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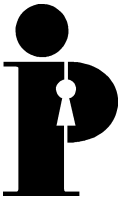

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Introduction

With the assistance of MBS staff, Chris and I have identified a number of subject areas for discussion today. Each of these address areas of current interest where our jurisprudence has or is evolving. We have included these subject areas in order to bring you up to date on the current thinking of the IPC and the Courts with respect to each issue. We welcome your questions and comments and hope to be able to address your concerns about each of these issues this afternoon. The written materials which I have provided to you will also be available on the IPC Web site at www.ipc.on.ca.

1. Recent Decision of the Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner,)* [2001] O.J. No. 3223 (C.A.)

On August 8, 2001, the Court of Appeal for Ontario released its reasons for judgment in three appeals brought by the Attorney General, the Solicitor General and the Minister of Correctional Services from decisions of the Divisional Court which in turn upheld the IPC's determinations on the labour relations exclusions at section 65(6) of the *Act* (the Bill 7 amendments).

In unanimous reasons delivered by Madame Justice Simmons, the Court allowed the appeals, reversed the Divisional Court judgments and quashed the IPC's orders holding that records in the three cases were not excluded from the *Act* because of the operation of section 65(6). The records at issue in the three cases consisted of:

(a) documents relating to a six year old police complaints file;

(b) a completed and unchallenged job competition; and

(c) the ranks and educational levels of former chiefs of police now serving with the OPP.

In each case, the IPC had found that the Ministry had failed to show the existence of a current or reasonably anticipated dispute or other matter having the capacity to affect its legal rights or obligations.

The Court of Appeal's decision has three significant elements. First, it reversed the Divisional Court's holding that the standard for review for the IPC's section 65(6) determinations is reasonableness. The Court agreed with the Ministries that the appropriate standard of review is the higher one of "correctness". The principle basis for the Court's decision in this respect is that by excluding the application of the *Act*, the Legislature intended that there should be no "delicate balancing" between access and privacy rights in relation to section 65(6) records and, therefore, no role for the IPC's particular expertise in interpreting this provision.

Secondly, the Court found that the IPC was incorrect in interpreting section 65(6) in the following two respects:

(a) by restricting the meaning of the term "interest" in section 65(6) to a "legal interest", i.e., one having the capacity to affect an institution's legal rights or obligations; and

(b) by introducing a time element into sections 65(6)1 and 3 "when none exists."

The Court said that the words "in which the institution has an interest" simply refer to matters involving the institution's own work force, and in that respect are similar in effect to the references found in sections 65(6)1 and 2 to the phrase "employment of a person by an institution". The Court also found that the IPC erred in taking a "purposive" approach to the Bill 7 amendments whereby the IPC, drawing on the long title of the Bill 7 legislation which read "to restore balance and stability to labour relations", examined whether the proceedings giving rise to the creation of the records were current, anticipated or in the reasonably proximate past such that disclosure could lead to the "imbalance and instability" referred to in the long title of the legislation.

The Court took the view that section 65(6) incorporates a time sensitive element unlike that in the IPC interpretation. The Court views the situation much differently in that the records become excluded under section 65(6) at the moment that they are "collected, prepared, maintained or used" by an institution. In addition, the Court took the position that once records are excluded, they remain so. The Court stated that the purpose of a statute does not mandate the introduction of time sensitive language in a statute that is otherwise clear. The Court found support for this conclusion in the practical sense that it makes for the administration of the *Act*. It said that when the IPC's interpretation is applied to the notice, retention and disposal provisions in the *Act*, would require institutions to continually review their records on an ongoing basis to assess the applicability of the *Act* and that one would not expect this result in the absence of clear language.

Costs were not awarded against the IPC in this case. IPC Counsel and senior staff are examining the decision carefully in order to determine whether to bring an application for leave to the Supreme Court of Canada. The deadline for bringing such an application is October 6, 2001.

2. Issues Surrounding Access to the Personal Information of Deceased Persons Under *MFIPPA* Section 54(a) and *FIPPA* Section 66(a)

Who is the "Personal Representative" of the Deceased?

Under section 66(a), a requester is able to exercise the deceased's right to request access to the deceased's personal information if he/she is able to demonstrate that:

1. he/she is the "personal representative" of the deceased; and
2. the request for access relates to the administration of the deceased's estate.

The term "personal representative" used in section 66(a) is not defined in the *Act*. However, section 66(a) relates to the administration of an individual's estate and the meaning of the term must be derived from this context.

In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a), the provision in the municipal *Act* which is the equivalent to section 66(a), and came to the following conclusion:

> … I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

The rights of a personal representative under section 66(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.

In Order M-1075, it was established that in order to give effect to the rights established by section 54(a), the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that she is the deceased's personal representative for the purposes of section 66(a), but also that she requires access to the records for the purposes of exercising her duties as a personal representative. To do this, the appellant must first provide evidence of her authority to deal with the estate of the deceased. As set out in the Notice of Inquiry, the production by the appellant of letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters probate under the seal of the proper court would be necessary to establish that she has the requisite authority.

The term "personal representative" of the estate was defined by the Divisional Court in *Adams v. Ontario (Information and Privacy Commissioner)* 1996, 136 D.L.R. (4th) 12 at 17-19 where Madame Justice Feldman stated:

> Although there is no definition of "personal representative" in the *Act*, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:
>
> > 1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.
> >
> > …

> … I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

Does the Request Relate to the Administration of the Deceased's Estate

In Order M-1075, Assistant Commissioner Tom Mitchinson made the following statements about the second requirement of section 54(a):

> The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the *Act*, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.
>
> In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

In Order M-919, former Adjudicator Fineberg reviewed the definition of the term "administration of estates" and the various activities that fall within the broad category of estate administration in order to first determine whether the appellant in that case qualified as "an administrator with the power and authority to administer the deceased's estate":

> *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), p.44 defines the term "administration of estates" as follows:
>
> > **Administration of estates.** The management and settlement of the estate of an intestate decedent, or of a testator who has no executor, performed under the supervision of the court, by a person duly qualified and legally appointed, and usually involving: (1) the collection of the decedent's assets; (2) payment of debts and claims against the estate; (3) payment of estate taxes; and (4) distribution of the remainder of the estate among those entitled thereto. The administration of an estate runs from the date of an individual's death until all the assets have been distributed and liabilities paid. Such administration is conducted by an administrator or an executor.

The *Black*'s definition goes on (at p.45) to list 13 different types of estate administration. Included in the list are the following:

> *Ad prosequendum*. An Administrator appointed to prosecute or defend a certain action … or actions in which the estate is concerned.
>
> *General administration*. The grant of authority to administer upon the entire estate of a decedent, without restriction or limitation, whether under the intestate laws or with will annexed.
>
> *Special administration*. Authority to administer upon a few particular effects of a decedent, as opposed to authority to administer his whole estate.

Thus, at law there are various types of administrators of an estate. It is clear that there may be more than one administrator of an estate, and that there are a wide variety of powers and responsibilities that may be given to an administrator. It seems that the typical administrator would be referred to as the "general administrator", and would have an unlimited authority to "administer upon the entire estate". On the other hand, some administrators, such as the special administrator, have a limited power to deal only with certain matters respecting the estate.

In Order MO-1449, Adjudicator Laurel Cropley made the following finding with respect to the limitations on various types of administrators for the purposes of section 54(a):

> In my view, each of these various types of administrators can be considered, in their particular roles, to be "administering" the estate. Thus, for example, the administrator *ad prosequendum*, as defined above, (the equivalent of the "litigation administrator" in the Ontario context) can be said to be "administering the estate", albeit in a limited fashion, to the extent that he or she is defending or prosecuting an action on behalf of the estate.
>
> In my opinion, this interpretation is consistent with the Divisional Court decision in *Adams*, since the court in effect acknowledged that pursuing an action on behalf of an estate constituted part of the administration of an estate. At p.19 the court stated:
>
> > The executor may require certain financial information for the administration of the estate, or even personal information in order to pursue a lawsuit on behalf of an estate.
> >
> > …
>
> Given that a personal representative, in this case an administrator, may have a wide range of different powers and/or duties, one must take into account the precise powers and duties vested in the particular administrator in order to determine the meaning of the phrase "administration of the estate".

She then went on to find that:

> I accept that a trustee may require both financial and non-financial information in order to wind up an estate. However, I also agree with Assistant Commissioner Mitchinson's comments in Order M-1075, and find that the phrase "relates to the administration of the estate" within the context of the *Act* must be read narrowly. Applying these principles here, I do not accept the appellant's arguments that this section should be construed so broadly as to contemplate that as part of the process of winding up the estate, the "fiduciary obligation" of the trustee would require that the appellant be able to access all information in the custody of the Police relating to her deceased brother (points one and two above).
>
> In this regard, I agree with the Police. Had the *Act* intended that a personal representative have full and unfettered access to information about the deceased, it would have indicated as much. Rather, as many previous orders have noted, a combined reading of section 2(2) and the wording of section 54(a) indicates that a deceased individual retains his or her privacy rights, except insofar as the personal information is required in order to wind up the estate.

In situations where the requester does not qualify under *MFIPPA* section 54(a) or *FIPPA* section 66(a), the requester stands in no better position to exercise access than a stranger would. In this situation, the institution must then determine whether the requester is entitled to access to the deceased's personal information using the personal information/invasion of privacy exemptions in *MFIPPA* sections 14(1) and 38(b) and *FIPPA* sections 21(1) and 49(b).

Access In Situations Where Sections 14(1) or 21(1) and/or 38(b) or 49(b) Apply to the Personal Information of the Deceased Person

Order PO-1936, a recent decision of Assistant Commissioner Mitchinson, offers a detailed and thorough analysis of the application of the invasion of privacy exemptions to situations where the personal information of deceased persons is at issue. The requester sought access to the personal information of deceased former nationals of the state of Croatia on behalf of potential heirs located there from the Office of the Public Guardian and Trustee.

In this decision, Assistant Commissioner Mitchinson first evaluates the possible application of the presumptions in section 21(3) to the personal information contained in the records, concluding that some of the information falls within the ambit of one or more of the presumptions. He then goes on to evaluate the application of a number of listed and unlisted considerations under section 21(2), weighing the significance of each and describing the weight being afforded to the factors in balancing the appellant's right of access against the deceased person's right to privacy.

The decision contains a detailed examination of the unlisted factor under section 21(2) which has been described as a "diminished privacy interest after death". Although in substantial agreement with the decision of former Commissioner Tom Wright in M-50, he finds that this consideration should be "applied with care", given the wording of the section.

He also evaluates another unlisted factor referred to as the "benefit to unknown heirs" which may accrue as a result of the disclosure of the information at issue in the appeal. Ultimately, the Assistant Commissioner finds that this consideration is a relevant one which favours the disclosure of at least some of the information contained in the records at issue.

I urge you to take a close look at this decision to assist you in performing the balancing of interests exercise inherent in a situation where there are competing and compelling arguments favouring privacy protection and the disclosure of information under section 21(2).

3. Avoiding An Absurd Result

Again, I will refer to Order MO-1449, a decision of Adjudicator Cropley which very succinctly evaluates the jurisprudence from the Commissioner's office with respect to the concept of "avoiding an absurd result". She held that:

> In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied in a number of subsequent similar orders of this Office and has been extended to include, not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (eg. MO-1196, P-1414 and PO-1679).

Adjudicator Cropley went on to find that:

> In Order MO-1323, I had occasion to consider the rationale for the application of the absurd result:
>
> > As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.

> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

I stated further in that order:

> In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

In Order MO-1323, Adjudicator Cropley also considered the rationale for the application of the absurd result:

> As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
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…

The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

In conclusion, it is difficult to draw a line in cases involving personal information where that information may be known to the requester. In situations where the requester provided to the information, it seems more likely that the "absurd result" scenario will be applied. In situations where it is less clear whether the requester was present when it was supplied or whether the information is within his or her knowledge, care must be taken to ensure that all of the evidence and facts surrounding the taking of the information are known to the decision maker. In situations where it is not clear, it seems reasonable that one should err on the side of privacy protection, particularly in light of the types of personal information which often are the subject of these types of requests.

4. Fee Waiver – The Standard of Proof

Introduction

Sections 48(1)(c) and 57(1) of the *Act* require an institution to charge fees for requests under the *Act*. Section 57(4) requires an institution to waive fees in certain circumstances. More specific provisions regarding fees and fee waiver are found in sections 6 through 9 of R.R.O. 1990, Regulation 460. The IPC may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

Fee waiver

On an appeal of a fee waiver decision, the Commissioner may either confirm or overturn the decision based on a consideration of the criteria set out in section 57(4) of the *Act*. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Factors for the IPC to consider in reviewing a decision to deny a fee waiver request include:

- the extent to which the actual cost of processing, collecting and copying the records varies from the amount charged by the institution;
- whether the payment will cause financial hardship for the requester;
- whether dissemination of the records will benefit public health or safety;
- whether the requester is given access to the records;
- if the amount charged is under $5, whether the amount of the payment is too small to justify requiring payment.

In addition to the above, section 57(4) of the *Act* also requires consideration of whether it would be "fair and equitable" to waive the fee. Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors, set out in Order M-408, are:

- the manner in which the institution attempted to respond to the appellant's request;
- whether the institution worked with the appellant to narrow and/or clarify the request;
- whether the institution provided any documentation to the appellant free of charge;
- whether the appellant worked constructively with the institution to narrow the scope of the request;

- whether the request involves a large number of records;
- whether or not the appellant has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

Where dissemination of information for the benefit of public health and safety may be a relevant factor:

1. Whether the subject matter of the record is a matter of public rather than private interest;
2. Whether the subject matter of the record relates directly to a public health or safety issue;
3. Whether the dissemination of the record would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue.
4. The probability that the requester will disseminate the contents of the record.[Order P-474]

In Order PO-1909, I reviewed the principles first enunciated by former Assistant Commissioner Irwin Glasberg in Order P-474 in which he examined the wording of the Williams Commission Report and former Commissioner Sidney B. Linden's Order 2. In that decision, I analysed in some detail each of the relevant considerations present in the request for a fee waiver. In that case, the request came from a prominent environmental organization with a long history of publicizing their findings and making use of the information received through FOI requests in a responsible and public-interest-minded way. This type of case, along with that in P-1557, require an evaluation of who the requester is and their bona fides in order to determine whether the fee waiver would be fair and equitable in the circumstances.

In a very well-crafted and readable decision dated June 14, 2001, Order 2001-017, Alberta Information and Privacy Commissioner Bob Clark evaluates a request for a fee waiver made by an MLA seeking certain environmental records held by the Alberta Environment Ministry. This decision contains a well-reasoned summary of the thinking that lies behind a decision on fee waivers and I would urge you to look at it.

It is less clear in situations where private individuals are seeking records which are personal to them and where there exists no real public interest in their disclosure. Again, each of the "fair and equitable" considerations must be examined after determining whether the section 57(4) and section 8 (of Regulation 460) factors apply. The appellant bears the onus of demonstrating that a fee waiver is justified and does so only be providing cogent, admissible evidence to substantiate the position they've taken. If they are relying on the financial hardship consideration, they must produce

evidence to verify that payment will cause a financial hardship. This would normally be proven by supplying some evidence of their financial circumstances including income, expenses and also a consideration of the amount of the fee which is the subject of the fee waiver request. Again, parties who take a position, including a request for a fee waiver, must expect to be asked by an institution for some evidence of their own financial situation, in order to verify the hardship which they allege.

5. The Public Interest Override

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant.

In Order MO-1433-F, Assistant Commissioner Mitchinson referred to his decision in PO-1705, in which he identified the balancing that must be done when reviewing the purpose of the personal information exemption:

> It is important to note that section 21 [the equivalent to section 14 found in the provincial *Freedom of Information and Protection of Privacy Act*] is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

Adjudicator Laurel Cropley elaborated on this question in Order MO-1254, where she stated:

> Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.
>
> Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature … the effect of the proposed exemption is to tip the scale in favour of non-disclosure".

Donald Hale, Adjudicator
September 13, 2001