



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

# **ORDER PO-1641**

Appeal PA-980187-1

Ministry of Education and Training



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/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Education and Training (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to copies of all letters received by the Ministry from a named individual (the affected person) between September 1997 and the date of the request. The affected person was the past Chair of the Board of Governors of Le College des Grands Lacs (the College). The Ministry located four responsive records. After notifying the named individual pursuant to section 28 of the Act, the Ministry denied access to the records claiming the application of the invasion of privacy exemption in section 21(1) of the Act.

The requester, now the appellant, appealed the Ministry's decision.

A Notice of Inquiry was provided to the appellant, the Ministry and the affected person. Representations were received from the affected person and the appellant.

The records at issue in this appeal consist of four letters, dated October 15 and December 15, 1997 and April 15 and 28, 1998, with various attachments. The letters relate to the opinions of the affected person, in her capacity as the former Chair of the College, about the operation of the College and its finances.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Section 2(1)(f) also specifically includes "correspondence sent to an institution that is implicitly or explicitly of a private or confidential nature" in the definition of the term "personal information". I note that each of the four letters which comprise the records at issue are clearly marked "Confidential". In my view, the records represent correspondence sent by the affected person to the Ministry whose contents are explicitly confidential and they contain her personal information within the meaning of section 2(1).

The subject matter of the records revolves around certain allegations of financial impropriety and malfeasance on the part of a number of identified individuals. The records contain the views and opinions of the affected person about a number of these individuals, who are associated in various ways with the College. In my view, these references qualify as the personal information of these individuals under section 2(1)(g) as they represent the views or opinions of the affected person about the identified individuals. In his representations, the appellant clarified that he is acting as counsel to both the College and the individuals who are referred to in the records.

Because the records contain the personal information of the appellant's clients, I must determine whether they qualify for exemption under the discretionary exemption under section 49(b), rather than the mandatory exemption in section 21(1). As a result of my findings below, it is unnecessary for me to solicit the

submissions of the parties as to the application of section 49(b) in addition to those received with respect to section 21(1).

### **INVASION OF PRIVACY**

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, it has the discretion to deny the requester access to that information.

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(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

The appellant indicates that none of the presumptions in section 21(3) apply in the circumstances of this appeal. I agree that none of the information contained in the records falls within the ambit of the section 21(3) presumptions. I will, accordingly, consider the application of the factors listed in section 21(2), along with the unlisted considerations raised by the parties, in order to determine whether the disclosure of the information contained in the records would constitute an unjustified invasion of the affected person's personal privacy.

The appellant submits that the disclosure of the information in the records is necessary in order for him to respond to the allegations made against the College and his clients which are contained therein. He refers specifically to Order P-634 in which former Assistant Commissioner Irwin Glasberg adopted the criteria established by Assistant Commissioner Tom Mitchinson in Order P-312 which must be met in order for section 21(2)(d) to apply. In those decisions it was held that:

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.

The appellant indicates that his clients are considering commencing a legal action against the affected person for what they consider to be slanderous allegations which they feel may be contained in the records. This legal right is one which is drawn from the common law. The appellant suggests that access to the contents of the records will assist his clients in determining whether or not to proceed with such an action. In my view, all of the requirements set out in Order P-634 for section 21(2)(d) have been satisfied. This is a significant factor weighing in favour of the disclosure of the information contained in the records.

The appellant is also concerned with how widely the affected person may have distributed the records, beyond the Ministry. The appellant submits that because the records may have been distributed by the affected person outside the Ministry and may have also been provided to the media, the appellant's expectation of confidentiality, and the privacy rights which go with it, has been diminished. Finally, the appellant indicates that because the records have been widely disseminated, their disclosure would not unfairly damage the reputation of the affected person, within the meaning of section 21(2)(I).

I have not, however, been provided with sufficient evidence to substantiate the appellant's allegation that the contents of the records were disseminated by the affected person outside the Ministry and to the media. Accordingly, I cannot agree that the appellant may have a diminished expectation of confidentiality as a result of the widespread broadcast of the allegations contained in the records.

The affected person categorically opposes the disclosure of the information contained in the records. She indicates that each letter was forwarded to the Ministry with an explicit statement that they were to be treated confidentially, as contemplated by section 21(2)(h). This is a significant factor favouring the non-disclosure of the information contained in the records.

The affected person's submissions also make reference to the delicate nature of the allegations contained in the records, giving rise to the application of section 21(2)(f), which addresses "highly sensitive information".

I agree that this information may properly be described as "highly sensitive" and that this is a factor weighing in favour of privacy protection.

The affected person also indicates that she has received correspondence from the appellant indicating his intention to pursue various legal remedies on behalf of the College and those who are referred to in the records. While not referring to the consideration listed in section 21(2)(e), I find that the affected person has concerns about pecuniary or other harm which may result from the disclosure of the records. I am not persuaded, however, that the possible exposure to pecuniary or other harm on the part of the affected person which may result from the disclosure of the records would be "unfair". While the appellant may have put the affected person on notice of its intention to bring certain legal actions against her, it cannot be said

that an adverse finding and any possible damages which may be awarded against the affected person in those proceedings would be “unfair”. The affected person has various defences which she may raise and the likelihood of success on the part of the appellant’s clients is not for me to decide. Therefore, I am unable to give a great deal of weight to this consideration.

The affected person also makes reference to her responsibility as a public official to bring to the attention of the Ministry, which is the funding agency for the College, what she sees as serious financial irregularities. In order to perform this function, the affected person suggests that confidentiality must be assured. The affected person indicates that she raised these concerns with the Ministry in good faith and out of concern for the propriety of the irregularities which are documented in the records. The affected person indicates that it was her wish that the Ministry would conduct an internal investigation into the allegations which she raised.

Public officials who wish to expose what they perceive to be financial malfeasance with respect to the use of public funds ought to be entitled to a degree of privacy protection when they act as a “whistle-blower”. This is particularly the case where the allegations which they raise are made in good faith and not for some other improper purpose, as is the case in the present circumstances. In my view, this is also a significant consideration which favours privacy protection.

The affected person has also referred to the “third party information” exemption in section 17(1) of the Act. In my view, this exemption is designed to protect commercial, financial and other information which is provided to an institution in confidence by a third party. In the circumstances of this case, the information was not provided by the third party to whom it relates, in this case, the College. Rather, it was the affected person who supplied the information to the Ministry, without the knowledge of or the concurrence of the College. Accordingly, I find that the information contained in the records does not meet the criteria for exemption under this section.

Balancing the privacy rights of the affected person against the access rights of the appellant’s clients in this situation is particularly difficult. The factors favouring the disclosure of the information are compelling, as are the considerations favouring privacy protection.

However, in a recent decision, Order M-1162, I had occasion to reflect on the significance of another unlisted consideration which was first articulated by former Commissioner Sidney B. Linden in Order 37. I found that:

In Order 37, former Commissioner Sidney B. Linden dealt with records compiled in the course of an investigation into an employment-related complaint. In that decision, former Commissioner Linden stated that:

fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of

disclosure ... should be more extensive if the complaint is likely to result in discipline.

I find that this unlisted consideration, which favours the disclosure of the information contained in the records, is applicable to those portions of the records which relate directly to the appellant.

In the circumstances of that appeal, I found that because portions of the responsive records contained allegations about the conduct of the appellant and another affected person, the disclosure of this information was necessary in order to give the appellant sufficient details about the substance of the allegations made against him. In the present appeal, the allegations of impropriety made against the appellant's clients in the records are serious and relate directly to the appellant's clients. In my view, as stated by the former Commissioner, fairness demands that the persons complained against be given as much disclosure of the substance of the allegations as is possible. Because the allegations relate to financial irregularities on the part of the appellant's clients, I find that the need for fairness in the degree of disclosure to be even more compelling than was the case in Order M-1162. In my view, this consideration tips the balance in favour of the disclosure of the information contained in the records to the appellant.

I find, accordingly, that the disclosure of the records would not constitute an unjustified invasion of the affected person's personal privacy. The records are not exempt under section 49(b) and, as no other mandatory exemptions apply, they should be disclosed to the appellant.

**ORDER:**

1. I order the Ministry to disclose the records to the appellant by providing him with a copy by **January 7, 1999** but not before **January 4, 1999**.
2. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ December 2, 1998