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

ORDER P-485

Appeal P-9200703

Ministry of Housing

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Ministry of Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to certain information about a Ministry job competition in which the requester was an unsuccessful candidate. The Ministry initially identified nine responsive records. It provided access to six records in their entirety and denied access to the remaining three records in part, pursuant to sections 21(1), 21(3)(d), (f), and (h) of the Act. The requester appealed the Ministry's decision.

During mediation, the appellant initially narrowed the scope of the appeal to two of the severed records. The Ministry then located five more records responsive to the request. Access in full was given to two of the additional records; the Ministry denied access to three of them. The appellant indicated that he wanted to view the original copies of the three records which had been released to him which contained severances. He also maintained that there exists two more specific records responsive to his request.

Further 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 appellant and the Ministry. Written representations were received from both parties. In his representations, the appellant indicated that he was not interested in receiving access to those portions of Record 5 which contain financial information about certain candidates for which the Ministry had claimed the exemption under section 21(3)(f) of the Act.

The five records which remain at issue in this appeal are described in Appendix A attached to this 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 to the records.

C. Whether the Ministry's search for the records was adequate in the circumstances of the appeal.

D. Whether it is reasonably practicable for the Ministry to permit the appellant to examine the originals of the severed records as provided by section 30(2) of the Act.

SUBMISSIONS/CONCLUSIONS:

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

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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> ...
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> ...
>
> (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;

I have reviewed the records and, in my view, they contain recorded information about a number of identifiable individuals which satisfies the requirements of the definition of personal information. I find that the severed portions of Records 1 and 2 and all of Records 3 and 4, contain personal information that relates to individuals other than the appellant.

There is one line in the appendix to Record 5 that contains solely the personal information of the appellant - his rank and score in the competition. This information should be disclosed to the appellant as the Ministry has done in Record 1. The balance of Record 5 contains the personal information of the other individuals.

However, if the names of the other candidates are severed from the appendix to Record 5, the scores and rankings can be disclosed to the appellant. Without the personal identifiers, they cannot be said to constitute personal information as defined by this section of the Act. Again, this is the manner in which the Ministry severed Record 1 prior to its disclosure to the appellant.

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

Under Issue A, I found that the severed portions of Records 1 and 2, all of Records 3 and 4, and the majority of the information in Record 5 contain personal information that relates to individuals other than the appellant.

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) 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 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy.

The Ministry submits that it considered the presumptions contained in section 21(3)(d), (g) and (h). Sections 21(3)(d), (g), and (h) of the Act read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;
> >
> > (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
> >
> > (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Consistent with previous orders (Orders 20, 97, 99, 196, P-230, and P-273), I find that the information contained in Records 1, 3, 4, and 5 satisfy the requirements of the presumption contained in section 21(3)(g). All of these records contain assessments of the candidates by the interview panel members; assessments made according to the measurable standards established for the scoring of the competition questions.

The margin notes contained in Record 1 clearly meet the requirements of section 21(3)(h).

In my view, the names of the candidates withheld from disclosure of Record 2 do not satisfy any of the presumptions claimed by the Ministry. As far as section 21(3)(d) is concerned, the mere fact that an individual is granted an interview for a position does not constitute that person's "employment history".

Nor does the information contained in Record 2, in and of itself, consist of personal recommendations or evaluations so as to meet the requirements of section 21(3)(g). This record is a document which implements the decision of the Ministry to interview certain individuals for the competition which is more accurately characterized as the results of personal recommendations or evaluations.

In summary, I find that Records 1, 3, 4, and 5 contain information which relates either to the personnel evaluations, personal recommendations or evaluations, or racial origin of individuals other than the appellant. Accordingly, I find that the presumption of an unjustified invasion of personal privacy contained in sections 21(3)(g) and (h) applies to these records.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been met, I must consider whether any other provisions of the Act come into play to rebut this presumption. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling so as to outweigh a presumption under section 21(3), however, such a case would be extremely unusual (Order 20).

In his representations, the appellant submits that sections 21(2)(a) and (d) apply to the records at issue and weigh in favour of disclosure. He added other considerations to those listed under section 21(2), such as the fact that he does not know the other individuals involved in the competition and that names of candidates and rating scores are available during the course of competition grievances heard before the Grievance Settlement Board.

I have considered both the enumerated circumstances under section 21(2) and all the other concerns raised by the appellant. In my view, only sections 21(2)(a) and (d) are potentially relevant considerations in the circumstances of this appeal. 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;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

The appellant claims that his review of the interviewers' notes and scores on his responses to interview questions, illustrates that information was tampered with. The appellant believes that he requires access to Records 1, 3, 4, and 5 to ascertain whether they also have been tampered with. The appellant submits that this apparent downgrading and doctoring of results is contrary to the Administration Manual of the Public Service Act and the Ontario government's current policy of openness and honesty with its employees. He claims that disclosure of the records is desirable for the purpose of subjecting the activities of the Government of Ontario to public scrutiny (section 21(2)(a)).

The appellant also submits that he is interested in obtaining this information to determine if he was fairly treated in relation to other candidates (section 21(2)(d)).

The Ministry submits that any changes, additions or deletions made by interviewers to their handwritten notes and scores for interview questions were a normal part of the interview process. The Ministry claims that any errors made by Ministry staff in calculating points assigned to interview questions were of a clerical, minor nature and did not affect the outcome of the job competition.

In Order P-273, former Assistant Commissioner Mitchinson dealt with a similar appeal involving a request for personal information about candidates involved in a job competition. He found that the information at issue satisfied the requirements of a presumed unjustified invasion of personal privacy under section 21(3)(d) of the Act. He then outlined what he felt was necessary in order to rebut this presumption using sections 21(2)(a) and (d):

> Records relating to job competitions frequently contain personal information of affected persons, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy under section 21(3). In attempting to rebut this presumption using sections 21(2)(a) and (d), the appellant must demonstrate that the contents of the records themselves, when considered in conjunction with all relevant evidence, satisfy the requirements of these sections. If the requirements are not satisfied, the presumption is not rebutted ... In order to rebut this presumption using sections 21(2)(a) and (d), it is not sufficient for an appellant to claim that the information contained in the record should be disclosed in order to satisfy generalized concerns for public accountability in the job recruitment process, or unsubstantiated allegations that the information contained in the record is required to assist in the fair determination of the appellant's rights. The Commissioner must be provided with evidence demonstrating that the institution's hiring practices have been publicly called into question, necessitating disclosure of the application and resume in order to subject the activities of that institution to

> public scrutiny; and/or that the contents of the application/resume have a demonstrated relevance to the fair determination of rights affecting the appellant.

I agree with these comments and feel that they are equally applicable to the records at issue in this appeal involving candidates' scores and rankings.

Former Assistant Commissioner Mitchinson also established a four part test which must be satisfied in order for section 21(2)(d) of the Act to be a relevant consideration. In Order P-312, he stated:

> ... in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is 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 is related 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 has some bearing on or is significant to the determination of the right in question; **and**
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In my view, the extent of disclosure already provided to the appellant is sufficient, with respect to this particular job competition, to subject the activities of the institution to public scrutiny. Disclosure of the personal information of the other candidates, in my view, is not necessary to achieve the purposes of section 21(2)(a) of the Act. Therefore, I find that section 21(2)(a) is not a relevant consideration in the circumstances of this appeal.

I also find that the appellant has failed to meet the requirements of the four part test under section 21(2)(d). The appellant has provided no evidence to indicate that he has commenced a legal proceeding, nor that one is contemplated. Consequently, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

Because none of the factors which weigh in favour of disclosure of personal information apply in the circumstances of this appeal, the presumption of an unjustified invasion of personal privacy under section 21(3)(g) has not been rebutted with respect to Records 1, 3, 4, and 5.

As there is no presumption under section 21(3) of the Act which applies to those portions of Record 2 which were not disclosed to the appellant, I must consider the factors listed in section 21(2) to determine whether the release of the names of the unsuccessful candidates on the interview list would constitute an unjustified invasion of the personal privacy of these individuals.

The Ministry submits that it considered the criteria in this section and (in addition to sections 21(3)(d) and (g)), they were deemed to "outweigh any arguable benefit gained by disclosure."

I have considered all the representations of the appellant and, as I have already indicated, have found no factors which weigh in favour of disclosure in the circumstances of this appeal. Accordingly, the names of the unsuccessful candidates in Record 2 are exempt from disclosure under section 21 of the Act.

ISSUE C: Whether the Ministry's search for the records was reasonable in the circumstances of this appeal.

The appellant maintains that there are two specific records which the Ministry failed to identify as being responsive to his request. They are:

1. A fourth form CSC 303 - "Authority to Appoint to Probationary Staff and/or Assign to a Position"; and

2. A waiver of competition form for successful candidates.

As part of its representations, the Ministry has provided a sworn affidavit from the employee of the Human Resources Branch of the Ministry who conducted the search for the records. This individual states that all relevant records responsive to the appellant's request were located and made available to him with the exception of the records containing the personal information of other individuals. The affidavit also states that only three "303 forms" exist in relation to this matter and each of these was provided to the appellant.

Moreover, in its decision letter, the Ministry advised the appellant that CSC 303 forms are only used for employees transferring in from another ministry or from the Metropolitan Toronto Housing Authority. It indicated that there were only three successful candidates in these circumstances in this competition.

Based on my review of the records and the affidavit statement, I am satisfied that the Ministry's search for the records was reasonable in the circumstances of this appeal.

ISSUE D: Whether it is reasonably practicable for the Ministry to permit the appellant to examine the originals of the severed records as provided by section 30(2) of the Act.

Section 30(2) of the Act states:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

It is the responsibility of the head to demonstrate that the means of viewing requested by the appellant is not reasonably practicable (Orders 6 and 8).

In the affidavit previously described, the employee who swore the affidavit maintains that it was not "reasonably practicable" to permit the appellant to examine the originals of severed records without disclosing personal information which the Act protects.

In its representations, the Ministry explains that the personal information of other individuals would be clearly visible if the originals were examined.

I am satisfied that, given the circumstances of this appeal and the nature of the information at issue, it would not be reasonably practicable for the Ministry to allow the appellant to examine those records which were disclosed to him in part.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 1-4.

2. I uphold the Ministry's decision not to permit the appellant to examine the originals of those records that were disclosed to him in part.

3. I order the Ministry to disclose Record 5 to the appellant, in accordance with the highlighted copy of this record which I have provided to the Ministry with a copy of this order, which identifies the information which should **not** be disclosed.

4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of Record 5 which is disclosed to the appellant pursuant to Provision 3, **only** upon my request.

Original signed by: June 25, 1993

Anita Fineberg
Inquiry Officer

APPENDIX A

1. "MH-22 Ranking" Sheet: This is a list of the scores and rankings of the top candidates in the competition. The names of the candidates other than the appellant as well as some margin notes about certain of the candidates have been withheld from disclosure.

2. "Housing Administrator Interviews": This is an interview schedule listing all candidates. The names of the unsuccessful candidates have been withheld from disclosure.

3. The individual interviewers' notes and scoring of the seven successful candidates' responses to interview questions. Access to these records was denied in total.

4. The scored Minister's response letters composed by the seven successful candidates as part of the competition process. Access to these records was denied in total.

5. A letter from the Regional Manager, dated April 6, 1992, confirming the seven successful candidates. Appendix A to this record contains the scores and ranking of all candidates interviewed. No portion of this record was disclosed to the appellant.