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

ORDER 149

Appeal 890108

Metropolitan Toronto District Health Council

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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, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(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 16, 1989, the requester wrote to the Metropolitan Toronto District Health Council (the "institution") seeking access to:

   Subject of the Record: a proposal to establish a Community Health Centre

   Name of Centre: Centre for Women's Health

   Proposed by: [a named individual]
   [a named individual]
   [a named individual]
   [a named individual]
   [a named individual]

   Specific event: 1) An article was published in the Toronto Star on January 25, 1989 (p.A3) entitled "Abortions included in plan for clinic". This article conveyed certain information pertaining to the above proposed centre.

> 2) The District Health Council has confirmed the submission of the proposal.

2. Following discussions with the representative for the persons who might be affected by the release of the record (the "affected persons"), the institution replied to the requester on March 14, 1989 as follows:

> Please be advised that after careful consideration, the request is refused under the authority of Sections 17 and 21 of the Act.

3. On April 11, 1989, my office received an appeal from the decision of the institution. I gave notice of the appeal to the institution and the appellant on April 26, 1989.

4. The Appeals Officer obtained and reviewed the record which is a 130 page proposal, with a 10 page index, for a community health centre with a focus on the health of women. Between April 26, 1989 and June 8, 1989 an Appeals Officer investigated the matter with a view to settlement, but in the circumstances of this appeal, no settlement was obtained. During attempts to mediate a settlement of the appeal, the appellant advised the Appeals Officer that she was not interested in the addresses of the individuals named in the record.

5. On June 8, 1989, notice that I was conducting an inquiry to review the decision of the head was sent to the appellant, the institution and the representative for the affected persons. Enclosed with each notice letter was 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. This

report indicates that the parties, in making their representations to me, need not limit themselves to the questions set out in the report.

6. On June 14, 1989, my office was advised by the representative for the affected persons that they had consented to the release of the program content of the record (pages 9 to 130 inclusive). They maintained their objection to the release of any part of the record containing names of individuals (specifically, a covering letter to the institution, pages 1 to 8 inclusive, page 131 and Appendix 1).

7. On June 19, 1989, the appellant's representative wrote to indicate that the inquiry should continue only with respect to the severed portion of the record, namely "...pages 1 through 8, the deleted portion of page 82 and the balance of any other material filed in support of the proposal. In particular, our client wishes to have access to the names of individuals and groups who are supporting the proposal for the establishment of a Centre for Women's Health."

The appellant's representative indicated that portions of page 82 of the record were deleted. I have reviewed this

page, which consists of only one quarter of a typed page of information, and find that it has been disclosed to the appellant in its entirety.

8. On August 4, 1989, the head provided access to additional parts of the record with the exception of the covering letter and pages 2, 3, 4, 131 and Appendix 1(a)(b)(c) which were severed in their entirety. Pages 5, 6, and 7 were disclosed with severances. These portions of the record remain at issue in this appeal.

9. Written representations were received from the appellant, the institution and the representative for the affected persons. Both the institution and the representative for the affected persons abandoned the claim of the section 17 exemption, but maintained that disclosure of the requested information would constitute an unjustified invasion of personal privacy pursuant to section 21 of the Act. I have considered all representations in making this Order.

The issues arising in this appeal are as follows:

A. Whether the severed portions of the record contain "personal information" within the meaning of subsection 2(1) of the Act.

B. If the answer to Issue "A" is in the affirmative, whether disclosure of the severed portions of the record would be an unjustified invasion of the personal privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

C. Whether the requested record could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

D. Whether there is a compelling public interest in the disclosure of the severed portions of the record which clearly outweighs the purpose of the exemption, pursuant to section 23 of the Act.

Before beginning my discussion of the specific issues in this case, I think it would be useful to outline briefly the purposes of the Act as set out in section 1. Subsection 1(a) provides a 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 be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. This 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 where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head. In this case, the burden of proving the applicability of the section 21 exemption lies both with the head and the affected persons as they are the ones resisting disclosure.

ISSUE A: Whether the severed portions of the record contain "personal information" within the meaning of subsection 2(1) of the Act.

Where a 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. Subsection 2(1) of the Act provides the following definition:

> "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;

As previously mentioned, the severed portions of the record are part of a proposal for a community health centre with a focus on the health of women. Before such a proposal can be considered for funding by the Ministry of Health, it must be submitted to the appropriate District Health Council for its review and recommendation. In this case, the proposal was submitted to the institution on December 8, 1989.

The proposal identifies the proponents of the Centre for Women's Health (the "Centre") as members of the Steering Committee of the Centre for Women's Health (the "Steering Committee"). The proposal indicates that the idea for a centre to address the health needs of the "whole woman" was fostered over five years ago by "a group of women, actively involved in women's issues". Extensive consultations were conducted throughout the five years it took to plan and complete the proposal for the Centre.

According to the proposal, the Steering Committee is comprised of 50 women "who possess a vast array of relevant skills, knowledge and experience, e.g. women's health issues, community development, research, health care, business management, human resources management, fundraising." (sic)

Examination of the severed portions of the record in issue shows that it contains, amongst other information, the names of individuals who are Steering Committee members as well as some of the individuals who were involved in the consultation process. Along with the names, the proposal also identifies the "affiliation" of Steering Committee members; e.g., the member's position in the community, a place of employment or place of business. Some of the affiliations contain personal identifiers

as well, for example "Director", "Co_Founder" or "extension 24" of a business telephone. In addition, the home or business addresses and home or business telephone numbers of the Steering Committee Members are included.

The representative for the affected persons advised one of my staff that the affiliations were included in the proposal as an indication of the Steering Committee members' background and experience. She stated that although the named individuals' affiliations were included in the severed portions of the record, the members were not acting as representatives of their respective affiliates, but rather, on their own behalf. Regardless of the reasons why these affiliations were included in the severed portions of the record, in my view, they, along with the names, addresses and telephone numbers included in the severed portions of the record, are personal information as defined in subsection 2(1) of the Act.

The severed portions of the record also contain information which is not personal information as defined in subsection 2(1) of the Act.

A covering letter from a member of the Steering Committee to the Executive Director of the institution, which was carbon copied to an Executive Director at the Ministry of Health, was withheld from disclosure. The author's name and address is the only part of the letter which qualifies as personal information. Therefore, I order the head to disclose the balance of the letter to the appellant.

Page 2 of the severed portion of the record, excluding the columns of names and affiliations, does not contain personal

information. Therefore, except for the aforementioned columns, I order the head to disclose page 2 to the appellant.

The first line and the line identified with the number 4 on page 4 of the severed portion of the record, and the first four

lines on page 5 of the severed portion of the record are not personal information. I therefore order the head to disclose these portions of the record to the appellant.

The first two sentences of the last paragraph on page 6 of the record were severed. There is no personal information contained in those two sentences. Therefore, I order that the first two sentences of the last paragraph on page 6 be disclosed to the appellant.

Finally, page 131 of the severed portion of the record, exclusive of the signatures, does not contain personal information. Therefore, except for the aforementioned signatures, I order the head to disclose page 131 to the appellant.

ISSUE B: If the answer to Issue "A" is in the affirmative, whether disclosure of the severed portions of the record would be an unjustified invasion of the personal privacy of the persons to whom the information relates, pursuant to section 21 of the Act.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this information, except in certain

circumstances. In particular subsection 21(1)(f) of the Act reads as follows:

> 21.__(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> ...
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Subsection 21(2) sets out some criteria to be considered by the head when determining if disclosure of personal information constitutes an unjustified invasion of personal privacy.

Subsection 21(2) of the Act provides that:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The representative for the affected persons argued that the disclosure of personal information contained in the severed portions of the record would be an unjustified invasion of the affected persons' personal privacy. With respect to the possible application of subsection 21(2)(a), the representations on behalf of the affected persons went on to state:

> It is our submission that the Government of Ontario is interested in funding the Centre because of the program content of the Centre. The personal information of the proposers is irrelevant. The public has a right to
>
> scrutinize the activities of the Government of Ontario, and to question its funding policies. In this case, the program content of the proposal has been released in its entirety and provides all information that could be required to scrutinise the Government or its agency.

It was also the position of the representative for the affected persons that the individuals named in the proposal could be exposed unfairly to harm, pursuant to subsection 21(2)(e), should the personal information be released. Reference was made to incidents of harassment of individuals who have been identified as supporters of projects similar to the one described in this appeal.

The representative for the affected persons also submitted that:

> Section 21(2)(h) asks whether the information was provided "in confidence". When the proposal was drafted to include the names and personal information of the steering committee members and others, no one concerned had any idea that this information would be released to the [appellant]. The Centre for Women's Health would submit that the personal information was submitted with the proposal in confidence. That is, had the proposers known of the provisions of the Freedom of Information Act at that time, the personal information would not have been included with the proposal.

The representations submitted by the institution indicated that:

> It is submitted that the mandate of the MTDHC [Metropolitan Toronto District Health Council] is to determine the health needs of the Metropolitan Toronto community and that Council's major vehicle in determining the needs is through community representations made in the form of proposals and other submissions. Every proposer who makes a submission to the MTDHC believes that their proposal is being submitted in confidence. Many years have been invested in developing the trust and confidence of our community. If all proposal submissions were made public documents, there would be a real danger of similar information not being supplied to the MTDHC and therefore inhibiting Council from fulfilling its mandate.

The appellant made no representations with respect to the applicability of subsections 21(2)(a), (e) or (h). The appellant's representations focused on her assertion that the individuals named in the severed portions of the record "are public figures". Not having seen the severed portions of the record, it appears as if the appellant is basing her assertion

on an article that appeared in the "Toronto Star" on January 25, 1989 in which several individuals were identified as being involved with the proposal.

A representative of the Steering Committee did provide a copy of the record including the severed portions of the record at issue in this appeal to a newspaper reporter and the reporter's subsequent article did mention several names that appear in the severed portions of the record. However, I also note that the reporter's description of the individuals involved with the proposal is not, in all cases accurate. In any event, I find that in the circumstances of this appeal, the individuals mentioned in the severed portions of the record could not be deemed to have consented to the release of the personal information which relates to them. This is true for several reasons.

Firstly, it cannot be said that all of the individuals named in the severed portions of the record knew what was in the record; only three individuals were signatories and the others were only mentioned in the severed portions of the record by name.

Secondly, the representative for the affected persons advised one of my staff that some individuals mentioned in the severed portions of the record had not actually been asked whether their names could be used.

Finally, even the signatories could not be said, at the time that they signed the proposal, to have understood that it would be made public. Indeed, investigations conducted by my staff indicate that the procedures employed by the institution when

reviewing proposals promote confidentiality through "in camera" sub_committee and committee meetings and by providing the public with only a synopsis of the proposal at the time it is being publicly debated by the District Health Council.

I have carefully considered the representations submitted by the appellant, the institution and the representative for the affected persons and I find that disclosure of the personal information in the severed portions of the record would constitute an unjustified invasion of the personal privacy of the affected persons. I uphold the head's decision not to disclose this information subject to my findings under Issues C and D.

ISSUE C: Whether the requested record could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

While I have found that release of the personal information in the severed portions of the record would be an unjustified invasion of the personal privacy of those named within it, I have also reviewed the severed portions of the record with a view to determining whether further severances can reasonably be made pursuant to subsection 10(2) of the Act.

Subsection 10(2) of the Act states that:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

In my Order 24 (Appeal Number 880006) dated October 21, 1988, I established the approach which should be taken when considering the severability provisions of subsection 10(2). At page 13 of that Order I stated:

> A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, at the same time protecting the confidentiality of the record covered by the exemption.

Following a review of the severed portions of the record, I find that it is possible, after removing the names, home addresses, home telephone numbers and any personal identifiers with respect to the affiliations, for example "Director", "Co_Founder" or "extension 24" of a business telephone, to disclose to the appellant the affiliations mentioned in the severed portions of the record. In my view, such disclosure can be made without constituting an unjustified invasion of the personal privacy of the affected persons.

I therefore order the head to disclose to the appellant the affiliations mentioned in the severed portions of the record, with all personal identifiers and other personal information severed. However, if disclosing an affiliation would lead in any way to the identification of an individual named in the severed portions of the record, then I order the head not to disclose that affiliation.

At this juncture it is also important to reiterate that the named individuals were acting on their own behalf and were not acting as representatives of their respective affiliates, where those affiliates are a place of business or an employer.

Therefore, it is not to be assumed that the affiliates listed in the severed portions of the record had any knowledge of, or expressed any support for, the proposal.

ISSUE D: Whether there is a compelling public interest in the disclosure of the severed portions of the record which clearly outweighs the purpose of the exemption, pursuant to section 23 of the Act.

The appellant cited section 23 of the Act in support of disclosure of the severed portions of the record in question.

Section 23 of the Act states that:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

I considered the proper interpretation of section 23 in my Order 24 (Appeal Number 880006) dated October 21, 1988. At page 14 of the Order I stated:

> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so_called "public interest override": there must be a compelling public interest in disclosure; and this compelling interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The burden of proof with respect to section 23 was considered in my Order 61 (Appeal Number 880166) dated May 26, 1989. I stated at page 11:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

With respect to section 23 of the Act, the appellant submitted that:

> ...there is a compelling public interest in obtaining the disclosure of all materials submitted in support of the proposal including the names of individuals and the groups who support the proposal.

The representative for the affected persons argued that:

> It is our submission that the compelling public interest in this case would militate for non_disclosure of this personal information where the personal information adds nothing to the program content of the proposal, and where the release of this personal information could subject the persons concerned to harassment or threats.

The representative for the affected persons further submitted that:

> The Centre for Women's Health submits that the proposal should be evaluated on its program content, and that the inclusion of the names in the proposal is irrelevant to the policy concerns of the [appellant]. The Centre for Women's Health submits that the [appellant] has a right to sufficient information to evaluate their objections to the proposed community health centre. We submit that the names and addresses and personal affiliations of the persons concerned are not an integral part of the proposal...

One of the principles in support of legislated freedom of information is that it furthers public debate and helps to ensure the accountability of the government. In considering the proper application of section 23 to this appeal, I am mindful of the fact that the record in question is a proposal which consists of an application for public funding to establish a community health centre.

Having reviewed the severed portions of the record and considered the representations of the appellant and the representative for the affected persons, I find that the appellant has failed to demonstrate such a compelling public interest in disclosure of the personal information in the severed portions of the record which clearly outweighs the purpose of protecting personal privacy under section 21 of the Act. Further, it is my view that the public's interest in this matter has been adequately and properly served by the disclosure of the "program" content of the record.

In summary my Order is as follows:

1. I order the head to disclose to the appellant the portions of the covering letter and pages 2, 4, 5, 6 and 131 that do not contain personal information.

2. I uphold the head's decision not to disclose the personal information in the severed portions of the record subject to Item 3 below.

3. I order the head to disclose the affiliations mentioned in the severed portions of the record to the appellant, after

removing any personal information and personal identifiers that would allow someone to be able to identify any individual named in the severed portions of the record. However, if disclosing an affiliation would lead in any way to the identification of an individual named in the severed portions of the record, then I order the head not to disclose that affiliation.

4. I order the head not to disclose to the appellant the parts of the severed portions of the record as described in Items 1 and 3 above until 30 days following the date of this Order. This time delay is necessary in order to give any party to the appeal the opportunity to apply for judicial review of my decision before the severed record is 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 severed record be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing as to the date of such disclosure within five (5) days of the date on which disclosure is made to the appellant.

Original signed by: February 22, 1990
Sidney B. Linden Date
Commissioner