

# **ORDER P-721**

**Appeal P\_9300636**

**Ministry of the Solicitor General and Correctional Services**



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## **NATURE OF THE APPEAL:**

This is a third party appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request for access to all records relating to the operation and administration of a residence for young offenders. This residence is publicly funded through the Ministry. The requester is a newspaper reporter with an interest in the operations of the residence.

The Ministry located 81 pages of records which were responsive to the request and granted access to most of these pages either in whole or in part. The Ministry decided, however, to withhold certain information from disclosure under sections 14(1)(k), 19 and 21 of the Act. The original requester did not appeal the application of these exemptions and, consequently, the information which the Ministry has previously withheld does not form part of the present appeal.

In the course of processing this request, the Ministry identified a third party whose interests might be affected by the disclosure of the personal information which the Ministry had not previously exempted. This third party (the appellant) has now appealed the Ministry's decision to release the remaining parts of the records to the original requester. The appellant contends that the release of the personal information in question would invade his personal privacy under section 21(1) of the Act.

A notice of inquiry was provided to the Ministry, the appellant and the original requester. Representations were received from all parties except the Ministry which stated that it would not be making any submissions.

The records which remain at issue in this appeal relate to a financial and management audit of the residence undertaken by the Ministry's Review, Audit and Investigations Branch. The purpose of this audit was to investigate (1) the adequacy of management and financial controls within the residence, (2) whether the facility's programs met the Ministry's Residential Service Standards and Guidelines, (3) whether the residence and its officials had appropriately used Ministry funds and (4) the circumstances surrounding a number of escapes from the residence.

The records, themselves, consist of (1) the Ministry's audit report, (2) internal Ministry documents pertaining to the investigation, (3) a job description and (4) various correspondence exchanged between Ministry personnel and officers or employees of the residence. These records are more fully described in Appendix A to this order. It should be noted that pages 28 through 33 of the records are duplicates of pages 61 through 66.

## **PRELIMINARY MATTER:**

The appellant argues that records which contain information about employees of a private, non-profit organization which has contracted with the Ministry on a fee for service basis, should not be subject to the Act. Section 10(1) of the Act is clear, however, that there exists a right of access to records which fall within the custody of an institution, unless one of the exemptions found in the Act applies. Since the records at issue in this appeal are in the custody of the Ministry, it necessarily follows that they are subject to the Act.

## **DISCUSSION:**

## INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Previous orders have held that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

In the context of the present appeal, therefore, where the records contain comments about the operation of the residence as a whole, this would not constitute the personal information of the employee involved. Where, however, the references relate directly to the performance of the employee or an investigation of his or her conduct, that information would qualify as that individual's personal information.

Following a careful review of the records, I find that portions of pages 3, 13, 14, 16-18, 21, 22, 24, 26, 27, 30, 32, 40, 41, 55-57, 63, 65, 69-71, 76-80 contain the personal information of the appellant and, in several instances on pages 77 and 78, that of another named individual.

I also find that the information found in the remaining pages (or portions thereof) does not contain the personal information of the appellant or any other individual. In addition, where the identities of employees or members of the Board of Directors are referred to in these records, these passages relate to the responsibilities of these individuals in their employment or professional capacities. Since no other exemption applies to the records in question, they should be disclosed to the original requester.

Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates. There are a number of exceptions to this rule, one of which is found in section 21(1)(f) of the Act. This section provides that a government institution must refuse to release the personal information of other individuals except if the disclosure does not constitute an unjustified invasion of personal privacy. Section 21(2) sets out a number of factors to be considered in making this determination.

The appellant submits that the following considerations outlined in section 21(2) weigh in favour of protecting his privacy interests in the records:

- the information is highly sensitive - section 21(2)(f)
- the information is unlikely to be accurate or reliable - section 21(2)(g)
- the information was supplied by the appellant in confidence - section 21(2)(h)
- the disclosure of the information may unfairly damage the reputation of the appellant - section 21(2)(i)

The original requester, on the other hand, submits that the release of the information is desirable for subjecting the activities of the Ministry, which funds and oversees the operations of the residence, to public scrutiny - section 21(2)(a).

Based on a careful review of the evidence before me, I have made the following findings:

- (1) I believe that the personal information relating to the appellant may be characterized as highly sensitive in nature for the purposes of section 21(2)(f) of the Act.
- (2) Based on the context in which the Ministry's audit was undertaken and the issues commented upon, it cannot be said that the release of the appellant's personal information may unfairly damage the appellant's reputation under section 21(2)(i) of the Act.
- (3) Given that the financial and management audit was undertaken by an independent third party and because the records contain the responses of members of the Board of Directors and an employee to the findings made, I cannot conclude that the personal information is unlikely to be accurate or reliable for the purposes of section 21(2)(g) of the Act.
- (4) There is no evidence before me that the appellant supplied the information contained in the records to the Ministry in confidence under section 21(2)(h) of the Act.

I would like to consider the application of the public scrutiny consideration in section 21(2)(a) of the Act in somewhat greater detail. This section specifies that, in determining whether the release of personal information would result in an unjustified invasion of privacy, a Ministry must consider whether the disclosure of the personal information is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

In the present case, the audit which the Ministry conducted was directed at the operations of a youth residence which is not a public agency. This residence, however, receives public funding from the Ministry which allows it to operate its program. In addition, the contract entered into between the Ministry and the residence specifies that the facility must comply with the Ministry's Residential Service Standards and Guidelines.

As I have indicated in a number of previous orders, the current recessionary environment has placed an unparalleled obligation on government agencies to ensure that tax dollars are spent wisely. In my view, this responsibility arises whether the monies in question are used to fund a Ministry's internal program or where a Ministry uses tax dollars to contract for services with a third party.

Where the operations of an internal Ministry program are the subject of a government audit, the public has the right to know whether the program is being run according to prescribed standards and that Ministry staff are performing their duties in an honest and appropriate fashion. Where, however, the audit is directed at a contractor who supplies services to a Ministry in exchange for tax dollars, the notion of public scrutiny takes on an added dimension. The public must not only be satisfied that the program is being run with integrity and according to government standards but must also be satisfied that the Ministry is adequately monitoring or auditing the operation of the program.

Following a careful review of the circumstances of this appeal, I have concluded that the release of the personal information contained in the records would be desirable for the purposes of subjecting the monitoring and audit activities of the Ministry to public scrutiny. The result is that section 21(2)(a) is a relevant consideration which weighs in favour of releasing the records at issue.

## **SHOULD THE PERSONAL INFORMATION BE RELEASED?**

To summarize, 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 whereas a competing factor (the highly sensitive nature of the personal information) weighs in favour of protecting the appellant's privacy interests.

After balancing the competing considerations which arise in this case, I find that the need to subject the activities of the Ministry to public scrutiny outweighs the need to protect the personal privacy interests of the appellant and the other individual referred to in the records. On this basis, I find that, subject to the following caveat, the release of the personal information in question would not constitute an unjustified invasion of personal privacy and should, therefore, be released to the original requester.

I believe, however, that an adequate level of public scrutiny respecting the results of the audit can be achieved without disclosing the names or other identifying information of the individuals mentioned in the records. That is the approach which has been adopted in several previous orders where the records at issue related to the investigation of alleged financial improprieties involving public officials (Orders P-256, P-434 and P-634). In the present appeal, I equally believe that the disclosure of this additional information would not be warranted in the circumstances. On this basis, I find that the release of this identifiable information would constitute an unjustified invasion of the personal privacy interests of the individuals named in the records.

## **COMPELLING PUBLIC INTEREST**

The original requester also submits that there exists a compelling public interest in the disclosure of the records under section 23 of the Act. In order for this provision to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the records.

The reporter believes that the records at issue will reveal a close relationship between the appellant and the Board of Directors of the residence. The reporter states that, since the Board continues to direct the operations of the residence, there is a compelling public interest to disclose the records.

In addressing this issue, it is important to note that the great majority of the information contained in the records will be provided to the original requester. In my view, this level of disclosure will provide the original requester with sufficient information to address the concerns which have been put forward.

On this basis, I find that (1) there does not exist a compelling public interest in the release of the remainder of the information found in the records and (2) in any event such a compelling public interest would not clearly outweigh the purpose of the invasion of privacy exemption. The result is that section 23 does not apply in the circumstances of this appeal.

I have forwarded a highlighted copy of the records to the Ministry's Freedom of Information and Privacy Co-ordinator, which identifies the portions of the records which should **not** be disclosed.

**ORDER:**

1. I uphold the Ministry's decision to disclose the following pages of the records to the original requester (excluding those passages which the Ministry has previously withheld from disclosure at the request stage):
  - (1) Pages 1, 2, 4-12, 15, 19, 20, 23, 25, 28, 29, 31, 33, 42, 44-47, 51, 54, 58, 61, 62, 64, 66-68, 72-75 and 81 in their entirety.
  - (2) Those portions of pages 3, 13, 14, 16-18, 21, 22, 24, 26, 27, 30, 32, 40, 41, 55\_57, 62, 63, 65, 68-71, 76-80 which have **not** been highlighted on the copy of the records which have been provided to the Ministry's Freedom of Information and Privacy Co-ordinator with this order.
2. I order the Ministry **not** to disclose to the original requester those portions of the records which have been highlighted.
3. I order the Ministry to disclose the pages or portions of pages referred to in Provision 1 of this order to the original requester within thirty-five (35) days of 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 this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Irwin Glasberg  
Assistant Commissioner

July 12, 1994

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## APPENDIX "A"

INDEX OF RECORDS		
PAGE NUMBERS	DESCRIPTION	DISPOSITION
1 - 33	Final Report - Review of Young Offenders' Open Custody Residence with attached memorandum	Disclosed in part
40 - 42	Note to file by Regional Co-ordinator regarding Board of Directors Meeting	Disclosed in part
44	Memorandum from Regional Co-ordinator to Area Manager regarding Follow-up Review	Disclosed
45 - 46	Memorandum from Area Manager to Regional Manager regarding request for follow-up audit, with enclosed letter from Chair of Board of Directors to Area Manager	Disclosed
47	Memorandum from Area Manager to Regional Manager regarding reimbursement for legal fees	Disclosed
51	Letter from Chair, Board of Directors to Area Manager, with enclosure	Disclosed
54 - 56	Memorandum/notes to file by Area Manager dated June 17, 28 and 30, 1993	Disclosed in part
57 - 58	Memorandum from Chair, Board of Directors to Area Manager	Disclosed in part
61 - 81	Memorandum from Regional Manager regarding draft report and enclosures, response to draft report from Board of Directors, temporary job description and letter to Board of Directors regarding draft report	Disclosed in part