



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

ORDER P-433

Appeal P-9200381

Ministry of Northern Development and Mines



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INTERIM ORDER

BACKGROUND:

The Ministry of Northern Development and Mines (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to reports prepared by the Ministry's audit investigation branch relating to the activities of three named Ministry employees. The Ministry advised the requester that one of the individuals had never been the subject of a Ministry audit. With respect to the other two employees, the Ministry notified these individuals of the request, pursuant to section 28 of the Act. After receiving their representations, the Ministry denied access to the two audit reports, claiming section 21(1) of the Act. The requester appealed the Ministry's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant, the two Ministry employees who had been the subject of two separate audit investigations (affected person #1 and affected person #2), and four other individuals or companies referred to in the records (the other affected persons). Written representations were received from the Ministry, the appellant, affected person #1, affected person #2, and two of the other affected persons.

Record 1 is an audit report relating to relocation expenses paid to affected person #1. Record 2 is an audit report concerning the use of Ministry funds and equipment by affected person #2. A description of the documents comprising the records is contained in Appendix A.

PRELIMINARY ISSUE:

In accordance with the normal practice of this agency, the Notice of Inquiry sent to the other affected persons asked them to contact the Ministry's Freedom of Information and Privacy Co-ordinator if they were unsure of the information in the records which related to them. When the Ministry was contacted by the companies referred to in Record 2, the Co-ordinator refused to disclose any information, claiming that to do so would result in an unjustified invasion of the personal privacy of affected person #2.

In order to enable the other affected persons who may have an interest in the disclosure of Record 2 to submit meaningful representations, I have decided to issue this interim order, which will dispose of all issues relating to Record 1, and will determine whether the information in Record 2 qualifies as personal information under section 2(1) of the Act and, if so, whether disclosure would constitute an unjustified invasion of the personal privacy of affected person #2. The parts of Record 2 which contain information which might affect the interests of the other affected person but which do not contain personal information, will be the subject of a final order.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information " as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act

Personal information is defined in section 2(1) of the Act, states, in part:

"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,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinion 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;

Having reviewed both records, I find that all of Record 1 contains the personal information of affected person #1, and portions of Record 2 contain the personal information of affected person #2. I also find that the remaining portions of Record 2 do not contain any personal information, and these portions will be the subject of my final order in this appeal. Finally, I find that neither

Record 1 nor Record 2 contain the personal information of any individuals other than affected persons #1 and #2.

I have attached a highlighted copy of Record 2 with the copy of this order sent to the Ministry, which identifies in yellow the portions of Record 2 which do not contain personal information.

ISSUE B: If the answer to Issue A 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 of the prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) reads:

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.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of any individual's personal privacy.

Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy, and section 21(2) provides some criteria for the Ministry to consider in determining whether the disclosure of the records would result in an unjustified invasion of personal privacy.

The Ministry claims that the presumption contained in section 21(3)(d) of the Act applies to both records. This section read 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;

In Order P-256, I dealt with an audit investigation report of the Liquor Control Board of Ontario respecting expense claims and the possible application of section 21(3)(d). In finding that section 21(3)(d) did not apply, I made the following statements:

In my view, expense claims submitted by individual employees in and of themselves are not sufficiently connected to an individual's employment history to meet the requirements of the subsection. A person must be an employee in order to incur expenses on employment-related matters and submit claims for reimbursement, but, in my view, that is where the connection to employment

ends. The policies relating to expense claims are developed by institutions on a corporate basis and apply to employees. They have no connection to an individual's position, job responsibilities, career history, performance appraisal, or other human resource - related characteristics which are normally associated with a person's employment history. A report which outlines the result of an investigation into expense claim administration is also, in my view, not properly considered to be part of an individual's employment history.

For the same reasons that I expressed in Order P-256, I find that the disclosure of the information relating to relocation expenses and the use of government funds and assets contained in Records 1 and 2 is not sufficiently connected to the employment history of affected persons #1 and #2 to meet the requirements of section 21(3)(d).

Turning to section 21(2), the appellant claims that the records should be disclosed in order to permit public scrutiny of government activities [section 21(2)(a)], and the Ministry raises sections 21(2)(f), (h) and (i) in support of its position that the release of the records would constitute an unjustified invasion of personal privacy.

These sections read 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny;
- (f) the personal information is highly sensitive;
- (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.

Section 21(2)(a)

In his representations, the appellant makes the following statements in support of his position:

I cannot express strongly enough the importance of subjecting this matter to public scrutiny.

...

The audits in question reveal not only details of the allegations in these matters, but the ministry's response to the allegations. The public has a right to have an

airing of all elements related to these audits. I believe these audits contain evidence of serious abuses of government power and money. The ministry has used privacy legislation to silence these abuses, that is, to prevent me gaining access to the necessary documentation. By revealing these audits, the [appellant's employer newspaper] would be able to publish a reasoned, balanced account of the entire matter, thus subjecting it to public scrutiny.

The appellant also states that the matter was brought to his attention by mining industry officials who wished to have the subject of the audits publicized.

In its representations, the Ministry appears to agree that section 21(2)(a) is a relevant consideration. The representations submitted by the Ministry contain the following statements:

Disclosing the records would subject the activities of the government of Ontario to public scrutiny to the extent that in [affected person #2's] record there would be an examination of the purchasing and management functions within one section of the [a named department]. Also there would be scrutiny of the process within the Ministry of Northern Development and Mines to investigate and address concerns that are brought to the attention of ministry senior management. In the case of [Record 1], there would be scrutiny of certain relocation policies and guidelines of the Ministry and as in [Record 2], of the Ministry's "process" to investigate and address concerns that are raised.

Neither affected person #1 nor affected person #2 make any direct reference to section 21(2)(a) in their representations. However, affected person #1 does state that since the events surrounding his audit have been resolved, disclosure of the audit report would not serve any purpose, except to harm his professional reputation and hinder him in his ability to carry out his current duties.

In Order P-256, I determined that section 21(2)(a) was a relevant consideration in deciding whether to disclose an audit report which had been prepared by the Ontario Liquor Control Board. In reaching this conclusion, I stated:

... institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in clause (a). In the circumstances of this case, the report contains information regarding the use and/or alleged misuse of public funds by an employee of the institution, and, in my view, this is a relevant factor which must be considered in determining whether release of the report is desirable for the purposes of subjecting the activities of the institution to public scrutiny.

I hold the same view with respect to the records at issue in this appeal, and find that section 21(2)(a) is a relevant factor which must be taken into account in assessing whether disclosure of the records would constitute an unjustified invasion of personal privacy.

Section 21(2)(f)

The Ministry submits that the information contained in both records is highly sensitive:

Apart from the individuals' assertions that they viewed this as an unjustified invasion of their personal privacy, the information would seem to be "highly sensitive" as referred to in clause 21(2)(f) of the Act. The motivations for their actions and the judgment they exercised are described, analyzed and explained by themselves and others in great personal detail.

Affected person #1 also submits that section 21(2)(f) is a relevant consideration:

The personal information includes details of me and my families', personal decisions regarding possible relocation options to Sudbury; it contains very detailed analyses of expense account items subject to variable interpretation depending on the motivations and personal interpretations of events exchanged, on a confidential basis, between a very restricted group of persons. The reasons for this tight restriction is itself a reflection of the highly sensitive nature of the record.

In my view, the information contained in the records cannot accurately be characterized as "highly sensitive". Record 1 contains information relating to the examination of certain relocation payments. These are expenses which are submitted, as a matter of routine, to Ministry officials for verification and approval and, in my view, the information itself cannot be considered to be "highly sensitive". The information contained in Record 2 relates to the purchase and use of government assets, and deals with allegations concerning mismanagement of Ministry property and unauthorized payments. Affected person #2 makes no direct representations respecting section 21(2)(f). Based on the representations received by the Ministry and affected person #1, and my independent review of the records themselves, I am unable to conclude that the information contained in either record is "highly sensitive", and I find that section 21(2)(f) is not a relevant consideration in the circumstances of this appeal.

Section 21(2)(h)

Affected person #1 makes the following statement regarding section 21(2)(h): "it was my strong belief that all the documentation in the record was obtained on the basis that the exchange was on a confidential basis". Affected person #2 makes no direct reference to section 21(2)(h) in his representations. The Ministry's representations concerning 21(2)(h) are restricted to the portions of Record 2 which contain information provided by certain of the other affected persons during the course of conducting the audit.

In my view, section 21(2)(h) is not a relevant consideration in the circumstances of this appeal. As far as Record 1 is concerned, I do not feel it is reasonable to argue that factual information provided in support of relocation expenses was provided in confidence. With respect to Record 2, to qualify under section 21(2)(h), the information at issue must be personal information that was supplied in confidence by the person to whom the information relates. The Ministry's representations deal with information provided by the other affected persons and, in my view,

this is more appropriately considered in the context of section 17 of the Act and will be addressed in my final order.

Section 21(2)(i)

Section 21(2)(i) is raised by the Ministry and both affected persons #1 and #2 as a relevant consideration.

The Ministry submits that, because both matters have been finalized, disclosure of the records might unfairly damage the reputations of the affected persons. Both affected persons make similar arguments.

Affected person #1 also makes reference to the fact that financial restitution has been made and that he was subsequently promoted within the Ministry as evidence that the matter has been satisfactorily concluded. He asserts that disclosure would serve no useful purpose, except to subject him and the Ministry to further debate, and adds that disclosure of Record 1 would harm his reputation and impede his ability to carry out his current professional responsibilities.

In his representations, affected person #2 makes the following statement in support of the relevance of section 21(2)(i):

This process did not conclude that there had been any wrong doing and any less than a careful review of the material in the absence of specific technical expertise, my participation and due course of law, could easily lead to false speculation. This would be, in my opinion, a completely unjustified invasion of my personal privacy and most certainly, would damage my professional reputation.

He also submits that disclosure of Record 2 would violate an earlier settlement agreement entered into between him and the Ministry, which provides that all materials relating to the events referred to in Record 2 are to be removed from his personnel file, conditional on future satisfactory performance reviews.

In my view, the representations provided by the Ministry and affected persons #1 and #2 have established that the reputation of these affected persons could be damaged as a result of disclosure of the records. The issue comes down to whether or not this damage would be "unfair".

In Order P-256, I made the following statement regarding the need for public knowledge respecting expenditures by government employees in the course of their duties:

In my view, the public has a right to expect that expenditures made by employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures. It has a further right to expect that these policies and procedures are carefully developed, in accordance with sound and responsible administrative principles; clearly communicated and understood by all employees, applied fairly and consistently, and that audit systems are in place to ensure that they are

followed and adhered to by all employees. In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public. As a general principle, I feel that this level of disclosure of expense account information is, as section 21(2)(a) states: "... desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny."

I feel these statements are equally applicable to the two records at issue in this appeal.

The balancing of competing interests under section 21(2) of the Act is usually difficult, and this case is no exception. In my view, what we are dealing with in this appeal is balancing the interests of public accountability under clause (a) against the potential damage to the reputation of the individuals referred to in the report under clause (i).

Having carefully review the records and all representations, I feel that an adequate level of public scrutiny can be achieved by releasing the records with the names and positions of affected persons #1 and #2 severed. I am aware that individuals who are knowledgeable about the Ministry's departments or the audit investigations may be able to identify these affected persons. However, to deny access to the records on this basis or to order further severances would, in my view, represent an inadequate response to a legitimate expectation on the part of the appellant and others that the relocation expense and purchasing and operational policies and procedures of the Ministry are being properly administered.

In summary, I find that the disclosure of the names and positions of affected persons #1 and #2 contained in Records 1 and 2 would constitute an unjustified invasion of their personal privacy and should be severed from the records prior to release to the appellant. I have attached a highlighted copy of the records with the copy of this order sent to the Ministry, which identifies in pink the portions which should not be released.

I remain seized of this appeal in order to deal with the portions of Record 2 which do not contain personal information. This office will provide the relevant affected persons with notice of this Interim Order, and afford them, the Ministry, the appellant and affected persons #1 and #2 an opportunity to submit representations on these portions of Record 2 prior to the issuance of a final order disposing of the remaining issues.

ORDER:

1. I order the Ministry to disclose Record 1 to the appellant, subject to the severance of the name and positions of affected person #1. I have attached a highlighted version of Record 1 with the copy of this order sent to the Ministry, which identifies in pink the portions which should not be disclosed.
2. I order the Ministry to disclose Record 2 to the appellant, subject to the severance of the portions of Record 2 which do not contain personal information, and also subject to the severance of the name and positions of affected person #2. I have attached a highlighted

version of Record 2 with the copy of this order to the Ministry, which identifies in yellow the portions which do not contain personal information, and the portions which contain the name and positions of affected person #2 in pink, all of which should not be disclosed.

3. I order the Ministry to disclose the records referred to in Provisions 1 and 2 within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon my request.
5. I remain seized of this appeal for the purpose of dealing with the portions of Record 2 which do not contain personal information.

Original signed by:
Tom Mitchinson
Assistant Commissioner

March 16, 1993

APPENDIX A

Record 1 Final Audit Report

- Memorandum dated August 30, 1990 from Manager of Audit Services to Deputy Minister
- Audit Test Summary (2 copies)
- Memorandum dated September 21, 1990 from affected person #1 to Deputy Minister

- Memorandum dated September 11, 1990 from affected person #1 to Assistant Deputy Minister
- Two memoranda, both dated September 10, 1990 to and from affected person #1 and Ministry staff person
- Schedule of "Ineligible Expenses per Audit Report" and corresponding commentary
- Audit Reporting Control Sheet completed by staff of the Audit Services Unit
- Undated Audit Note to File by Auditor
- Memorandum dated September 27, 1990 from Executive Director of Corporate Services to Deputy Minister
- Inter-office memorandum dated March 12, 1991 from staff person to Executive Director of Corporate Services
- Inter-office memorandum dated March 11, 1992 from Executive Director of Corporate Services to staff person
- Memorandum dated September 28, 1990 to affected person #1 from Deputy Minister

Record 2 Final Audit Report

- Audit Reporting Control Sheet completed by staff of the Audit Services Unit
- August 28, 1991 covering memorandum from Manager of Audit Services Unit to two Assistant Deputy Ministers, with copy of June 27, 1991 Special Investigation Report attached
- Letter dated July 12, 1991 from affected person #2 to Assistant Deputy Minister, and attached responses to Special Investigation Report
- Inter-office memorandum dated December 31, 1991 with attached copy of invoice re purchases
- Inter-office memorandum dated December 20, 1991 from staff person to Assistant Deputy Minister re purchases

- Inter-office memorandum dated December 20, 1991 from Assistant Deputy Minister to staff person re purchases
- Inter-office memorandum dated December 19, 1991 from staff person to Assistant Deputy Minister re purchases
- Inter-office memorandum dated December 17, 1991 from staff person to Assistant Deputy Minister re Special Investigation Report
- Inter-office memorandum dated December 17, 1991 from staff person to other staff person re vehicle storage