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

ORDER MO-1366

Appeal MA-990197-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request from a member of the media under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an electronic list of donors who had made contributions to the campaigns of candidates in the 1997 municipal election.

The City denied access pursuant to section 15(a) of the *Act* (information published or available). In its decision letter, the City stated:

> Hard copies of the records relating to campaign contributions are required to be filed with the City Clerk, and, in accordance with municipal elections legislation, are maintained as a public record of personal information.

The City also advised the requester of the specific location he could attend and review the records.

In its decision letter, the City referred to section 88(5) of the *Municipal Elections Act* (the *MEA*) which provides, in the City's words: "only for the documents and materials to be inspected by any person at the clerk's office at a time when the office is open". The City reminded the requester that he had already attended at the specified location, reviewed certain records, and had been provided with copies, at his request.

The City acknowledged in its decision letter that it has an electronic copy of the requested information, which is maintained for administrative purposes. The City pointed out to the requester that this electronic record was not created nor maintained as a public record of personal information.

Although not specifically claimed, the City also alluded to the application of section 14(1) of the *Act* (invasion of privacy) with respect to personal information in electronic format. In this regard, the City stated:

> Personal information in electronic form may be manipulated, used and disclosed far beyond the purposes for which the original information has been established as a public record of personal information. Disclosure of an electronic copy of the record would constitute disclosure to the world in that no further requests from anyone could be denied. Should that occur, the institution would have no control over this database of personal information. It could be posted on the Internet or be used to create a wide variety of mailing lists for various purposes. For these reasons, only the original copies of records filed with the Clerk pursuant to the *MEA* are identified as public records of personal information.

The requester (now the appellant) appealed the City's decision to deny access to an electronic version of the requested record.

Mediation was not successful, and the appeal moved to the inquiry stage. A Notice of Inquiry was initially sent to the City, and the City submitted representations. The Notice was then sent to the appellant, along with the City's representations. The appellant submitted representations which included reference to section 16 of the *Act*, the public interest override. The City was then given an opportunity to provide reply representations, which it did.

RECORDS:

The record at issue consists of an electronic list of campaign donors in the 1997 election, including the names and addresses of each donor, the amount of the contribution, the candidate and the amount of the rebate to each donor.

DISCUSSION:

PURPOSES OF THE ACT

Section 1 of the *Act* outlines the purposes of the statute, including the following principles from section (b) which govern the right of access to government held information:

> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific,
>
> ...

Section 1(b) identifies another purpose of the *Act*:

> 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.

I will bear these principles in mind in disposing of the issues in this appeal.

BACKGROUND

For the purpose of the discussion that follows, it is helpful to identify the differences between the requested record and the records which are currently available to the public under the provisions of the *MEA*.

The appellant and the City both agree that records are available to the public under the *MEA* which contain some of the information sought by the appellant. Specifically, the *MEA* requires that, in addition to other materials, the records of campaign contributions and campaign financial statements filed with the clerk must be made available for public inspection. Both the City and the appellant have provided me with samples of the types of information available to the public under the *MEA*. The sample provided by the City is a "Financial Statement and Auditors's Report". It contains detailed financial information related to the campaign of a municipal councillor, including an alphabetical summary listing of the names, addresses and contribution amounts of the individuals

who contributed to that candidate's campaign. The report, as well as the individual contribution forms summarized in the report, are available for routine inspection and copying.

The appellant's sample consists of lists of individual contributors to the campaigns of three municipal candidates. The lists were viewed and copied by the appellant in the manner identified by the City. The appellant points out that there were 55 constituencies in the City at the time of the 1997 election, each with a number of candidates, so the overall number of contribution lists is voluminous.

The City explains that the clerk has responsibility to issue rebates to all contributors who apply for one. In order to administer this rebate program, the City has created an electronic database. This database contains the names, addresses and financial contributions of individual contributors to candidates in the 1997 election, as well as the amount of the permitted rebate, and whether or not application for a rebate was made. The database also contains the names, addresses and telephone numbers of the respective candidates. This electronic record is the subject of this appeal.

The appellant raised a preliminary issue concerning the interpretation of section 88(5) of the *MEA*. In his view, this section precludes the City from denying access to the record. I will address this issue in my discussion of section 14(1)(d) of the *Act*.

INFORMATION PUBLISHED OR CURRENTLY AVAILABLE

Section 15(a) reads as follows:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

The City submits that the information contained in the record is available for public inspection. In support of its position, the City summarizes the process by which members of the public can attend and view hard-copy records located in the Clerk's department at the North York Civic Centre. Members of the public can visit the offices during regular business hours and can view and copy these records.

The City points out that the requirement to make these records available to the public is found in the *MEA*, and that the arrangement put in place by the City for inspection of the records constitutes a regularized system of access as contemplated in section 15(a) of the *Act*. Among the records available through this system is an alphabetical listing of the individual contribution forms.

In the City's view, section 15(a) does not require that a particular record be available to the public, only that the "information contained in the record" is available.

The appellant acknowledges that the information identified by the City is available to the public through the processes described by the City. However, he points out that the request is for the electronic record created by the City for its rebate program, not the individualized hard-copy records. In that regard, the appellant states:

> ... the "record" which is sought is not published or currently available to the public, as the City is refusing to provide the electronic record. While much of the "information" may be available, it is not available in an identical form, or a convenient form for use by the appellant. Indeed, the actual electronic record sought by the appellant contains more information than that which is included in the lists submitted by the candidates ...

In the alternative, the appellant submits that:

> ... [the *Act*] should be interpreted in a manner consistent with the context of the late 1990's, when much information in government is contained in electronic form, and that its usefulness to the public derives from the fact that it is in electronic form. It is inconsistent with the purpose of the legislation for government to deny access to information in electronic form simply on the basis that it already provides access to data in hard copy form, where it is apparent that denying access to electronic data frustrates an objective of public access, namely, scrutiny of public institutions - especially when the institution is municipal government and the subject matter is the democratic process itself.

This Office has reviewed the application of section 15(a) of the *Act* and the equivalent section 22(a) of the provincial *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) in the past. In Order P-1114, I stated that the intent of this exemption is to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*. In Order P-327, I explained that for the exemption to apply, the record, or the information contained in it, must either be published or available to members of the public generally, through a regularized system of access, such as a public library or a government publications centre.

This Office has also addressed the issue of access to records in electronic format in circumstances where records or information contained in the records are available to the public in a different manner. In Interim Order P-1281, a requester asked the Ministry of Consumer and Commercial Relations for access to a database containing information gathered from a business registry administered by that Ministry. Individual registrations could be accessed by the public on a record-by-record basis upon payment of a fee. The Ministry argued that the requested information was publically available, and that section 22(a) of the provincial *Act* applied. In that order, I found that the information which responded to the request was the entire database, and went on to state:

> In my view, directing the appellant to the individual record-by-record search facility provided to access portions of the database containing business data of specific business registrants does not provide him with access to the requested information. Not only is the public access limited to searches by individual business identifiers to specific pieces of information, as opposed to the collection of the relational data elements, but it is also clear from the Ministry's submissions that the third component part of the database, the software programs has never been publicly available.
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> As I stated in Order P-327 in discussing the application of section 22(a):
>
> > In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act.
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> (See also Order 170)
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> For the reasons I have outlined, I find that the alternative system of access established by the Ministry will not provide the appellant with access to the information which responds to his request, and the section 22(a) exemption does not apply...

In Order P-1316, former Commissioner Tom Wright dealt with the application of section 22(a) to assessment role information, which was available to the public through a particular system of access. He stated:

> The record which is responsive to the appellant's request is the compilation of assessment roll information from all the municipalities in the region of Ottawa-Carleton. In my view, referring the appellant to the individual municipalities will not satisfy the appellant's request. No one municipality has the compilation. Accordingly, the Ministry of Finance has failed to establish that the requested record or the information contained in the record is "published or available to the public" through this source. Therefore, the section 22(a) exemption does not apply with respect to viewing or obtaining hard copies of the assessment roll at each municipality.

Each appeal has its own particular fact situation. In the present appeal, contribution lists for each candidate have already been compiled and are publicly available, so it is not necessary for a requester to review each individual entry to obtain the information. However, based on the information provided to me by the City, I am satisfied that the electronic database prepared to administer the rebate program contains more information than the publicly available documents. Specifically, in addition to the information culled from the individual candidate registration forms

and alphabetical listings, the database contains the amount of the permitted rebate, and whether or not application for a rebate was made. It is also important to note that the information is in an electronic format.

The information which responds to the appellant's request is the electronic record of the contributors in the database maintained for the purposes of the rebate program. In my view, directing the appellant to the hard-copy materials available through the clerk's office on a record-by-record, or candidate-by-candidate search basis does not provide him with access to the requested information. Accordingly, I find that the alternative system of access referred to by the City will not provide the appellant with access to the information he seeks, and the section 15(a) exemption does not apply in the circumstances of this appeal.

PERSONAL INFORMATION

Personal information is defined in section 2 of the *Act*, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) ... information relating to financial transactions in which the individual has been involved,
>
> (d) the address, telephone number, ... of the individual,
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The record contains the names and addresses of individuals who made campaign contributions during the last municipal election, the amount of the contribution and permitted rebate, together with information as to whether or not application had been made for a rebate. I find that this constitutes the personal information of the contributors as defined in the *Act* (Order M-1154).

The record does not contain any personal information of the appellant.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 14(1) of the *Act* prohibits the disclosure of this information except in certain circumstances.

In this appeal, the parties have referred to the possible relevance of sections 14(1)(c), (d) and (f) of the *Act*.

Section 14(1)(c)

Section 14(1)(c) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > personal information collected and maintained specifically for the purpose of creating a record available to the general public;

The City addresses the section 14(1)(c) issue as follows:

> The database was not created or maintained for the purpose outlined in section 14(1)(c). It was created solely for the purpose of administering the rebate program. The hard copies of the financial statements and contribution forms are maintained for the purpose of creating a record available to the public pursuant to the *MEA*.

The City adds that:

> Copies of individual's rebate applications are not available for public inspection as they are not collected or maintained as a public record of personal information under the *MEA* or under a municipal by-law. The completed rebate application forms are not election records and do not fall within the categories of election records identified in the *MEA*. ...
> ...
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> ... The [City's] position is that the database was not created to administer the *MEA* but to administer a program established under a municipal by-law. The application forms and the database are, therefore, not made available for public inspection in order to respect the privacy rights of rebate applicants.

The appellant's representations do not focus on the section 14(1)(c) exception, but do include the submission that:

> ... a necessary consequence of creating the database for purposes of administering the *MEA* is its accessibility to the public. Section 88(5) [of the *MEA*] expressly authorizes the disclosure of materials prepared by the clerk under the Act and there is no basis for asserting, as the City does in its submissions, that this does not apply to this "administrative database".

I will address the appellant's argument regarding the interpretation of section 88(5) of the *MEA* under my discussion of section 14(1)(d).

The appellant also submits that section 14(1)(c) applies "... as, by implication, the record is collected and maintained for the purpose of creating a record available to the general public".

This Office has examined the application of section 14(1)(c) of the *Act* and the equivalent section 21(1)(c) of the provincial *Act* on a number of occasions. In Order PO-1736, Senior Adjudicator David Goodis stated:

> In previous orders this office has stated that in order to satisfy the requirements of section 21(1)(c), the information must have been collected and maintained specifically for the purpose of creating a record available to the general public (for example, Order P-318). Section 21(1)(c) has been found to be applicable where, for example, a person files a form with an institution as required by a statute, and where that statute provides any member of the public with an express right of access to the form (Order P-318, regarding a Form 1 under the *Corporations Information Act*). On the other hand, this office has found that where information in a record may be available to the public from a source other than the institution receiving the request, and the requested information is not maintained specifically for the purpose of creating a record available to the general public, section 21(1)(c) does not apply. For example, in Order M-170, former Commissioner Tom Wright stated the following with respect to records in the custody of a police force:
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> > The various witness statements and the officer's statement were prepared and obtained as part of a police investigation into a possible violation of law. In my view, the specific purpose for the collection of the personal information was to assist the Police in determining whether a violation of law had occurred and, if so, to assist them in identifying and apprehending a suspect. The records are not currently maintained in a publicly available form, and it is my view that section 14(1)(c) [the municipal equivalent to section 21(1)(c) of the *Act*] does not apply.
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> Similarly, in Order M-527, former Adjudicator Holly Big Canoe stated:
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> > In my view, while some of the same personal information may be available elsewhere, the specific purpose for collecting and maintaining this personal information was to investigate the accident, not to create a record available to the general public, and section 14(1)(c) does not apply.

I recently applied this line of reasoning in Order PO-1786, where I examined the application of section 21(1)(c) to information relating to properties sold by the Ontario Realty Corporation (the ORC) over a specified period of time. I found as follows:

> I agree with the conclusions in Order PO-1736 and the other authorities cited and, in my view, the circumstances of this appeal present a similar situation. Although the information may be available in transfer documents registered under the Land Registry system, that service is operated by [the Ministry of Consumer and Commercial Relations], a separate institution, and the information is in a very different form. As previously noted, the ORC's records are in the form of lists. Unlike the Land Registry system, which provides access to the registered documents pertaining to all real property in the province, the lists created by the ORC contain selected information about a particular class of properties, namely those which have been sold by the Ontario government.

Sections 27 of the *Act* and 37 of the provincial *Act* exclude the privacy protection provisions of the *Act* for personal information contained in publicly available records. The language of these sections is similar to that found in sections 14(1)(c)/21(1)(c), and past interpretations of sections 27/37 are useful to consider in the context of this appeal. Section 27 provides:

> This Part [Part II] does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

Investigation Report I94-011P states:

> It is our view that, if applicable, section 37 excludes personal information from the privacy provisions of Part III of the [provincial *Act* - Part II of the municipal *Act*] only if the information in question is held by the institution maintaining it for the express purpose of creating a record available to the general public. Other institutions cannot claim the benefit of the exclusion for the same personal information unless they, too, maintain the information for the purpose of making it available to the general public. In our view, this interpretation is not only reasonable, but also in keeping with one of the fundamental goals of the *Act*, namely "to protect the privacy of individuals with respect to personal information about themselves held by institutions." In the circumstances of this case, it cannot be said that the Ministry [of Northern Development and Mines] was maintaining the complainant's personal information (that was later disclosed in the Minister's letter) specifically for the purpose of creating a record available to the general public. Accordingly, section 37 of the *Act* did not apply.

This Office has considered the issue of publicly available records and information in several other previous orders as well. Information contained in police daily arrest sheets (Order M-849), dockets listing daily matters being heard under the *Police Services Act* (Order M-1053), a list of all doctors registered with the College of Physicians and Surgeons of Ontario (Order P-1635) and a list of the names and addresses of all persons licensed to drive in the province of Ontario (Order P-1144) have all been found to not satisfy the requirements of sections 14(1)(c)/21(1)(c).

Many previous orders examine situations where personal information has been collected and maintained by one institution, and whether section 14(1)(c) then applies to that information when it was in the hands of another institution. That is not the situation in the current appeal, where the information is collected and maintained by the same institution and, in fact, the clerk's department maintains both the information which is available to the public, and the electronic database which is the subject of this appeal. However, in my view, there is a clear distinction between the record maintained by the clerk for the purpose of making material available to the public under the *MEA*, and the electronic record maintained for the purpose of administering the rebate program. The electronic record contains more personal information and is maintained in order to administer the City's rebate program, not in order to discharge public accountability obligations under the *MEA*. Consequently, in these circumstances, I am satisfied that the information which is contained in the electronic database is not maintained by the clerk specifically for the purpose of creating a record available to the public, and the section 14(1)(c) exception does not apply.

My finding regarding section 14(1)(c) is also supported by a different line of reasoning.

In Investigation PC-980049-1, Commissioner Ann Cavoukian examined the provisions of section 37 of the provincial *Act* to determine whether or not certain personal information was made available to the public under the provisions of the *Registry Act*, the *Land Titles Act* and the *Land Registration Reform Act*. These statutes require certain records to be made publicly available, and the Commissioner found that there was a statutory requirement to make the individual records available to the public. Commissioner Cavoukian also noted that these statutes specifically provided for the availability of records in electronic form, and found that electronic records also fit within section 37. However, she went on to state:

> The situation is more complex when it involves "bulk" access to this personal information, or when an institution is considering the disclosure of information such as the operating system or the software programs relating to a particular database. Previous Orders of the office articulate these complexities.

Commissioner Cavoukian proceeded to discuss the orders which have addressed these issues. Later in the investigation, she examined the application of section 37 of the *Act* in the context of disclosure of certain microfilm records as follows:

> As stated previously, it is our view that under section 37 of the *Act*, personal information that is maintained by an institution may be excluded from the application of Part III of the *Act* only if the personal information is maintained by that institution specifically for the purpose of creating a record which is available to the general public. Other institutions cannot claim the exclusion unless they also maintain the personal information for this purpose.
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> We have already concluded that the personal information contained in individual land registration records, either in paper, **microfilm** or electronic format, is maintained at the Land Registry Offices for the purposes of creating a record that is

available to the general public [emphasis added]. However, we have also indicated that a number of previous orders of this office have dealt with situations involving "bulk" access to personal information [Orders P-1114, P-1144 and P-1281]. Such situations are more complex and raise unique considerations.

As discussed, the reasons that the personal information contained in individual land registration records, which are maintained at the Land Registry Offices, is considered to be "maintained for the purpose of creating a record that is available to the general public" are that these records meet certain criteria of public availability, such as:

- the Land Registry personnel have a statutory duty to make this information available to the public;

- at these Land Registry Offices, there is a regularized system of access to the information on a record-by-record basis; and

- at these Land Registry Offices, a standardized fee is charged to all persons seeking access.

Since the information in question is available only one record at a time , there is also a practical limit to the ability of recipients to obtain and possibly abuse the personal information in the documents.

The Ministry has not, however, provided us with any information to suggest that the microfilms in question are being made available by the Land Registry Offices in bulk to members of the public. On the contrary, in its original submissions the Ministry explains that "all information contained in the land registration documents, plans and records is available for review on a record-by-record basis". Therefore, it does not appear that "bulk" access is provided to users of the information.

The bulk disclosure of the personal information in the microfilms to the [Ontario Property Assessment] Corporation does not conform to the criteria set out above. The Land Registry personnel do not appear to have a statutory duty to make the microfilms available in bulk to the public, nor does there appear to be a regularized system of bulk access to the microfilms. Accordingly, it is our view that the personal information contained in the microfilmed records, which are being disclosed in bulk to the Corporation, is not maintained for the purposes of creating a record that is available to the general public. Therefore, the Ministry cannot claim the exclusion in section 37 of the *Act* in these circumstances.

I agree with the rationale set out by Commissioner Cavoukian. The information contained in the electronic record at issue in this appeal is stored in bulk form. Although much of the information available to the public is also available in the form of lists, the electronic record, in addition to containing more information, is a bulk compilation of these lists. In my view, the fact that the

requested record contains all of the information in bulk form also distinguishes it from the records which are made available to the public through the *MEA*.

In summary, I find that the personal information contained in the record is not "collected and maintained" by the clerk specifically for the purpose of creating a record available to the general public because: (1) the clerk maintains the electronic database for the specific purpose of administering the rebate program; and (2) the personal information contained in the electronic record exists in bulk form.

Accordingly, I am satisfied that the electronic database itself is not a record which is collected and maintained for the purpose of creating a record available to the public, and section 14(1)(c) of the *Act* does not apply.

Section 14(1)(d)

Section 14(1)(d) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > under an Act of Ontario or Canada that expressly authorizes the disclosure;

Previous orders of this Office have found that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the *Act* closely mirrors the interpretation of similar wording in section 28(2) of the *Act* and its counterpart, section 38(2) of the provincial *Act* [Orders M-292 and M-484 (reversed on other grounds on reconsideration in Orders M-787) and M-1154]. Investigation I90-29P, established the interpretation of section 38(2) as follows:

> The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] *Act* requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

I agree with this interpretation and consider it the appropriate test to apply in this case.

The appellant submits that, based on section 88(5) of the *MEA*, the City has no basis upon which to deny access to the record.

Section 88(5) of the *MEA* states:

> Despite anything in the *Municipal Freedom of Information and Protection of Privacy Act*, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open.

The appellant submits:

> The appellant's position is that there is no basis for the City denying him access to the electronic version of the information. Indeed, the City's position that [the appellant] is only entitled to view the hard copy of the information is inconsistent with s. 88(5) of the *MEA*, which entitles [the appellant], "despite anything in the *Municipal Freedom of Information and Protection of Privacy Act"*, to inspect "documents and materials filed with *or prepared by the clerk"*. [emphasis added] Accordingly, there is no basis for the City to only permit [the appellant] to view (and copy in accordance with s. 88(7) of the *MEA*) the documents filed by the candidates, but not to view and copy the record "*prepared by the clerk"*, which happens to be in an electronic form.
> ...
>
> ... As the record sought is "prepared by the clerk" in accordance with obligations under the *MEA*, then it must be disclosed.

In response to the appellant's position, the City summarizes the requirements under the *MEA* to make records available to the public. It takes the position that there is no requirement under the *MEA* to make this information available in electronic form:

> Under the *MEA*, candidates are required to file certain documents with the Clerk and the Clerk is required to make them publically available for inspection at a time when the office is open. Personal information contained in campaign finance records would normally be protected by privacy legislation, however, the *MEA* specifically provides otherwise related to the personal information. It is submitted that all documents filed with the Clerk or prepared by the Clerk are publically available in accordance with section 88(5) of the *MEA*.

Further, the City states:

> There is no provision in the *MEA* which requires a municipal institution or a clerk to establish a rebate program or to disclose personal information relating to the management of the program in electronic form. The powers and duties of the Clerk and the requirements to both file documents with the Clerk and for the Clerk to prepare "documents and materials" are specifically provided for in the *MEA*. The application of section 88(5) is therefore limited to the "documents and materials filed with or prepared by the clerk" as set out in the provisions of the *MEA*.

The City refers to Order M-1154, in which Senior Adjudicator David Goodis addressed the issue of public inspection pursuant to section 88(5) of the *MEA* as follows:

> In my view, by enacting section 88(5) of the *MEA*, the Legislature clearly intended that municipalities should make available for inspection, to any member of the public upon request, any documents or materials filed with municipal clerks. Section 88(5) itself does not describe in detail the type of information to be disclosed. Nevertheless, by requiring candidates for municipal office under section 78(1) of the *MEA* and sections 10 and 11 of the Regulation to file prescribed forms which specifically describe the type of information to be provided, the Legislature and the Minister [of Municipal Affairs and Housing] have identified the information to be disclosed to the public with sufficient detail to satisfy the requirements of section 14(1)(d) of the *Act*.

The City also refers to the case of *Ford v. Cooper and City of London* [1958], O.R. 164 (H.C.), which addressed the question of whether certain documents and materials fell within section 234(1) of the *Municipal Act* in force at that time. That section reads as follows:

> Any person may, at all reasonable hours, inspect any of the records, books or documents mentioned in section 233 and minutes and proceedings of any committee of the council, whether the acts of the committee have been adopted or not, and the assessment rolls, voter's lists and other documents in the possession or under the control of the clerk, and the clerk shall, within a reasonable time, furnish copies of them, certified under his hand, to any applicant on payment at the rate of 10 cents for every 100 words or at such lower rate as the council may fix.

In deciding whether certain records fell within the scope of the section 234(1), and were therefore available for inspection by the public, the court found:

> ... As to the general words "other documents in the possession or control of the clerk" if they are to be construed as [counsel for the applicant] contended they should be," person" whether ratepayer, stranger to the Municipality, or an alien would have the right to inspect every scrap of paper in the clerk's possession, regardless of when that document came into existence, whether it was temporary or permanent and whether intended to be acted upon or not. I do not think that is a meaning which should be attributed to the legislation or was intended by the Legislature.

It is the City's position that both Order M-1154 and *Ford* incorporate a test of reasonableness in interpreting the disclosure requirements of the respective statutes, and require some degree of specificity and identification of what information must be disclosed. On this basis, the City takes the position that it would be not be reasonable to conclude that an individual's rebate application (and consequently the record which is used by the clerk to administer the rebate application program), has been identified with sufficient specificity in the *MEA* to require its disclosure under the provisions of the *MEA*.

I accept the City's position, in part.

Section 88(5) of the *MEA* clearly applies to "documents and materials filed with or prepared by the clerk or any other election official **under this Act"** (emphasis added). The *MEA* and sections 10 and 11 of Ontario Regulation 101/97 identify specific materials and documents relating to campaign contributions that must be filed with the clerk. There is no specific reference to the rebate material in that legislation. However, the *MEA* does allow for the establishment of rebate programs under municipal by-law. Section 82(1) reads:

> A municipality may, by by-law, provide for the payment of rebates to persons who made contributions to candidates for office on the municipal council.

Section 82(1) is not a mandatory requirement on municipalities. However, the City had passed a by-law prior to the 1997 election, providing for the payment of rebates to contributors. A factor complicating the issue in this case is that the 1997 municipal election, to which the requested records relate, was impacted by the restructuring of certain municipalities, including the City. As the cities were to be dissolved, none of the Councils had the authority to establish a rebate program for the 1997 election. In that regard, Ontario Regulation 172/97, "Transition Matters Affecting the 1997 Regular Election and Arising Out of Restructuring", made under the *MEA*, addressed the rebate application process in section 10. Section 10(1) provides that an individual contributor may apply to the clerk for a rebate, and section 10(3) identifies the required form of the rebate. For this reason, the City's position that the individual rebate applications are not records covered by section 88(5) is not as clear as the City suggests.

However, in the circumstances, it is not necessary for me to determine whether or not the clerk is required to make the individual rebate applications available for inspection under section 88(5) of the *MEA*, because the appellant's request clearly relates to the electronic database used by the clerk to administer the rebate program, not the individual rebate applications. Neither Regulation 172/97 nor the City's earlier rebate by-law required the clerk to prepare the type of electronic record at issue in this appeal. Although the City's narrow interpretation of the requirements under section 88(5) of the *MEA* may not be fully supportable, the specific record at issue in this appeal is not required to be prepared by the clerk, either under the provisions of the *MEA*, the regulations, or under a by-law passed pursuant to the *MEA*. Rather, this electronic record has been prepared by the clerk in order to administer the rebate program and, in my view, section 88(5) cannot properly be interpreted to extend to this record.

Accordingly, I find that no act of Ontario or Canada expressly authorizes the disclosure of the personal information contained in the record, and the exception provided by section 14(1)(d) of the *Act* does not apply.

The appellant had referred to section 88(5) of the *MEA* as a section which removed the record at issue from the application of the *Act*. Because of my finding that the record at issue in this appeal is

not the type of record referred to in section 88(5) of the *MEA*, I do not accept the appellant's position, and find that the *Act* clearly applies to the record.

Section 14(1)(f)

Section 14(1)(f) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2)(3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the individual relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The City submits:

> The definition of personal information under the *Act* is not exhaustive and the Commission has added to the definition through numerous Orders. Similarly, the listing under Section 14(3) relating to a presumed invasion of privacy was developed when the potential impact of technology on privacy was not fully recognized. The listing of factors is therefore not exhaustive. It is submitted that disclosure of personal information in electronic form where it can be massively disseminated, matched and merged with other personal information and used for purposes far beyond that contemplated under statute would constitute a presumed invasion of privacy.

I do not accept the City's position on this issue. The list of presumptions in section 14(3) is finite and specific. Based on the wording of the *Act*, it is section 14(2), not section 14(3), which invites consideration of factors not specifically listed. As stated by former Commissioner Sidney B. Linden in Order P-99:

> The subsection [14(2)] lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria.

Turning to section 14(2), I do find that the possibility of wide dissemination and usage of personal information in a computerized format, as identified by the City above, is a relevant factor to consider in determining whether disclosure of this information would constitute an unjustified invasion of privacy, particularly in the context of section 14(2)(f) (highly sensitive).

A number of previous orders have identified that the format of information can affect the determination of whether disclosure would constitute an unjustified invasion of privacy. For example, in Order M-981, former Adjudicator John Higgins made the following statements regarding information accessible through searches conducted at the province's land registry offices:

> ... It is possible that one could find the type of information that is at issue in this appeal by searching in the Registry Office. However, the Registry Office allows searches in relation to a particular property, whose address or legal description must be known to the searcher in advance. By contrast, access to the information at issue in the context of the Townships' [of Belmont and Methuen] accounts would identify, potentially in a comprehensive way, all individuals and properties for which tax registrations were undertaken during the period covered by the accounts, and in my view, disclosure in that context would, in the circumstances of this appeal, constitute an unjustified invasion of personal privacy. On this basis as well, the information is exempt under section 14(1).

Similarly in Order P-1635, I made the following finding:

> As this example illustrates, information which would arguably be non-controversial when available on a one-off basis can accurately be characterized as highly sensitive (section 21(2)(f)) when considered in bulk format, as in this appeal. This is particularly true when one recognizes that disclosure under the *Act* is not restricted to the specific requester, but is in effect "disclosure to the world". In my view, this factor alone is sufficient to outweigh the factor favouring disclosure described above.

In M-849, I reviewed the impact of disclosure of personal information, which is otherwise available to the public on a record-by-record basis, in a computerized format. I stated:

> In my view, this appeal turns on the question of whether personal information, which is disclosed by the Police on an individual basis in paper format, changes in nature when disclosed in bulk in computerized format.
>
> Arrest Sheets differ in content but not in type. Paper versions are produced on a daily basis and disclosed by the Police without the need for a formal request under the *Act* or the need to consider and apply any exemption claims. [This Office] has determined that individuals charged with criminal offences can reasonably expect that personal information concerning these charges would be disclosed by police organizations to the community, and that the purpose of this type of routine

disclosure is consistent with the original purpose of obtaining and compiling this personal information (section 32(c) of the *Act*). (See for example, Investigation I96-018P).

However, the records at issue in this appeal are **computerized** versions of the original paper records, stored in bulk. The appellant points out the difficulties associated with using the paper versions of the Arrest Sheets, and states:

> It is virtually impossible to search for information in them, spot trends or conduct any analysis because they are in paper format. The computer, as is well known, is an excellent records management tool with sorting capabilities. My request is simply to obtain this information ... in computer format.

If the appellant is provided with an electronic version of the Arrest Sheets, the restrictions on usage will disappear. He will be able to develop a computer database of records, where various fields of data, including those containing personal information, can be easily searched, sorted, matched and manipulated for a wide variety of purposes. Although section 32(c) of the *Act* permits disclosure of this personal information at the time of the arrest, in my view, it is not reasonable to conclude that the individuals identified on the Arrest Sheets could have expected that this same personal information would similarly be distributed in bulk and in computerized format. Therefore, I find that section 32(c) does not extend to the disclosure of the electronic version of the Arrest Sheets.

In the circumstances of the present appeal, I am satisfied that the disclosure of the personal information in electronic form, where it can be massively disseminated, matched and merged, and used for purposes far beyond those for which the information was collected in the first place, is a relevant factor to consider, and weighs significantly in favour of non-disclosure of the personal information in that format.

The appellant refers to section 14(2)(a) as a relevant factor favouring disclosure. That section reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

The appellant submits that this factor is relevant and is linked to the public accountability provisions of the *MEA*.

I accept the appellant's position that public scrutiny is a relevant factor when considering campaign contribution records. However, in my view, public scrutiny considerations are clearly addressed

through the scheme established by the *MEA*, which makes certain records relating to contributions available to the public. I do not accept that there is a broader relevant public scrutiny factor under section 14(2)(a) separate and distinct from that addressed by the *MEA* scheme.

In summary, I find that no factors favouring disclosure of the electronic record have been established, and that the format of the record and its potential use are relevant considerations favouring privacy protection, particularly when considered in the context of section 14(2)(f). Accordingly, I find that disclosure of the record would constitute an unjustified invasion of personal privacy, and the exception in section 14(1)(f) of the *Act* does not apply.

In summary, I find that none of the exceptions in sections 14(1)(c), (d) or (f) have been established, and therefore the record qualifies for exemption under section 14(1) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant claims that the "public interest override" in section 16 of the *Act* applies in this case. This section states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

It has been established in a number of orders that, for section 16 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), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 14. Section 16 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 (Order P-1398).

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. 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, it must be determined that a compelling public interest exists which outweighs the purpose of the exemption (Order PO-1705).

The appellant submits that there is a compelling public interest in the disclosure that is sufficient to outweigh the purpose of the section 14 exemption. He states:

> Having regard to the need for scrutiny of the election process, and of the accountability and public access provisions of the *MEA*, it would be an unreasonable application of [the *Act*] to deny what should clearly be made public. The legislature has spoken in the *MEA* that public accountability is essential, which is consistent with the need for transparency in the election process. Consequently, if there is any technical application of [the *Act*] preventing disclosure (such as that the record contains "financial information") the appellant submits that there is a compelling public interest in disclosure which clearly outweighs the purpose of the exemptions in [the *Act*]. See Order 24. Further, unlike the economic information that was denied in *Ontario (Minister of Finance) v. Ontario (Inquiry Officer)* (1998), 107 O.A.C 341, information relating to elections and election finances goes directly to the issue of voters making political choices that are open to them. The right of the public to receive information about public institutions is a constitutional value (see, e.g. *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 at 1399-40) and [the *Act*] must be interpreted and applied consistently with that fundamental value.
>
> The City appears to rely on the spectre that this information could be widely disseminated or manipulated. This is an *in terrorism* argument without any foundation and was rejected by the very passing of the freedom of information legislation over a decade ago which places no restrictions on the use of personal information. In the specific context of this case, where the information is public in any event, and there is no basis whatever to suggest it will be manipulated or distorted, but instead used for an important public purpose, the City's argument is especially specious.

The City responded to issue of the possible application of section 16 as follows:

> The appellant's statement and the access which he concedes has been provided is consistent with transparency of the election process. In the criteria for meeting the test of "compelling public interest" there is a requirement that the information must in some way add to the information the public has to make effective use of the means of expressing public opinion or to make public choices.
>
> Considering that the campaign finance information is publically available for inspection in the office of the clerk, no additional information on campaign finances would be added by disclosing the database. The personal and financial information of rebate applicants would constitute additional personal information, however, information as to whether or not a contributor applied for the permitted rebate would

> not conceivably enhance public choice or expression of public opinion. The decision to apply or not apply for a rebate is a matter of private rather than public choice.

The City refers to my Order M-849, where I reviewed the public interest in disclosure of bulk personal information in computerized format. Like this appeal, in that case certain information was made available to the public through on an individual paper-copy basis. I made the following statements:

> In my view, the public interest in disclosure of records is adequately and properly served by the daily practice of disclosing a paper version of the records ...

I find that the same principles and reasoning apply in the circumstances of this appeal. The public has a right to examine and copy information relating to campaign contributions as set out in the regularized disclosure process identified and described earlier in this order. This process is required under the *MEA*, and one of the reasons for these requirements is undoubtedly to make campaign contribution information available as part of a public accountability scheme. I am satisfied that the public interest in the disclosure of the record is adequately and properly served by the processes available under the *MEA*.

The City also submits:

> The utility of public records of personal information, such as assessment information and campaign finance records, for a wide variety of purposes is undisputed. The costs to personal privacy would be immense if government institutions ignored the qualitative difference between public records of personal information in hard copy and disclosure of personal information in bulk electronic form.
> ...
>
> The database contains the personal information of more than 39,000 individuals and, regardless of the utility of the information, such disclosure may be reasonably expected to have a chilling effect on contributions to municipal election candidates. In fairness and to provide the necessary notice, contributors would need to be informed that their personal information would be provided in electronic form to anyone who requests it.

Although it is not necessary for me to either accept or reject the City's suggestion regarding notice, the description of the possible impact of disclosure on a wide cross section of City residents reinforces the important privacy considerations at issue in this appeal.

Accordingly, I find that there is no compelling public interest in disclosure of the personal information contained in the electronic record, and that any public interest that does exist is addressed through the provisions of the *MEA* and does not clearly outweigh the purpose of the exemption. Therefore, section 16 of the *Act* is not applicable.

ORDER:

I uphold the decision of the City.

Original signed by: November 23, 2000
Tom Mitchinson
Assistant Commissioner

POSTSCRIPT

Finding the appropriate balance between the right of access to government-held information and the right to personal privacy is seldom more complex than when faced with requests for publicly available personal information in electronic format. This Office has voiced concerns about the lack of public debate and policy formulation in this area for several years. Former Commissioner Tom Wright effectively articulated the issue in a December 16, 1996 Postscript to Order P-1316. In dealing with a request for electronic access to property assessment roll data, he stated:

> In Ontario, assessment information is publicly available by law. For years anyone has been able to go to the office of the clerk of a municipality and view the assessment roll. However, the paper medium on which information was stored provided a built-in privacy protection. Although it was possible to go to a municipality and copy out the information contained on the paper rolls, using the appellant's situation as an example, in order to do so he would have to travel to 11 municipal offices and copy thousands of pages. The sheer enormity of this task made it unlikely that assessment information would be used other than for assessment-related purposes. Using words of the U.S. Supreme Court, I have described this as privacy protection based on "practical obscurity".
>
> But, as these rolls are transferred to electronic format, it grows much easier to retrieve and manipulate the personal data they contain, and to use it for purposes other than those originally intended. Indeed, this ability to manipulate data is described by the Ministry [of Finance] as one of the added benefits of having information in electronic format.
>
> In my 1994 Annual Report to the Legislative Assembly I said that I believe the transition to electronic records requires that the whole question of what personal information truly belongs on the public record needs to be rethought.

No such rethinking exercise has taken place, and we find ourselves several years down the road, with electronic technology transforming our world at an accelerated pace, and no closer to clarifying how

best to address the inherent tension between the right to know and the right to expect governments to preserve our privacy.

The right to privacy is fundamental. Section 1 of the *Act* incorporates this right as one of the two purposes of the legislation, making it clear that the public has a statutory right and a valid expectation that governments will ensure the adequate protection of all personal information held by these public bodies.

That being said, the right to privacy is not absolute, and must be balanced at times against other rights and public expectations. Some of these competing interests are reflected in the *Act*, including the section 14(1)(c) exception which permits disclosure of "personal information collected and maintained specifically for the purpose of creating a record available to the general public". There is a sound and well-established policy rationale for the need to make certain personal information accessible to everyone. Land registration documents, for example, often contain a great deal of sensitive personal information concerning vendors and purchasers of property, but the integrity of the land registration system and the need for open and transparent disclosure of all facts relevant to the purchase and sale of property outweighs the right to privacy, and does so on a systemic basis. As a vendor of real estate, it is generally accepted that the process will require you to disclosure details of the status of your mortgage - it is a justified invasion of privacy and is also supported as a matter of sound public policy.

However, that is not to say that one's privacy has not been invaded when public records are disclosed in this manner. It has. What distinguishes this from the vast majority of potential disclosures of personal information is its characterization as a "justified" as opposed to an "unjustified" invasion of privacy. The land registration system requires that all pertinent information be made available as a matter of public record, and the extent to which this represents an invasion of any individual's privacy, that result is justified and defensible. Transparency is integral to the public administration of the system, and has been incorporated into the statutory framework that regulates land registration in Ontario. Said another way, in implementing Ontario's land registration system, the Legislature has considered and debated the appropriate balance between the right to privacy and the need for transparency, and has made a decision that transparency outweighs privacy, in the public interest.

The rationale supporting the need to place personal information contained in land registration documents on the public record is based on the context of an individual land transaction. The public interest is addressed by ensuring that the parties to this particular transaction have all pertinent information involving the property. Electronic access to this information may render the transaction easier to complete, but it is not necessary in order to address the underlying rationale for making the personal information publicly available. Taking it one step further, the need for bulk access to information concerning other properties, in electronic format, takes the situation even further away from the original rationale. Can it be argued that the personal information of all land owners in Ontario, provided in electronic format, is necessary in order to ensure the integrity of a particular land transaction? I do not think so. That is not to say that a different and equally valid and

supportable rationale may exist; it is simply that it would be different and not defensible on the same basis.

The disclosure by governments of personal information, in bulk, and in electronic format, would represent a significant invasion of personal privacy. This invasion may be "justified", just as the disclosure of personal information in individual land registration records has been deemed to be a "justified" invasion of privacy. However, any such justification has not been articulated, debated and established. Until this debate takes place, a cautious approach must be taken; it is the only prudent one in the circumstances.

The *Act* speaks strongly and directly in support of the privacy rights of individuals, while at the same time recognizing that these rights must yield on occasion, both individually and systemically, in the public interest. As Commissioner Wright summed up in his Postscript four years ago:

> In a world of electronic information, "practical obscurity" is no longer sufficient protection for publicly available personal information since in reality, it no longer exists. Indeed, the availability of information electronically creates an urgent need to address the overriding question B just how much is someone else entitled to know about you?

The debate on this issue is long overdue. Advancements in technology, including scanning systems, are blurring the distinction between paper and electronic records. It is simply not acceptable to turn a blind eye to the realities of our electronic world. Solutions exist and interests can be effectively balanced, but not without careful thought and creative public debate. Time is running out, and it has become a legitimate fear that, unless the issue of electronic access to public records is addressed and resolved soon, the privacy rights of the public will inevitably be compromised.