



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

ORDER P-434

Appeal P-9200153

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documentation, including notes, memoranda and files, relating to the requester and the CC-3 promotion processes for 1990 and 1991. The Ministry identified a 149-page record as responsive to the request, and provided the requester with access to 131 pages in their entirety. Of the remaining 18 pages, the Ministry denied access to 13 pages in whole and 5 pages in part, claiming sections 49(a) [in the context of section 13(1)], sections 49(b) and (c), and section 21(1) of the Act as the grounds for denying access. The requester appealed the Ministry's decision.

During the course of mediation, the Ministry identified 29 additional pages which were responsive to the request, and disclosed them to the appellant in their entirety. The appellant also confirmed during mediation that he did not want access to any parts of the record that contained only the personal information of other individuals, thereby removing section 21(1) as an exemption claim.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant and four individuals whose names appear on certain pages of the record (the affected persons). Written representations were received from the Ministry, the appellant, and two of the affected persons.

After receiving the Notice of Inquiry, the Ministry disclosed 11 of the 18 remaining pages of the record in their entirety, and withdrew the section 49(c) exemption claim.

The seven pages of the record which remain at issue in this appeal are described as follows:

- pages 40-41 - copy of a two-page memorandum dated October 28, 1991 from the appellant to one affected person - handwritten notations made by another individual in the margins and on the back of page 40 withheld in their entirety under sections 49(a)/13(1);
- pages 51-52 - pages 2 and 3 of a three-page note to file, dated October 31 (no year reference, but presumably is 1991) - one paragraph severed from each page under section 49(b);
- pages 106-7 - two-page note to file, dated November 28, 1991, by one affected person - second paragraph on page 106 (which extends on to page 107) and first two full paragraphs on page 107 severed under sections 49(a) [in the context of 13(1)] and 49(b);

page 110 - page 1 of a two-page transcript of an undated voice mail message between two affected persons - first paragraph severed under sections 49(a) [in the context of 13(1)] and 49(b)

PRELIMINARY ISSUE:

During the inquiry stage of this appeal, the appellant pointed out that the Ministry had not provided him with any indication as to the considerations or factors taken into account by the head in exercising discretion in favour of exempting the parts of the record which remain at issue. In a letter to the Ministry, the appellant stated that, in his view, this created a situation of procedural unfairness and violated the principles of natural justice, and could only be cured if the Ministry provided him with "either a copy of the Ministry's written submissions or a listing of those considerations or factors that were taken into account in the exercise of discretion."

In response, the Ministry sent a letter to the appellant which stated, in part:

I regret that I am unable to provide you with a copy of the Ministry's submissions in this appeal since disclosure of the submissions could have the effect of disclosing the exempted records and information, I can, however, provide you with a general summary of the Ministry's submissions on the considerations and factors that the head took into account in exercising his discretion.

The Ministry then went on to outline the considerations and factors taken into account by the designated head in relation to the exempt parts of the record.

It would appear to me that the appellant's concerns regarding fairness were satisfactorily dealt with by the Ministry's response. However, I thought it might be instructive to refer to Order 164, where former Commissioner Sidney B. Linden discussed the concept of procedural fairness in the context of the statutory scheme created by the Act.

At page 22 of his Order, Commissioner Linden makes the following comments which I feel are relevant to the current appeal:

... the Statutory Powers Procedure Act does not apply to an inquiry under the [Act]. Thus, the only statutory procedural guidelines that govern inquiries under the [Act] are those which appear in the Act. However, while that Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the

exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

In fact, it would be an extremely unusual case in which I would order the exchange of representations. This is because, in the vast majority of cases, an institution cannot make adequate representations as to why a statutory exemption applies to a record, and why the head's discretion was exercised as it was, without alluding to the contents of the record. ...

Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed ... allow parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to avert to the contents of the records in their representations in confidence that such representations will not be disclosed.

I am in agreement with Commissioner Linden's view, and feel that the letter sent by the Ministry in this case provided the appellant with adequate disclosure regarding the considerations and factors taken into account by the head in the exercise of discretion. In my view, to provide access to the actual written representations could reveal the contents of the portions of the record which are subject to the exemption claims, and I find that this is not an appropriate case to require the Ministry to provide the appellant with access to its written representations.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by sections 49(a)/13(1) of the Act applies to pages 40-41, 106-7 and/or 110 of the record.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to pages 51-52, 106-7 and/or 110 of the record.

SUBMISSIONS/CONCLUSIONS:

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

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

"personal information" means recorded information about an identifiable individual, including,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(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;

The Ministry does not dispute that the portions of the record which remain at issue in this appeal contain the personal information of the appellant. However, in the Ministry's view, the severed portions of pages 51-52, 106-7 and 110 also contain the personal information of certain affected persons.

The appellant submits that any information provided in the execution of employment responsibilities is not properly considered to be "personal information"; and that any views or opinions expressed by the affected persons which relate to the appellant should be characterized as the personal information of the appellant and not the affected persons.

Having reviewed the relevant pages of the record, I find that they all contain the personal information of the appellant.

I further find that the severed portions of pages 51-52, five sentences on pages 106-7, and one sentence on page 110, consist of the personal opinions or views of the authors of these pages regarding various affected persons other than the appellant, and that these severances contain the personal information of both the appellant and one or more of the affected persons.

As to the appellant's suggestion that the employment context takes any information about the affected persons outside the scope of section 2(1), in my view, the severances referred to above deal with personal discussions between various affected persons, not work-related matters, and I find that the information contained in these severances is not excluded from the scope of section 2(1) simply because it was created in the employment context. The five sentences on pages 106-7 and the one sentence on page 110 do not contain information which relates directly to the appellant, although they do contain information which was created in the context of discussions

about the appellant. Unlike the remaining parts of these pages which contain the personal information of the appellant only, I find that the six sentences on pages 106-7 and 100 also contain the personal information of two of the affected persons.

In summary, I find that:

- pages 40-41 - contain the personal information of the appellant only;
- pages 51-52 - contain the personal information of the appellant and one affected person;
- pages 106-7 - all parts contain the personal information of the appellant; the five sentences referred to above contain the personal information of the appellant and two affected persons;
- page 110 - all parts contain the personal information of the appellant; the one sentence referred to above contains the personal information of the appellant and two of the affected persons.

I will now proceed to discuss the possible application of section 49(a) to those parts of the record which contain only the personal information of the appellant, and are subject to an exemption claim under section 49(a) [i.e. the handwritten notations on pages 40-41, and pages 106-7 and 110). I will then consider the possible application of section 49(b) to those parts of the record which contain the personal information of both the appellant and one or more of the affected persons.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by sections 49(a)/13(1) applies to pages 40-41, 106-7 and/or 110 of the record.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, **13**, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 13(1) of the Act reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The Ministry submits that the handwritten notes on pages 40-41 consist of a "suggestion or draft" prepared for consideration by one of the affected persons in responding to the appellant's October 28, 1991 memorandum. In the Ministry's view, these notes are by their very nature, a recommendation. As far as pages 106-7 are concerned, the Ministry acknowledges that:

"it is not a formal record of advice or recommendations. Indeed, it reflects the "back and forth" of real conversation rather than the formality of a memorandum. Nonetheless, we submit that the record reveals both the explicit and implicit advice or recommendations of [one affected person] to [another affected person] to each other as well as some rationale for the advice given."

A similar position is taken by the Ministry with respect to the information severed from page 110.

In Order 94, former Commissioner Linden discussed the general purpose of the section 13(1) exemption, and made the following comments:

... in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt by the Ministry under section 13(1) in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

In addition, I find that the Ministry has failed to establish that the information exempt under section 13(1) qualifies as "advice or recommendations". It has been established in a number of previous orders that "advice" and "recommendations" for the purposes of section 13(1) must

contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348, P-365 and P-401). "Recommendations" should be viewed in the same vein (Orders 161, P-348, P-356, P-402 and P-428). The portions of pages 106-7 and 110 severed under section 13(1) do not, in my view, suggest a course of action which will ultimately be accepted or rejected by the affected person, and I do not accept the Ministry's position that a draft memorandum (i.e. pages 40-41) is "by its very nature, a recommendation". Therefore, I find that the handwritten notations on pages 40-41 and the severed parts of pages 106-7 and 110 do not qualify for exemption under section 13(1), and the exemption provided by section 49(a) of the Act, therefore, does not apply. Because no other exemptions have been claimed for the handwritten notations on pages 40-41, these two pages, including the back of page 40, should be released to the appellant.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to pages 51-52, 106-7 and/or 110 of the record.

The general right of access to personal information about oneself is also subject to the exemption provided by section 49(b) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I will now consider the possible application of this exemption to the portions of the record which I found contain the personal information of the appellant and one or more of the affected persons, namely the severed portions of pages 51-52, the five sentences on pages 106-7 and the one sentence on page 110.

As has been stated in a number of previous orders, section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the appellant's right of access to his own information against the affected persons' right to the protection of their own privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the affected persons' personal privacy, then section 49(b) gives the Ministry the discretion to deny the appellant access to his personal information (Order 37).

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Ministry submits that none of the provisions of section 21(3) apply. I agree.

Section 21(2) lists a number of circumstances that the Ministry must consider in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy. The Ministry raises sections 21(2)(f) and (h) as relevant considerations. One affected person identifies these two sections, and also raises the type of considerations present in section 21(2)(g). The other affected person who provided representations makes reference to the considerations present in sections 21(2)(g) and (h). The appellant refers to the considerations present in section 21(2)(d) in support of his position that the information should be released.

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who make the request;
- (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;

section 21(2)(d)

In his representations, the appellant makes the following comments regarding the considerations raised by section 21(2)(d):

... The fair determination of rights should be viewed as paramount especially where as is this case government lawyers are specifically precluded from any right to grieve their classification for salary purposes or the unfairness of promotional decisions under the Public Service Act as most other public servants are permitted to do.

Accordingly, it is submitted that any 'invasion' of the privacy of others by the disclosure to the Appellant, of the severed portions, would be justified as being far outweighed by the desirability of allowing the Appellant some opportunity for the fair determination of his right not to be abused by superiors or have his privacy rights violated during a Ministry promotional process.

In Order P-312, I outlined the following four-part test which must be met in order for section 21(2)(d) to be regarded as a relevant consideration in the circumstances of an appeal:

- (1) the right in question must be a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right must relate to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to must have some bearing on or be significant to the determination of the right in question; **and**
- (4) the personal information must be required in order to prepare for the proceeding or to ensure an impartial hearing.

I want to emphasize that in my discussion of Issue A, I found that the majority of pages 106-7 and 110 contain the personal information of the appellant only, and are not subject to section 49(b); it is only the remaining six sentences on these pages, and the severed information on pages 51-52 which are subject to consideration under this section.

In my view, the appellant has not established all requirements of the four-part test under section 21(2)(d). Even if I accept that the appellant has a "legal right", he has not established that this right relates to a proceeding which is either existing or contemplated. Further, although it could be argued that the parts of pages 106-7 and 110 which are not subject to the section 49(b) exemption claim have some bearing on the determination of the appellant's "right", in my view, the six severed sentences on these pages and the severed parts of pages 51-52 do not. Finally, I find that the appellant has failed to establish that the personal information contained in these parts of the record is required in order for him to prepare for any proceeding or to ensure an impartial hearing of any kind.

Therefore, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

section 21(2)(f)

As far as the severed portions of pages 51-52 are concerned, the Ministry submits that the severed information is highly sensitive because it conveys an emotional reaction on the part of the affected person to a particular situation involving the appellant, and makes reference to a comment made by the affected person about the appellant which could "create bad feelings and make it difficult for the people involved to work together in the future". The severances on pages 106-7 and 100 are, in the Ministry's view, highly sensitive because disclosure would "reveal a personal disagreement between the [two affected persons], and the emotional nature of the exchange between the two individuals was private and, hence, highly sensitive.

Having reviewed these severances, I do not agree that they contain "highly sensitive" information. Although I can accept that release of this information might cause some level of embarrassment to certain affected persons, I do not feel this is sufficient to bring it within the scope of section 21(2)(f). In my view, in order to properly be considered "highly sensitive", the Ministry and/or the affected persons resisting disclosure must establish that release of the information would cause excessive personal distress to the affected persons. The one affected person who raises section 21(2)(f) provides no representations which deal specifically with why the severances are highly sensitive, and I find that the reasons provided by the Ministry are not sufficient to establish that the affected persons could reasonably be expected to experience excessive personal distress if this information is released.

Therefore, I find that section 21(2)(f) is not a relevant consideration in the circumstances of this appeal.

section 21(2)(g)

Both affected persons who provided representations raise the type of considerations present in section 21(2)(g). One affected person states that the severed portions of pages 51-52 do not accurately reflect the conversation referred to in the record; and the other affected person states that the comments reflected in the severed parts of pages 106-7 are exaggerated and could be misleading if released. The Ministry does not raise section 21(2)(g).

Having reviewed the relevant severances, I do not feel that section 21(2)(g) is a relevant consideration. The information severed from pages 51-52 and the limited parts of pages 106-7 and 110 which I have found to contain the personal information of the affected person contain opinions expressed by other individuals about the affected persons. Although the affected persons both question the accuracy of the information contained in the severances, in my view, I have not been provided with sufficient evidence to suggest that the information is "unlikely to be accurate or reliable", as required by section 21(2)(g).

Therefore, I find that section 21(2)(g) is not a relevant consideration in the circumstances of this appeal.

section 21(2)(h)

In addressing pages 51-52, the Ministry submits that "... while [the affected person] did not supply [the severed parts of these pages] to [a named individual] directly, the information was supplied indirectly to this institution by her and, in our understanding, in circumstances where confidentiality was expected." As far as the severed parts of pages 106-7 and 110 are concerned, the Ministry states: "Furthermore, to the extent that the information was supplied by [the affected person], it was supplied in confidence, thereby bringing into play the factor in section 21(2)(h)." Similarly, the two affected persons who provided representations state that the information contained in the severances was provided by them in confidence.

Having reviewed the information contained in these severances, I am prepared to accept that the information was supplied by the various affected persons with some expectation of confidentiality. The context in which the records were created was a job competition, which by

its very nature presupposes that communication among the various participants would generally be confidential. The severances also involve exchanges between various affected persons which concern interpersonal matters which do not directly involve the appellant, and I find that the nature of this information is such that it is reasonable to assume that the affected persons expected these discussions would be confidential.

Therefore, I find that section 21(2)(h) is a relevant consideration in the circumstances of this appeal.

In summary, I find that none of the factors under section 21(2) of the Act which favour disclosure of the severed parts of the record are present, and the only factor which is present (section 21(2)(h)) supports the position that disclosure would constitute an unjustified invasion of the personal privacy of the relevant affected persons.

Consequently, I find that the severed portions of pages 51-52 and the six sentences on pages 106-7 and 110 qualify for exemption under section 49(b) of the Act. I have attached a highlighted copy of pages 106-7 and 110 with the copy of this order provided to the Ministry, which identifies the six sentences which qualify for exemption.

Because section 49(b) is a discretionary exemption, I have reviewed the Ministry's representations regarding its decision to exercise discretion in favour of denying access to these portions of the record, and I find nothing improper in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision not to disclose the severed parts of pages 51-52 and the six sentences on pages 106-7 and 110 which I have found qualify for exemption under section 49(b) of the Act. I have attached a highlighted copy of pages 106-7 and 110 with the copy of this order provided to the Ministry, which identifies the six sentences on these pages which should not be disclosed.
2. I order the Ministry to disclose pages 40-41, including the back of page 40, and the remaining parts of pages 106-7 and 110 not referred to in Provision 1 to the appellant within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon my request.

Original signed by: _____

March 22, 1993

Tom Mitchinson
Assistant Commissioner