DATE: November 8, 2002
DOCKET: C38093

COURT OF APPEAL FOR ONTARIO

RE: **ATTORNEY GENERAL FOR ONTARIO (Applicant/ Appellant) – and – IRENA PASCOE, ADJUDICATOR, JOHN DOE, REQUESTER and JOHN Q. DOE, AFFECTED PERSON (Respondents/Respondents in appeal)**

BEFORE: **MORDEN, DOHERTY and FELDMAN JJ.A.**

COUNSEL: **Elaine Atkinson for the appellant**

Peter M. Jacobsen for the respondent/requester

Christopher D. Bredt and Rema J. Imseis for the respondent Information and Privacy Commissioner

HEARD: **November 5, 2002**

On appeal from the decision of the Divisional Court dated December 17, 2001.

E N D O R S E M E N T

[1] The appellant's basic submission is that the Divisional Court erred in its review of the Commissioner's decision that the record in question did not contain "personal information" within the meaning of this term in s. 2(1) and s. 21 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Specifically, the appellant submits that the Divisional Court erred in holding that "detailed and convincing evidence" was required to establish that the affected person was identifiable within the meaning of the term "personal information" in s. 2(1) of the Act.

[2] There are two relevant and important matters that are not in dispute. The first relates to the substantive test which should be applied, which the Commissioner set forth in her reasons. It is:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

[3] The second relates to the applicable standard of review to be applied by the Divisional Court. It is that of reasonableness. This was accepted by the Divisional Court.

[4] Further, it is agreed that the onus is on the Ministry on the question of whether the information was "personal information". The appellant submits that the "detailed and convincing"

test applied by the Divisional Court in its review of the Commissioner's decision is unreasonably high. At this point, we observe that the Commissioner herself did not use the "detailed and convincing" expression. She merely said that, on the material before her, she was "not persuaded" or "not satisfied" that the information in question was personal information.

[5] We note that the impugned formulation of the test has been used to express the onus to bring a case within one of the exemptions in the Act (see ss. 12-23), and that in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, (1998) 41 O.R. (3d) 464 at 476 (C.A.) it was held that these words have been used by the Supreme Court of Canada "to describe the quality of evidence required to satisfy the burden of proof in civil cases."

[6] Notwithstanding this latter point, having regard to the substantive test of what is "personal information", referred to in paragraph 2 above, we think that reference to an evidentiary standard of "detailed and convincing evidence" is too demanding to be realistically appropriate. What is required to satisfy or persuade the Commissioner, on the balance of probabilities, will depend on the circumstances of a case and the issues arising in it.

[7] Having regard for the record before the Commissioner, we do not think that in the present case the formula used in the Divisional Court's reasons resulted in any material error. There was a distinct paucity of evidence before the Commissioner on which she could be satisfied or persuaded that the substantive test had been met. Accepting that the proper standard of review on application for judicial review is that of reasonableness, we are satisfied that her decision that the information in question was not personal information could not be said to be unreasonable.

[8] The appeal is dismissed. Neither the appellant nor the respondent Commissioner seeks costs. The respondent requester is entitled to his costs of the appeal payable by the appellant. Submissions on his behalf respecting quantum should be delivered within seven days and the appellant should deliver its response to them within five days of their receipt.

"J.W. Morden J.A."
"D. Doherty J.A."
"K. Feldman J.A."