# ORDER PO-2113

## Appeal PA-020211-1

## Ontario Human Rights Commission

## NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> . . . a copy of the minutes of the Commission meeting on [a specified date], which yields the following decisions under section 34 of the *Code* [the *Ontario Human Rights Code*]: (referring to 8 complaint files initiated by the requester).

The OHRC located the requested minutes and granted access to those portions which refer to the disposition of the requester's complaints. The OHRC denied access to the remaining minutes as they refer to complaints made to the OHRC by other individuals. The OHRC also refused access to the names of the Commissioners who rendered the decision disposing of the requester's complaints, relying on the exemption in section 21(1) (invasion of privacy), with reference to the presumption in section 21(3)(b) of the *Act* (compiled as part of an investigation into a possible violation of law).

The requester, now the appellant, appealed the OHRC's decision to deny him access to the record.

Mediation of the appeal was not possible and the matter was referred to the adjudication stage of the appeal process. I decided to seek the representations of the OHRC initially, as it bears the onus of establishing the application of the exemption claimed. The OHRC submitted representations in response to the Notice.

In its submissions, the OHRC also claimed the application of sections 14(1)(e) (endanger life or safety) and 20 (danger to safety or health), in conjunction with section 49(a), to deny access to the names of the Commissioners which appear on the records at issue. As these exemptions had not been put forward by the OHRC in its decision letter or during the mediation stage of the process, I decided to seek the representations of the appellant on the issue of whether the OHRC ought to be entitled to rely on them at this stage of the appeal, in addition to the other issues identified in the Notice. The appellant made representations which were shared with the OHRC, who then made additional submissions by way of reply.

The OHRC also indicates in its representations that it acknowledges that the names of the Commissioners included in page one of the minutes is not the "personal information" of these individuals as the information relates to them only in their "professional or official government capacity". As this information does not qualify as personal information for the purposes of section 2(1) of the *Act*, it cannot be exempt from disclosure under the invasion of privacy exemptions in section 21(1) or sections 49(a) and (b) of the *Act*. The OHRC clarified that it is relying only on the discretionary exemptions in sections 14(1)(e) and 20 with respect to the names of the Commissioners listed on page one of the minutes.

In his representations, the appellant clarified that he was seeking access only to that portion of the Commission minutes dealing with the eight complaints which he initiated. He indicates that he is not seeking access to those portions of the minutes relating to other complaints and other

individuals. Accordingly, the scope of the request was narrowed to include only the names of the Commissioners who comprised Panel Meeting #7 on March 13, 2002. This information is found on page one of the minutes. As noted above, the minutes relating to the appellant's complaints, contained in pages 17 and 18, have been disclosed to him and are no longer at issue in the appeal.

## RECORDS:

The information remaining at issue in this appeal consists of the names of the Commissioners listed on page one of the Commission minutes dated March 13, 2002.

## DISCUSSION:

### LATE RAISING OF DISCRETIONARY EXEMPTIONS

On August 15, 2002, this office provided the OHRC with a Confirmation of Appeal stating that it had available a 30-day period, or until September 20, 2002, to claim the application of any discretionary exemptions to the records. The OHRC provided its representations in this appeal on October 8, 2002 claiming, for the first time, the application of sections 14(1)(e) and 20 to the records. The appellant objects to the late raising of these discretionary exemptions, arguing that the OHRC was given a window of opportunity for raising them and that it should not be extended.

The OHRC relies on previous decisions of this office involving the same appellant in support of its contention that it ought to be entitled to raise the application of sections 14(1)(e) and 20 with respect to the remaining information at issue. In particular, it relies on my findings in Order PO-1858 where I found that:

> . . . the appellant would not be prejudiced in any significant way by allowing the OHRC to claim the application of section 14(1)(e) to this information. He is aware that this exemption has been applied, and upheld, in two previous decisions of this office on the identical information. In the present circumstances, I am of the view that it would be inconsistent of me to hold that an exemption which was found to have been appropriately brought to the Commissioner's office by an affected person could not be brought by the OHRC because of the expiration of the 35-day time period. Accordingly, I will consider the possible application of section 14(1)(e) to those portions of Record 1(A) to which it was applied by the OHRC in my reasons below.

In another decision, Order P-1544, involving a different appellant, I addressed the late raising of the discretionary exemptions in sections 14(1)(e) and 20 by the OHRC as follows:

> In the circumstances of this appeal, and because of the sensitive nature of the information in these records, I am prepared to consider the application of these exemptions. I am not satisfied that the appellant will suffer any real prejudice should I do so. Particularly with respect to section 20 and because these records

> deal with very real security concerns, I am inclined to err on the side of caution to ensure that the health or safety of individuals is not put at risk through the disclosure of information which may properly qualify for exemption under these sections.

The OHRC concludes its submission on this issue by stating that:

> In the present case, it is the institution's position that the appellant would again not be prejudiced in any significant way by allowing the institution to claim the application of sections 14(1)(e), 20 and 49(a) of the *Act* after the expiration of the 35-day period. This is due to the fact that the appellant is seeking similar information, namely the names of the Commissioners who attended the Commissioners meeting and the disclosure of this information could be expected to endanger the personal safety of these individuals.

In my view, the circumstances surrounding the late raising of sections 14(1)(e) and 20 in the decisions referred to above are similar to those in the present case. In the earlier appeals, the appellant made access requests for identical information relating to a third party, who objected strongly to the disclosure of the information. Several previous decisions of this office had upheld the OHRC's decision not to grant access to this information at the time of my decisions in P-1544 and particularly PO-1848 on the basis that the information was properly exempt under sections 14(1)(e) and 20. In those circumstances, it would have been inconsistent not to allow the OHRC to rely on these exemptions.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Divisional Court in the judicial review of Order P-883 *(Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict

this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In the circumstances of this appeal, I have decided to permit the OHRC to raise these new discretionary exemptions. I have reached this decision for the following reasons:

- sections 14(1)(e) and 20 involve an examination of issues surrounding the safety of an individual. The prejudice to the parties about whom the information relates could be onerous if the possible application of these exemptions is not examined as they relate to the health or safety of these individuals. I find that they should not be penalized for the failure of the OHRC to raise the application of the exemptions in a timely manner;

- allowing the OHRC to rely on sections 14(1)(e) and 20 despite falling outside the time frame provided for in the Confirmation of Appeal is consistent with previous orders of the Commissioner's office regarding these exemptions;

- the appellant is not significantly prejudiced as the OHRC raised the application of the exemptions just 19 days after the expiration of the period referred to in the Confirmation of Appeal; and

- the prejudice to the parties whose information is included in the record significantly outweighs any prejudice to the appellant in the circumstances of this appeal.

I will, accordingly, examine the application of sections 14(1)(e) and 20 to the remaining information at issue in this appeal, despite the fact that these exemptions were first relied on by the OHRC following the expiration of the 35-day period set forth in the Confirmation of Appeal.

**DANGER TO SAFETY OR HEALTH**

Section 14(1)(e) of the *Act* provides that:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

Section 20 of the *Act* states:

> 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.

**Sections 14(1)(e) and 20 Generally**

Section 14 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the *Act*. [Order P-188]

The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption. [Order P-948]

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), 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) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].
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> 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 p. 6):
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> > 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 . . . 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 [section 14(1)(e)] to refuse disclosure.
>
> In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) [and section 20] still must provide "detailed and convincing

> evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

**The Representations of the Parties**

The OHRC relies on the findings in a number of previous orders of the Commissioner's office involving itself and the appellant. In particular, it submits that in Order PO-1787, former Adjudicator Holly Big Canoe found "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." In that appeal, the present appellant was seeking access to the name of an individual, much the same situation as exists in the present appeal. Similarly, it relies on the findings of Adjudicator Laurel Cropley in Order PO-1940 to substantiate its position that the information sought by the appellant is subject to the exemption in section 20.

The appellant disputes the ability of the OHRC to rely on the exemptions in section 14(1)(e) and 20 as they were made past the deadline in the Confirmation of Appeal document. I have addressed this issue above. The appellant does, however, address the issues raised by these exemptions as follows:

> It is discriminatory for the head of OHRC and IPC adjudicating judge to consider that, once the names of the Commissioners are disclosed, their lives will be jeopardized by the appellant, who is regarded by OHRC and IPC as a violent criminal before being convicted by a genuine judge. It should be noted that, *sometimes, an appellant/complainant's life is more valuable than the part-time Commissioners,* who are blind followers under the control of OHRC potential decision-maker to carry out the conscience-stricken, immoral duties in return for pecuniary reward. No any complainant/appellant is interested in poor told-to-do Commissioners' lives. With all the intended proceedings against the OHRC and its' staff wrong-doings, the real situation could be the other way around. [my emphasis]

**Findings**

In Order PO-1940, Adjudicator Cropley reviewed in great detail the interactions between the OHRC and the appellant in making a determination that the information sought by the appellant was exempt under section 20. After a lengthy review of the various appeals initiated by the appellant and the findings contained in the orders disposing of these appeals, Adjudicator Cropley summarized those findings as follows:

> 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 on 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 record at issue in this appeal, therefore, qualifies for exemption under section 20.

I adopt the findings of Adjudicator Cropley for the purposes of the current appeal. In my view, previous decisions of this office have made certain findings with respect to the actions of the appellant towards those he feels have acted against him. Specifically, it has been found in a number of orders, including PO-1787 and PO-1940, that the appellant's actions and statements have provided a reasonable basis for believing that the disclosure of information contained in records relating to him could be expected to result in endangerment to other individuals. The appellant has not provided me with sufficient evidence to refute these findings. Rather, the appellant's submissions lend credence to the notion that he is an angry and potentially dangerous individual.

In my view, the OHRC has established the application of section 20 to the names of the Commissioners contained in page one of the record. I find that I have been provided with a reasonable basis for believing that the disclosure of this information could be expected to result in a serious threat to the safety of the Commissioners referred to therein. The appellant's actions, as outlined in Order PO-1940 and his own submissions in the present appeal, have also provided a reasonable basis for upholding the application of section 20 to this information.

Because of my findings with respect to the application of section 20 to the information at issue, it is not necessary for me to specifically address the application of section 14(1)(e) to it as well.

## ORDER:

I uphold the decision of the OHRC to deny access to the names of the Commissioners appearing at page one of the record.

Original signed by: February 19, 2003
Donald Hale
Adjudicator