



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 121

Appeal 890110

Ministry of Community and Social Services



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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 under the Act to the Commissioner.

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

1. On February 10, 1989, a request was made to the Ministry of Community and Social Services (the "institution") for a copy of a Serious Occurrence Report of an incident at a child care centre. The requester later amended her request on February 10, 1989, to include "Metro's Report" which was an "Exception Report" about the same incident, produced by the Municipality of Metropolitan Toronto Community Services Department, Children's Services Division.
2. Upon receipt of the request, the institution notified the Municipality of Metropolitan Toronto Community Services Department, Children's Services Division, (the "affected party") of the request, pursuant to section 28 of the Act, and invited representations as to whether the records ought to be released. After considering the representations, the institution's decision was to deny access to the requested records in their entirety, citing subsections 17(1) (a) and (c) of the Act.

3. By letter dated April 19, 1989, the appellant, representing the requester, appealed the decision of the head. I sent notice of the appeal to the institution and to the appellant.
4. The records were obtained and examined by an Appeals Officer from my staff, who contacted the appellant and the institution and investigated the circumstances of the appeal.
5. On July 12, 1989, I sent a notice of appeal and notice of inquiry under subsection 50(3) of the Act to the Municipality of Metropolitan Toronto Community Services Department, Children's Services Division, as an affected party in the appeal. I also sent notice to the mother of the child mentioned in the reports, pursuant to the same subsection. I notified both parties that I was conducting an inquiry to review the decision of the head. The Notice of Inquiry stated the facts of the case, and invited representations as to the issues arising in the appeal. I have received representations from the Municipality of Metropolitan Toronto Community Services Department, Children's Services Division, and I have considered them in making my Order.

The issues arising in this appeal are as follows:

- A. Whether the head properly applied the mandatory exemption provided by subsections 17(1)(a) or (c) of the Act in denying access to the requested records.
- B. Whether the information contained in the records qualifies as "personal information", as defined by subsection 2(1) of the Act.

C. If the answer to Issue B is in the affirmative, whether the exemptions provided by subsections 21(1) and 49(b) of the Act apply in the circumstances of this appeal.

It is important to note at the outset that the purposes of the Act, as outlined in subsection 1(a) and (b) are as follows:

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

...

(b) 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.

Further, section 53 of the Act provides that the burden of proof that a record, or part of a record, falls within one of the specified exemptions lies with the head of the institution. The affected party in this appeal has relied on the exemption provided by section 17 of the Act to prohibit disclosure of the record, and therefore shares with the institution the onus of proving that this exemption applies to the relevant parts of the record.

The records at issue in this appeal consist of two reports entitled "Exception Report (Serious/Contentious Issue) or (Political/Public Enquiry)", produced by the Municipality of Metropolitan Toronto Community Services Department, Children's

Services Division, and "Serious Occurrence Preliminary Inquiry Data", produced by the Ministry of Community and Social Services.

ISSUE A: Whether the head properly applied the mandatory exemption provided by subsections 17(1) (a) and (c) of the Act in denying access to the requested record.

Subsection 17(1) of the Act reads as follows:

17.__(1) a head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

...

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In my Order 36 (Appeal Number 880030), dated December 28, 1988, I outlined the three_part test which must be satisfied in order for a record to be exempt under section 17. The test, as outlined on page 4 of the Order, is as follows:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid.

The records at issue are two reports. The "Exception Report" is an account of an investigation of an alleged incident at a child care centre. The "Serious Occurrence Report" is an account of that incident, and of proposed follow_up. This report was compiled by the institution from information supplied by the child care centre.

The Children's Services Division of the Municipality of Metropolitan Toronto (the "affected party") contends that the information contained in the reports is labour relations information. However, examination of the record does not lead me to conclude that the information conforms to the requirements of the first part of the test. It is clearly information which relates primarily to the original requester and to a child at the child care centre. I find that it is not labour relations information, nor is it a "trade secret, scientific, technical, commercial or financial information."

Because I have found that the information does not satisfy the first part of the test, it is not necessary for me to examine the record in light of the other two parts. However, I should like to note that the affected party has not provided me with

sufficient evidence of how any of the harms specified in (a), (b) or (c) of subsection 17(1) would arise through the disclosure of the record, as is required by the third part of the test.

Accordingly, I find that the affected party has not satisfied the requirements for a valid claim to the subsection 17(1) exemption.

ISSUE B: Whether the information contained in the records qualifies as "personal information", as defined by subsection 2(1) of the Act.

Where the request involves access to personal information I must, before deciding whether an exemption applies, ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and determine whether this information relates to the original requester, another individual or both.

Subsection 2(1) of the Act states,

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where 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.

In my view, all information contained in the records at issue falls within the definition of personal information contained under subsection 2(1). I find that the statements and/or allegations contained in each of the records are properly considered recorded information about both the original requester and the individual who made them.

ISSUE C: If the answer to Issue B is in the affirmative, whether the exemptions provided by subsections 21(1) and 49(b) of the Act apply in the circumstances of this appeal.

I have found under Issue B that the information contained in the records at issue in this appeal qualifies as "personal information" under the Act. I must now determine whether access should be denied to the records on the basis that they fall within the exemptions provided by subsections 21(1) and 49(b).

Subsection 47(1) of the Act gives individuals a general right of access to:

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, as I have stated in my Order 37, (Appeal Number 880074), dated January 16, 1989, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of disclosure of personal information to the person to whom the information relates. Specifically, subsection 49(b) provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

...

- (b) where the disclosure would constitute an unjustified invasion of another individuals' personal privacy;

...

In Order 37 above, I stated at page 9

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his own personal information against another individual's right to the protection of their privacy. If the head

determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives him discretion to deny access to the personal information of the requester.

Subsections 21(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of another individual's personal privacy. Subsection 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion. Subsection 21(2) provides some criteria for the head to consider in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy.

The personal information relating to an individual other than the original requester in the records at issue in this appeal is the statement of a child about the incident which is the subject of the reports. As I have stated earlier, I notified the mother of this child to elicit her views as to whether the disclosure of the child's statement would constitute an unjustified invasion of his personal privacy, but did not receive a response.

The records at issue were produced in the context of an employment_related complaint, and the original requester was the subject of this complaint. The identity of the complainant in the incident is known to the original requester. The information about the complainant contained in the reports consists of his name, date of birth and statements made by him about the original requester. I have received evidence that the original requester has been subjected to disciplinary procedures as a

result of the complaint, and that an arbitration hearing is pending. In Order 37 (supra) I stated at page 11:

In such situations, fairness demands that the person complained against be given as much disclosure of the substance of the allegations as possible. The degree of disclosure would depend on the circumstances of each particular case, but should be more extensive if the complaint is likely to result in discipline.

I do not find that the information relating to the complainant is such as to raise a presumption of an unjustified invasion of his privacy under subsection 21(3) of the Act. In weighing the original requester's right of access to information relating to herself, and the right of another individual to protection of his personal privacy, I am mindful of one of the factors enumerated under subsection 21(2) of the Act. Subsection 21(2) states that a head must consider all relevant factors, including:

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

Having examined the records in issue, and considered the circumstances of this appeal, it is my view that the disclosure of the records to the appellant would not be an unjustified invasion of the personal privacy of the complainant. Accordingly, I order the institution to disclose the records to the appellant in their entirety. I also order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the affected party sufficient opportunity to apply for judicial review of my decision before

the records are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution within this 30_day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Original signed by:
Sidney B. Linden
Commissioner

November 24, 1989
Date