



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

ORDER PO-2229

Appeal PA-030142-2

Ministry of Community, Family and Children's Services



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NATURE OF THE APPEAL:

The Ministry of Community, Family and Children's Services (the Ministry) received a request under the *Freedom of Information and Privacy Act (the Act)* for the following information:

Copies of all correspondence in MCFCS possession related to an 'Operational Review' of [a named facility] conducted by [a named consulting firm] or any other relationship between [the named facility], MCFCS and or [the named consulting firm].

The requested correspondence includes, but is not limited to: Letters; Internal memos; Records of telephone conversations; E-Mails; Contracts; Interim, draft and/or final reports

The Ministry failed to respond to the request within the 30-day period contemplated by section 26 of the *Act*. The requester (now the appellant) appealed to the Commissioner's office stating that the Ministry was in a "deemed refusal" situation by not responding with a decision letter within the 30-day statutory time period. This office opened Appeal Number PA-030142-1. The Ministry then issued a decision letter stating the following:

Access to the record is being denied, as section 22 of the *Act* allows the Ministry to refuse to disclose a record where, it is likely that the record or the information contained in the record will be published by the Ministry within 90 days.

The appellant appealed the Ministry's decision on the basis that the decision letter referred only to some of the records responsive to the request. This office then opened Appeal Number PA-030142-2.

During the mediation stage of the appeal, the Mediator clarified with the appellant that the Ministry's decision failed to address the second part of his request. The Ministry issued a supplementary decision letter stating that access was denied to those records responsive to the second part of the request under the discretionary exemption in section 14(2)(b) of the *Act* (law enforcement). As further mediation was not possible, the appeal was moved to the adjudication stage of the process.

Following the conclusion of mediation, the Ministry provided copies of the records responsive to the second part of the request to this office. In addition, the Ministry disclosed to the appellant Records 3 and 9 (the Final Report on the Operational Review) in their entirety and certain information from the remaining records. The Ministry advised the appellant that access to the undisclosed portions of Records 1, 2, 4, 5, 6, 7 and 8 was denied pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (invasion of privacy).

I decided to seek the submissions of the Ministry and the consulting firm (the affected party) initially on the application of sections 17(1) and 21(1) to the undisclosed records, and parts of records. I did not seek the representations of the facility that was the subject of the operational review as the information relating to it was contained only in the Final Report (Record 9), which

was disclosed to the appellant. Neither the Ministry nor the affected party chose to submit representations in response to the substantive issues raised in the Notice, though the affected party indicated its desire to resist the disclosure of a preliminary report, which is not, in fact, at issue in this appeal. As sections 17(1) and 21(1) are mandatory exemptions, I also sought and received submissions from the appellant on the application of these exemptions to the records.

RECORDS:

The records consist of the contract entered into between the affected party and the facility and various invoices, budgets, communications strategies, terms of reference and notes relating to a meeting to discuss a preliminary report relating to the operational review. It should be noted that the Final Report on the Operational Review dated March 2003 (Record 9) and an Executive Summary were disclosed to the appellant at the conclusion of the mediation stage of the appeal.

DISCUSSION:

LAW ENFORCEMENT

The Ministry initially claimed the application of the discretionary exemption in section 14(2)(b) for Record 9, which was disclosed to the appellant at the conclusion of the mediation stage. It did not, however, claim exemption for the records remaining at issue and did not make any submissions on whether section 14(2)(b) might apply to them. As a result, I find that section 14(2)(b) has no application to the remaining records.

PERSONAL INFORMATION

The section 21(1) personal privacy exemption applies only to information which qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual, including the individual's telephone number [paragraph (d)] and the person'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 [paragraph (h)].

Neither the affected party nor the Ministry addressed the question of whether the records contain “personal information” for the purposes of section 2(1).

I have reviewed the contents of the records and find that the invoices for hotel accommodations contained in Record 1 include references to certain telephone numbers for which charges were incurred by the consultant conducting the operational review for the affected party. Because of their apparently personal nature, I find that these telephone numbers qualify as the personal information of the individual consultant employed by the affected party.

Turning to the remaining information in Record 1 and the contents of Records 2, 4, 5, 6, 7 and 8, in Order PO-2225 Assistant Commissioner Tom Mitchinson reviewed a number of previous

orders addressing the distinction between the personal and professional characteristics of information contained in a record. He found that:

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 a 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). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P-427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity:

- In Order M-118, former Commissioner Tom Wright ordered the partial disclosure of mailing lists compiled by the City of Toronto that included the names and addresses of individuals who had expressed an interest in certain municipal properties. Commissioner Wright distinguished between the personal or business capacity of the named individual. The distinction did not turn on whether or not the name as it appeared on the list was that of an individual, but rather on whether there was evidence indicating that the individual was acting in a personal or business capacity.
- In Order M-454, former Adjudicator John Higgins found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but "information [that] relates to the ordinary operation of the business".
- Order P-710 dealt with records that contained the names of individuals and corporations who were vendors of goods and services to the Liquor Control Board of Ontario. Adjudicator Donald Hale found that the names of individuals should be disclosed as the identifying information related to "the business activities of these individuals" and as such did not qualify as their personal information.
- In Order P-729, former Adjudicator Anita Fineberg found that the amount of financial assistance received from the Ontario Film Development Corporation received by a named individual applicant (as opposed to a corporation, sole proprietorship or partnership) related to the business activities of that individual and could not be characterized as personal information.

Assistant Commissioner Mitchinson then applied the reasoning taken from these earlier decisions to the facts before him in the appeal, describing the issue to be addressed as follows:

Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I find that the remaining information contained in Records 1, 2, 4, 5, 6, 7 and 8 relates to the individual consultant in her professional capacity only. Applying the analysis stated in Order PO-2225, I find that the context surrounding the inclusion of the name of the consultant is wholly related to her providing professional services to the affected party as part of the operational review of the named facility. In addition, I find that there is nothing inherently personal about the information, apart from the telephone numbers in the hotel invoices referred to above.

In response to the second question posed in Order PO-2225, I find that there is nothing about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual consultant. The records do not contain information that would, if disclosed, reveal information about the consultant that could be considered to be personal in nature. As a result, the information contained in the records, with the exception of the telephone numbers in Record 1, does not qualify as "personal information" for the purposes of section 2(1).

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, 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. The only exception which has any possible application in the current appeal is 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.

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 institution to consider

in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. 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].

A section 21(3) presumption can be overcome 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 exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption [Order PO-1764].

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The appellant has not referred to any of the considerations under section 21(2) or any unlisted factors that might favour the disclosure of the personal information contained in Record 1. In the absence of any factors weighing in favour of the disclosure of this information, I find that its disclosure would constitute an unjustified invasion of the personal privacy of the individual consultant. The telephone numbers contained in the hotel invoices in Record 1 are, accordingly, exempt from disclosure under section 21(1).

THIRD PARTY INFORMATION

General principles

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Representations of the parties

Neither the Ministry nor the affected party's submissions address the application of section 17(1) to the records at issue in this appeal. The affected party's representations address only her concerns regarding the disclosure of a record which was not identified as responsive to this request by the Ministry.

The appellant submits the following:

The consulting firm was hired to assess the [named facility's] ability to deliver services, and according to the consultants themselves, use industry standards, in an open and transparent process to arrive at the recommendations. These consultants had previous experience in conducting operational reviews, all apparently negotiated, at least in collaboration with, Board of Directors of these agencies. Furthermore, [the named facility] involved in this process is a publicly funded transfer payment agency, which must produce audited financial statements, accessible to the general public. The financial relationship of this particular contract would be available in this format, thus neither the institution, or the affected party, can reasonably expect that the contract was supplied in the context of the confidence. Furthermore, I submit the exact opposite would be 'reasonably expected'; that is the requested information would be, or become, general knowledge, given the scrutiny the recommendations would be subject to.

Recognizing that the institution bears the onus of showing qualification under this exemption, and in light of the fact the affected party has made no representation, much less evidence that is detailed and convincing, I would suggest that the first two parts of the test have not been met.

Findings

I have decided to deal with part 3 of the section 17(1) test first.

For part 3 to apply, the Ministry and/or the affected party must demonstrate that disclosure of the records "could reasonably be expected to" lead to the specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient (*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

The harms identified in sections 17(1)(a), (b) and (c) are:

- (a) significant prejudice to the competitive position or significant interference with the contractual or other negotiations of a person, group of persons, or organization;
- (b) similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) undue loss or gain to any person, group, committee or financial institution or agency.

Clearly, absent evidence and argument from the Ministry and/or the affected party, I do not have the detailed and convincing evidence of harm necessary to establish the requirements of part 3 of the section 17(1) test. As all three parts of the test under section 17(1) must be satisfied, I find that the information remaining at issue in Records 1, 2, 4, 5, 6, 7 and 8 is not exempt from disclosure under this exemption.

ORDER:

- 1. I uphold the Ministry's decision to deny access to the telephone numbers contained in the hotel invoices included in Record 1.
- 2. I do not uphold the Ministry's decision to deny access to the remaining portions of Record 1 and the undisclosed portions of Records 2, 4, 5, 6, 7 and 8.
- 3. I order the Ministry to disclose to the appellant Records 1 (with the exception of the telephone numbers in the hotel invoices), 2, 4, 5, 6, 7 and 8 by providing him with copies by **February 26, 2004** but not before **February 20, 2004**.
- 4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant pursuant to Order Provision 3.

Original signed by: _____
Donald Hale
Adjudicator

January 22, 2004