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

ORDER P-257

Appeal 900094

Ministry of Community and Social Services

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O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

BACKGROUND:

On April 20, 1989, the Ministry of Community and Social Services (the "institution") received a request for access to the Program Review file of the Children's Castle Day Care Centre in Ottawa, and the 1988-1989 negative Day Nursery Health Inspection Reports (the "reports") prepared by the Ottawa-Carleton Medical Officer of Health (the "MOH"). The institution denied access to the Program Review file and all reports pursuant to subsection 17(1) of the Act.

The requester appealed the decision of the institution to this office. During the course of mediation, the requester received access to the Children's Castle Day Care Centre Program Review file with all personal information severed. The requester indicated that he was satisfied with this decision, and the first part of his appeal was settled.

With respect to the reports, the institution decided to deny access until all potential affected persons were notified and given an opportunity to provide their comments. Pursuant to subsection 28(1) of the Act, the institution notified the MOH for the Regional Municipality of Ottawa-Carleton (the author of the reports) and the day care centres identified by the institution as affected persons.

The MOH and two day care centres responded to the institution's notification, each objecting to the institution's intent to disclose the reports. The day care centres expressed concern that
the reports could be misinterpreted by persons not familiar with the circumstances. Despite the objections, the institution decided to release all reports to the requester. One of the day care centres and counsel for the MOH appealed the institution's decision to grant access to the reports.

Two appeal files were opened by this office: Appeal Number 900092 dealing with the appeal by the day care centre, and Appeal Number 900094 addressing the appeal by counsel for the MOH. The day care centre agreed to close Appeal Number 900092, and to be considered as an affected person in Appeal Number 900094. Accordingly, this order deals with the reports involving the various day care centres in Appeal Number 900094.

Because mediation of the appeal was not successful, counsel for the MOH (the "appellant") requested that an inquiry be conducted to review the head's decision to grant access to the reports. The appellant, the institution, the original requester and sixteen day care centres (the "affected persons") were notified of the inquiry. One day care centre had closed, and was unable to be notified.

Written representations were received from the original requester, the appellant, and four of the affected persons. The institution maintained its position that the reports should be released to the requester. The appellant relied on the

objections he had made when originally contacted by the institution.

The reports are written on preprinted forms entitled "Inspection Report". The forms are divided into two parts. Part I contains observations made on general environmental health, sanitation and maintenance, such as comments on the cleanliness of the floors, ceilings, cupboards and washrooms of the day care centre during inspection. The form indicates that these items must be corrected on or before the next regular inspection. Part II contains specific sanitation, design and maintenance comments such as unsafe

play areas. The form indicates that these items must receive immediate attention.

The reports are prepared in accordance with the provisions of the Health Protection and Promotion Act. This legislation authorizes the MOH to oversee the provision of health programs and services in his/her jurisdiction. Pursuant to this statutory obligation, the MOH's staff enters and inspects the day care centres, and prepares a report. The relevant day care centre receives a copy of each report. The day care centre then forwards a copy of the report to the institution, as required by regulation under the Day Nurseries Act. That legislation sets out standards applicable to the licensing and regulation of day care centres in their daily operations, including adherence to health and safety standards.

ISSUES:

The key issues arising in this appeal are as follows:

A. Whether an affected person can rely on the application of a discretionary exemption to claim that access to a record should be denied in circumstances where the institution has not claimed the exemption.

B. Whether the reports are in the custody or control of the institution pursuant to section 10(1) of the Act.

C. Whether the mandatory exemption provided by section 17(1) of the Act applies.

D. Whether the information contained in the reports qualifies as "personal information" as defined by section 2(1) of the Act.

E. If the answer to Issue D is yes, whether disclosure of such personal information would result in an unjustified invasion of any individual's personal privacy.

F. Whether the records can reasonably be severed, under section 10(2) of the Act, without disclosing the information that falls under an exemption.

G. Whether section 23 of the Act applies in the circumstances of this appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether an affected person can rely on the application of a discretionary exemption to claim that access to a record should be denied in circumstances where the institution has not claimed the exemption.

The first issue in this appeal concerns the possible application of subsections 14(1) and (2) of the Act. These subsections were raised by the appellant following his notification of the request by the institution pursuant to section 28 of the Act.

Section 28(1) states:

> Before a head grants a request for access to a record,

> (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
>
> (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

This section requires the head to notify affected persons in order to provide them with an opportunity to make comments with respect to the application of sections 17(1) and 21(1)(f). The Act does not require the head to notify an affected person in respect of any other exemption, nor does it provide for an affected person to raise any other exemption for consideration during the appeal process. The Act acknowledges that the views of an affected person are a valuable component of the head's decision-making process with respect to the specific types of information covered by sections 17(1) and 21(1). However, the Act makes no similar acknowledgement with respect to other exemptions and, in the absence of the circumstances which give rise to the application of section 28(1), an affected person would have no knowledge of the head's intention to release records prior to the actual release.

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the Act. In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the

case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

In the circumstances of this appeal, I feel that the interests of the appellant and the affected persons have been recognized and addressed through the issuance of the appropriate notices during the course of considering how to respond to the original request. In my view, a consideration of the proper application of sections 17(1) and 21(1) will address those interests, and it is not necessary or appropriate for me to consider the appellant's arguments with respect to sections 14(1) and (2) of the Act.

ISSUE B: Whether the reports are in the custody or control of the institution pursuant to section 10(1) of the Act.

The appellant submitted that the institution does not have custody or control of the reports as required by section 10(1) of the Act. That section states:

> Every person has a right of access to a record or a part of 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.

The appellant submitted that the institution merely had simple possession of the reports. He stated that the institution has no propriety interest in the reports; no right to deal with them in any way except for the limited purposes described by the Day

Nurseries Act; cannot prescribe what information is contained in the reports; cannot require their production by the MOH; nor can it transfer the reports to third parties. The appellant further stated that the MOH is under no legal obligation to forward the

reports to the institution, and that they are for the internal use of the MOH and the day care centres. The appellant did acknowledge, however, that each of the day care centres is legally obliged to forward copies of each report to the institution, as required by regulation under the Day Nurseries Act.

In Order 41, dated March 2, 1989, former Commissioner Sidney B. Linden stated that institutions must be found to have either "custody" or "control" of the record, but not both. I agree with this interpretation of subsection 10(1) of the Act and adopt it for the purposes of this appeal. In Interim Order 120, dated November 22, 1989, Commissioner Linden stated that the terms "custody" and "control" should be given a broad interpretation in order to give effect to the purposes and principles of the Act. On page 11 of that Order, he outlined some factors that should be considered when determining the issue of "custody" and "control" of the record. Two of these are relevant in this case:

> 3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
>
> 6. Does the content of the record relate to the institution's mandate and functions?

Commissioner Linden stated at page 15 of that Order that:

> ... physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

Following the reasoning of those two Orders and considering the facts in this case, I am of the opinion that the institution has custody of the reports through both physical possession and pursuant to the mandatory reporting requirement contained in the regulation under the Day Nurseries Act.

Having found that the institution had "custody" of the reports, it is not necessary to consider whether it had "control" over them.

ISSUE C: Whether the mandatory exemption provided by section 17(1) of the Act applies.

The appellant submitted that sections 17(1)(a), (b) and (c) of the Act apply to the reports. These sections read as follows:

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

Before considering the appellant's submissions, I will set out the requirements of section 17(1), as established by former Commissioner Linden in Order 36, dated December 28, 1988. At page 4 of that Order, Commissioner Linden outlined a three-part test which must be met in order for a record to be exempt under this section:

> 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) exemption claim invalid.

Turning to part two of the test, the appellant stated in his representations that the information contained in the reports was obtained through inspections required by and carried out pursuant to the Health Protection and Promotion Act. Once the reports are completed and provided to the relevant day care centre, each centre then forwards a copy to the institution, as required by regulation under the Day Nurseries Act. In my view, it is clear that the appellant did not supply the reports to the institution. Rather, the institution obtained the reports from

the various day care centres by statutory requirement. In my view, the appellant has

not established the requirements of the second part of the above-mentioned test and, therefore, the mandatory exemption provided by section 17(1) of the Act does not apply.

ISSUE D: Whether the information contained in the reports qualifies as "personal information" as defined by section 2(1) of the Act.

The appellant cited sections 2(1)(a) through (h) of the Act in claiming that the reports "may contain personal information ... about both the Health Department inspector preparing the [health inspection] report, and an individual associated with an establishment being inspected". The appellant further maintained that the reports contain the personal opinions of the Health Inspector and his supervisor, whose names appear on the reports.

Section 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;

Upon a review of each of the reports, I note that at the bottom of each one there are two spaces headed "Signature of Public Health Inspector" and "Signature of Person in Charge". On most of the reports those spaces contain the names of a health inspector and an employee or director of the day care centre. In all instances the comments on the reports relate only to the day care centres and not to any identifiable individual.

In my view, the comments about the day care centres in the body of the reports do not constitute "recorded information about any identifiable individual", as required by the Act. The names of the health inspector and day care employee or director are clearly included on the reports in their capacities as representatives of the MOH and the day care centres respectively, and do not constitute "personal information" as defined in section 2(1).

Support for this view is contained in Commissioner Linden's Order 80, dated July 26, 1989. In that Order, Commissioner Linden found that corporate officers' names appearing on correspondence concerning corporate matters did not qualify as "personal information", but was more accurately described as "corporate information".

Because I have found that the reports do not contain "personal information" as defined in section 2(1) of the Act, it is not necessary for me to consider Issue E.

Having decided that the answers to Issues C and D are no, I also do not need to consider Issues F or G.

ORDER:

1. I order the head to disclose the reports to the requester.

2. I further order that the institution not release these reports until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in

order to give the parties to the appeal sufficient opportunity to apply for judicial review of my decision before the reports are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution within this thirty (30) day period, I order the institution to release the reports within thirty-five (35) days of the date of this Order.

3. I further order the head to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom Mitchinson
Assistant Commissioner

November 29, 1991
Date