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

ORDER PO-1939

Appeal PA-000323-1

Ontario Human Rights Commission

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

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

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

BACKGROUND:

The appellant submitted a request to the Ontario Human Rights Commission (the OHRC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the complete name, title, company name and address of the anonymous writer of the statement..." This request refers to the OHRC's "letter of December 10, 1997, furnishing me an anonymous and partially blacked-out statement from the respondent, who is conceivably a law professional."

The OHRC denied access to the requested information and appeal PA-000255-1 was opened. Adjudicator Holly Big Canoe disposed of the issues in this appeal in Order PO-1787. She found, in part, that the information at issue qualified for exemption under the discretionary exemption in section 14(1)(e) (danger to life or safety) of the *Act*. As section 14(1)(e) had not been raised by it, she ordered the OHRC to exercise its discretion under that section and to inform the parties of its decision.

The OHRC issued a decision to the appellant indicating that it had exercised its discretion under section 14(1)(e) in favour of non-disclosure. The appellant appealed this decision and Appeal PA-990255-2 was opened. I was assigned to adjudicate the issues raised in this appeal.

At inquiry, I sought representations from the OHRC initially. I subsequently sent the non-confidential portions of them to the appellant along with a Notice of Inquiry and sought his representations on the issues in that appeal. In doing so, I withheld two statements which the OHRC had attached to its representations on the basis of confidentiality concerns expressed by the OHRC. I disposed of the issues in Appeal PA-990255-2 in Order PO-1867.

NATURE OF THE APPEAL:

Upon receipt of its representations relating to Appeal PA-990255-2, the appellant submitted a request to the OHRC under the *Act* for access to:

1. Two mediation staff reports to IPC recording my past behaviour and continuing propensity of such type of behaviour mentioned in your letter dated July 26, 2000.
2. [A named individual's] response to my complaint under TI-98-0049(a) Section 34 Case Analysis.
3. [A named individual's] response to my complaint under TI-98-0049(b) Section 34 Case Analysis.
4. [A named individual's] response to my complaint under TI-99-0056 Section 34 Case Analysis.
5. [A named individual's] response to my complaint under TI-99-0059 Section 34 Case Analysis.

The OHRC responded to this request and granted access to items 2, 3 and 4 (responses to cases TI-98-0049 (a) and (b), as well as TI-99-0056). With regard to item 5 of the request (response to case TI-99-0059), the OHRC advised that access could not be granted since no response was composed. Finally, the OHRC denied access to item 1 of the request (staff reports to the IPC), pursuant to section 20 (threat to health or safety) of the *Act*.

The appellant appealed the OHRC's decision that no response was composed (item 5), as well as the denial of access to the staff reports (item 1). During the intake stage of this appeal, an intake analyst dismissed the appellant's appeal relating to item 5 since, in her view, the requester did not provide a reasonable basis for concluding that a responsive record exists.

During mediation, the appellant indicated that he had not received [a named individual's] response to TI-98-0049(b) from the OHRC (item 3 of the request). The OHRC advised the mediator that the same document is responsive to items 2 and 3 and that there are no additional documents pertaining to item 3. The appellant maintains that a separate response was composed, and that additional documents should exist for item 3.

The appellant also indicated that he wished to pursue the matter regarding the existence of a record responsive to item 5.

As I noted above, during the intake stage of this appeal, an intake analyst dismissed the requester's appeal relating to item 5 since, in her view, the requester did not provide a reasonable basis for concluding that a responsive record exists. The Commissioner has delegated the authority to the Intake Analyst to decide whether or not an appeal should proceed through the appeal process or be dismissed. Prior to issuing her decision to dismiss the appeal with respect to item 5, the Intake Analyst gave the appellant an opportunity to provide her with written submissions to explain why he believes records responsive to item 5 exist. As a decision regarding item 5 has already been issued by this office at an earlier stage of this appeal, I will not deal with it further in this order.

However, I determined that the issue of the existence of additional records responsive to item 3 had not been previously dealt with, and decided to address it as an issue in this appeal.

I sought representations from the OHRC and affected persons, initially. In addition to the exemption in section 20, I asked the parties to consider the possible application of the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy).

The OHRC replied on its own behalf and on behalf of the affected persons. The OHRC's representations address the Reasonableness of Search issue, but do not refer to sections 20, 49(a) or 49(b).

I subsequently decided to seek representations from the appellant. In doing so, I put the appellant on notice that, in addition to the information submitted by the OHRC in this appeal, I was contemplating taking into consideration several categories of information of which I am aware as a result of the numerous appeals the appellant has filed with this office, including those with which I have dealt. I then set out, in detail, the specific evidence which might be relevant. In responding to the issues in this appeal, I invited the appellant to:

1. address the incorporation of this evidence into the current appeal; and

2. explain why he believes the circumstances in the current appeal warrant a different approach.

The appellant submitted representations in response.

RECORDS:

The records at issue in this appeal consist of two statements made by OHRC staff, dated July 20, 2000 totalling six pages.

PRELIMINARY MATTER:

THE EVIDENCE THAT I INTEND TO CONSIDER IN THIS APPEAL

As I indicated above, although claimed as the basis for withholding the records at issue from disclosure, the OHRC does not refer to section 20 in its representations. Section 20 is a discretionary exemption and the failure of the OHRC to make submissions on its application could be construed as an indicator that it intends to abandon this claim. However, the OHRC's response to this appeal must be viewed in the context of its overall dealings with the appellant in connection with certain other access requests made by him and his subsequent appeals of them to this office. I advised the appellant that as I am aware of his previous appeals and am currently considering similar issues in another related appeal filed by him (Appeal PA-000247-1), I am not able to summarily dismiss this exemption claim as it appears that the OHRC's concerns with respect to the current appeal are based on the same considerations in Appeal PA-000247-1. I also noted that the bases for withholding the records in the current appeal are consistent with the position taken by the OHRC and the findings of various Adjudicators in this office, including myself, in the previous appeals.

I noted in the Notice of Inquiry for Appeal PA-000247-1 (referred to above), which I sent to the appellant simultaneously with the Notice in the current appeal, that the OHRC has raised the relevancy of the circumstances in Appeal PA-990255-1 (and subsequent Order PO-1787) to the issues in that appeal. I advised the appellant that these considerations may also be relevant in the current appeal.

In particular, in raising the relevancy of the circumstances in appeal PA-990255-1, the OHRC appears to be relying on the evidence that was before the Adjudicator in that appeal. I therefore decided to consider incorporating the evidence submitted in appeal PA-990255-1 into the current appeal. Moreover, I noted that the appellant has filed several other appeals in connection with the issues in Appeal PA-990255-1 and, indirectly, the issues in the current appeal. Therefore, I reviewed all of these appeal files and any orders or decisions resulting from them. I concluded that the evidence submitted in these appeals and the findings in their related orders may be relevant in the circumstances of the current appeal.

My reasons for contemplating considering all of this evidence were set out in the Notice of Inquiry that was sent to the appellant and, as I indicated above, he was given an opportunity to

address this issue in detail. In responding to the Notice of Inquiry, the appellant objects strenuously to the incorporation of evidence from other appeals into the current appeal. He writes:

> As the above Appeal has nothing to do with the demised PA-990255-1, PA-000156-1& PA-000157-1, PA-000232-1, PA-000210-1, PA-990255-2 and the now separately-inquired PA-000247-1, I am not going to take part in IPC recycled screenplays with its patent prescription of universal relevancy theory to recycle the now-defunct appeals except the living PA-000323-1 currently being inquired.
>
> When an appeal is slaughtered by an IPC adjudicator, it is dead, it is no longer existent. The demised appeal is no longer a valid subject for IPC to recycle its relevancy to a currently inquired appeal no matter what relevancy is to be interpreted, good or bad to the surviving appeal. All the public want is the principle, not the politics. In the past year, I have been either fooled around or tantalized by IPC adjudicators with whole bunch of recycled relevancy games for my appeals to access to different information. I have enough defunct information for my own recycle bin. I don't need anymore dead information from IPC.
>
> ...
>
> Under Charter of Rights and Freedoms, I have the constitutional right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. IPC has already violated my constitutional right to accept the records of my violent behaviour illegally produced by OHRC mediation staff as the convincing evidence for use in its official adjudication processes. I wonder if the IPC adjudicator's legal immunity promised by FIPPA is able to override our Constitution.
>
> It is entirely up to IPC to fulfill its statutory mandate in adjudicating this appeal for the information covered by two OHRC mediation staff reports and one mediation staff response to my complaint, which is completely a different ball game from the now-defunct appeal aimed at the name of Bi-Way anonymous human rights lawyer.

In Brown & Evans, *Judicial Review of Administrative Action in Canada* (Vol. 2), (Toronto: Canvasback Publishing, 1998) (looseleaf), the authors discuss the principle of "fairness" in the administrative decision-making process (at Chap. 12 – 1):

> Traditionally, procedural fairness has been viewed to pertain to the parties' right to an effective opportunity to participate in the decision-making process through the presentation of evidence and argument, and through the requirement of impartiality in the decision-maker. In addition, there are other aspects of the law which are designed to prevent the conduct of the tribunal from undermining the participatory rights required by the duty of procedural fairness … These

> principles and rules relate to five related aspects of the decision-making process: [including] the gathering of information …

They also comment on the extent to which administrative adjudicators may make use of information not adduced by the parties to a proceeding (at Chap. 12 – 2 to 4):

> If adjudicative decision-makers are permitted to unilaterally conduct their own investigations, the ability of parties to participate in the decision-making process through the presentation of proofs and argument to neutral decision-makers may be impaired …
>
> As a result, when performing essentially adjudicative functions, administrative decision-makers, like judges, are generally precluded from *ex parte* fact-finding …
>
> …
>
> The general rule proscribing *ex parte* evidence-gathering is qualified, however, to the extent that it is permissible for administrative adjudicators to make use of information that can be judicially noticed … And because tribunals have often been established in order to provide more specialized decision-making, and sometimes to escape the adversarial procedural model of the courts, it may be that their members may take notice of a wider range of information than that within the narrowly-circumscribed scope of judicial notice. As well, of course, tribunal members may draw on their experience to assist them in assessing the evidence that they have heard, including their awareness of relevant published material that may suggest principles to guide them in the exercise of their discretion.

The authors note that authority to take official notice of facts may arise by statute or as a matter of common law. In either case, however, they indicate that (at Chap. 12 – 5):

> [A] tribunal should strive to inform the parties of its intention to take official notice of facts, and to provide them an opportunity to comment on the material, … as a matter of fairness.

As an administrative tribunal, the Information and Privacy Commissioner (the IPC) functions in a somewhat different capacity from other tribunals. While the majority of administrative tribunals operate under an "adversarial" model, the IPC model has "inquisitorial" elements. Although the rules of natural justice and procedural fairness applicable to other administrative tribunals similarly apply to IPC inquiry processes, the extent to which an adjudicator may "inquire", on his or her own initiative, into the issues on appeal is heightened under this model.

The consideration of evidence obtained in other appeals is somewhat outside the normal practice for this office, primarily because the issues in one appeal do not necessarily reflect on the issues in another. In addition, the principle that each case should be decided on its own facts is not one to be lightly tampered with. There are, however, circumstances where prior requests and/or appeals made by an appellant are relevant to the issues in an appeal. For example, an

institution's claim that a request is frivolous or vexatious under section 27.1 of the *Act* may, in part, be based on prior requests and/or appeals. In these situations, previous requests and appeals are often referred to in order to establish a "pattern of conduct" on the part of a requester in support of the claim.

Similarly, in the circumstances of the current appeal, the previous appeals filed by the appellant are relevant in considering a pattern of conduct on the part of the appellant which may support a finding that disclosure of the requested information could reasonably be expected to threaten the health or safety of an individual (under section 20 of the *Act*).

The Court of Appeal for Ontario [in *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) (C.A.) at 395, affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)] has drawn a distinction between the interests being protected under section 20 and the harms "that could reasonably be expected to" occur under other exemptions. In this regard, the Court noted that the interests at stake in cases where the anticipated harm relates to financial loss, for example, are less compelling than those of personal safety and bodily integrity (see the Court's discussion at pages 403 and 404). Since I am clearly aware of the issues raised in previous appeals relating to this issue because of my own involvement in dealing with some of them, I would be remiss in not considering the possible impact of the evidence obtained in them in assessing whether the issues in the current appeal raise similar concerns.

As I indicated above, the appellant was put on notice that I intended to consider taking this approach to the issues in this appeal. He was provided with detailed information regarding the specific evidence I was contemplating considering and he was given sufficient time to address both the process and the evidence itself in his representations. In my view, neither the process nor its implementation is unfair to the appellant.

After considering the appellant's views on this issue and the overall circumstances of this appeal, I have decided to incorporate the evidence from previous appeals as part of the overall body of evidence before me.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the OHRC indicates that further records do not exist, it is my responsibility to ensure that the OHRC has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the OHRC to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the OHRC must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the OHRC's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The OHRC's representations were prepared by the Special Advisor to the Chief Commissioner. He states:

> It has been explained to the complainant on several occasions that all documentation associated with this matter has been provided to him. He asserts that a separate complaint [I assume he means response] was filed by both of the affected parties and that this is not being disclosed to him. However, this is not the case. A combined response was composed for both cases (a) and (b) and I have already provided this response to the complainant.
>
> I personally checked all records of this case at the Commission, spoke with the Trustee of Investigations and with the respondents in question to ensure that the above-related facts are indeed true, and can attest that they are.

The appellant does not address this issue in his representations. I have reviewed the complete appeal file (excluding those portions that are mediation privileged) and I find that the appellant has not provided a reasonable basis for concluding that additional records might exist. Moreover, I am satisfied, based on the OHRC's submissions, that, in reviewing the complete file and confirming the facts with the subject respondents, it has made a reasonable effort to determine whether additional records exist. On this basis, I find that the OHRC's search for responsive records was reasonable in the circumstances.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/DANGER TO SAFETY OR HEALTH

Section 2(1) of the *Act* defines "personal information" in part as "recorded information about an identifiable individual".

The records at issue in this appeal relate to and describe the circumstances surrounding contacts between OHRC staff and the appellant. The records were created following complaints made by the appellant against these staff in regards to their treatment of him. They contain the observations of the staff members with respect to the appellant's behaviour as well as their comments on the impact the appellant's behaviour had on them personally. It appears that the records may have been created in order to respond more fully to the issues the OHRC was asked to address in Appeal PA-990255-2. Given the overall circumstances involving these individuals, I find that these records contain their personal information. Because the records relate to the appellant's behaviour, I find that they contain recorded information about him and thus contain his personal information as well.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general

right of access. Under section 49(a) of the *Act*, the OHRC has the discretion to deny an individual access to their own personal information in instances where certain exemptions, including section 20, would apply to the disclosure of that information.

Section 20 of the *Act* provides:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words "could reasonably be expected to" appear in the preamble of section 20, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)*].

As I noted above, however, in *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at pp. 403-404):

> 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 be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons 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 [sections] 14(1)(e) or 20 to refuse disclosure.

Despite this distinction, "detailed and convincing evidence" of a reasonable expectation of harm is still required in order to establish the application of section 20. This evidence must demonstrate that there is a reasonable basis for believing that endangerment could be expected to result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

[See Orders MO-1262 and PO-1747]

With respect to this issue, the appellant states:

> Two OHRC mediation staff reports sent to IPC recording my past violent behaviour and continuing propensity of such behaviour are my personal information that I have the constitutional right governed by FIPPA to get access to it. Canada is not a secret police state for the agency to secretly keep the citizens' criminal records in its file for official use without a fair trial. IPC's federal counterpart did a good job to force Justice Minister Office of Canada to release the files of potential terrorist black lists to the individuals about half a year ago.
>
> It is a shame that my violent behaviour records in OHRC mediation staff reports submitted to IPC by OHRC and Bi-Way anonymous human rights lawyer have been accepted as the evidence for official use in adjudicating my appeals by means of illicity (*sic)* triangle business transactions.
>
> It is unfair for IPC to prejudge that the failure of OHRC's reiteration of Section 20 as an exemption in its representations is construed as an indicator to abandon the claim. Rather than picking out institution's procedural flaw for not to reiterate something previously referred to in its early submission, the information watchdog must stick to the principles of the *Act* and its regulations on whether or not the information I seek fits into the category of my personal information that I should have the constitutional right to know or the head of OHRC has the statutory mandate to secretly compose my violent behaviour records to be sent to other government agency for official use.
>
> The reality is that I have previously identified two mediation staff, who have accused me of having threatened them with exhibiting violent behaviours, and I have filed official complaints against them. Yet, their lives are safe and sound as ever. They are enjoying daily works happily in the criminally infested paradise of OHRC as usual.

The purposes of the *Act* are set out in section 1, which states:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and

> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Contrary to the appellant's perception of his "rights" under the *Act*, there is no unqualified right of access to one's own personal information under the *Act*. Although, as stated in section 1(b), the *Act* recognizes a "heightened" right of access to one's own personal information, the ability of a requester to exercise this right is governed by the access provisions of the *Act*. Where an exemption such as section 20 is found to apply to such information, the *Act* permits an institution to withhold it.

The following is a list of the relevant appeals, the evidence from which I intend to consider in determining whether section 20 applies to the appellant's personal information in the circumstances of this appeal.

Appeal PA-990255-1

Date of Request - January 2, 1998
IPC Decision - Order PO-1787, dated May 18, 2000

The appellant requested from the OHRC, among other things, the name and address of the anonymous writer of a statement relating to File No. GGON-3KVL29.

Appeals PA-000156-1 and PA-000157-1

Dates of Requests - February 23, 2000 and March 9, 2000, respectively
IPC Decision - Order PO-1858, dated January 22, 2001

In Appeal PA-000156-1, the appellant requested "evidence as the reasons" for the decision of the OHRC dated November 23, 1999, File No. GGON-3KVL29. In Appeal PA-000157-1, the appellant requested "the following evidences and insufficient evidence indicated by the [OHRC's] negative decision dated November 23, 1999 File No. GGON-3KVLHX.

Appeal PA-000232-1

Date of Request - May 16, 2000
IPC Decision - Summary Dismissal Letter, dated October 25, 2000

The appellant requested records of precedents for practicing blackouts of the names of affected respondents and their counsel, witnesses, etc. in responses to the complainant and OHRC decisions over its 38 year history. The OHRC attempted to respond to his queries, in part, but

the appellant was not satisfied. The OHRC also indicated that it would not process the second part of his request.

Appeal PA-000210-1

Date of Request - June 28, 2000
IPC Decision - Order PO-1812, dated August 4, 2000

The appellant requested from the OHRC a copy of the unsevered representations, dated January 5, 2000, that it submitted to the IPC in response to Appeal PA-990255-1. Portions of the OHRC's representations were withheld by Adjudicator Big Canoe during the sharing of representations process.

Appeal PA-990255-2

Date of Appeal - June 7, 2000
IPC Decision - Order PO-1867, dated February 15, 2001

The appellant submitted an appeal to the IPC in relation to the decision of the OHRC following Order PO-1787. Adjudicator Big Canoe had ordered the OHRC to exercise its discretion under section 14(1)(e).

Appeal PA-000247-1

Date of Request - June 20, 2000
IPC Decision - currently at the inquiry stage

The appellant requested copies of the minutes of an OHRC meeting relating to four cases in which the appellant had filed complaints against four named staff members. The OHRC granted partial access to the records requested, severing the names of the commissioners present at the meeting and the name of one staff person, from the minutes of the OHRC meeting citing section 20 (danger to safety or health) as the basis for withholding this information.

I intend to determine the issues in Appeal PA-000247-1 and the current appeal concurrently (although I will address the specific issues in each appeal in separate orders) and will consider the totality of the evidence presented by the parties and contained in the above noted appeals in arriving at my decision in each appeal.

Discussion and Findings

Chronology of events

The appellant's involvement with the OHRC began in 1997 when he brought two complaints under the *Human Rights Code* (the *Code*) against a named store (complaint GGON 3KVL29)

and a named security company (complaint GGON 3KVLHX). It appears that the OHRC provided him with a severed copy of the respondent's response in December 1997.

On January 2, 1998, the appellant submitted his first access request to the OHRC for, among other things, the name and address of the "anonymous" writer of a statement relating to his complaint GGON 3KVL29 (Appeal PA-990255-1). The information at issue consisted of the name of the lawyer who made the submission to the OHRC on behalf of the respondent to the appellant's complaint.

According to the OHRC (as stated in its representations in response to Appeals PA-000156-1 and PA-000157-1), the appellant's complaints underwent the usual investigation and conciliation process under the *Code* and on November 23, 1999, decisions adverse to him were issued pursuant to section 36 of the *Code*. The appellant applied for reconsideration of these decisions under section 37 of the *Code*.

During the time in which the OHRC was processing his human rights complaints and access requests, the appellant brought complaints under the *Code* against a number of OHRC staff members relating to their treatment of him. The staff members had dealt with the appellant in varying capacities.

In February and March of 2000, he submitted two requests to the OHRC under the *Act* seeking the "evidence" which formed the basis for the section 36 decisions made under the *Code* (Appeals PA-000156-1 and PA-000157-1). Some of the information at issue in these two appeals is identical to that at issue in Appeal PA-990255-1), specifically, the identity of the lawyer.

During this time, Adjudicator Big Canoe was seeking representations from the parties in Appeal PA-990155-1. As part of this process, she provided the appellant with the severed representations of the OHRC after determining that portions of them should be withheld due to confidentiality concerns. She issued her order (PO-1787) on May 18, 2000. In her decision, Adjudicator Big Canoe ordered the OHRC to exercise its discretion with respect to the application of section 14(1)(e) to the name and address of the lawyer. The OHRC did so and issued a further decision to the appellant in which it indicated that it had exercised its discretion in favour of continued non-disclosure. Immediately upon receipt of this decision (June 7, 2000), the appellant initiated a further appeal of the OHRC's exercise of discretion (Appeal PA-990255-2).

On June 28, 2000, the appellant submitted a request to the OHRC for an unsevered copy of the representations it submitted in response to Appeal PA-990255-1 (Appeal PA-000210-1). The information at issue in this appeal is identical to that in Appeals PA-990255-1 and PA-000156-1.

Also in June, 2000, the appellant submitted a request for the minutes of an OHRC meeting relating to the four complaints he had filed against OHRC staff (Appeal PA-000247-1). The appellant received a copy of the information contained in the minutes. Only the names of those attending the meeting are at issue in this appeal.

In order to dispose of the issues in Appeal PA-990255-2, I sought representations from the OHRC which I then shared, in part, with the appellant. I decided to withhold two statements made by staff based on confidentiality concerns. The appellant immediately submitted a request to the OHRC for, among other things, a copy of these two statements (Appeal PA-000323-1, the current appeal). The statements were made by two of the OHRC staff against whom the appellant made a complaint.

The appellant has filed several other appeals with this office from decisions of the OHRC made during this time frame which, although not all directly seeking information about identifiable individuals, reflect his focussed and persistent attempts to address the issues in the former group of appeals (Appeals PA-990233-1, PA-000161-1, PA-000162-1 and PA-000232-1). When viewed as a whole, the eleven appeals the appellant has initiated since 1998 demonstrate the intensity of his feelings of "persecution" at the hands of the various individuals who have dealt with him in his "quest for justice".

IPC decisions

In Order PO-1787 (Appeal PA-990255-1) issued May 18, 2000, Adjudicator Big Canoe found that section 14(1)(e) (endanger life or safety) applied to the information that would identify the lawyer and ordered the OHRC to exercise its discretion under this section. In making this finding, she stated:

> As indicated above, the lawyer submits that disclosure of the information at issue would enable the appellant to contact him. The OHRC and the lawyer submit that the records show that the appellant has in the past exhibited violent behaviour against those whom he perceives have not treated him fairly. Both the OHRC and the lawyer believe that the appellant views the lawyer as "the prime culprit" in the matter. The lawyer indicates that if the record was disclosed, he would be exposed to physical danger and may have to undertake security measures to protect himself.
>
> In the circumstances, I find that the OHRC and the lawyer have demonstrated that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. I am satisfied that there is a reasonable basis for believing that disclosure could be expected to endanger the lawyer's personal safety, and I find that section 14(1)(e) applies.

Despite this decision, the appellant pursued the same information in Appeal PA-000210-1.

In Order PO-1812 (Appeal PA-000210-1) issued August 4, 2000, Adjudicator Donald Hale upheld the OHRC's decision under section 14(1)(e) and 49(a) of the *Act*. In making this decision, Adjudicator Hale stated:

> In my discussion of "personal information" above, I noted that the information contained in the record at issue in this appeal was similar in character to that

> which was the subject of the record in Order PO-1787. The disclosure of the record at issue in this appeal would serve to identify the affected person, as was the case in the earlier decision.
>
> The appellant has made extensive representations in support of his claim that he does not pose a threat to anyone. He has provided me with several medical reports and has disclosed his age to further his argument that he is not capable of harming anyone and would not do so regardless.
>
> I have reviewed the evidence tendered by the OHRC and the affected person in Appeal Number PA-990255-1 in support of their contention that the record at issue in that appeal is exempt from disclosure under section 14(1)(e). I adopt the findings of Adjudicator Big Canoe in Order PO-1787 with respect to the reasonableness of the OHRC and the affected person's concern for his/her safety. I am not persuaded by the evidence tendered by the appellant that I should find differently. Again, I reiterate that Adjudicator Big Canoe, in her decision concerning access to the OHRC's submissions in Appeal Number PA-990255-1 (which is the record at issue in this appeal), determined that only portions of the OHRC's representations should be made available to the appellant, due to concerns which she had about the confidentiality of the severed portions. In my view, that decision was reasonable and in keeping with her final decision in Order PO-1787 in which she held that information which would disclose the identity and extent of involvement of the affected person in the OHRC matter was exempt under section 14(1)(e).
>
> I adopt those findings for the purposes of the present appeal and have determined that the record at issue in this appeal also qualifies for exemption under section 14(1)(e). The OHRC has made submissions with respect to its exercise of discretion under section 49(a) in its decision letter and subsequent correspondence filed with this office. I am satisfied that the OHRC exercised its discretion in a proper manner and will not disturb it on appeal. Because the record qualifies for exemption under section 14(1)(e), I find that it is properly exempt under section 49(a).

The appellant continued to pursue this same information in Appeal PA-000156-1.

In Order PO-1858 (Appeals PA-000156-1 and PA-000157-1) issued on January 22, 2001, Adjudicator Hale upheld the decision of the OHRC to withhold the requested information, in part, on the basis of section 14(1)(e) of the *Act*. In his decision, Adjudicator Hale concluded:

> In my view, the concerns expressed by Adjudicator Big Canoe and myself in Orders PO-1787 and PO-1812 respectively remain at the present time. The appellant's representations and the fact that another appeal respecting the same information is before this office make it very clear that he continues to seek to ascertain the name and address of the respondent's counsel with equal vigour.

> Based on the appellant's submissions and those of the OHRC and the respondent's counsel, as well as the findings in the earlier decisions, I find that the information contained in Record 1(A) with respect to the identity and whereabouts of counsel for the respondent continues to qualify for exemption under section 14(1)(e). Accordingly, I find that this information is exempt under the discretionary exemption in section 49(a).

Finally, in Order PO-1867 (Appeal PA-990255-2) issued on February 15, 2001, I upheld the OHRC's exercise of discretion, stating:

> The OHRC indicates that the head reconsidered his original decision in light of Order PO-1787. In this regard, the OHRC notes that in exercising his discretion not to disclose the information at issue to the appellant the head took a number of factors into consideration, including: the concerns expressed by the affected person; the past threatening and violent behaviour exhibited by the appellant against those whom he perceives as not having treated him fairly; the experiences of OHRC mediation staff who were previously involved in processing the appellant's human rights complaint and the Adjudicator's findings in Order PO-1787.
>
> In support of the head's decision on the exercise of discretion, the OHRC provided several staff reports about the appellant to the Commissioner's office. These reports reflect staff's concern regarding the appellant's behaviour during their contact with him.
>
> The OHRC indicates that it was particularly relevant to the head that the appellant is specifically seeking the identity and whereabouts of a particular individual "who in the mind of the requester is the 'prime culprit' in the unfairness he perceives".
>
> The OHRC indicates further that the head considered the fact that the appellant has received full disclosure of the investigation findings regarding his complaint and considered whether disclosure of the information at issue was crucial to the appellant's right to know the case against him or to enable him to respond to the issues in his human rights complaint. The head came to the conclusion that this information was not relevant to the complaint itself and decided that, in the circumstances, the appellant's "right to know does not override considerations of health and safety risks where such apprehension by the affected third person has a reasonable basis in fact".
>
> The appellant takes issue, first, with Adjudicator Big Canoe's findings regarding the application of section 14(1)(e) as well as any evidence presented that would tend to support such a finding. He also complains about the manner in which he has been dealt with by the OHRC and by all involved parties generally and submits that his human and *Charter* rights have been infringed by such treatment.

> In essence, he feels that he has been dealt with unfairly and that the actions of the OHRC and the Commissioner's office are "illegal" and improper.
>
> Based on the submissions of the OHRC, I am satisfied that the head has taken appropriate considerations into account in exercising his discretion not to disclose the information to the appellant. Accordingly, I find that the head's exercise of discretion under section 14(1)(e) should not be disturbed.

In each of the above cases, the appellant submitted at times extensive representations relating to the application of section 14(1)(e) to the identity of the lawyer. In each case, the adjudicator considered his representations but ultimately came to the same conclusion. While the submissions made by the OHRC and the lawyer were persuasive in the final analysis, the representations submitted by the appellant, in my view, help put the former submissions into perspective and provide some insight into the issue of whether the reasons for resisting disclosure are frivolous or exaggerated.

For example, in his representations dated December 28, 2000, submitted in response to Appeal PA-000156-1, the appellant wrote:

> So far, I have been able to submit 11 counts of human rights complaints against OHRC staff, one Law Society complaint against the head of OHRC and 3 counts of human rights complaints against IPC staff because I know their names. Despite my complaints, all of them are safely enjoying working as usual in OHRC and IPC. Thus far, none of them has ever raised the issue that his/her life is being threatened by the complainant and needs to call for police protection. Should you have changed your mind to release the name of Bi-way lawyer, I will guarantee that she/he will be treated equally and safely as the head of OHRC to be exalted to the Law Society.

The records at issue in the appeals which concerned his original OHRC complaints against the store and security company, many of which have been disclosed to him, describe an event involving the appellant in which he exhibits violent behaviour. As I noted in Order PO-1867, the statements provided by the OHRC with its representations (which are the records at issue in the current appeal) reflect staff's' concerns regarding the appellant's behaviour during their contact with him. In my view, the records themselves provide evidence which tends to support a concern regarding the appellant's behaviour as posing a threat to the safety of individuals who appear to oppose the appellant's interests.

Further, the persistence exhibited by the appellant in attempting to obtain the same information over and over again with, as Adjudicator Hale observed, equal vigour supports the concerns raised by the records. It appears that the appellant has now, for the moment, changed his focus to the OHRC staff against whom he has complained.

On May 23, June 1 and June 18 2000, the appellant wrote to this office complaining about the decision in Order PO-1787 and asking a number of questions requiring the IPC to "justify"

various procedural steps taken during the processing of his appeal as well as the adjudicator's decision. In each case the IPC's Registrar responded to the appellant advising him that the appeal was closed and informing him of his options if he is dissatisfied with the decision.

It is clear from the appellant's letters that he feels particularly aggrieved by the decision of Adjudicator Big Canoe to uphold the OHRC's decision to withhold the name of the lawyer. His persistence and his vehemence in expressing his displeasure attests to the degree to which he is focussed on these issues. Indeed, this sequence of letters is indicative of his pursuit of identifying information taken as a whole.

The correspondence from the appellant contained in various appeal files, directed in part to the OHRC and the IPC, depicts a very angry individual. His correspondence contains scathing, and at times hurtful attacks on specifically named individuals. The tenor of many of his letters is aggressive, if not abusive and intimidating. His correspondence generally reflects a pattern on his part of bringing complaints against individuals he has had contact with on an official (or other) basis over the past few years who have, in some way, displeased him.

In my view, given the prior documented experiences some of these people and others have had with the appellant, the concerns expressed cannot be said to be frivolous or exaggerated. Despite the appellant's assertions that he would not harm anyone, there is every indication from his pattern of conduct in pursuing information about specific individuals, that he will persevere in his quest in a similar manner.

It is apparent that every action taken by either the OHRC or the IPC in dealing with his OHRC complaint and/or requests has incited further response from him as part of a pattern in objecting to the process and the decisions that are made. In my view, his insistence in using the *Act* to further his quarrels borders on an abuse of the right of access under the *Act*. It also supports a concern that is neither frivolous nor exaggerated, that disclosure of the requested information could reasonably be expected to endanger the safety of the individuals referred to in them.

In coming to this conclusion, it is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Minister of Labour):*

> 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 [sections] 14(1)(e) or 20 to refuse disclosure.

Consequently, based on all of the evidence before me, I conclude that there is a reasonable basis for believing that endangerment could be expected to result from disclosure of the information at issue. The records at issue in this appeal, therefore, qualify for exemption under section 20.

Exercise of Discretion under sections 20 and 49(a)

As I indicated above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. This reflects one of the primary purposes of the *Act* as set out in section 1, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure.

Under section 49(a) of the *Act*, the OHRC has the discretion to deny an individual access to their own personal information in instances where certain exemptions, including section 20, would apply to the disclosure of that information. In addition, section 20 is, in and of itself, a discretionary exemption.

In Order P-344, Assistant Commissioner Tom Mitchinson considered the question of the proper exercise of discretion under sections 14 (law enforcement) and 49(a) of the *Act*:

> ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.
>
> In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.

I noted above that the OHRC did not address either section 20 or 49(a) in its representations. However, in responding to the other appeals brought by the appellant and considered in the current appeal, the OHRC has described the manner in which it has exercised its discretion to refuse access to the requested information in those cases. As the representations submitted in response to these other appeals have been incorporated into this appeal, I am satisfied that they sufficiently address this issue for the purposes of this appeal. I find further that they are relevant to the exercise of discretion in the current appeal. Accordingly, similar to my findings in Order PO-1867, I am satisfied that the head has taken appropriate considerations into account in exercising his discretion not to disclose the information at issue to the appellant under both sections 20 and 49(a) and the head's decision should not be disturbed.

ORDER:

1. The OHRC's search for responsive records was reasonable and this part of the appeal is dismissed.

2. I uphold the OHRC's decision to withhold the records at issue from the appellant.

Original signed by: August 21, 2001
Laurel Cropley
Adjudicator

POSTSCRIPT:

There are occasions where staff working in "public" offices, and particularly in places such as the OHRC or indeed like the IPC will be required to deal with "difficult" clients. In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage a section 20 or 14(1)(e) claim. Rather, as was the case in this appeal, there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed.