



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

ORDER P-1212

Appeals P-9600096 and P-9600098

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NATURE OF THE APPEAL:

Algonquin College of Applied Arts and Technology (the College) received two requests under the Freedom of Information and Protection of Privacy Act (the Act). The first requester (Appeal P-9600096) wanted information concerning “the terms, conditions and dollar amounts for the separation package for the former Algonquin College President”, including “sick leave paid, severance and any other financial benefit, ... such as extended health care coverage.” The second requester (Appeal P-9600098) asked for information concerning “payments or perquisites” received by the former President, and how any such payments affected his retirement arrangement.

The former President of the College stepped down from his duties in January 1996. He is concluding his current six year contract with the College by taking a one year sabbatical, in accordance with the terms of his employment agreement.

The College identified the same record as responsive to both requests, namely, the former President’s employment agreement, including an attached schedule. The College denied access to both requests on the basis of the following exemption:

- invasion of privacy - section 21(1)

The College also claimed that the amount of salary and benefits paid to the former President in 1995 was soon to be published in accordance with section 3(1) of the Public Sector Salary Disclosure Act, 1996 (the PSSD), and that section 22(b) of the Act (information to be published) applied as an additional exemption claim with respect to the portions of the record containing this type of information.

Both requesters (now the appellants) appealed the College’s decision to deny access.

This office sent a Notice of Inquiry to both appellants, the College and the former President. Because the appellant in Appeal P-9600096 raised the possible application of section 23 of the Act (the so-called “public interest override”) in his appeal letter, all parties in both appeals were asked to address this issue in their representations. Representations were received from the appellant in Appeal P-9600096 and the College, but not from the former President or the appellant in Appeal P-9600098.

Because the same record is responsive to both requests, I have decided to issue one order which will dispose of all issues in both appeals.

PRELIMINARY ISSUE:

Shortly after both appeal files were opened, the College published the salary and benefit figures for its employees who earned at least \$100,000 in 1995, in accordance with the PSSD. The former President was among these employees. As a consequence, section 22(b) and the amount of salary and benefits disclosed pursuant to the PSSD are no longer at issue in these appeals.

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.

The appellant in Appeal P-9600096 submits that the record does not contain personal information because information concerning the salary and benefits of employees of the College is not specifically listed among the types of information in paragraphs (a) through (h) of the definition of personal information, nor is it akin to any of these types of information. This appellant also acknowledges that the types of information listed in these paragraphs is not exhaustive.

Having reviewed the record, in my view, it contains recorded information about an identifiable individual, the former President, and I find that this information falls within the definition of personal information in section 2(1). The information relates to the former President only, and not to either of the appellants.

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. One of these circumstances is found in section 21(1)(f), which 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.

Section 21(4)(a) of the Act identifies particular types of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 21(4)(a) reads:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

Because the former President was an officer or employee of the College, section 21(4)(a) is relevant in the circumstances of these appeals.

The words “[d]espite subsection (3)” do not limit the application of section 21(4) to those types of information identified in section 21(3); rather, they identify types of information that the legislature clearly intended to fall within the exception contained in section 21(1)(f). Generally

speaking, if a record contains information of the type described in section 21(4)(a), the exception to the section 21 exemption contained in section 21(1)(f) will apply (Order M-23).

In its representations with respect to section 21(4)(a), the College submits that the former President's salary and benefit information has been published in accordance with the requirements of the PSSD.

Section 3(1) of the PSSD states:

Not later than March 31 of each year beginning with the year 1996, every employer shall make available for inspection by the public without charge a written record of the amount of salary and benefits paid in the previous year by the employer to or in respect of an employee to whom the employer paid at least \$100,000 as salary.

It is important to note that section 3(1) requires only that the **amount** of salary and benefits be published. Section 3(2)(d) of the PSSD provides that the term "benefit" for the purpose of the public disclosure requirements of section 3(1) is:

the amount of benefits reported to Revenue Canada, Taxation, under the Income Tax Act (Canada) by the employer for the employee in the year.

It is clear that the employment contract of the former President contains benefit information which goes beyond the scope of the disclosure requirements of the PSSD. Consequently, I will consider the possible application of section 21(4)(a) to this additional benefit information contained in the record.

In Order M-23, Commissioner Tom Wright considered the meaning of the word "benefits" found in the section 14(4)(a) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 21(4)(a) of the provincial Act). He stated:

Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the Act that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as life, health, hospital, dental and disability coverage. They will also include **sick leave, vacation, leaves of absence, termination allowance, death and pension benefits**. [my emphasis]

It is clear from a reading of Order M-23 that Commissioner Wright did not intend the list of enumerated benefits in that order to be exhaustive or that the meaning of "benefits" should be restricted to a dollar value only. In my view, the list of enumerated benefits in Order M-23 were merely provided as examples, and I agree that the term "benefits" should be given an expansive definition, in order to be consistent with the intent of both section 21 and the Act as a whole.

In Order P-380, I found that no distinction should be drawn between the "standard" benefits and those which are commonly negotiated with the employer by a senior level employee. In that order I stated:

In my view, in defining what constitutes a "benefit" under section 21(4)(a), the distinction between standard benefits and negotiated benefits is artificial. In many positions in the public service, particularly those at a senior level, it is reasonable to expect that there will be a certain element of negotiation involved in establishing salary and benefit packages.

Therefore, in my view, all of the entitlements provided to the former President as part of his employment or upon conclusion of his employment as an officer and/or employee of the College are properly characterized as "benefits" for the purpose of section 21(4)(a).

I find that the benefits provided to the former President under the terms of his employment agreement, fall within the scope of section 21(4)(a) of the Act and, therefore, release of the parts of the record which would disclose this information would not constitute an unjustified invasion of his personal privacy. This information is found in clauses 6(a) and (b), 7, 8(a) and (b), 9(a) and (b), 12(a), (b) and (c) of the agreement and Schedule A in its entirety.

Because both requests are quite specific and deal only with information concerning the former President's benefits, I find that the remaining parts of the record are not responsive to the request and fall outside the scope of this appeal. Therefore, it is not necessary for me to consider the application of section 21(1) or 23 to these part of the record.

In correspondence submitted to this office during the course of these appeals, the College outlines a number of factors which it feels explain certain elements of the former President's employment agreement. If the College feels that these explanations are required in order to place the agreement terms in the proper light, it could consider the advisability of providing this information to the appellants.

ORDER:

1. I order the College to disclose to the appellants clauses 6(a) and (b), 7, 8(a) and (b), 9(a) and (b), 12(a), (b) and (c) of the record and Schedule A in its entirety by **July 25, 1996**, but not earlier than **July 22, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the College to provide me with a copy of the records which are disclosed to the appellants pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 20 1996