



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

ORDER 119

Appeal 880097

Ministry of Skills Development



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On March 11, 1988, the appellant made a request to the Ministry of Skills Development (the "institution ") for the following information:

1. An alphabetical list of all current 309-A certificate holders in Essex and Kent County areas, including the following:

- (a) name of certificate holder
- (b) address of certificate holder
- (c) date of certification
- (d) social insurance number.

2. An alphabetical list of all current 309-A apprentices in Essex and Kent County areas including the following:

- (a) name of apprentice
- (b) address of apprentice
- (c) employer of apprentice
- (d) social insurance number

3. List of all electrical contractors or employers of a related nature (panel shop, motor winding shops etc.) who have employed persons who have qualified under the Futures program within the last 48 month period in the Essex and Kent County areas, including the following information for each employer:
 - (a) employer's name and address
 - (b) employee's name and address
 - (c) length of funding approved.
2. On April 12, 1988, the institution responded, disclosing an alphabetical list of all current 309-A certificate holders under the Apprenticeship and Tradesmen's Qualification Act in the Essex and Kent County areas, and an alphabetical list of all current 309-A apprentices registered under the Apprenticeship and Tradesmen's Qualification Act in the Essex and Kent County areas.

Access was denied to the following information:

- (1) address of certificate holder
date of certificate
social insurance number of certificate holder
- (2) address of registered apprentice
employer of apprentice
social insurance number of registered apprentice
- (3) employer's name and address
employee's name and address
length of funding approved under the Futures program.

The institution claimed an exemption under subsection 21(1)(f) for the information in (1) and (2) above, and under subsection 17(1) for the information in (3) above.

3. On April 25, 1988, the requester appealed the institution's decision, and I gave notice of the appeal to the institution.
4. During the course of an investigation by an Appeals Officer from my staff, the institution clarified the reasons for its decision. Thus, the institution claimed that the information was exempt from disclosure under subsection 21(3) (d) because it related to employment or educational history, under subsection 21(2) (f) (not 21(1) (f) as previously cited) because it was highly sensitive, and under subsection 21(2) (h) because it was supplied in confidence by the persons to whom it relates.
5. The institution provided to the Appeals Officer records which it stated were samples of the requested record. In an attempt to mediate a settlement, and at the request of the appellant, the Appeals Officer conveyed to the institution the appellant's reasons for requesting the record. However, this information was not sufficient to resolve the appeal, and so the matter proceeded to an inquiry.
6. On August 9, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with the Notice was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act

which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the Report.

7. By letter to the appellant, dated September 30, 1988, the institution indicated that it was now willing to disclose the dates of certification of the 309-A certificate holders, and this information was sent to the appellant. The institution offered further clarification of its decision relating to the information requested in item (3), and claimed exemption for this information under subsection 21(1) and subsections 17(1)(a), (b) and (c).
8. In his representations, the appellant withdrew his request for the information under items (1) and (2) and limited his appeal to the denial of the following information:

The names of all Futures participants who have been employed by electrical contractors and related employers in the Essex and Kent County areas during the past 48 months;

The names of the electrical contractors and other related employers in Essex and Kent Counties who have employed Futures participants during the past 48 months.

9. The institution was informed by the Appeals Officer of the appellant's withdrawal of his request for some of the information, and the subsequent limitation in the scope of the appeal, and was afforded an opportunity to make further representations with respect to the information which was now the subject of the appeal. The institution withdrew

its claim for exemption under subsection 17(1), and relied exclusively on the mandatory exemption provided under section 21.

10. After representations had been received from the institution and the appellant, the Appeals Officer conducted further investigations in order to clarify some outstanding issues. At this time the institution provided the Appeals Officer with an untitled record which it stated was the record which responded to the appellant's amended request. However, the Appeals Officer noticed a discrepancy between some of the facts on the face of the record, and some facts which had been provided by the appellant. The appellant stated that he had contacted approximately a dozen people whom he considered to fit within the class of people covered by the subject matter of the request. The record forwarded by the institution as responding to the request contained the names of only two Futures participants.

The institution's response to the Appeals Officer's inquiry into the discrepancy was that the record provided to the Commissioner did not exactly respond to the appellant's request. The record which had been forwarded to this Office as responding to the request was a list of Futures participants in Essex and Kent County areas who had worked for electrical contractors during the past 48 months, and who had applied to become registered as apprentices, and their employers. The institution stated that the only records in its possession related to apprentices, and that the information sought by the appellant did not reside at the institution.

11. The Appeals Officer met with officials of the institution in an effort to determine where the information which was the subject of the appeal might be. The institution explained that the Futures program is not administered directly by institution officials. The program is contracted out to Community Colleges and Youth Employment Counselling Centres. Community Colleges have been "institutions" for the purposes of the Freedom of Information and Protection of Privacy Act, 1987 since January 1989. Youth Employment Counselling Centres are independent community based agencies which are not "institutions" for the purposes of the Act. These organizations do not submit lists of names of Futures participants to the institution, but report to the institution and are reimbursed through statistical reporting. The institution stated that it may obtain access to the agency records for the purposes of performing an audit. It was the institution's position that it had neither custody nor control of the requested information.

12. The Appeals Officer contacted the appellant and inquired whether he was willing to proceed with the inquiry based on the record in the possession of this Office. However, upon reflection, the appellant decided that the information contained in this record did not meet his needs, and he chose to proceed on the basis of the information which he had requested.

13. Accordingly, the appellant and the institution were requested to provide further representations on the issue of the institution's custody or control of the requested

information. I have received representations from the institution, and have considered them in making my Order.

14. Enclosed with the institution's representations was a list of the agencies within the Essex and Kent Counties which deliver the Futures program in those areas. These agencies are Futures offices within the two campuses of St. Clair College of Applied Arts and Technology, in Windsor and Chatham. St. Clair College is a Community College, and is an "institution" for the purposes of the Act as of January 1, 1989. The institution was of the opinion that the requested information resides at these offices.

15. This information was conveyed to the appellant, who decided to continue with his appeal rather than resubmit his request to St. Clair College. The institution in the meantime sent the following information to the appellant:

the number of names of Futures participants on the record provided to this Office;

whether or not a name provided by the appellant was on this record; and

the precise nature of the record provided, i.e. that it is a list of Futures participants who applied for registration as apprentices in the electrical trade.

It is important to note at the outset the purposes of the Act as set out in section 1. Subsection 1(a) provides a right of access to information in the custody or under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to information about themselves held by institutions and should therefore provide individuals with a right of access to that information.

Since the head has not seen the requested record, nor has he made a decision under the Act with respect to that record, the sole issue for me to decide in this appeal is whether the record is in the custody or under the control of the institution.

ISSUE A: Whether the institution has custody or control of the requested record.

Section 10(1) of the Act provides that

Every person has a right of access to a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. (emphasis added)

The institution submits that the issue of custody or control is not a preliminary issue,

but rather that a decision must be made on substantive grounds (personal privacy) before the issue of custody or control becomes relevant. If the Commissioner's decision is that the substantive grounds asserted by the Ministry preclude disclosure, then the issue of custody or control becomes a nullity. If the Commissioner intends to overrule the Minister's position on the personal privacy issue, only then is custody or control relevant.

I find no merit in this position. As I have stated above, the institution has made no decision with respect to disclosure of the requested record, and the exemptions which it has claimed for a record which was not requested are irrelevant in this appeal. If I were to find that the institution did in fact have either custody or control of the requested record, I would order the head to make a decision as to disclosure under the Act with respect to that record.

The institution acknowledges that it did not make the extent of its own records clear to the requester in the first instance, and states that "only those records related to FUTURES participants who have applied to become apprentices in the electrical trade were considered by the Ministry as it holds no other classes of records within the request. However, these records do fall within the scope of the request and the Ministry was obliged to deal with them in its response to the request." The appellant has made it clear that the record provided to this Office by the institution does not meet his needs or his request, and he is not in fact interested in the information contained therein.

The institution submits the following factors as considerations governing whether the requested information is within its custody or control:

1. The records at issue do not reside at the Ministry;
2. The FUTURES program is delivered on a purchase of service basis through transfer payment contracts with Colleges of Applied Arts and Technology and Youth Employment Counselling Centres;

3. FUTURES delivery organizations are not agents of the Ministry;
4. The Ministry directs the collection of personal information by the delivery agencies for program purposes alone;
5. Personal information respecting participants in the program is not forwarded to the Ministry except in extraordinary circumstances, such as the closure of a centre; the Ministry receives aggregate statistical information from the delivery agencies;
6. The Ministry's inspection and audit rights are only for the purposes of ensuring program quality and accountability for funds;
7. The Ministry does not have control over the maintenance of records by the external delivery agencies; neither does it have control over decisions made by these organizations with respect to disclosure of information; the organizations make independent decisions in these areas, although the Ministry provides some guidelines;

Having considered all of these circumstances, I am satisfied that the institution has neither custody nor control of the requested records.

A great deal of time and trouble could have been saved had the institution given more consideration to its response to the requester in the first place. The request was clear and the

institution was aware from the outset that it did not have the requested record in its possession.

Subsection 29(1)(a) of the Act provides as follows:

29.--(1) Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

(a) where there is no such record, that there is no such record;

Despite this provision, no indication was given to the requester by the institution that it did not have the requested record. It was left to the Appeals Officer to discover quite by accident that the record requested had not been identified by the institution. The Appeals Officer then spent some months dealing with both the institution and the appellant before she was able to establish a firm basis on which to continue the appeal, at which time further representations were requested of both the institution and the appellant with regard to the question of custody or control of the record. It was the institution's failure to state its position clearly from the outset that gave rise to this difficulty, and I trust that this experience will be helpful in clarifying the institution's responsibilities in future cases of this kind.

The appellant has been kept informed of the events occurring in the appeal throughout, and is aware that, unless I found that the institution had custody or control of the record, continuing with the appeal would be an academic exercise. He considered and rejected the option of requesting the information directly from the Futures Offices at St. Clair College of Applied Arts and Technology in Windsor and Chatham.

I have considered the option of having the institution forward the request to the institution having custody or control of the record as a way of shortening the time the requester must wait for a response to his request. Accordingly, my Order in this appeal is as follows:

1. The institution shall forward the request as defined in paragraph 8 on page 4 of this Order to St. Clair College of Applied Arts and Technology within five (5) days of the date of this Order.

2. St. Clair College of Applied Arts and Technology shall treat the request as a new request.

I further order the institution to inform me in writing within five (5) days of the date upon which it complied with this Order, of the date upon which it forwarded the request to St. Clair College of Applied Arts and Technology.

Original signed by: _____
1989
Sidney B. Linden
Commissioner

_____ November _____ 16,
Date