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

ORDER P-339

Appeal P-910192

Ministry of Correctional Services

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ORDER

BACKGROUND:

The Ministry of Correctional Services (the institution) received the following request under the Freedom of Information and Protection of Privacy Act (the Act):

> I am requesting full interview results and marks awarded to all involved in competition #CI-4120-90. I request that all participants be identified by number only to protect their privacy. I would like the successful candidates identified by their numbers as above, identified as well as the unsuccessful candidates identified with a full breakdown of all marks awarded re: education, experience, interview points etc. I want to know if any investigation took place regarding this competition and if so I would like the details, results and conclusions provided. Again by the same letter, please identify the individuals involved in the investigation.

The institution denied access to certain responsive records pursuant to section 21 of the Act, and the requester appealed the institution's decision. The institution later added sections 18(1)(c) and (d) as new exemption claims with respect to the question and answer sheets, and refused to confirm or deny the existence of records related to an investigation pursuant to section 21(5) of the Act.

During mediation, the scope of the appeal was narrowed to the following records and exemptions:

1. Three sets of question and answer sheets for each of the 24 candidates in the competition. Each set is four pages in length, consisting of twelve typewritten questions and a list of ideal responses for each question. All identifying characteristics of the candidates have been removed from these records and are not within the scope of this appeal. The institution claims section 18(1)(c) and (d) as the basis for exempting these records.

2. Documents related to an investigation, if they exist. The institution refuses to confirm or deny the existence of any responsive records, pursuant to section 21(5) of the Act.

Because further mediation was not possible the matter proceeded to an inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. In order to assist the parties in making representations to this office, the notice contained a summary of the facts of the appeal, a description of the issues and a list of the exemptions claimed. Written representations were received from the institution. While the appellant did not provide any representations, his letter of appeal includes statements in support of his position.

ISSUES:

A. Whether the discretionary exemptions provided by sections 18(1)(c) and/or (d) of the Act apply to the question and answer sheets.

B. Whether the head properly exercised his discretion under section 21(5) of the Act in refusing to confirm or deny the existence of certain responsive records.

C. If the answer to Issue B is no, whether records related to an investigation would qualify as personal information as defined in section 2(1) of the Act.

D. If the answer to Issue C is yes, whether records related to an investigation would satisfy the requirements of the mandatory exemption provided by section 21 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 18(1)(c) and/or (d) of the Act apply to the question and answer sheets.

The institution claims that sections 18(1)(c) and (d) of the Act apply to all of the question and answer sheets. These sections read as follows:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
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> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

The phrase, "could reasonably be expected to", as it is used in these sections means that the expectation of one of the identified harms coming to pass, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one that is based on reason. Further, in order to support a claim under this section, the evidence provided by the institution must be detailed and convincing [Orders 203, 204 and 229].

The institution submits:

> Unsuitable correctional officers can represent a significant financial drain on the ministry's resources. This results from increased training needs, increased work absences, increased administrative errors, and increased operational and security errors - all of which prove to be very costly for the ministry. Furthermore, security errors can also prove to be quite costly for other agencies such as transfer payment agencies, the police and the courts.
>
> A further prejudice relates to the time and money invested in developing competition questions and ideal responses. In this period of constraint, it is questionable for this ministry to utilize scarce resources in order to constantly prepare new questions and ideal responses. Given the clearly defined and very limited scope of the correctional officer position - essential duties centre around the care, custody, and control of offenders - it is time-consuming, difficult and costly for human resources personnel to keep developing fresh questions.

In my view, the information contained in the question and answer sheets is not the type of information which section 18 was designed to protect. I find that the institution has failed to establish the requirements for exemption under sections 18(1)(c) and/or (d), and I order the institution to disclose the question and answer sheets to the appellant, subject to the agreed-upon severance of all identifying personal information.

ISSUE B: Whether the head properly exercised his discretion under section 21(5) of the Act in refusing to confirm or deny the existence of certain responsive records.

Section 21(5) of the Act reads as follows:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which, in my view, should be exercised only in rare cases.

In my view, an institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

In its representations, the institution states that individuals referred to in the requested records wish the matter to remain confidential and object to any disclosure which would invade an individual's privacy. Further, the institution states that simply confirming the existence of a record would unfairly damage the reputation of individuals referred to in the records.

In my view, the head has confused the exercise of discretion under 21(5) with the analysis of the exemption claim under section 21. By simply confirming that records associated with an investigation exist, the head is not confirming that any identifiable individual was investigated. Rather, the head is merely confirming that records associated with such a process exist, without indicating the parties involved. In my view, there is no unjustified invasion of personal privacy in these circumstances.

I find that the head has not provided sufficient evidence to establish that disclosure of the existence of records relating to an investigation would convey information to the requester which would constitute an unjustified invasion of personal privacy and therefore, section 21(5) does not apply.

ISSUE C: If the answer to Issue B is no, whether records related to an investigation would qualify as personal information as defined in section 2(1) of the Act.

In disposing of Issue B, it was necessary for me to confirm that records related to an investigation do in fact exist. I will now determine whether these records contain personal information as defined in section 2(1) of the Act.

The definition of personal information found in section 2(1) of the Act states in part: "personal information" means recorded information about an identifiable individual ...".

There are two letters and eight pages of notes taken during a meeting which are responsive to the appellant's request for information related to an investigation. The institution submits that these records include information relating to the employment history of several individuals, as well as personal opinions and views about a particular individual.

In my view, the letters and notes contain recorded information about identifiable individuals and qualify as personal information as defined in section 2(1) of the Act.

ISSUE D: If the answer to Issue C is yes, whether records related to an investigation would satisfy the requirements of the mandatory exemption provided by section 21 of the Act.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this personal information except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act, which reads:

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

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(2) of the Act provides a list of criteria for the head to consider in making his determination, and section 21(3) identifies types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The institution submits that section 21(3)(d) applies in the circumstances of this appeal. This section reads as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > relates to employment or educational history;

The institution submits that the letters and notes relate to the employment history of the persons referred to in the letters and notes, thereby satisfying the requirements of section 21(3)(d).

Having reviewed the representations and the circumstances of this appeal, in my view, records related to the investigation of this job competition do not satisfy the requirements of a presumed unjustified invasion of personal privacy under section 21(3)(d). A record which outlines information about the administration of a competition is not, in my view, properly considered to be part of any individual's employment history.

The institution also raises the factors listed in sections 21(2)(e), (f) and (i). These sections read:

> 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,
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> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

To summarize the institution's arguments, it submits that the release of the letters and notes would cause personal embarrassment, and impact negatively on the reputation and career of individuals referred to in the records. It also argues that the release of the information could result in the loss of career opportunities, thus creating the prospect of lost income or pecuniary harm.

One of the individuals referred to in the records (the affected person) was contacted during the course of the inquiry and afforded the opportunity to make representations. In response, the affected person indicated that he strongly objected to the release of the letters and notes. In support of his position, he identifies several of the presumptions set out in section 21(3), and lists a number of exceptions to the personal information exemption listed in 21(1), stating that none of them apply in the circumstances of this appeal.

Although not specifically referring to any of the section 21(2) factors, the affected person does raise the possible application of sections 21(2)(e) and (i) by stating that, "Once the candidate [who was questioned during the investigation] is identified then he or she may be treated prejudicially by others for having been investigated".

The appellant did not address the application of section 21 in his representations.

Having carefully reviewed all of the provisions of section 21, the representations of the parties and the circumstances of this appeal, I find that the records contain personal information which could properly be characterized as highly sensitive [section 21(2)(f)]. In my view, therefore, disclosure of the records relating to the investigation would constitute an unjustified invasion of personal privacy, and the mandatory exemption provided by section 21 of the Act applies.

ORDER:

1. In this order, I have disclosed the existence of records responsive to the appellant's request. Because the institution and/or the affected person may apply for judicial review, I have decided to release this order to the institution and the affected person in advance of the appellant. The purpose for doing this is to provide the institution and/or the affected person with an opportunity to review the order and determine whether to apply for judicial review.

2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order. I order the head to disclose the question and answer sheets, with the identifying characteristics removed, to the appellant within twenty (20) days of the date of this order, and advise me in writing within five (5) days of the date in which disclosure was made. This notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1. A copy of this order will be sent to the appellant upon the

expiration of the fifteen (15) day period referred to above, unless a Notice of an Application for Judicial Review has been served on me.

3. I uphold the head's decision to deny access to the records related to an investigation of the job competition.

4. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, upon my request.

Original signed by: August 10, 1992
Tom Mitchinson
Assistant Commissioner