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

ORDER PO-1678

Appeal PA-980207-1

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NATURE OF THE APPEAL:

Management Board of Cabinet (MBC) received a request from the Ontario Federation of Justices of the Peace Associations for all documents relating to the Report of the Ontario Justice of the Peace Remuneration Commission, 1995 (the Report). The request identified specific types of records being sought, and made it clear that any and all records dealing with MBC's consideration, analysis and response to the Report fell within the scope of the request.

Management Board Secretariat (MBS) identified 49 records (totalling approximately 300 pages) responsive to the request. MBS denied access to all records in their entirety, claiming they fell outside the scope of the Act pursuant to section 65(6)3.

The requester (now the appellant) appealed this decision and Appeal P-9700368 was opened.

After considering representations from the parties, and reviewing the records, I issued Order P-1563, in which I found that section 65(6)3 did not apply, and that the records were within the jurisdiction of the Act. I ordered MBS to provide the appellant with a decision letter, in accordance with the provisions of section 29 of the Act.

Shortly after I issued Order P-1563, MBC applied to the Divisional Court for a judicial review of my order. MBS also asked me to stay the provisions of Order P-1563 pending the final disposition of the application for judicial review. After receiving representations from the parties, I denied the request for a stay, and required MBS to comply with the provisions of the order. In my decision, I stated:

> If an order for disclosure of records were made at the end of any appeal process, [MBS] could seek a stay of such order at that time, pending the hearing of any application for judicial review on jurisdictional grounds or on the merits of such a decision.

MBS then provided the appellant with an access decision. No exemptions were claimed for Records 8, 20, 23-26, 28-39 and 40. MBS made the following statement with respect to these records

> Given the decision regarding the stay of Order P-1563 ..., the records for which no exemptions are claimed are being withheld pending a determination by the Divisional Court on judicial review.

MBS denied access to the remainder of the records pursuant to sections 12(1), 13(1), 18(1)(c) and (d), and/or 19 of the Act.

The appellant appealed this decision.

I sent a Notice of Inquiry to MBS and the appellant, and received representations from both parties.

In its representations, MBS for the first time claimed section 12(1) of the Act as the basis for denying access to Records 22, 30 and 39. Because section 12(1) is a mandatory exemption, I will consider its application to these three records, as well as the other records previously withheld on the basis of section 12(1).

The records to which access has been denied consist of briefing notes, a House Book note, Management Board submissions, correspondence, internal memoranda, analysis material, and facsimiles.

PRELIMINARY MATTERS:

Records for which MBS is claiming no exemptions

The appellant submits that because I refused to stay Order P-1563, he should be provided with immediate access to any records for which no exemption is claimed. In the appellant's view, Order P-1563 determined that the Act applies to all responsive records, and that there is no basis for denying access in the absence of an exemption claim, or in situations where I determine that a record does not qualify for exemption.

I disagree with the appellant's position. Passages from the letter I sent to the parties when I denied MBS's request for a stay of Order P-1563 make my position on this issue clear:

> If [MBS] decides that no exemptions apply to any particular records, [Order P-1563] [does] not provide that these records must be disclosed to the appellant; they simply require any such decisions to be identified in the decision letters. I acknowledge that institutions in issuing decision letters would normally disclose records for which no exemption is claimed. However, the existence of an ongoing judicial review on a jurisdictional issue takes these cases outside the norm. If the appellant is advised that no exemption claims are made for specific records, there is nothing to prevent him from seeking an order from this agency for their disclosure before the judicial review applications have been heard and disposed of by the courts. If this were to occur, the IPC would have to take into account the status of the judicial review proceedings before disposing of any such appeal or making any order for disclosure.
> ...
>
> If [MBS], or the appellant for that matter, wish to challenge in the courts an order of this Office on the merits of such an appeal, they may do so without prejudice to [MBS's] right to continue with the jurisdictional challenge at the same time. If an order for disclosure of records were made at the end of any appeal process, [MBS] could seek a stay of such order at that time, pending the hearing of any application for judicial review on jurisdictional grounds or on the merits of such a decision.

I will take into account the status of MBC's judicial review application in determining the appropriate order provision for records which are not subject to any exemption claims, as well as any records I find do not qualify for exemption.

Adequacy of the MBS's decision letter

The appellant complains that MBS's decision letter was inadequate in that it failed to provide any reasons for denying access to the requested information, pursuant to section 29(1)(b)(ii) of the Act. In the appellant's view, the decision letter did not include a general description of the records and, as a result, the appellant argues that it is "impossible to make full submissions on the *bona fides* of the exemptions claimed by the Government."

MBS's decision letter provides a general description of the type of records subject to each exemption claim, together with an index that sets out a brief description of each individual record and the specific exemptions claimed for each. In my view, MBS's decision letter satisfies the requirements of section 29(1)(b)(ii), and I find that the appellant has been provided with sufficient information to enable him to address the issues in this appeal. It should also be noted that the two Notices of Inquiry provided to the appellant also describe the records and explain the exemptions claimed by MBS.

DISCUSSION:

CABINET RECORDS

MBS claims that Records 1-7, 9-19, 21-22, 30, 39 and 41-49 are exempt from disclosure by virtue of the introductory wording of section 12(1) and/or sections 12(1)(a), (b), (c) and (e) 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;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making

> decisions, before those decisions are made and implemented;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

By way of background, MBS explains that after the Report was issued, Management Board of Cabinet, a committee of Executive Council (Cabinet) considered the remuneration issue for justices of the peace. Cabinet also dealt with the issue after each time it was considered by MBC. MBS states that Cabinet made it's final decision on the remuneration issue in December 1997, and this decision was announced in January 1998.

The appellant submits that:

> ... it should be noted that where section 12 is used to justify non-disclosure in this case, it must be interpreted strictly and the Government's burden to demonstrate the applicability of the exemption, can only be satisfied if the disclosure of the document in question would cause serious harm. This strict interpretation is mandated by the guarantee of judicial independence provided for in section 11(d) of the Charter [of Rights and Freedoms] as the records in question deal with the Government's decisions respecting the remuneration and financial security of the Justices of the Peace.

It should be noted that the appellant did not include section 12 within the scope of the Notice of Constitutional Question filed in the context of this appeal.

The appellant adds that MBS is precluded in this case from relying on subsections 12(1)(c) and (e), because Cabinet has already made a decision on the issues which are the subject matter of the records.

Previous orders have held that section 12(1)(c) (Orders P-60, P-323 and P-1623) and section 12(1)(e) (Orders P-22, P-40, P-946 and P-1182) are both prospective in nature. The use of the present tense in these sections preclude their application to matters that have already been considered by the Cabinet or its committees. MBS acknowledges that the subject matter of the records for which these exemptions have been claimed was considered by Cabinet which "ultimately made its decision on the remuneration of justices of the peace in December 1997, and the decision was announced in January 1998". Therefore, because the subject matter of these records has already been presented to and discussed by Cabinet or one of its committees, I find that sections 12(1)(c) and (e) do not apply.

However, 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.

Records 2 (with the exception of the first page), 6, 46 and 47 are all MBC briefing notes that were provided to members of MBS as part of their meeting materials. MBS explains that these records contain a list of the items that were being considered, recommendations of MBS staff, as well as analyses, options and other comments and recommendations. MBS further submits that Records 1 and 43, which are virtually identical to each other, are also briefing notes, dated 1995, the contents of which were reproduced in Records 2, 6, 46 and 47. The first page of Record 2 and Records 4, 5 and 42 are MBC minutes. Record 31 is a memorandum from the Deputy Minister's Executive Assistant to the Agenda Secretary of the Executive Council Office, identifying an item to be considered by Cabinet at its December 13, 1995 meeting. MBS submits that disclosure of these records would reveal the substance of deliberations of MBC, a committee of Cabinet.

Records 2, 4, 5, 6, 42, 45, 46 and 47 are all clearly identified as records used during the deliberation and decision-making process of MBC. The content of Records 1 and 43 can be similarly characterized, and Record 31 contains information which reflects the deliberations of MBC. In my view, the contents of these records relates directly to the issues considered and discussed by MBC, and I find that their disclosure would clearly reveal the substance of deliberations of MBC. Accordingly, these records are exempt under the introductory wording of section 12(1). I also find that the first page of Record 2 and Records 4, 5 and 42 qualify for exemption under section 12(1)(a).

MBS explains that Records 3, 7, 9-19, 32-38, 41, 45 and 49 are reports and analyses that were used by MBS staff in analysing the Report and formulating options for the government's response. Specifically, MBS states that these records were prepared by MBS in order to develop portions of Records 2, 4, 5, 42, 46 and 47, the actual Cabinet records.

Records 21, 22 and 44 are described by MBS as communication strategies that were prepared for Cabinet's consideration in December 1997 (Record 44) and December 1995 (Records 21 and 22) regarding the issue of the remuneration of justices of the peace. Record 48 is a more detailed version of Record 44 and is in tabular form.

Record 30 is an unsigned draft letter from the Chair of MBC to the Chair of the Remuneration Commission, with handwritten notations made by MBS staff. The final version of this letter is Record 29, for which no

exemptions have been claimed. MBS explains that this record contains an incorrect reference to the fact that Cabinet made a decision on a particular issue when, in fact, no such decision had been made.

The Ministry argues that Records 3, 7, 9-19, 21, 22, 30, 32-38, 41, 44, 45, 48 and 49 all deal with matters that were ultimately considered by Cabinet, and their disclosure would either reveal the substance of the deliberations of Cabinet or permit the drawing of accurate inferences regarding the substances of these deliberations.

It is clear from my review of the records and MBS's representations that MBC and Cabinet considered matters relating to the Report and issues stemming from the Report in considerable detail and on a number of occasions during 1997. Having considered the context in which Records 3, 7, 9-19, 21, 22, 30, 32-38, 41, 44, 45, 48 and 49 were created, and the explanations offered by MBS, I find that these records all relate to this subject matter and, in my view, with the exception of Record 30 and the first four pages of Record 22, disclosure of the contents of these records would reveal the substance of deliberations of Cabinet and/or MBC. Therefore, I find that these records, with the exception of Record 30 and the first four pages of Record 22, all qualify for exemption under the introductory wording of section 12(1).

As far as Record 30 is concerned, I do not accept MBS's position that disclosure of a description of activities that **did not** take place at a Cabinet meeting can reveal the substances of deliberations of Cabinet or permit the drawing of accurate inferences regarding the substance of any deliberations. Accordingly, I find that Record 30 does not qualify for exemption under section 12(1) of the Act.

Record 22 consists of a fax transmittal sheet, a three-page House Book note, a five-page communications strategy, and one page of related handwritten notes. The fax transmittal sheet contains no substantive information and does not meet the requirements for exemption under section 12(1). The House Book note consists primarily of factual information about the Remuneration Commission and its mandate, background information and suggested responses by the Attorney General, commonly found in House Book notes. In my view, disclosure of these three pages, with the exception of one paragraph at the top of the third page, would not reveal the substance of deliberations of Cabinet and/or MBC, and I find that they are not exempt under the introductory wording of section 12(1). Conversely, for the same reasons outlined above for Records 3, 7, etc., I find that disclosure of the one paragraph on the third page of the House Book note portion of Record 22 would reveal the substance of deliberations of Cabinet and/or MBC, and it qualifies for exemption under the introductory wording of section 12(1).

Record 39 is also a House Book note. MBS states that information contained in the Background section of this record relates directly to the substance of Cabinet deliberations on the issue of remuneration of justices of the peace. Having carefully reviewed the contents of this record, I find that none of it deals with the substance of deliberations of Cabinet and/or MBC. It consists of factual information about the Remuneration Commission and its mandate and, in my view, I find that its disclosure would neither reveal the substance of deliberations of Cabinet nor permit the drawing of accurate inferences regarding the substance of these deliberations. Therefore, Record 39 does not qualify for exemption under section 12(1).

ADVICE OR RECOMMENDATIONS

The records remaining at issue for which MBS has claimed exemption under section 13(1) are Records 27, 30, 39 and the first four pages of Record 22.
Section 13(1) of the Act states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

Record 27 is a "correspondence briefing note" prepared by MBS staff for the Chair of MBC dealing with a letter sent by the Chair to the Chair of the Remuneration Commission (Record 28). No exemption claims have been made by MBS for Record 28. MBS submits that Record 27 contains advice or recommendations "in respect of the content of ministerial correspondence". Having reviewed this record, I find that it contains what is essentially factual information, with the exception of two sentences that can accurately be characterized as advice to the Chair in dealing with a particular aspect of the justices of the peace remuneration issue. I find that these two sentences qualify for exemption under section 13(1), but the rest of Record 27 does not.

As described earlier, Record 30 is an earlier draft of Record 29, with handwritten notations made by MBS staff. No exemptions have been claimed for Record 29. MBS states that the draft provides advice and recommendations "in the form of alternate versions of content to be included in ministerial correspondence." I have reviewed the draft and final versions of this letter, and I accept that the final two paragraphs of the draft letter in Record 30, as well as the handwritten notations on both pages of this record, are accurately characterized as advice or recommendations for the purposes of section 13(1), and that this information qualifies for exemption under this section. The rest of Record 30, which is identical to the corresponding portions of Record 29, does not satisfy the requirements for exemption under section 13(1).

Record 39 and the remaining portions of Record 22 are "House Book notes". Record 22 appears to have been prepared for the Attorney General. Although MBS does not explain who prepared Record 39, it seems most likely that it was prepared by MBS staff in order to assist the Chair of MBC in responding if asked particular questions in the Legislature on the issue of justice of the peace remuneration. I accept that the "Response" sections of these records contain information provided by staff as to the manner in which the Ministers should respond to questions on this issue. However, in my view, these records do not contain "advice" or "recommendations" in the sense contemplated by section 13(1). The information is provided to the Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate. For this reason, I find that the "Response" portion of Records 22 and 39 would not reveal advice or recommendations of a public servant and, accordingly, it does not qualify for exemption under section 13(1) of the Act. The remaining portions of Record 39 and the House Book note portion of Record 22, with the exception of the one paragraph which has been exempt under section 12(1), consist of factual information which also fails to meet the requirements for exemption under section 13(1).

No other discretionary exemptions have been claimed for Records 27 and 39 or the portions of Records 30 and 22 which I have found do not qualify for exemption under section 13(1). Therefore, they should be disclosed to the appellant, subject to the severance of the information which I found to be exemption under sections 12(1) or 13(1). My order for disclosure of these records will be stayed pending the disposition by the court of the judicial review application regarding the jurisdictional issue in this matter.

Because of the manner in which I have disposed of the issues in this appeal, it is not necessary for me to consider the application of sections 18(1)(c) and (d) and 19.

COMPELLING PUBLIC INTEREST

In its representations, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section 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]

Section 12 is not subject to section 23. Therefore, the only records which qualify for consideration under section 23 are the two sentences in Record 27, and the final two paragraphs of the draft letter and the handwritten notations in Record 30.

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1998] O.J. No. 420, 107 O.A.C. 341, 5 Admin. L.R. (3d) 175 (Div. Ct.), reversed (January 27, 1999), Docs. C29916, C29917 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 13(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis under section 23.

The appellant's representations deal with the application of section 23 of the Act to both sections 13(1) and 18(1). Section 18(1) is no longer at issue. The appellant points to the Supreme Court of Canada decision in Manitoba Provincial Judge's Assn. v. Manitoba (Minister of Justice) (1997), 150 D.L.R. (4th) 577, and submits that:

> ... the Supreme Court of Canada has outlined, not only a compelling public interest but a **constitutionally protected right** of the public to scrutinize decisions regarding the remuneration of judicial officers. Disclosure of the records is necessary to ensure the public's ability to monitor the judicial independence guaranteed by section 11(d) of the Charter. This protection of the public's right far outweighs the negligible, if even existent, potential that disclosure will interfere with the Government's convenience in managing the economy. The Government, therefore, improperly exercised its discretion under sections 13 and 18 by failing to disclosure the documents in this case where the public interest and the Charter clearly mandated disclosure of the documents and where there is no counterbalancing public interest in the non-disclosure of the documents. (emphasis in original)

The appellant's position with respect to the application of the Canadian Charter of Rights and Freedoms will be addressed later in this order.

As far as the section 23 issue is concerned, I am not persuaded that there is a **compelling** public interest in the disclosure of **these two specific records**, nor that any public interest that does exist is sufficient to clearly outweigh the purpose of the section 13(1) exemption claim. As described earlier, the information exempt under section 13(1) consists of two sentences in a correspondence briefing note, and two paragraphs and handwritten notations in a draft letter from the Chair of MBC to the Chair of the

Remuneration Commission. In my view, the disclosure of this information would not add significantly to the information that will be made available to the appellant by the disclosure of other records. Accordingly, I find that there is no compelling public interest in the disclosure of the two sentences in Record 27 and the final two paragraphs of the draft letter and the handwritten notations in Record 30.

Therefore, I find that the requirements of section 23 are not present in the circumstances of this appeal.

The Canadian Charter of Rights and Freedoms (the Charter)

In his representations in both this appeal and his related appeal involving the Ministry of the Attorney General (Appeal PA-980206-1), the appellant raised the constitutional validity and/or constitutional applicability of sections 12 and 13 of the Act under section 11(d) of the Charter. I notified the appellant of the requirements of section 109 of the Courts of Justices Act, and asked him to comply with the notice requirements of this section, or satisfy me that these requirements are not applicable in the circumstances of these appeals. Section 109, which applies to proceedings before tribunals as well as to courts, requires a person who seeks a ruling that a legislative provision is constitutionally invalid, to serve a Notice of Constitutional Question (a NCQ) on the Attorney General of Canada, the Attorney General of Ontario and any other parties.

A NCQ for both appeals was then sent by the appellant to the Attorney General of Canada, and the Attorney General of Ontario.

In the NCQ, the appellant states:

> The Justice of the Peace Remuneration Commission is an independent Commission which was established in 1993 for the purpose of examining and making recommendations on the salaries and benefits paid to Justices of the Peace in Ontario. The Remuneration Commission delivered its report, including salary recommendations, to the Management Board [of Cabinet] in 1995. The Government rejected the recommendations of the Remuneration Commission in 1998.
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> The Association made a freedom of information request to the Government for the disclosure of all records in the Government's possession relating to the Report of the Remuneration Commission.
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> The Government refused disclosure on various grounds including sections 13 and 18 of the *Freedom of Information and Protection of Privacy Act*, both of which are discretionary rather than mandatory exemptions from disclosure. Section 13 gives the decision maker the discretion to refuse to disclose documents that reveal the advice of public servants while section 18 gives a similar discretion with respect to documents the disclosure of which may prejudice the government's competitive or economic advantage.

As the legal basis for the constitutional question, the appellant states:

> A discretion granted to a government decision-maker must be exercised in accordance with the *Charter of Rights*. Section 11(d) of the *Charter* mandates that, if a government rejects the recommendations of an independent commission on the salaries of judicial officers, the government must publicly justify that decision. Accordingly, the discretion given in sections 13 and 18 should be exercised in favour of disclosure in this case in order to allow for public justification, among other reasons.

Because the constitutional issue raised by the appellant was not included in the original Notice of Inquiry, I issued a Supplementary Notice in order to provide the parties with an opportunity to submit representations on the specific constitutional issues raised in the NCQ. A copy of the Supplementary Notice was also provided to the Attorney General of Canada. No supplementary representations were received in this appeal. However, the Ministry of the Attorney General (MAG) submitted supplementary representations in the appellant's related Appeal PA-980206-1, and MBS informed me that I could rely on MAG's representations in support of MBS's position in this appeal.

Subsequently, in discussions with counsel from this Office, the appellant and MAG agreed to share their representations on the constitutional issues. I provided each party's representations to the other, and invited them to respond. Once again, only MAG provided additional representations.

MAG characterizes the legal issue differently, as follows:

> Whether the Act, which permits the Government to refuse to disclose certain documents on a variety of grounds, or the Government decision pursuant to the Act not to disclose certain documents relating to the Justice of the Peace Remuneration Commission Report, violates the right of accused persons to a fair trial before an independent and impartial tribunal under clause 11(d) of the *Charter of Right and Freedoms*.

Although the appellant's original representations raised the constitutional issue with respect to both sections 12(1), 13(1) and 18(1) of the Act, the NCQ is restricted to discretionary exemption claims (ie. sections 13(1) and 18(1)).

Section 11(d) of the Charter states as follows:

> Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

MAG submits that the constitutional issue is presently before the Courts and it would be contrary to the proper administration of justice to allow the appellant to argue the same issue in these proceedings. These

proceedings have now concluded with the Divisional Court judgment of March 16, 1999, finding that the government's response to the Remuneration Commission's recommendations did not, in fact, satisfy the constitutional requirements for ensuring the independence of justices of the peace.

MAG further submits that:

> ... the *Charter* does not create a constitutional right to disclosure of government documents. The Ontario Divisional Court has held, in the context of freedom of expression under s. 2(b) of the *Charter*, that the *Charter* does not give rise to a general constitutional right of public access to all information under the control of government. Just as there is no public right to disclosure under s. 2(b), s. 11(d) of the *Charter* does not provide Justices of the Peace with a private right to disclosure of information.

MAG goes on to submit that:

> ... the concept of judicial independence has no relationship to disclosure under the Act. Judicial independence contemplates statutory and other types of arrangements in place to promote the individual and institutional independence of the judiciary. These arrangements concern the core characteristics of judicial independence: the administrative independence of the courts, security of tenure and financial security of judges. None of these core characteristics has any bearing on documentary disclosure under the Act: *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Wickman; Manitoba Provincial Judges Assn. V. Manitoba (Minister of Justice)* [1997] 3 S.C.R. 1 at 81-82 (the Judges Reference case).

In the alternative, if it is determined that the Judges Reference case does apply to the determination of justice of the peace remuneration, MAG submits that the case only states that section 11(d) of the Charter requires a Remuneration Commission process and that the government respond to the Commission's report. MAG points out that the government has created the Remuneration Commission and responded to its recommendations in January 1998.

MAG submit that:

> The [Judges Reference case] speaks of an obligation on government to **respond** to the Commission's recommendations; it makes no mention of a right to **disclosure**. Where the judiciary is not satisfied with the response it may seek judicial review of the Government's decision, which is precisely what the JP Associations have done in the ongoing Division Court proceeding. (emphasis in original)

The appellant's general position on this issue is reflected in the following submission:

> It has been recognized by the Supreme Court of Canada that financial security of judicial officers is a key ingredient in the judicial independence guaranteed by s. 11(d) of the Charter and the public's ability to scrutinize government decisions concerning the independence of the judiciary, particularly decisions to reject the recommendations of a remuneration commission, is central to the purpose of s. 11(d) ... Therefore, denying access to these records is inconsistent with the public's right to ensure judicial independence guaranteed by section 11(d) and, thus, access to these records should not be denied unless such denial is demonstrably justifiable in a free and democratic society as outlined in section 1 of the Charter. Refusal to give access to the records which would allow the public to scrutinize judicial independence should only be allowed in the clearest of cases.

Specifically in relations to section 13(1) of the Act, the appellant submits:

> Section 13 provides a possible exemption from disclosure for records that reveal the advice of public servants to a government institution. This is not a mandatory exemption, it is, rather, a discretionary one. Before exercising the discretion to refuse to disclose a record on the basis of this exemption, a decision maker must consider whether the issues with which the particular record deals are ones which have already been made. The fact that a decision has already been made weighs in favour of disclosing the records as the rationale for the exemption, that is protecting the free flow of advice for the purpose of decision-making is no longer as pressing after the decision has been made. The fact that a decision has already been made speaks in favour of disclosure in this case in particular since, the records at issue relate, at least in part, to the Government's decision to reject the recommendations of the Remuneration Commission concerning the salaries of Justices of the Peace. The Supreme Court of Canada has held that section 11(d) of the Charter demands that, where a government rejects the recommendations of an independent commission concerning the remuneration of judicial officers, the government must be prepared to justify that decision.
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> Chief Justice Lamer, writing for the majority of the Court in [the Judges Reference case] held that where the Government rejects the recommendations of an independent commission on judicial remuneration, the constitution mandates public justification of that rejection. Lamer C. J. wrote:
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> > [t]he need for public justification, to my mind, emerges from one of the purposes of s. 11(d)'s [of the Charter] guarantee of judicial independence - to ensure public confidence in the justice system (at 653).
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> In this case, it is inconsistent with the Charter to exercise the discretion under section 13 of the Act in order to refuse to fully disclose the grounds for the Government's decision on

> judicial remuneration, thus allowing the Government to avoid justifying its decision to reject the Report's recommendations, and preventing the public from testing the *bona fides* of any Government justification.

I have considered the principles set out in the Judges Reference case, which are summarized in the recent judgment of the Divisional Court in Ontario Federation of Justices of the Peace Associations v. Ontario [1999] O.J. No. 786. This case involved the same parties and dealt with the same subject matter as the appeal now before me. At paragraphs 101 to 104 of that judgment, Madame Justice Haley states, in part:

> The recommendations of the commission need not be binding on the legislature or the executive because "decisions about the allocation of public resources are generally within the realm of the legislature and through it, the executive". However, in considering a "positive resolution model" i.e. one in which the government is not required to take any action, as in this case, the Chief Justice [in the Judges Reference case] said at p. 108, paragraph 178:
>
> > However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.
> >
> > What judicial independence requires is that the executive or the legislature ... must formally respond to the contents of the commission's report within a specified amount of time. Before it can set judges' salaries, the executive must issue a report in which it outlines its response to the commission's recommendations.
>
> The Chief Justice noted that if the government rejects one or more of the commission's recommendations it must justify its decision with reasons or run the risk of having its unjustified decision declared unconstitutional.
>
> At p. 110, paragraph 183, he discussed the standard of justification required and the steps a reviewing court must take in determining whether that standard has been met:
>
> > The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons

> paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 [of the Charter] analysis.
> ...
>
> With these guidelines in mind we considered the government response and its justification for rejecting all of the recommendations of the Remuneration Commission.

The remedy sought by the appellant in this case is an order for disclosure of records which qualify for exemption on the basis of sections 13(1) (and 18(1)) of the Act. The basis advanced for the remedy is that the discretion given to government to refuse to disclose records under these provisions "should be exercised in favour of disclosure ... in order to allow for public justification, among other reasons." I am not persuaded that the constitutional obligations articulated in the Judges Reference case require the exercise of discretion in favour of disclosure of these records under the Act.

In an effort to discharge its constitutional responsibility under section 11(d) of the Charter for ensuring the independence of justices of the peace on issues of remuneration, Ontario decided to appoint an independent Remuneration Commission to make recommendations, received recommendations from the Commission, deliberated regarding the implications of these recommendations, and issued a formal response. It is this formal response, not records which may have been created by the government in the course of formulating the response, which is the measure of the constitutionality of the government's action. Even the reviewing court does not engage in a "searching analysis" of the government's reasons for rejecting the Commission's recommendations.

If the Government decides to depart from the recommendations of the Remuneration Commission, as it did in this instance, the Judges Reference case imposes a requirement that it articulate a "legitimate reason" for doing so. If this standard of justification has not been met, then it is up to a court to determine what measures must be taken by the Government to remedy the constitutional deficiency. The Government's response must stand or fall on its own and, in my view, any deficiency cannot be remedied through an effort to provide "legitimate reasons" through the disclosure of related records under the Act.

In the present circumstances, the Government has made a formal response to the Remuneration Commission's report, and the Ontario Court of Justice (General Division) determined that it is constitutionally inadequate. In this respect, Madame Justice Haley made the following findings, beginning at paragraph 136 of her judgment:

> We have found that the justices of the peace are entitled to the same constitutional guarantees of judicial independence as those accorded to the provincial court judges by the Supreme Court of Canada. The commission process put in place by agreement between the justices of the peace and the government is flawed because:

> (a) the government failed to replace the government appointee to the commission which had the effect of preventing the commission from completing its mandate;
>
> (b) the government did not consider the continuation of the commission binding upon it as required by the agreement;
>
> (c) the government did not make a formal response to the commission's recommendations in a timely fashion which resulted in a freeze and a reduction in the real salaries of the justices of the peace;
>
> (d) the government did not give complete or satisfactory reasons, and in some instances gave no reasons at all, for its rejection of the commission recommendations.
>
> In the result the actions of the government which effected a freeze of the salaries of the justices of the peace for the period from April 1, 1996 to April 1, 1999 without resorting to the commission process, as directed by the Supreme Court of Canada, were unconstitutional.

The Court granted the following remedy, as set out at paragraph 148 of the judgment:

> An order will go directing the government to conduct a review of the compensation of the justices of the peace for the period April 1, 1996 to April 1, 1999 and for that purpose to set up a commission meeting the criteria of the Supreme Court of Canada in the Judges Reference within 6 months of the date of these reasons and requiring as a minimum a written response from the government within 90 days of the delivery of the commission's report to the government. The government by way of such review shall provide a proposal to the commission regarding the remuneration of the justices of the peace for the Commission's consideration. In the interim, to avoid further erosion of the remuneration by delay, the government shall index the salary starting at the salary level at April 1, 1996 by the percentage increase in the Average Industrial Wage based on that wage for the year 1995 over that for the year 1994 and for the like increase, if any, for every subsequent year until the commission to be established shall have made its report and the government shall have responded to it.

No part of the Court's remedy required the government to provide "complete or satisfactory reasons" for the decision which the Court had already found to be constitutionally inadequate. Rather, the Court's remedy was to require the government to take steps in the future to bring itself within its constitutional obligations by setting up a new commission and responding appropriately to its recommendations.

In my view, disclosure of the records which I have found to qualify under section 13(1) will not advance the constitutional requirement that government must give complete and satisfactory reasons for its rejection of the recommendations of the Justice of the Peace Remuneration Commission. This obligation exists separate and apart from the provisions of the Act. The failure to discharge this obligation is a matter for the court to remedy, in accordance with constitutional standards for judicial independence, as Madam Justice Haleyhas done in the Ontario Federation of Justices of the Peace Associations v. Ontario case. In the appeal before me, the Act is not a mechanism for ensuring government's compliance with these constitutional obligations.

ORDER:

1. I order MBS to disclose Records 8, 20, 23-26, 28-29, 39 and 40 in their entirety, and Records 22, 27 and 30, subject to the severance of those portions which I have found qualify for exemption under sections 12(1) or 13(1) of the Act. I have attached a highlighted version of these records to the copy of this order sent to MBS's Freedom of Information and Privacy Co-ordinator, which identifies those portions which should **not** be disclosed.

2. My order for disclosure of records under Provision 1 of this Order is stayed pending the disposition by the Superior Court of Ontario (Divisional Court) of the current judicial review of Order P-1563.

3.. I uphold MBS's decision to deny access to the remainder of the records.

4. In order to verify compliance with the provisions of this order, I reserve the right to require MBS to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: May 12, 1999
Tom Mitchinson
Assistant Commissioner