



Information and Privacy
Commissioner/Ontario

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

ORDER 80

Appeal 880076

Ministry of Health



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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) of the Act a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

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

1. On January 19, 1988, the Ministry of Health (the "institution") received a request for "any and all documents, memos, reports and correspondence with regard to the Council on Mind Abuse (C.O.M.A.) Inc." ("COMA")
2. On February 25, 1988, the institution issued a third party notice to COMA, pursuant to subsection 28(1)(a) of the Act.
3. COMA responded to the institution on March 15, 1988, requesting that the records not be disclosed.
4. By letter dated April 6, 1988, the institution notified the requester that access to the records was denied because "...they are the subject of a pending discussion by Cabinet (s.12) and, in addition, the third party has requested that the information not be disclosed as per s.17(1)(c)."
5. The requester wrote to me on April 12, 1988 appealing the head's decision. Notice of the appeal was sent to the institution and COMA.
6. The Appeals Officer assigned to this case obtained and reviewed the records in question. During the investigation stage the institution raised the possible application of subsections

17(1) (a) and (b).

7. Efforts by the Appeals Officer to mediate a settlement were unsuccessful, as all parties retained their respective positions.
8. By letter dated June 27, 1988, I gave notice to the appellant, the institution and the third party that I was conducting an inquiry to review the decision of the head. Enclosed with this letter 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 representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all parties affected by the subject matter of the appeal.
9. On September 23, 1988, I asked all parties to submit written representations by October 14, 1988. Representations were received from the appellant, the third party and the institution. I have considered all representations received from the parties in making my Order.
10. The institution's representations included section 21 as a new basis for exemption. I notified the appellant and invited him to make further representations on this new exemption, however, he declined to do so.

The issues arising in the context of this appeal are as follows:

- A. Whether the head properly applied the mandatory exemption provided by section 12 of the Act to the requested records.
- B. Whether the head properly applied the mandatory exemption provided

by section 17 of the Act to the requested records.

- C. Whether the head properly applied the mandatory exemption provided by subsection 21(1) of the Act to the requested records.
- D. Whether the severability requirements of subsection 10(2) of the Act apply to any of the records at issue in the appeal.
- E. If the answer to Issue B or C is in the affirmative, whether there is a compelling public interest in disclosure of the records exempted under sections 17 or 21 that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

Before addressing the specific issues raised in this appeal, it should be noted that the purposes of the Act as set out in subsections 1(a) and (b) are:

- (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 proving that a record falls within any of the specified exemptions in the Act lies upon the head of the institution. It is up to the head to establish the proper application of the exemptions provided by sections 12 and 21. As far as the section 17 exemption is concerned, COMA, as an affected third party, shares with the institution the onus of proving that this exemption applies to the relevant records.

ISSUE A: Whether the head properly applied the mandatory exemption provided by section 12 of the Act to the requested records.

The record exempted by the institution under subsections 12(1) (b) and (c) is a funding proposal headed "Submission to Cabinet Committee on Social Policy".

Subsections 12(1) (b) and (c) of the Act read as follows:

12.--(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

...

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

...

The institution has provided an affidavit attesting to the fact that this record was sent to the Cabinet Committee on Social Policy. The affidavit also states that on or about July 20, 1988, COMA requested that the proposal be withdrawn and that on or about October 21, 1988, COMA requested that the proposal be reactivated. The affidavit also states that the Cabinet Committee has not considered the contents of the record.

COMA confirms that in December 1987 it sent the funding proposal directly to the Cabinet Committee on Social Policy. Hearing nothing from the Committee after a period of approximately seven months COMA asked that the proposal be returned so that it could be reworked and improved. COMA then sent the reworked proposal to Cabinet Committee in October 1988 and confirms that to date, so far as they are aware, the contents of the proposal have not been deliberated.

The appellant submits that subsections 12(1)(b) and (c) contemplate "internally generated records", as opposed to section 17 which, in his view, was intended to cover "information supplied in confidence by a third party". The appellant argues that it is inconsistent for the institution to claim these two exemptions concurrently.

The wording of section 12 of the Act does not specifically address the issue of whether or not the exemption is restricted to "internally generated records", as argued by the appellant. Ordinarily, records which are presented to Cabinet first go through a process of preparation by staff of an institution or the Cabinet Office, even in circumstances where some of the information contained in the records was originally provided by members of the public. This normal process was not followed with respect to the funding proposal at issue in this appeal; it was sent directly to the Cabinet Committee on Social Policy by COMA without first being reviewed by staff of the institution or any other department of government.

After reviewing the contents of the funding proposal and considering the representations of all parties, I have concluded that the record does not meet the requirements for exemption under section 12. In my view, this exemption is intended to ensure that records associated with the normal Cabinet decision-making process are protected from disclosure, provided they satisfy the specific requirements of section 12. The funding request from COMA, which was sent directly to the Cabinet committee, is not, in my view, the type of record which was intended to qualify for exemption under section 12, and, unless this record meets the requirements for exemption under another provision of the Act, it should be released to the appellant.

ISSUE B: Whether the head has properly applied the mandatory exemption provided by section 17 of the Act to the requested records.

The institution and the third party argue that the funding proposal and

three letters should be subject to exemption under section 17. Two of these letters represent an exchange of correspondence between COMA and the institution which predate the funding request, and the other is the covering letter accompanying the funding request.

Subsection 17(1) 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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to fall within the section 17 exemption, the institution and/or third party must satisfy the requirements of the following three-part test, outlined on page 4 of my Order 36 (Appeal Number 880030), released on December 28, 1988:

- 1. the records 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 injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

As stated earlier in this Order, the institution and affected third

party share the burden of proof in any claims for exemption under section 17.

The institution restricts its argument regarding the correspondence to subsection 17(1)(b), and submits that the correspondence between COMA and the institution contains financial information which has been implicitly supplied in confidence. Based on conversations with the Executive Director of COMA, the institution argues that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the institution where it is in the public interest that this practice continue.

The third party argues in general terms that the release of the records, which it regards as confidential, would cause harm (subsection 17(1)(c)).

The appellant makes no arguments relating to the substantive provisions of section 17. He contends that the institution should not be permitted to advocate the third party's interest under section 17, an argument which I do not accept for reasons outlined earlier in this Order.

I have carefully examined the three pieces of correspondence and, in my view, these records do not contain the type of information required to meet the first part of the test for exemption under section 17. The two letters from COMA to the institution generally outline a need for government funding;

and the response from the institution advises COMA on standard funding procedures. While the subject of all three pieces of correspondence relates to a funding request, in my view, this is not sufficient to qualify as "financial" information, as contemplated by section 17 of the Act. As I have stated in previous orders, in my view, financial information refers to specific data on the use and distribution of money, such as information on pricing practices profit and loss data, overhead and operating costs. (emphasis added)

As far as the funding proposal itself is concerned, it consists of the following parts:

- (a) cover pages;
- (b) section entitled "Need For Services";
- (c) section entitled "COMA: The Council on Mind Abuse" describing the organization;
- (d) section entitled "COMA's Needs";
- (e) section entitled "Projects";
- (f) section containing 1986 financial statements;
- (g) copies of newspaper and journal articles;
- (h) a copy of a "Ritual Abuse Questionnaire";
- (i) a copy of a speech made by (former) Attorney General Roy McMurtry.

After carefully examining this record, I find that only part (e) entitled "Projects", and part (f) containing the 1986 financial statements satisfy the requirements of the first part of the test for exemption under section 17. These two parts of the funding proposal, in my view, contain "financial" information.

Turning to the second part of the test, I must now determine whether parts (e) and (f) of the funding proposal qualify as "information supplied in confidence implicitly or explicitly".

The third party claims that the funding proposal was made with the implicit understanding that it would be treated as confidential. The institution submits that it is "reasonable to assume" that the request was submitted in confidence, and goes on to state that:

...this information was supplied to the Ministry prior to the coming into force of the FOI/PPA. There was no legislation in place during the time when the Record was created which would have alerted COMA that this information would potentially be disclosable to an outside force.

I have addressed this particular interpretation of implied confidentiality in Order 70 (Appeal Number 880264) dated June 29, 1989. At page 6 of that Order I concluded:

[T]he fact that a record or part of a record was not publicly available prior to the Act coming into force does not, in my view, establish confidentiality.

However, in this case, as in Order 70, supra, I need not base my decision solely on the second part of the test for exemption under section 17, because, in my view, the institution and/or third party have failed to satisfy the "harms" portion of the three-part test.

Addressing the third part of the test, the institution argues that disclosure of the record would reveal information about the organization which could prejudice COMA financially (subsection 17(1)(a)), and states that it has been advised by COMA that no further information of any type would be supplied if the record is disclosed. The institution also argues that "...it is in the public interest that information of the type which COMA has supplied continue to be so supplied..." (ss.17(1)(b)).

The third party supports the arguments of the institution, and identifies a previous experience in a different jurisdiction where documents which were considered "harmless" were photocopied and reassembled in a way which was damaging to the organization. In Order 36 supra, I discussed the requirements for satisfying the Part 3 test and noted that,

...the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a) - (c) would occur if the information was disclosed. (Emphasis added).

After reviewing the contents of the funding proposal and giving serious

consideration to the submissions of both the institution and the third party, in my view, the requirements for the third part of the test for exemption under section 17 have not been satisfied. The financial information at issue is at least two years old and is very general in nature. In the circumstances of this appeal, I find that neither party has presented detailed or convincing evidence sufficient to establish the harm envisioned by subsections 17(1) (a)-(c).

In summary, I find that the test for exemption under section 17 has not been satisfied with respect to the funding proposal or the three pieces of correspondence, and, subject to my discussion of Issue C, these records should be released to the appellant in their entirety.

ISSUE C: Whether the head properly applied the mandatory exemption provided by subsection 21(1) of the Act to the requested records.

The institution has relied on subsection 21(1) of the Act to exempt the names of COMA officers contained in the three pieces of correspondence between COMA and the institution referred to in my discussion of Issue B.

In all cases where requests involve access to personal information, it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" found in subsection 2(1) of the Act. This definition reads 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 submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director or president, is personal information defined in section 2 of the FIO/PPA."

Having carefully reviewed the contents of these three letters and the circumstances surrounding their submission to the institution, in my view, the names of the individuals do not qualify as "personal information" in the circumstances of this appeal. All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate

information" rather than "personal information" under the circumstances.

Having determined that the names do not qualify as 'personal information', the provisions of section 21 do not apply.

Because I have found in my discussion of Issues A, B and C that none of the exemptions claimed by the institution apply, it is unnecessary for me to consider Issues D and E.

The head is ordered to release the three pieces of correspondence and the funding proposal entitled "Submission to Cabinet Committee on Social Policy" to the appellant in their 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 26, 1989
Date