



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2120

Appeal PA-010436-1

Ministry of Education



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

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Education (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to “the ‘Audit Report for the Provincial and Demonstration Schools Branch’, year 2000”.

The Ministry identified one responsive record, a document prepared by the Ministry’s Audit Services Branch entitled “Final Report on Provincial Schools Branch”, dated November 2000 (the Report), and granted partial access to it. The Ministry withheld certain portions of the record pursuant to sections 18(1)(e) and (f) (economic and other interests) and 21 (personal privacy) of the *Act*. With respect to the section 21 claim, the Ministry relies on section 21(3)(d).

The appellant appealed the Ministry’s decision to this office.

By way of background, the Ministry’s Provincial Schools Branch (the PSB) “provides education and instruction to deaf or partially deaf, blind, deaf-blind and severely learning disabled students in day and residential programs at the elementary and secondary levels at five sites within the province.” The PSB also assists school boards across the province with the assessment of needs and the provision of services to disabled pre-school and school age children.

The Report covered five specific schools. The audit objectives were to assess:

1. the adequacy, efficiency and effectiveness of financial/administrative controls and processes in the PSB’s head office and the schools;
2. the degree to which the PSB achieved economy, efficiency and effectiveness in the management of their resources; and
3. the degree of compliance with the PSB Policies and Procedures Manual and Management Board of Cabinet Directives.

During the mediation stage of this appeal, the Ministry issued a revised decision letter advising the appellant that it is no longer relying on section 18 of the *Act*. The Ministry confirmed, however, that it continues to rely on section 21 to withhold certain portions of the record.

Also during mediation, the appellant raised the possible application of section 23 (the public interest override).

I initially sought representations from the Ministry. The Ministry submitted representations and they were shared in their entirety with the appellant. In its representations, the Ministry indicated that it had decided to release additional portions of the record that it had previously withheld under section 21. The Ministry issued a supplementary decision letter confirming its decision and enclosing copies of the severed pages.

I then sought representations from the appellant who submitted representations in response. The appellant’s representations raised issues in response to the Ministry’s representations. The

appellant's representations were shared with the Ministry and I then sought and received reply representations from the Ministry.

RECORD:

The information at issue in this appeal is contained in pages 3, 4, 8, 9, 14, 15, 17, 18 and 20, and page 2 of Appendix A of the Report. None of the passages in question contains the names of any affected persons.

DISCUSSION:

PERSONAL INFORMATION

Introduction

As stated above, the Ministry relies on the section 21 exemption to deny access to the withheld information. The section 21 exemption can apply only to "personal information".

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

There are two issues that arise in applying the definition of "personal information" in this case:

1. Is it reasonable to expect that the individuals can be identified from the information at issue?
2. If so, is the information at issue "about" the individuals in their personal as opposed to professional or official government capacity?

Identifiability

Even where the information in question contains no names (as is the case here), it may still qualify as "personal information" if there is a reasonable expectation that an individual can be identified if the record is disclosed [see Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.), and Reconsideration Order R-980023, upheld on judicial review in *Ontario (Minister of Health) v. Hale* (February 26, 2003), Toronto Docs. 369/98, 42/99 (Ont. Div. Ct.)]. In these circumstances, the burden of proof on the identifiability issue rests with the Ministry.

The Ministry submits:

. . . [T]he particular details associated with individuals in the severed portions of the document are related to employment history in that the context in each case involves an employment related situation. Furthermore, because of this

relationship, although the individual(s) is/are unnamed in the severed passages, disclosure of the details would allow the individuals to be identified . . .

The appellant makes no specific representations on the identifiability issue.

The Ministry's representations are of little assistance to me on this issue. For example, the Ministry did not provide information regarding the number of individuals that participated in the audit from each school. This information would have been useful to get a true sense of the size of the group of affected persons and the scope of the audit. Information regarding the appellant's motivation for seeking this information and her connection, if any, to the PSB would also have been helpful in addressing this issue. Therefore, I am left to make my decision based on my review of the record and the surrounding circumstances.

Based on my review, I find that some of the withheld information, if disclosed, could reasonably be expected to reveal the identity of some affected persons. I am unable to go into greater detail on this point, due to confidentiality concerns.

To conclude, I find that some of the withheld information does not qualify as personal information, on the basis that no individuals are "identifiable" as required by the section 2(1) definition of "personal information". As a result, this information is not exempt under section 21 and must be disclosed to the appellant. The remaining withheld information meets the "identifiable" aspect of the definition, but may not be considered "personal information" if it is not considered to be "about" the individuals in their personal capacity, as discussed below.

Personal versus professional/official government capacity

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621]. Conversely, other decisions of this office have found that where information about an individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's "personal information" (Orders P-721, P-939, P-1318, PO-1772 and Reconsideration Order R-980015).

Neither the Ministry nor the appellant makes specific submissions on this point.

I have carefully reviewed the withheld information that I found above meets the "identifiable" test. With one exception, all of this information relates to identifiable individuals in their personal capacity, because it relates to those individuals' conduct as employees. The one exception is the withheld portion at page 9. Although it is reasonable to expect that individuals may be identified from this information, it concerns these individuals purely in an official

government capacity, as opposed to a personal capacity. This passage contains no evaluations or information about their conduct as employees.

To conclude, I find that all of the withheld information that meets the “identifiable” test also can be considered “about” the individuals in question in a personal capacity, except for the withheld passage on page 9.

INVASION OF PRIVACY

I have determined above that some of the withheld information consists of personal information.

As outlined above, section 21(1) of the *Act* prohibits the disclosure of personal information, unless one of the exceptions listed in that section is applicable. In this appeal, the only exception which could apply is section 21(1)(f), which permits disclosure if it “. . . does not constitute an unjustified invasion of personal privacy”. 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. The Divisional Court has stated that once a presumption against disclosure under section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [see *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. A section 21(3) presumption can be overcome only if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest in disclosing the personal information in the record clearly outweighs the purpose of the section 21 exemption.

The Ministry relies on the presumption in section 21(3)(d), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to employment or educational history;

In support of its position, the Ministry submits that the record contains personal information that is employment-related and would form part of the “employment history” of the affected persons.

The appellant makes no submissions on the application of section 21(3)(d), but implicitly appears to rely on the factor favouring disclosure in section 21(2)(a) of the *Act*, which reads:

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,

the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

The appellant submits simply that the Report “is a public document and as such the general public is entitled to the contents of the said document.”

In the circumstances, I have not been provided with sufficient information to establish that disclosure of the relatively small portions of personal information in the record is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny. The appellant does not provide me with background or other information to assist me in understanding how the withheld information could advance a particular issue or controversy concerning the Ministry or any of its branches, or any particular school. The fact that the Ministry has already disclosed the vast majority of the Report, and that more information will be disclosed as a result of this order, makes it even more difficult to reach the conclusion that the section 21(2)(a) factor applies.

Since none of the factors favouring disclosure applies, I find that the withheld passages of the Report that meet the definition of “personal information” qualify for exemption under section 21 of the *Act*. In the circumstances, it is not necessary to make a specific finding on the application of the presumption at section 21(3)(d) of the *Act*.

PUBLIC INTEREST OVERRIDE

Introduction

The appellant has raised the application of the section 23 public interest override as a basis for finding that information found exempt under section 21 should nevertheless be disclosed.

Under section 23 of the *Act*, an exemption from disclosure under section 21 (among others) does not apply where a “compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.” For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “arousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding

in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. (See Order P-1398)

Section 21 and public interest

It is important to note that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. (See Order PO-1705)

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that "[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure". (See Order MO-1254)

Representations

The appellant's position on this issue is set out above in the discussion of the section 21 exemption. To reiterate, the appellant feels that the Report is a public document and the general public should have access to its contents.

The Ministry provides detailed representations in response to the appellant's position:

In order for section 23 to apply, two requirements must be met. First there must be a *compelling* public interest in the disclosure of the record. Second, this compelling public interest must *clearly* outweigh the purpose of the exemption.

It is the Ministry's position that the Appellant has not met either test of section 23.

In citing this section, the Appellant fails to indicate what the “compelling public interest” would be in the disclosure of the portions of the record severed under section 21 of the Act. Furthermore, she nowhere states why such a public interest would be compelling or why this interest clearly outweighs the purpose of section 21.

It is the Ministry’s view that to the extent that there is *any* public interest in the disclosure of the audit report, this interest has been met by the information that the Ministry has released to the Appellant. In her original request, the Appellant asked for an “Audit Report.” The Ministry submits that the majority of the record has been disclosed and is completely intelligible as an “audit” without the personal information that has been severed. Therefore, the public interest has been met by releasing the report and no further public purpose could be served by releasing the personal information.

Furthermore, in determining the relative weight of any public interest in releasing the information versus the purpose of keeping the information confidential, it is the Ministry’s view that the protection of personal privacy in this case is of a higher value than the public’s “right to access”. In this case, there is a strong possibility of jeopardizing personal privacy by disclosing employment-related information that would, given the rather circumscribed nature of the employment context, permit identification of the unnamed individuals in the report. By contrast, the disclosure of the information would serve little, if any, purpose given that the audit report is completely intelligible as it presently stands.

Findings

I concur with the Ministry’s comments. As I stated above, the appellant has been granted generous access to the contents of the Report, and I have found that some additional information is not exempt and must be disclosed. I agree that the integrity of this document is not compromised by the removal of this small amount of personal information. Furthermore, as stated above in my discussion under section 21(2)(a), the appellant has provided little if any evidence to support her public interest argument. As well, if one were to assume that a compelling public interest in disclosure does exist, the appellant has failed to establish how such an interest would clearly outweigh the important privacy purpose of section 21.

To conclude, the appellant has not established a compelling public interest as required by section 23, and this section does not apply.

ORDER:

1. I uphold in full the Ministry’s decision to withhold information at page 3 of the Report.

2. I uphold in part the Ministry's decision to withhold information at pages 4, 8 and 17 of the Report.
3. I order the Ministry to disclose the Report in full, with the exception of the passages highlighted on pages 3, 4, 8 and 17 on the copy of the Report enclosed with the Ministry's copy of this order, no later than **April 4, 2003**, but not earlier than **March 28, 2003**. To be clear, the Ministry should *not* disclose the highlighted portions of these pages of the record.
4. In order to verify compliance with the terms of provision 3, I reserve the right to require the Ministry to provide me with a copy of the material it discloses to the appellant.

Original signed by: _____
Bernard Morrow
Adjudicator

February 28, 2003 _____