



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

ORDER P-634

Appeal P-9300263

Ministry of the Solicitor General and Correctional Services



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ORDER

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all documents relating to an investigation of a senior Ministry employee. The requester, who is also employed by the Ministry, had filed a complaint with the institution about the employee's conduct. The basis for the investigation was an allegation that the senior Ministry employee had misused public funds.

The Ministry identified a covering memorandum, a 14-page investigation report, and 15 attachments to the report as the records which were responsive to the request. Each of these attachments represents a witness statement provided by a Ministry employee during the course of the investigation. The Ministry granted access to several portions of the report but refused to disclose the remaining parts and the attachments pursuant to the exemption found in section 49(b) of the Act. The requester appealed the Ministry's decision.

During the course of the appeal, the appellant agreed not to pursue access to Attachments 1 through 9. The records which remain at issue, therefore, are a covering memorandum dated March 31, 1993, the investigation report itself, as well as Attachments 10 through 15.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, the employee whose conduct was investigated (the primary affected person) and five employees who provided witness statements to the Ministry's investigator (the other affected persons). Representations were received from the appellant, the Ministry, the primary affected person and one of the other affected persons.

ISSUES:

The issues arising in this appeal are the following:

- A. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the records contain the personal information of both the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information.

SUBMISSIONS/CONCLUSIONS:

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

Under section 2(1) of the Act, personal information is defined as recorded information about an identifiable individual including 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.

Following a careful review of the records and representations before me, I find that each of the records contains the personal information of both the appellant and the primary affected person. Portions of the records also contain the personal information of other affected persons.

Although I have found that the information contained in the records constitutes personal information as defined by the Act, it is relevant to point out that the information concerns the work as opposed to the private lives of the affected persons.

ISSUE B: If the records contain the personal information of both the appellant and other individuals whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information.

Under Issue A, I have found that the records contain the personal information of the appellant and other identifiable individuals.

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

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny the requester access to the personal information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I find that none of the section 21(3) presumptions apply to the personal information contained in the records nor is section 21(4) relevant in the circumstances of this appeal.

I must now consider the application of section 21(2) of the Act to the personal information found in the records. This provision reads, in part, as follows:

[IPC Order P-634/February 25, 1994]

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;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (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.

In interpreting section 21(2), all the relevant circumstances of the case must be considered not only the factors enumerated in the section.

In its representations, the Ministry relies on sections 21(2)(e), (f), (h) and (i) to substantiate its position that the disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the affected persons. The primary affected person agrees that section 21(2)(e) of the Act is a relevant consideration whereas the other affected person states that section 21(2)(h) is a factor to consider.

The appellant, on the other hand, argues that the considerations outlined in sections 21(2)(a) and (d) of the Act collectively support the release of the personal information found in the records.

I will first explore the factors outlined in section 21(2) of the Act, and any other relevant circumstances, which weigh in favour of disclosing the personal information contained in the records.

Public Scrutiny - Section 21(2)(a)

The appellant states that the disclosure of the records is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny. He takes this position because (1) the allegations relate to the misuse of public funds by a Ministry employees and (2) he is "concerned with the validity of the investigative process, the credibility of the sources utilized and the relevance of the conclusions made."

In its representations, the Ministry argues that, in order for this section to be relevant, there must be a public demand to scrutinize the behaviour of the Ministry and its employee. The Ministry further submits that there has been no public debate or interest in the allegations which the appellant has raised.

The application of section 21(2)(a) has been considered in a number of previous orders issued by the Commissioner's office. These orders have held that, to establish the relevance of this provision, evidence must be provided to demonstrate that the activities of the institution have been publicly called into question, necessitating disclosure of the personal information of the affected persons in order to subject the activities of the institution to public scrutiny (Orders M_84, P-273 and M-173).

The records at issue in this appeal were created during a recessionary environment which has placed an unparalleled obligation on government agencies to ensure that tax dollars are spent wisely. Furthermore, it is reasonable to expect that investigation reports which are designed to respond to allegations of financial improprieties will inherently be subject to a high degree of public scrutiny. In these situations, I believe that the evidentiary threshold to establish that "the activities of a Ministry have been publicly called into question" should be modest in nature. That threshold will be satisfied, in my view, where there is some evidence that a public interest has been expressed about the circumstances which led to the creation of the record.

I have carefully reviewed the contents of the records and the representations provided by the parties. I have also taken into account the fact that the Minister of Correctional Services ordered that an investigation be undertaken into the allegations raised. Based on the evidence before me and the approach which I have previously outlined, I find that the activities of the Ministry and of the primary affected person have been publicly called into question. The result is that section 21(2)(a) is a relevant consideration which weighs in favour of releasing the records at issue.

Fair Determination of the Appellant's Rights - Section 21(2)(d)

The appellant also submits that the release of the records is relevant to a fair determination of his rights. This is the case because, during the course of the investigation, the Ministry investigator raised questions about the manner in which the appellant brought his concerns to the attention of the Ministry. As a result, the appellant submits that he has the right to be fully advised of the basis for the investigator's views. Finally, the appellant states that the personal information which he is seeking is significant to the determination of the right in question, as disciplinary proceedings have commenced against him.

In order for section 21(2)(d) to apply to the facts of this case, 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 to which the appellant is seeking access 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.

[Order P-312]

I have carefully considered the appellant's representations. In my view, the appellant has not identified, with sufficient particularity, how the personal information contained in the records would have some bearing on the legal rights which he is attempting to advance. On this basis, I find that section 21(2)(d) is not a relevant factor in the circumstances of this appeal.

To summarize, therefore, of the factors raised by the appellant, only one (the public scrutiny consideration) weighs in favour of disclosing the records.

I will now examine the considerations outlined in section 21(2) and any other relevant circumstances which predispose towards protecting the privacy interests of the affected persons.

Highly Sensitive Information - Section 21(2)(f)

In its representations, the Ministry takes the position that when allegations are levelled against government employees about the misuse of public funds, such statements are inherently sensitive in nature. The Ministry further states that, in the present case, the resulting interviews with staff yielded contain highly sensitive information. It should be noted that neither of the affected persons who provided representations to the Commissioner's office raised this concern.

In order for personal information to be considered "highly sensitive", the parties relying on this proposition must establish that disclosure of the information would cause excessive personal distress to the affected persons (Order P-434). Following a careful review of the records, I find that the nature of the information which they contain cannot properly be characterized as "highly sensitive" as it pertains to the affected persons. On this basis, I find that section 21(2)(f) is not a circumstance which weighs in favour of protecting the privacy interests of the affected persons.

Expectation of Confidentiality - Section 21(2)(h)

The Ministry and one of the affected persons rely on section 21(2)(h) of the Act to support the view that the personal information contained in the record should not be released to the appellant. In particular, the Ministry submits that:

"...[T]he employees interviewed for the investigation were given an assurance by [the Manager of Inspections] that the information they provided would be kept confidential to the greatest extent possible..."

The Ministry then goes on to state that because Correctional Services staff are required by virtue of section 22 of the Ministry of Correctional Services Act to co-operate in investigations undertaken by the Ministry, it follows that any information provided during the course of such investigations would be provided in confidence.

I have reviewed this statutory provision and find that it does not deal with expectations of confidentiality in any way. Furthermore, based on my review of the representations, it appears that the Ministry investigator did not offer an unqualified assurance that the statements provided to him would be held in confidence. On this basis, I find that the affected persons could not have had a reasonable expectation that their statements would be kept confidential for all purposes. The result is that section 21(2)(h) is not a relevant consideration in this case.

Unfair Exposure to Harm - Section 21(2)(e)

In its representations, the Ministry submits that, by taking his complaints directly to the Minister (rather than going through regular channels), the appellant set out to embarrass the primary affected person. In my view, this argument is not germane to a finding that section 21(2)(e) applies to the present fact situation.

The primary affected person has also advanced some general arguments to support the application of this provision, but I find none of these to be persuasive. In the absence of evidence to establish a sufficient connection between the release of the records and the possible pecuniary or other harm to the affected persons, I find that section 21(2)(e) is not a relevant consideration in determining whether or not to release the personal information contained in the records.

Unfair Damage to Reputation - Section 21(2)(i)

In its representations, the Ministry submits that:

The allegations against the [primary affected person] - misappropriation of funds and violation of conflict of interest policies - cannot be viewed as routine issues that individuals might expect to encounter in the course of their employment. We submit that these allegations relate to [the primary affected person] personally, rather than professionally.

Providing the appellant with additional and unrestricted access to the balance of the investigation report would likely result in unfair and unnecessary damage to the [the affected person's] reputation. The damage would be unfair as an independent investigator found that ... [the affected person] had not violated any specific acts or regulations.

It is the Ministry's position, therefore, that the release of personal information about the primary affected person would **unfairly** damage that individual's reputation because the report has exonerated the employee's behaviour. In other words, since no formal action has or will be taken with respect to the allegations raised, it would be unnecessary and inequitable for the personal information about the employee to be disclosed. I accept that, in determining whether an employee's reputation might be unfairly damaged by the release of such information, it is relevant to consider the outcome of an investigation which judges the conduct of that individual.

I believe, however, that in interpreting section 21(2)(i), it is also necessary to reflect on the nature of the allegations raised, the type of records at issue and the position occupied by the government employee whose conduct is being questioned.

In Order P-256, former Assistant Commissioner Tom Mitchinson had occasion to interpret section 21(2)(i) in an appeal where the record at issue was an audit report pertaining to employee expense claims. Both the nature of the record and the facts surrounding its creation are not dissimilar from the circumstances which exist in the present case.

In that order, Assistant Commissioner Mitchinson made the following statements which, I believe, are also germane to this appeal:

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 ... 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 ...

I have carefully reviewed the contents of the records and the representations provided to me. I have taken into account both the position of the primary affected person and the expectation that such an individual would have that expense claims would be carefully scrutinized. Based on these considerations, I conclude that the release of an investigation report which probes the appropriateness of these expenditures cannot be said to **unfairly** damage that individual's reputation. The result, therefore, is that section 21(2)(i) is not a relevant consideration in determining whether the disclosure of the information would constitute an unjustified invasion of personal privacy.

Should the Personal Information Be Released?

To summarize, therefore, I have found that one consideration set out in section 21(2) of the Act (public scrutiny of the institution) favours the disclosure of the personal information. I have also determined that there do not exist any factors under this section which weigh in favour of protecting the privacy interests of the affected persons. On this basis, I find that, subject to the caveat that follows, the release of the personal information contained in the records would not constitute an unjustified invasion of the personal privacy of the affected persons.

I should add that, even if I had found that section 21(2)(i) of the Act or any other individual factor supporting non-disclosure applied in this case, my conclusion in this appeal would not

have changed. That is the case because the records at issue also contain the personal information of the appellant. Under section 49(b) of the Act, I would have balanced section 21(2)(a) against the factor weighing in favour of personal privacy and concluded that the release of the personal information of the affected persons was justified in the circumstances of this particular case.

In my view, however, an adequate level of public scrutiny respecting the results of the investigation can be achieved without disclosing the names or other identifying information of the affected persons. This is the approach which has been adopted in several previous orders where the records at issue related to the investigation of alleged financial improprieties of government officials (see Orders P-256 and P-434). While I appreciate that knowledgeable individuals may still be able to link the named individuals to the report, the disclosure of this additional information would, in my opinion, not be warranted in the circumstances. For these reasons, I find that the release of this identifiable information would constitute an unjustified invasion of the personal privacy interests of the affected persons.

I have attached a highlighted copy of the records with the copy of this order sent to the Ministry's Freedom of Information Co-ordinator, which identifies the words and passages in the records which should not be released.

I have reviewed the Ministry's exercise of discretion under section 49(b) in refusing to disclose the names and positions of the affected persons referred to in the records. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this case.

ORDER:

1. I order the Ministry to disclose the records to the appellant, subject to the severance of any identifying information such as the name and positions of the affected persons. I have attached a highlighted version of the records with the copy of this order sent to the Ministry, which identifies the portions which should **not** be disclosed.
2. I order the Ministry to disclose the records referred to in Provision 1 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 records which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

February 25, 1994