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

ORDER P-352

Appeals P-9200372 and P-9200392

Archives of Ontario

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ORDER

BACKGROUND:

The Archives of Ontario (the Archives) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to a 1976 report prepared by the Inspection and Standards Branch of the Ministry of Correctional Services (the ministry), concerning alleged inappropriate staff conduct at the Grandview Training School for Girls (Grandview).

The record consists of:

- a one-page internal memo;
- a one-page memo on letterhead;
- the investigation report, which is comprised of a one-page index, 16-page investigation report in memo form, and 84 pages of attachments.

The Archives denied access to the entire record pursuant to section 14(2)(a) of the Act. The Archives also exempted significant portions of the record under sections 14(1)(a), (b), (c), (d), and (f), 14(2)(d) and 21 of the Act.

The Archives indicated that it had considered section 23 of the Act and concluded that "there is no compelling public interest in disclosure of the information which would clearly outweigh the need to protect the personal privacy of individuals named in the record." The Archives noted that section 23 does not apply to information found to be exempt under section 14 of the Act.

Both requesters appealed the Archives' decision.

Mediation of the appeals was unsuccessful and the matters proceeded to inquiry. Notice that an inquiry was being conducted to review the decisions was sent to the Archives, the appellants and the person whose conduct was the subject of the record (the affected person). Enclosed with each notice was an Appeals Officer's Report, intended to assist the parties in making representations about the subject matter of the appeal. Written representations were received from all parties. In its representations, the Archives withdrew its exemption claim under section 14(1)(c), and added section 14(2)(b) in the context of the possible application of the Young Offenders Act as a new exemption claim.

ISSUES:

A. Whether the record contains information which falls within the scope of the Young Offenders Act, and qualifies for exemption under section 14(2)(b) of the Act.

B. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

C. Whether the record contains information that would qualify as "personal information" as defined in section 2(1) of the Act.

D. If the answer to Issue C is yes, whether the mandatory exemption provided by section 21 of the Act applies.

E. If the answer to Issue D is yes, whether there is a compelling public interest in disclosure of the personal information contained in the record or part thereof, which clearly outweighs the purpose of the section 21 exemption.

F. Whether the discretionary exemptions provided by section 14(1)(a), (b), (d) and/or (f) of the Act apply.

G. Whether the discretionary exemption provided by section 14(2)(d) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record contains information which falls within the scope of the Young Offenders Act, and qualifies for exemption under section 14(2)(b) of the Act.

Section 14(2)(b) provides:

> A head may refuse to disclose a record,
>
> > that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

The Archives submits that because some wards at Grandview were committed to training schools pursuant to the Juvenile Delinquents Act, the predecessor to the Young Offenders Act (the YOA), the record may contain information about these wards. The Archives suggests that disclosure of the record for reasons other than those cited in the YOA may contravene that statute, which is an Act of the federal parliament.

Section 45.2 of the YOA specifies the circumstances under which a provincial archivist may disclose records about young offenders:

> Where records originally kept pursuant to section 40, 42 or 43 are under the custody or control of the National Archivist of Canada or the archivist for any province, that person may disclose any information contained in the records to any other person if:
>
> (a) the Attorney General or his agent is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and
>
> (b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

Section 40, 42 and 43 of the YOA regulate record keeping practices of courts and government agencies with respect to their dealings with the activities of young persons within the justice system.

In my view, the record at issue in this appeal does not qualify as a record which falls within the scope of the YOA. The record concerns an internal investigation into the operation of a training school, and the conduct of certain employees of the ministry. The investigation which lead to the creation of the record was not conducted for the purpose of investigating an offence alleged to have been committed by a young person; for use in proceedings against a young person; or for any other type of activity outlined in sections 40, 42 or 43 of the YOA. As such, I find that section 45.2 of the YOA is not applicable to the record, and section 14(2)(b) of the Act is not a valid exemption claim in the circumstances of this appeal.

ISSUE B: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

The Archives claims that section 14(2)(a) applies to the record in its entirety. Section 14(2)(a) reads:

> A head may refuse to disclose a record,
>
> that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The Archives must satisfy each part of the following three-part test in order to properly exempt a record under section 14(2)(a):

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

I have reviewed the record and I find that it is a report, and this report was prepared in the course of an investigation, thereby satisfying the first two parts of the test.

As far as the third part of the test is concerned, the Archives submits that the report was prepared as a result of an investigation conducted by the Inspections and Standards Branch of the Ministry of Correctional Services, pursuant to section 7 of the Training Schools Act, which the ministry was responsible for administering in 1976. In the Archives' view, the administrative and enforcement responsibilities under that statute qualify as law enforcement activities, thereby categorizing the ministry as an agency which has the function of enforcing and regulating compliance with a law.

I do not agree with the Archives position. In my view, the investigation conducted by the ministry was an internal investigation into the operation of a training school. Upon completion of the investigation, the ministry was not in a position to enforce or regulate compliance with the Training Schools Act or any other law. Rather, it determined that the allegations warranted further investigation and forwarded the report to the local Crown Attorney's office. In my view, the ministry had investigatory responsibility for ensuring the proper administration of the training school, but it was the police force and Crown Attorney's office which had regulatory responsibilities of law enforcement as envisioned by section 14(2)(a) of the Act. Therefore, I find that section 14(2)(a) is not applicable in the circumstances of this appeal.

ISSUE C: Whether the record contains information that would qualify as "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2 of the Act in part as:

"... recorded information about an identifiable individual ..."

Having reviewed the record and the various representations, I am satisfied that parts of the record contain information that qualifies as personal information under section 2(1) of the Act. In my view, these parts contain the personal information of the affected person, as well as other identifiable individuals (the other individuals). The record does not contain any personal information of either of the appellants. The parts of the record which relate to the investigation generally and certain of the ministry employees do not contain any personal information.

ISSUE D: If the answer to Issue C is yes, whether the mandatory exemption provided by section 21 of the Act applies.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances. Specifically, section 21(1)(f) of the Act states:

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

I have determined under Issue B that parts of the record contain the personal information of the affected person and other individuals. Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Archives submits that sections 21(3)(a) and (b) of the Act apply. These sections read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In my view, some, but not all, of the parts of the record which contain personal information of the other individuals satisfy the requirements of section 21(3)(a). These parts contain information which relates to the medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of wards at Grandview. I find that section 21(3)(a) does not apply to any parts of the record which contain the personal information of the affected person.

As far as section 21(3)(b) is concerned, the personal information was compiled by the ministry and is identifiable as part of an investigation into the operation of the training school. In my

view, this investigation does not fall within the meaning of the word "law" as it is used in section 21(3)(b), and I find that this presumption does not apply to any parts of the record.

Section 21(4) of the Act outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my opinion, the record does not contain any information that pertains to section 21(4), and therefore that section does not operate to rebut the presumed unjustified invasion of privacy under section 21(3)(a).

In Order 20, former Commissioner Sidney B. Linden stated that "... a combination of the circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under section 21(3). However, in my view, such a case would be extremely unusual".

The appellants claim that the consideration found in section 21(2)(a) is relevant in the circumstances of this appeal. This section reads as follows:

> 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,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

The appellants submit that there has been considerable media attention focused on Grandview, and there is a need to clarify what actually occurred at that institution. The appellants also submit that the people of Ontario have an interest in knowing how well the government is watching out for the young people in its care.

In the circumstances of this appeal, I find that section 21(2)(a) is a relevant consideration. However, in my view, the application of section 21(2)(a) alone is not sufficient to rebut the presumption contained in section 21(3)(a). Accordingly, I find that the presumed unjustified invasion of personal privacy of the other individuals under section 21(3)(a) has not been rebutted, and that the parts of the record which contain this information are properly exempt.

As far as the remaining parts of the record which contain personal information are concerned, section 21(2) provides an non-exhaustive list of criteria for the Archives to consider in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. I have concluded that section 21(2)(a) is a relevant consideration, and this section weighs in favour of disclosure. The Archives and the affected person both submit that section 21(2)(f) and (i) are relevant in the circumstances and weigh in favour of denying access. These sections state:

> 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,

(f) the personal information is highly sensitive;

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

The Archives and the affected person submit that the personal information which does not meet the requirements of section 21(3)(a) is highly sensitive, because it explicitly documents emotional and physical behaviour of employees and wards, and allegations of mistreatment and abuse. The Archives also submits that the reputations of former employees and wards could be unfairly damaged through public revelation of events from their past.
Having examined the record, I find that sections 21(2)(f) and (i) are relevant considerations in the circumstances of this appeal.

In weighing the factors under section 21(2)(a), (f) and (i), I find that disclosure of the parts of the record which contain the personal information of the affected person and the other individuals would constitute an unjustified invasion of their privacy.

In summary, I find that the disclosure of all personal information contained in the record would constitute an unjustified invasion of personal privacy, and is properly exempt under section 21 of the Act. I have identified the relevant parts of the record by "highlighting" the copy which is being sent to the Archives with this order.

ISSUE E: Whether there is a compelling public interest in disclosure of the personal information contained in the record or part thereof, which clearly outweighs the purpose of the section 21 exemption.

Section 23 of the Act states:

> 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.

The Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

The appellants state that the public has a right to information about the operations of "publicly funded vital institutions" and that the fact that some of the former residents of the training school have been publicly vocal indicates "that they feel that this is an important matter of interest to

many beyond those who directly went through these experiences, and that the public interest in clarifying what occurred at Grandview is greater than their own interest in privacy".

The Archives submits that while the appellants have expressed interest in disclosure of the record, this does not qualify as a "compelling public interest" and it is not sufficient to outweigh the purpose of the section 21 exemption in protecting personal privacy. The Archives states that the "public interest is best served by allowing the current administration of justice, including the present law enforcement investigations, to proceed unhindered by public disclosure in the media".

I accept that there is an element of public interest in the contents of the record. However, in my view, this interest is not sufficient to satisfy the requirements of section 23. It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption [Orders 24, 163, 183]. In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the mandatory exemption provided by section 21 of the Act, that being the protection of personal privacy of the individuals named in the record.

ISSUE F: Whether the discretionary exemptions provided by section 14(1)(a), (b), (d) and/or (f) of the Act apply.

Section 14(1) of the Act reads, in part, as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> ...
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> ...
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

Section 14(1) of the Act provides that a provincial institution may refuse to disclose a record where doing so **could reasonably be expected** to result in the types of harms described in subparagraphs (a) through (l). The Archives submits that the law enforcement matters relevant to this record are the investigations currently being conducted by the Waterloo Regional Police and the Ontario Provincial Police.

In support of the application of section 14(1)(a), (b) and (f), the Archives submits that disclosure of the record would hinder the conduct of the investigation by prejudicing the determination of facts and the gathering of evidence. The Archives states that disclosure of the record has the potential to negatively impact on an impartial investigation and a fair trial, but states that "[a]t present, no trial or adjudication is in progress and the Archives does not know when they may commence".

The affected person submits that "[t]here is a possibility that criminal charges will be laid", and the publicity inevitably attendant upon the release of the record could make it difficult for the individuals involved to receive a fair trial in the event charges are laid.

In support of the application of section 14(1)(d), the Archives states that disclosure of the record would disclose the identity of a confidential source of information. My review of the record indicates that the identity of this "confidential source" was made known to the person who would have been most affected by the information, prior to the events leading to the investigation and the preparation of the record.

In Order 188, Commissioner Wright found that "the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason". He also found that a provincial institution relying on the section 14 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harms.

Having reviewed the record and considered all representations, I find that the Archives has not provided sufficient evidence to establish that disclosure of the remaining portions of the record could reasonably be expected to lead to the harms identified in section 14(1)(a), (b), (d) or (f), and I find that the record does not qualify for exemption under section 14(1) of the Act.

ISSUE G: Whether the discretionary exemption provided by section 14(2)(d) of the Act applies.

Section 14(2)(d) provides:

> A head may refuse to disclose a record,
>
> > that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

In its representations, the Archives submits that the record contains specific information about individuals "who were at one time under the control or supervision of a correctional authority". The Archives adds that it "has no knowledge if these persons are currently under the control or supervision of a correctional authority". In my view, the purpose of section 14(2)(d) is to allow an appropriate level of security with respect to the records of individuals **in custody** [Order 98]. It is clear from the age of the record that the term of correctional supervision which was in effect for each individual who was a ward at Grandview at the time the record was created has expired, and I find that the requirements for exemption under section 14(2)(d) have not been met.

ORDER:

1. I order the Archives to disclose to the appellant the portions of the record which are not highlighted in the copy of the record which is being forwarded to the Archives with this order, within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.

2. I uphold the head's decision not to disclose the portions of the record which are highlighted in the copy of the record which is being forwarded to the Archives with this order.

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

4. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the parts of the record which are disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: September 21, 1992
Tom Mitchinson
Assistant Commissioner