



Information and Privacy
Commissioner/Ontario

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

ORDER 78

Appeal 890033

Ministry of Community and Social Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléf: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

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 made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head to the Commissioner.

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

1. On April 12, 1988, the requester wrote to the Ministry of Community and Social Services (the "institution") to request various records in its possession regarding the Council on Mind Abuse Inc. (COMA), (the institution assigned file #19-0002 to this request). Shortly thereafter the institution wrote to COMA as a third party, pursuant to section 28 of the Act, to request its representations as to disclosure of the records to the requester. Despite having received representations to the contrary, from COMA, the institution wrote to the third party to advise of its intention to release the requested information to the requester, subject to COMA's right of appeal as the third party. The third party, COMA, did not appeal the head's decision, and the requested information was released to the requester.

On November 25, 1988, the requester wrote to the institution to request the "Third party submissions made by the Council on Mind Abuse in Ministry of Community and Social Services file number 19-0002."

2. Having received this new request, the institution again contacted COMA as the third party and solicited its representations as to the issue of disclosure of the representations it made on the request for information in file number 19-0002. Apparently, the third party verbally indicated its wish to have the requested record withheld from disclosure.
3. On January 23, 1989, the institution wrote to the requester denying access to the requested record pursuant to subsection 21(1) of the Act. It was the head's view that the record in question contained personal information which, if disclosed, would unjustifiably invade another individual's

personal privacy. The head reached this conclusion because, in his view, the personal information had been supplied by the individual in confidence.

4. On February 17, 1989, the requester appealed this decision of the institution. I gave notice of the appeal to the institution on February 27, 1989.
5. A copy of the record at issue was obtained and reviewed by the Appeals Officer assigned to this case. The Appeals Officer spoke with the appellant and the third party but efforts to mediate a settlement were not successful.
6. By letters dated May 1, 1989, I notified the appellant, the institution and the third party that I was conducting an inquiry into this matter. Enclosed with these letters was a copy of a report 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 indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the report. The report is sent to all persons affected by the subject matter of the appeal.
7. All parties were invited to make representations, which were received from all parties. I have considered all representations in making my Order.

The following issues are relevant to this appeal:

- A. Does the record in question contain "personal information" as defined in section 2 of the Act?
- B. If issue A is answered in the affirmative, would disclosure of the record in question constitute an unjustified invasion of an individual's personal privacy?

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides that right of access to information 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

[IPC Order 78/July 21, 1989]

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 personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information. Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of the Act lies upon the head.

This appeal raises a matter of general importance - access to third party representations made to the head of an institution pursuant to notice given under s. 28 of the Act. Subsection 52(13) of the Act stipulates that parties are not entitled to access to another party's representations at the appeal stage, but the Act is silent as to the issue of access to such representations at the request stage. Although I am mindful of the policy considerations which would suggest to some that such third party representations should be exempt from disclosure, none of the parties have argued this position and I note that the Federal Freedom of Information Act does not afford special status to third party representations. Accordingly, I have determined that access requests for third party representations made to the head of an institution are to be treated as general requests under subsection 24(1) of the Act and that the Act applies to such requests in the usual manner. Third party representations made to the head of an institution are generated under section 28 of the Act. If, upon receipt of a request, a head has reason to believe that the requested record might contain information referred to in subsection 17(1) (i.e., trade, secrets, scientific, technical, commercial, financial or labour relations information) or personal information which, if disclosed, might unjustifiably invade an individual's personal privacy, section 28 requires the head to notify the person to whom the information relates and gives that person an opportunity to persuade the head not to disclose the requested record. Often such a person is in a better position than the institution to address such concerns as a possible invasion of privacy or the consequences of disclosure on the competitive position of a company, for example.

Typically, third party representations would be exempt from disclosure (or at least would contain exempt information) particularly if the record to which they correspond is found to be exempt. This is because such representations, ideally, would refer to the requested record and its contents and describe the economic and/or privacy consequences that would flow from disclosure of the requested record.

In this appeal the record at issue is a one-page letter dated May 18, 1988. It is written on letterhead paper of the Council on Mind Abuse Inc. and is signed by the Executive Director of the organization. As mentioned above, this letter was drafted by COMA in response to the institution's request for representations regarding the issue of disclosure of previously requested records.

ISSUE A: Does the record in question contain "personal information" as defined in section 2 of the Act?

Subsection 2(1) of the Act defines personal information as follows:

"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;

The institution claimed that the record at issue contains personal information which, if disclosed, would unjustifiably invade the author's personal privacy. The institution relied on subsection 2(1)(f) in support of its position and submitted that:

the fact that a party is being asked to make representations as to why information should not be released to a requester and the fact that the head may base the decision whether or not to release the information on these representations, implies that such information should be treated as confidential. The record in question contains personal views and information that explains the contents of the record originally refused. The Ministry further submits that if the third party representations are not considered to be information supplied in confidence, then the intent of the legislation to protect the personal privacy of affected third parties is undermined in that a requester may receive indirectly information he was refused directly.

The appellant submitted that COMA is a non-share capital corporation incorporated in the Province of Ontario. In his representations to me, the appellant pointed out that:

the head is purporting to apply the personal privacy exemption in section 21 of the Act to the records of a corporation. ...Personal Information is defined in section 2 of the Act as 'recorded information about an identifiable individual'. The term 'individual' has been extensively interpreted by Canadian courts to mean a natural person and to exclude a corporation.

The contents of the record at issue address COMA's concerns that the records which had been the subject of the previous request should not be disclosed generally, and to cult organizations in particular. The record refers to the consequences such disclosure would have on organizations such as COMA.

Having reviewed the record and the representations received from the parties, I am of the view that the record in question does not contain personal information as defined by section 2 of the Act. In this instance, the record was drafted on letterhead paper and signed by the author in his capacity as Executive Director. The Executive Director of COMA advised me that the office of the Executive Director is a paid, full-time position with the organization and reports to a Board of Directors. Indeed, the Executive Director took the

record in question to the Board for discussion whereupon the Board directed the Executive Director to send the letter to the institution. Any views or opinions of the author were endorsed by the organization's corporate Board such that they may be referable to the Board and the organization, as opposed to the individual author. As I wrote in my Order 16 (Appeal Number 880025 et al) dated September 9, 1988 at page 17:

the use of the term 'individual' in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended 'identifiable individual' to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

Although I have reached the conclusion that the record in question does not contain personal information, and it is not necessary for me to decide Issue B, I wish to add that even if Issue A had been answered in the affirmative and the record did contain personal information, as defined by the Act, I would not have concluded that its disclosure would constitute an unjustified invasion of an individual's privacy. As a result of the work and reputation of the Council on Mind Abuse Inc., and its Executive Director, all of the information contained in the record in question is publicly known. Indeed, one of the purposes for incorporating the Council on Mind Abuse was to make the public aware of its concerns about cult organizations.

I might add that, although the issue was not raised by any party to the appeal, I would not have determined that the record could be prohibited from disclosure by section 17 of the Act, in the alternative.

In conclusion, my Order is that the institution disclose to the appellant the record in its entirety. I also order that the institution not release this record until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the third party sufficient opportunity to apply for judicial review of my decision before the record is actually released. Provided notice of an application for judicial review has not been served on the institution within this 30-day period, I order that the record 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

July 21, 1989
Date