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

Reconsideration Order PO-1817-R

Appeal PA-000290-1

Appeal P-9700149 - Order P-1482
(Reconsideration Order R-980012)

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BACKGROUND:

On December 29, 1998, I issued Reconsideration Order R-980012 in which I ordered that Records 14, 21, 60, 70, 72, 76, 79, 91-1, 92-1, 99-1, 159 to 160, 172, 174 to 175 and 250-1 to 250-2 and the non-highlighted portions of Records 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 37, 62 to 64, 68, 73, 87-1, 111, 145, 166, 177, 178-1, 179, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 206, 207-1, 210-1, 221-1, 228 to 229, 233 and 255 be disclosed to the appellant. There were two bases for this decision. The first was my finding that these records or parts of records for which the Ministry of the Attorney General (the Ministry) had claimed section 21 of the Act did not contain personal information. As the Ministry did not claim any other exemptions for certain of these records and parts of records, I found that they were not exempt under the Act. The Ministry claimed the application of the discretionary exemption in section 20 of the Act for the remaining records and parts of records. The second basis for disclosure was my finding that section 20 did not apply to the remaining records and parts of records.

The Ministry then brought an application for judicial review of this decision and on March 25, 1999, I ordered that Reconsideration Order R-980012 be stayed pending the final disposition of the application for judicial review.

In a decision released on December 2, 1999, Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), the Court of Appeal for Ontario considered the appropriate test to be applied in situations where sections 14(1)(e) or 20 of the Act have been claimed. As a result of this decision, Adjudicator Donald Hale issued Reconsideration Order PO-1776-R on April 28, 2000 in which he applied the Court of Appeal's reasoning to similar types of records as those at issue in the current appeal.

Subsequently, on June 5, 2000 I invited the appellant and the Ministry to make further submissions on the impact these two decisions may have on the pending application for judicial review of Reconsideration Order R-980012. Both parties submitted representations on this issue. These representations were exchanged and both parties submitted representations in reply.

RECORDS:

As I indicated above, the Ministry had claimed the application of section 21 for all of the records that I ordered to be disclosed. I found that none of these records or parts of records contained personal information, therefore, section 21 could not apply to exempt them from disclosure. I also found that these records and parts of records fell into two categories. I have set out below, those records for which only section 21 had been claimed and those for which section 20 had also been claimed:

- **Records for which only section 21 was claimed:** Records 14, 21, 60, 70, 72, 76, 79, 159 to 160, 172, 174 to 175 and the non-highlighted portions of Records 37, 62 to 64, 68, 73, 111, 145, 166, 177, 179, 228 to 229, 233 and 255.

- **Records for which both sections 21 and 20 were claimed:** Records 91-1, 92-1, 99-1, 250-1 to 250-2 and the non-highlighted portions of Records 3-1, 4-1 to

4-3, 30-1 to 30-2, 31-1, 34-1, 87-1, 178-1, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 206, 207-1, 210-1 and 221-1.

The Court of Appeal in Ontario (Minister of Labour) v. Big Canoe considered the different interests at stake in cases where disclosure of a record could reasonably be expected to result in financial or contractual harm as opposed to harm to personal safety and bodily integrity, suggesting that the latter is more compelling. On this basis, the Court concluded that "it is unreasonable to require a government institution to show an expectation of probable harm to an individual in order to rely on the personal safety exemption provisions".

Section 20 is a discretionary exemption which means that, in the usual case, an institution is required to raise it before it will be considered on adjudication. At the time the Ministry issued its original decision in this matter it did not claim section 20 for all of the records at issue in this reconsideration. It also did not have the benefit of the Court's views on this issue. Taking the spirit of the Court of Appeal's approach to its logical conclusion, in my view, places a higher obligation on the Commissioner to raise and consider the implications for the personal safety or integrity of an individual resulting from the disclosure of a record, at least where there is some indication that it would be relevant. Therefore, although the Ministry did not claim the application of section 20 for certain records for which section 21 had been claimed, that does not preclude me from considering whether it applies in the circumstances of this appeal.

The records at issue in this appeal are all of a similar character. They are distinguishable only in the fact that the Ministry did not claim section 20 for all of them. Moreover, it is not only the identities of the individuals, but the content or nature of the records themselves that must be considered in determining whether section 20 applies in the circumstances. On this basis, therefore, I have decided to consider whether section 20 applies to all of the above-noted records.

DISCUSSION:

DANGER TO HEALTH OR SAFETY

In Reconsideration Order R-980012, the only submissions which touched on health or safety concerns were made by the Ministry in its discussion under section 21(1) of the Act. The Ministry submitted:

> Given the inflammatory nature of much of the information and opinion in the responsive records, the Ministry submits that the identity of named individuals should not be disclosed so as to ensure their peace and future safety.

I noted the paucity of evidence which had been provided by the Ministry and affected persons on this issue and concluded as follows:

> There has been no suggestion, nor is there any evidence in the representations or the records themselves to support an argument that the health or safety of any individual who has spoken out in their professional capacity against hate propaganda has or will be threatened by disclosure of these types of records. I find that I have not been provided

> with sufficient evidence to establish a reasonable expectation that disclosure of the identities of individuals in their official capacities could seriously threaten anyone's safety or health.

Although not referred to in the Reconsideration order, the test I applied in assessing this issue was essentially the same one used in previous orders of this office, and in particular, by former Adjudicator Big Canoe in Order P-1510 (a reasonable expectation of probable harm) and Adjudicator Hale in Reconsideration Order R-980015 (a reasonable likelihood of a serious threat to personal health or safety).

In Ontario (Minister of Labour) v. Big Canoe, the Court of Appeal for Ontario took a somewhat different view as to the appropriate test to be applied in circumstances where the exemptions in sections 14(1)(e) or 20 have been claimed. At paragraph 25 of its decision, the Court held that:

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could reasonably be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly, section 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

This restatement of the test under section 20 differs significantly from that which I applied in my decision in Reconsideration Order R-980012. In my view, the Court of Appeal has recognized that in situations where personal safety or bodily integrity are in issue, so long as the expectation of harm is reasonable in the sense that it is not groundless, exaggerated or frivolous, section 20 will be found to apply. I adopt the test enunciated by the Court of Appeal for the purposes of this reconsideration.

In Order PO-1776-R, Adjudicator Hale revisited the representations he had received on this issue and concluded:

> While much of the information about this organization provided by the affected person relates to reprisals taken against former members of the group who have publicly spoken out against it, the evidence also contains examples of actions taken against other individuals who have taken a public stand against this group; including the principal of a school and local residents of neighbourhoods where leafleting by the organization had taken place. The actions taken by the organization associated with the appellant against those who oppose it publicly may be likened to those normally associated with organized crime. I find that intimidation and threats form part of this group's methods and are not confined strictly to

> former members who "turn coat." By adopting the rhetoric and symbols of fear and intimidation used by Nazi and extremist groups favouring racial separation, hate groups such as that associated with the appellant by their very nature advocate violence and engender fear in the targets of their hostility.
>
> Based on the evidence provided to me, I must conclude that the concerns about health or safety expressed by the affected person cannot be said to be groundless or exaggerated. In my view, these concerns are reasonably-held and have a reasonable basis, particularly in light of the affected person's standing in the community and his/her well-known activities against the aims and objectives of the organization associated with the appellant. The same may also be said for the other affected persons who speak on behalf of organizations which are dedicated to combatting the influence of groups such as that associated with the appellant. Despite the lack of submissions from these individuals, I find that concerns about their safety or health are equally engaged and cannot be said to be exaggerated or groundless given the evidence of violence and intimidation tendered by the other affected person.

In the Notice of Inquiry which I sent to the appellant and the Ministry, I asked the parties to make submissions on what impact, if any, the decisions of the Court of Appeal and Adjudicator Hale might have on the outcome of the appeal, particularly in light of my overall discussion of the application of section 20, which appears at pages 7 to 10 of Reconsideration Order R-980012.

In its representations, the Ministry quoted from Order PO-1776-R where Adjudicator Hale stated:

> The same may also be said for the other affected persons who speak on behalf of organizations which are dedicated to combatting the influence of groups such as that associated with the appellant. Despite the lack of submissions from these individuals, I find that concerns about their safety or health are equally engaged and cannot be said to be exaggerated or groundless given the evidence of violence and intimidation tendered by the other affected person.

The Ministry requested that I come to a similar conclusion in the current appeal.

On this point, the appellant states:

> [S]pokespeople for various organizations speaking out against hate or who are lobbying for hate charges have been in the past very vocal and high profile, seeking coverage in the media. Some put out annual reports and will have press conferences seen on TV and almost always reported in the newspapers as they attempt to convince large numbers of people through the media that charges are warranted.
>
> Certainly those calling for hate charges against such people as [named individuals or groups], have been extremely vocal in the media, literally "demanding" that charges be laid.

> [I]n these circumstances it is hard for them to then argue that they are afraid lest correspondence they have written to the Attorney General becomes public. Usually these spokespeople are already very well known, issue press releases, and so on. Certainly their organizations are very well known for pressing for hate charges.

In the alternative, the appellant agrees to have the names and official positions of individuals be withheld, while the rest of the record be released intact, including the name of the organization.

In responding to the appellant's initial position, the Ministry notes that Adjudicator Hale also dealt with a high-profile affected person and that this factor weighed in favour of applying the section 20 exemption. In this regard, Adjudicator Hale found that this affected person's concerns were:

> reasonably held and have a reasonable basis, particularly in light of the affected person's standing in the community and his/her well-known activities against the aims and objectives of the organization associated with the appellant.

With respect to the appellant's alternative argument, the Ministry submits that simply withholding their names and titles is not sufficient protection for the affected persons. The Ministry again refers to Adjudicator Hale's findings in Order PO-1776-R that "hate groups such as that associated with the appellant by their very nature advocate violence and engender fear in the targets of their hostility". The Ministry submits that to disclose any of the information at issue would allow hate groups to further identify and target the individuals and/or the associations, which could reasonably result in concerns for their health or safety.

The appellant takes issue with what she considers to be the Ministry's attempts to protect organizations using an exemption intended to protect individual safety. She states:

> Organizations which choose to speak out against hate or are lobbying for hate charges will not be put in any greater danger from the release of these documents than they would be from the normal course of their activities.
>
> ... organizations have different characteristics and functions from individuals. Organizations have money and influence to lobby far beyond that of an individual.
>
> If the name of any organization spokesperson signing a letter is deleted, it is hard to fathom who exactly would be put in danger by the release of the information. I repeat, these organizations are generally very well-known already.

In Reconsideration Order R-980012, I made the following comments on the appellant's submission that section 20 could only apply to an "identifiable individual" as opposed to a racial group:

> The appellant urges me not to vary my decision in Order P-1482. She submits that the components of the section indicate that "an individual" must be threatened by the release of the records and that section 20 is not extendible to racial groups. She argues that this threat must be directed at a particular individual. The appellant submits that "individual" is defined in the dictionary (Funk & Wagnalls Standard College Dictionary) as meaning "a

> person", "a single human being as distinct from others". In this regard, she contends that Adjudicator Hale erred in finding that the health or safety of "minority groups" could reasonably be expected to be threatened. She stresses that the intention of the Act is that exemptions be construed narrowly and that such an expansive interpretation of this section is inconsistent with this intention.
>
> I accept the appellant's definition of "an individual" and agree that section 20 contemplates that "an individual" must be threatened by disclosure of the records. However, in my view, a finding that a particular group is maligned and threatened by the content of the records is merely a preliminary step to finding that members of that group or "individuals" belonging to that group are equally maligned and threatened by the information contained in the records. Further, I do not accept the appellant's argument that the threat must be to a "particular" individual. In my view, an individual must be read to mean any individual, including any member of an identifiable group.

In my view, this rationale can apply equally to membership in an identified organization, particularly where that organization represents a target group. I do not interpret the Ministry's submissions as advocating protecting organizations under section 20, but rather, as advocating the protection of individuals within that organization and/or represented by it.

In the current appeal, it was not possible to contact the many affected persons identified in the records. A previous attempt to do so (prior to the issuance of Reconsideration Order R-980012) yielded minimal results. Therefore, my decision must be made in the absence of their views. Further, I recognize that there is no direct evidence before me that any individual referred to in the records has been threatened or has a personal fear for their safety based on past experience. Nor has any party submitted the kind of evidence which Adjudicator Hale had the benefit of receiving in deciding Order PO-1776-R. I am aware of Adjudicator Hale's findings based on this evidence, however, and the parties have been given an opportunity to address those findings. I agree with and adopt Adjudicator Hale's specific findings that concerns about the safety and health of individuals who, either individually or on behalf of organizations they represent, speak against proponents of hate literature, cannot be said to be exaggerated or groundless. I intend to apply this reasoning to the facts in the current appeal. In doing so, I by no means wish to suggest that the appellant in this appeal is likely to engage in harmful activities or that she belongs to a group that might do so. Rather, I intend to follow the approach taken by Adjudicator Hale on the basis that disclosure of this information is effectively disclosure to the world (Order M-96, upheld on judicial review in Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al. (20 December 1994), Toronto, 407/93 (Ont. Div. Ct.), leave to appeal refused (16 October 1995), Doc. M15357 (C.A.)). On this basis, I have come to the following conclusions.

I accept that many individuals and groups have taken public stances against hate groups and it is arguable that they could not expect any additional harm to result from the disclosure of private correspondence sent to the Ministry. However, what an individual says publicly and what that person says privately are not necessarily the same. Had they wished the contents of these records to be public, many individuals or spokespersons for organizations have the means to make them public. They chose not to. The question then becomes whether the Act should require such disclosure in the absence of their consent. The task

before me is to decide whether the concerns about health or safety expressed by the Ministry on behalf of the affected persons are frivolous, groundless or exaggerated. In view of Adjudicator Hale's findings in Order PO-1776-R, I conclude that they are not.

Clearly, the character of the information as being "personal" or "professional" is immaterial to the question of whether an individual could reasonably be expected to suffer harm to his or her physical safety as a result of disclosure. Section 20 only requires that "an individual" be at risk of harm. Similar to the case in Order PO-1776-R, some of these individuals are well-known activists in the community and disclosure of the names, titles and organizations who corresponded with the Ministry could reasonably be expected to result in harm to these individuals. Some of the individuals identified in the records are or were otherwise high profile. Many of these individuals are no longer in the positions in which they originally contacted the Ministry. In my view, this is particularly significant in that they may no longer be involved in dealing with hate groups and their literature. Re-identifying them at a later date could reasonably be expected to expose them to a completely unanticipated risk.

Given the findings made in Order PO-1776-R regarding the extent to which hate groups will go to advocate violence and engender fear in their target groups, identification of the individuals in the records could reasonably be expected to inflame these groups and provoke retaliatory action against them and/or any individual associated with an identified group or organization. Therefore, I find that the risk to health or safety of the individuals referred to in the records and to individuals associated with the groups or organizations targeted by hate groups cannot be said to be exaggerated or groundless.

Accordingly, I find that, with one exception, the information in Records 14, 21, 60, 70, 72, 76, 79, 91-1, 92-1, 99-1, 159 to 160, 172, 174 to 175 and 250-1 to 250-2 and the non-highlighted portions of Records 3-1, 4-1 to 4-3, 30-1 to 30-2, 31-1, 34-1, 37, 62 to 64, 68, 73, 87-1, 111, 145, 166, 177, 178-1, 179, 180, 185-1, 197-1, 198-1, 202-1, 205-1, 206, 207-1, 210-1, 221-1, 228 to 229, 233 and 255 which the Ministry originally withheld from disclosure are exempt under section 20.

In response to the Notice which I sent to the affected persons prior to the issuance of Reconsideration Order R-980012, one affected person acknowledges that she was referred to in a record at issue (Record 14) and consents to the disclosure of this record. This affected person was referred to in the record in her official capacity as a member of the Legislative Assembly. Since this individual has consented to the disclosure of her identity, that information should be provided to the appellant.

ORDER:

1. Order provision 1 of Reconsideration Order R-980012 is rescinded.

2 I order the Ministry to disclose the name of the consenting party on Record 14 by providing a copy of this record to the appellant in accordance with the directions provided in the covering letter to this order which is being sent to the Ministry. This record should be disclosed to the appellant no later than **October 5, 2000**.

3. I uphold the Ministry's decision regarding the remaining records.

4. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: September 14, 2000
Laurel Cropley
Adjudicator