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

ORDER PO-2194

Appeal PA-020329-2

Ministry of Community, Family and Children's Services

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Community, Family and Children's Services (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant), sought access to the following:

> … copies of any reviews of group homes and foster homes which were completed by the Office of Child and Family Services Advocacy from January 1, 1999 to the present.

As explained in the Ministry's representations in this appeal, the Office of Child and Family Service Advocacy (OCFSA) is mandated under the *Child and Family Services Act* to protect the rights of Ontario children and families who are seeking or receiving services through the agencies of the Ministry. The duties of the OCFSA Advocacy Officers include mediating complaints, identifying systemic problems affecting youth, and advising ministries of service delivery gaps. The work of OCFSA also includes conducting agency reviews that may be initiated at an agency's request, at a ministry's request, or at the discretion of OCFSA due to complaints about a residential setting. The Ministry states that the purpose of the reviews is to gather information in a systematic way about youths' perception of the care they receive while in a residence, and to contextualize this information from the Child Advocate's perspective and experience. The OCFSA then presents this information and recommendations to the respective management personnel of the agency.

In response to the request, the Ministry identified a number of relevant records. It initially provided access to 28 reports (with names of youths severed), denied access to a further five in reliance on the mandatory exemption under section 21 of the *Act* (unjustified invasion of privacy) or the discretionary exemption under section 14(1) (law enforcement interests), and denied access to a further 26 reviews conducted during a labour dispute.

Subsequently, the Ministry transferred the request for access to 24 of the reviews conducted during the labour dispute to the Ministry of Public Safety and Security (the MPSS).

The appellant appealed from the Ministry's decision.

During the mediation of this appeal through this office, certain matters were narrowed or clarified. The Ministry advised that it was withdrawing its reliance on the law enforcement exemption in section 14(1) of the *Act* and granted access to two more reviews, with severances of names. The appellant clarified that she is not appealing the Ministry's decision to make severances to the reports to which she has been provided access. The appellant also stated that she is objecting to the Ministry's decision to transfer part of her request to the MPSS. Finally, the Ministry decided to disclose two further reviews in full.

Remaining at issue is the denial of access to three reviews, and the decision by the Ministry to transfer the request as it relates to 24 reviews to the MPSS.

On June 27, 2003, I issued Order PO-2157, in which I found that the 24 reviews transferred to the MPSS were excluded from the scope of the *Act*.

In this appeal, I sent a Notice of Inquiry to both the Ministry and the appellant at the first stage. I invited the Ministry to make representations on the application of section 21 of the *Act*. I also invited the appellant to make representations on whether I ought to determine the validity of the transfer of part of the request by the Ministry to the MPSS, in view of my finding in Order PO-2157 that the relevant records are excluded from the scope of the *Act*.

I received representations from the Ministry, but none from the appellant. I sent the representations of the Ministry on section 21 (excluding confidential portions) to the appellant for her response, but again, received nothing from her.

RECORDS:

The records at issue are three reviews conducted by the OCFSA, two relating to an agency and community in Northern Ontario (Records 1 and 2) and one relating to the Oakville Children's Home (Record 3).

The 24 reviews transferred to the MPSS are described in Order PO-2157.

DISCUSSION:

MOOTNESS

In Order PO-2046, I discussed the issue of "mootness" and its application to appeals under the *Act*. In that order, I approved of the approach to this issue articulated in Order P-1295 by former Assistant Commissioner Irwin Glasberg, in which he stated:

> The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada*. There, the court commented on the topic of mootness as follows:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

I am satisfied that the principles in the *Borowski* case are equally applicable to the adjudication processes of the Commissioner's office, and will apply them here. With respect to the first step of the "two-step" analysis discussed by Sopinka J., it is clear that the appeal before me is moot. If I had determined that the 24 records transferred to the MPSS were covered by the *Act*, there would have been a "live controversy" affecting the rights of the parties. However, given my findings in Order PO-2157 that the records are not covered by the *Act*, the question of whether the records were validly transferred under the *Act* is hypothetical only.

In these circumstances, and in the absence of any broader public benefit to be gained by the determination of this hypothetical issue, I find that no useful purpose would be served by proceeding with a determination of this issue. In the absence of a live controversy, I am not inclined to rule on an issue that does not raise issues of current public interest and importance.

I will turn to consider the application of the section 21 exemption to the three remaining records at issue.

PERSONAL INFORMATION

The first question to be determined is whether the records contain "personal information", as the section 21 personal privacy exemption applies only to information which qualifies as "personal information" under the *Act*.

"Personal information" is defined, in part, to mean 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.

The Ministry submits that, with respect to Records 1 and 2, the small number of families that have had advocacy intervention would be identifiable in their communities if the reports were released to the public. The reports are about specific foster parents and agency management about specific children. In a small northern community this report, even with identity information removed, would identify those parents and children.

The Ministry acknowledges that Record 3 does not contain the personal information of any *named* individuals. However, it submits that the information contained in the report would identify the individuals. For confidentiality reasons, I am unable to provide all the details of the facts in support of the Ministry's position here.

Findings

Records 1 and 2 clearly contain personal information. In these records, Advocacy Officers with the OCFSA detail the information obtained during the course of reviewing the care provided to named children by a northern child welfare agency. They set out the circumstances leading to the initiation of the reviews, their actions in investigating the children's care, the results of interviews with various named individuals, and their conclusions and recommendations. I have considered whether severing the names of individuals would "anonymize" the remaining information; however, given the degree of detail in which the information is given, I am not convinced that this can be achieved. The circumstances of particular individuals is set out in such detail that, in my view, it is reasonable to expect that they may be identified even with the names severed.

With respect to Record 3, the only individuals whose names are given are the Advocacy Officers conducting the reviews, and an employee of the Ministry. The information about these individuals does not constitute their personal information, as it is about them in their professional capacities (see, for example, Reconsideration Order R-980015). Other information in the records relates to unnamed residents of a home or homes operated by the Oakville Children's Home. On my review of the Ministry's submissions and the record, I am satisfied that, despite the absence of names, these individuals could be identified. I find, therefore, that Record 3 contains the personal information of some residents of the Oakville Children's Home.

Other parts of the records, however, are more general in nature and do not qualify as personal information. For instance, the background portion of the report, many of the recommendations, and most of the appendices would not, with specific severances, be linked with a resident of a home operated by the Oakville Children's Home. I find that, after such severances, these portions of the report do not contain the personal information of any individual and do not qualify for exemption under section 21. As no other exemption has been claimed for it, I will order the release of this information.

In sum, apart from the information that cannot reasonably be linked to an identifiable individual, I find all three records to contain personal information. Accordingly, I turn to consider whether disclosure of this information is exempt under section 21.

UNJUSTIFIED INVASION OF PERSONAL PRIVACY

Where a requester seeks the personal information of other individuals, as in this case, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In this case, the only relevant part of section 21(1) is section 21(1)(f), which permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Sections 21(2) and (3) provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides

some criteria for the head to consider in making a determination as to 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(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be applied in favour of disclosure.

The Ministry refers to the presumptions in sections 21(3)(a), (g) and (h) of the *Act* in support of its position that disclosure of the personal information would constitute an unjustified invasion of personal privacy. Although I am not convinced that section 21(3)(g) applies (personal recommendations or evaluations), I am satisfied that some of the information is covered by the presumptions in sections 21(3)(a) (medical, psychiatric or psychological history etc.) and 21(3)(h) (racial or ethnic origin).

To the extent that some of the information may not be covered by a presumption, the Ministry refers to the factors in sections 21(2)(f) (highly sensitive) and (h) (supplied in confidence). I am satisfied that the information, by its nature, is highly sensitive, and that section 21(2)(f) weighs heavily in favour of non-disclosure.

I have no representations from the appellant on the application of the factors in section 21(2). On my review, although it is possible that the factor in section 21(2)(a) (public scrutiny) is relevant, I am not convinced that it outweighs the considerations in favour of protecting the privacy of the subject individuals. Accordingly, I am not satisfied that disclosure of the personal information in the records would not constitute an unjustified invasion of personal privacy.

To summarize, I find that the portions of Record 3 that do not contain personal information are not exempt from disclosure. The remainder of Record 3, as well as the entirety of Records 1 and 2, are exempt under section 21.

ORDER:

1. I order the Ministry to disclose to the appellant those portions of Record 3 that I have found do not contain personal information. For greater certainty, I have sent the Ministry a copy of Record 3, highlighting the portions to be withheld.

2. I order disclosure to be made by sending the appellant a copy of Record 3, severed in accordance with my directions, by **November 18, 2003.**

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to this order.

Original signed by: October 20, 2003
Sherry Liang
Adjudicator