopt the reasoning of former Adjudicator Hale for the purposes of the present appeals.

Some entries relate to scheduled meetings involving the named employee and:

- individuals involved with the Progressive Conservative Party of Ontario or one of the local Progressive Conservative constituency associations; or
- individuals representing private sector organizations

Progressive Conservative Party of Ontario/local PC constituency association

A number of entries relate to activities undertaken by the named employee in his capacity as a member of the Progressive Conservative Party of Ontario or his involvement in partisan political activity at the constituency level. For the most part, appointments in this category take place after regular business hours or over lunch, although I note that the named employee has a very busy appointment schedule, and do not consider the time of day itself to be determinative of the proper characterization of these appointments. As stated earlier, I accept that employees of the Premier’s Office often perform political party functions in addition to their roles as employees of the institution. Unlike the various relationships between the named individual and the GMS, elected MPPs and the Progressive Conservative caucus, which flow directly from his employment responsibilities with the Premier’s Office, there is no necessary connection between the partisan political role played by the named individual in his association with the provincial or local party apparatus and his employment responsibilities with the government. As far as I am aware, the position held by the named employee does not automatically entitle him to an official role with the provincial party or any constituency association. Dual roles of this nature are undoubtedly commonplace among senior officials in all governing parties but, in my view, the decision to become involved in partisan activities outside the employment context is a personal choice. I find that records which contain information concerning such activities is accurately characterized as “about” the named employee and qualifies as his personal information under section 2(1).

The entries that fit within this category are:

1997

7:45 a.m. October 17; 9:00 a.m. October 18; 9:00 a.m. October 19; 5:00 p.m. November 10; and 10:30 a.m. December 18

1998

8:00 a.m. January 17; 10:30 a.m. February 10; 11:00 a.m. February 23; 2:15 p.m. March 9; 4:00 p.m. March 10; 3:30 p.m. March 12; 8:30 a.m. March 13; 3:00 p.m. March 19; 10:00 a.m. March 28; 5:00 p.m. April 1; 6:00 p.m. May 4; 5:45 p.m. June 11; 6:00 p.m. (first entry) July 9; 5:00 p.m. July 14; 1:00 p.m. July 21; 12:00 p.m. July 22; 10:00 a.m. July 23; top reference & 1:00 p.m. July 30; 2:00 p.m. August 4; 6:00 p.m. August 11; 4:00 p.m. August 14; 6:30 p.m. August 19; 6:00 p.m. August 21; top reference August 22; top reference August 23; 12:30 p.m. September 2; 11:00 a.m. September 8; and 7:00 p.m. September 15

Private sector organizations

As far as the entries relating to meetings with persons representing various private sector organizations are concerned, I find that the reasoning outlined in Order 80 and Reconsideration Order R-980015 applies. This information relates to these individuals only in their capacities as officials with the organizations which employ them or which they represent. Their involvement with the named employee in his capacity as an employee of the Premier's Office and the issues under discussion is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. I find that the following statement made by former Adjudicator Hale in Reconsideration Order R-980015 is equally applicable to the records from the present appeals which fit within this category:

... This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals, and therefore, does not qualify as the "personal information" within the meaning of the opening words of the definition.

Therefore, I find that the following entries do not contain personal information:

1997

3:00 p.m. November 3; and 2:00 p.m. (first entry) November 27

1998

11:00 a.m. January 13; 10:00 a.m. February 2; 3:00 p.m. (the name only) & 4:00 p.m. February 13; 5:30 p.m. March 10; 1:00 p.m. March 24; 2:30 p.m. April 15; 2:30 p.m. May 14; 3:00 p.m. May 21; 5:15 p.m. June 10; and 2:00 p.m. June 18

INVASION OF PRIVACY

Section 21(1) of the Act can only apply to personal information and does not apply to records which contain no personal information (see Order PO-1646). Consequently, the records noted above, which I have found do not contain personal information, cannot qualify for exemption under section 21(1). It should also be noted that no other mandatory exemptions apply and no discretionary exemptions have been claimed for these records.

As far as those records which contain personal information are concerned, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. One of these exceptions is found in section 21(1)(f), which reads:

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

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

Sections 21(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 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies.

The requester provided no representations on the issue of whether disclosure of personal information would constitute an unjustified invasion of privacy under section 21(1) of the Act. Section 21(1) is a mandatory exemption claim which reflects one of the purposes outlined in section 1(b) of the Act, specifically:

to protect the privacy of individuals with respect to personal information about themselves held by institutions ...

In the absence of any representations from the requester addressing this issue, or other evidence supporting a finding that disclosure of this personal information would **not** constitute an unjustified invasion of personal privacy, I am unable to find that the section 21(1)(f) exception applies. Accordingly, the personal information contained in the records qualifies for exemption under the mandatory requirements of section 21(1) of the Act.

In summary, then, I find that the personal information severed from the records qualifies for exemption pursuant to section 21 of the Act.

Because I have found that the entires for Thursday, December 18, 1997 at 1:30 p.m. and Monday, April 27, 1998 at 2:00 p.m. qualify for exemption under section 12(1), it is not necessary for me to consider the section 18(1)(g) exemption claim.

COMPELLING PUBLIC INTEREST

As noted earlier, the requester claimed that the “public interest override” in section 23 of the Act applies in this case. Section 23 does not apply to records which qualify for exemption under section 12 of the Act

Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the mandatory section 21(1) exemption, the only exemption I have upheld.

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

The requester has not provided any representations on this or any of the other issues.

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments.

I have conducted an independent review of the records and, in the absence of representations from the appellant on this issue, I am not persuaded that there is a compelling public interest in disclosure of this personal information or that any public interest that may exist would outweigh the purpose of the mandatory personal information exemption claim.

Therefore, I find that section 23 does not apply to any of the entries I have found to qualify for exemption under section 21 of the Act.

ORDER:

1. I order Cabinet Office to issue an access decision to the requester concerning the 11:45 a.m. entry on October 24, 1997, in accordance with the provisions of sections 26, 28 and 29 of the Act, treating the date of this order as the date of the request.
2. I order Cabinet Office to disclose the following entries to the requester by **December 10, 1999** but, not before **December 6, 1999**:

1997

7:45 a.m. October 16; 4:00 p.m. October 21; 11:30 a.m. October 24; 3:00 p.m. November 3; 4:00 p.m. November 25; 8:00 a.m. & 2:00 p.m. (first entry) November 27; 1:30 p.m. November 28; 8:00 a.m. December 25; and 8:00 a.m. December 26

1998

11:00 a.m., 1:30 p.m. & 2:30 p.m. January 13; 10:30 a.m. & 1:00 pm January 15; 3:30 p.m. January 16; 10:00 a.m. January 21; 1:00 p.m. & 2:30 p.m. January 29; 10:00 a.m. & 11:00 a.m. February 2; 11:00 a.m. February 12; 3:00 p.m. (the name only) & 4:00 p.m. February 13; 12:00 p.m. & 1:15 p.m. February 17; 1:30 p.m., 2:30 p.m., 3:15 p.m. & 4:15 p.m. February 18; 1:00 p.m., 1:45 p.m., 2:30 p.m., 3:30 p.m. & 4:30 p.m. February 19; 11:00 a.m., 12:15 p.m., 1:00 p.m., 2:15 p.m. & 3:15 p.m. February 20; 1:00 p.m. March 4; 1:00 p.m. March 5; 3:00 p.m. & 5:30 p.m. March 10; 1:00 p.m. March 24; 2:30 p.m. April 15; 1:00 p.m. April 23; 10:00 a.m. April 28; 10:00 a.m. May 5; 5:00 p.m. May 6; 10:00 a.m. May 12; 2:30 p.m. May 14; 3:00 p.m. May 21; 10:00 a.m. May 26; 10:00 a.m. June 2; 3:00 p.m. June 3; 2:00 p.m. June 4; 1:00 p.m. June 8; 2:30 p.m., 4:00 p.m. & 5:15 p.m. June 10; 1:30 p.m. June 16; 3:30 p.m. June 17; 2:00 p.m. June 18; 11:30 a.m. June 19; 12:00 p.m. June 23; 5:00 p.m. June 24; 3:00 p.m. & 5:30 p.m. June 25; 10:00 a.m., 1:00 p.m. & 2:00 p.m. June 29; 11:00 a.m., 1:00 p.m. & 4:00 p.m. June 30; 11:00 a.m. July 3; 11:00 a.m. & 4:00 p.m. July 6; 11:00 a.m. July 8; 11:00 a.m. July 9; 2:00 p.m. July 13; 11:00 a.m. July 14; 11:00 a.m. August 4; 11:00 a.m. August 7; 12:30 p.m. August 10; 11:00 a.m. August 11; and 10:00 a.m. August 21

3. I uphold Cabinet Office's decision not to disclose all other entries.

4. In order to verify compliance with the provisions of this order, I reserve the right to require Cabinet Office to provide me with a copy of the records which are disclosed to the requester pursuant to Provisions 2.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ November 4, 1999