

ORDER PO-2176

Appeal PA-020374-1

Centennial College of Applied Arts and Technology

NATURE OF THE APPEAL:

This is an appeal from a decision of the Centennial College of Applied Arts and Technology (the College), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester, now the appellant, sought access to the following records:

all details regarding the departure from the college of [a named individual] including his sabbatical, his secondment to the ministry and/or his termination including reasons for leaving and any monetary settlements.

After locating records responsive to the request, the College provided notice of the request to the named individual (the affected party). The affected party objected to the release of the records. Subsequently, the College issued a decision in which it denied access to the records in their entirety, relying on the mandatory exemption in section 21(1) of the *Act* (unjustified invasion of personal privacy), with reference to the presumptions in sections 21(3)(d) (employment history), 21(3)(f) (finances, income etc.) and 21(3)(g) (personal recommendations).

During the course of mediation through this office, the College agreed to conduct a further search for records. As a result of this search, the College located and decided to disclose two additional records. As well, it located three additional records to which it denied access, and these records have been added to this appeal.

I sought the representations of the College and the affected party, initially. Both made submissions. As both of these parties requested that I withhold all or part of their representations from the appellant, I ruled on this request and decided that I would release the representations of the College in their entirety to the appellant, and summarize portions of the affected party's representations in the Notice of Inquiry.

I then provided the appellant with a Notice of Inquiry, enclosing the representations of the College and a summary of portions of the affected party's representations, and invited the appellant to make representations. As the College has now claimed that section 65(6)3 of the *Act* operates to exclude records 4 and 5 from the scope of the *Act*, I also included this issue in the Notice of Inquiry sent to the appellant. The appellant provided representations in response to the Notice.

RECORDS:

The following records are at issue in this appeal:

1. Minutes of Settlement and Release dated August 12, 2002
2. Secondment Agreement dated October 16, 2002
3. Intranet message dated October 09, 2002
4. E-mail from affected party to President dated October 3, 2002
5. E-mail from affected party to President dated October 9, 2002; attached to this is an original message from the President to the affected party dated October 7, 2002.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 65(6)3 of the *Act* states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Records 4 and 5 are e-mail messages recording the affected party's submissions and position with respect to the negotiation of Records 1 and 2. For the following reasons, I find that section 65(6)3 excludes Records 4 and 5 from the scope of the *Act*.

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the College must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The College submits that Records 4 and 5 were prepared by the affected party, an employee of the College. They reflect a discussion between the affected party and another college official relating to the content of the agreements at Records 1 and 2. Records 3, 4 and 5 relate to binding legal agreements which the College was contemplating entering into, which would affect the College's legal rights. The College further submits that section 65(6)7 has no application to these records since they are not agreements between the College and the affected party but rather communications made in the course of negotiating the agreements. It is submitted, therefore, that the records do not fall within the scope of the *Act*.

The appellant states that he is disadvantaged in responding to this issue without knowledge of the content of the documents, but is prepared to rely on the judgement of the Commissioner as to whether these documents are covered by section 65(6)3.

Findings

I am satisfied that Records 4 and 5 were prepared, collected, maintained or used by the College.

I am also satisfied that the records were used by the College in relation to discussions about the agreements entered into between the College and the affected party, which agreements are reflected in Records 1 and 2. I find that these discussions related to employment issues in which the College, as the employer of the affected party, has an interest.

I also find that the exceptions to section 65(6) found in section 65(6)7 do not apply to these records. Accordingly, Records 4 and 5 are excluded from the scope of the *Act*, and it is unnecessary to consider whether they would have been exempt from disclosure under the *Act* under section 21(1).

I will now consider whether Records 1, 2 and 3 are exempt from disclosure.

PERSONAL INFORMATION/INVASION OF PRIVACY

The first issue to consider is whether these records contain personal information, as 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 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)].

On my review of the records and the representations, I am satisfied that these records contain the personal information of the affected party, and of no other individual.

Section 21(1) of the *Act* prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section. On my review, the only exception to the section 21(1) exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads as follows:

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.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of the affected party's 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 privacy. Section 21(2) provides some criteria for institutions to consider in making this determination, and section 21(3) identifies the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) itemizes specific types of information whose disclosure is presumed not 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 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 21(4)

Section 21(4)(a) states:

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;

Neither the College nor the appellant have made specific representations on the applicability of section 21(4). The affected party refers to Order M-173, among others, submitting that section 21(4) has no application to the information in the records.

Order M-173 considered whether entitlements in retirement agreements constitute "benefits" within the meaning of the municipal equivalent to section 21(4). In that decision, former Assistant Commissioner Irwin Glasberg found that as these entitlements were negotiated by employees in exchange for the acceptance of early retirement packages, they did not derive from the original contracts of employment and were not received as a result of being employed by the institution. Accordingly, this section did not apply. These principles have been applied in a number of subsequent decisions.

Based on Order M-173 and other decisions, I am satisfied that section 21(4)(a) has no application to the information in the records. I am also satisfied that the other exceptions in section 21(4) do not apply.

Section 21(3)

Neither the College nor the appellant have made specific representations on the application of any of the presumptions in section 21(3) to the records. The affected party submits that sections 21(3)(d), (f) and (g) apply. These sections state:

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

- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

On my review, I am satisfied that certain information in the records qualifies as relating to the employment history of the affected party, insofar as it describes changes in the affected party's employment status. Further, information about salary and benefits falls within the presumption in section 21(3)(f), as it describes the affected party's finances or income (Order P-1348).

I am not convinced that section 21(3)(g) has any application to the information in the records. The terms "personal evaluations" or "personnel evaluations" are normally applied to assessments made according to "measurable standards." [See Orders P-447 and PO-1756]

Section 21(2)

With respect to other information that is not captured by a presumption under section 21(3), the College has submitted that sections 21(2)(f) and (h) are relevant to a determination of whether disclosure of the information in the records would constitute an unjustified invasion of personal privacy. The affected party relies on sections 21(2)(e), (f) and (g). These sections state:

At 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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;

- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

The College submits that it is likely that the request has been made in order to publish the results to the college community at large. It states that the basis for this conclusion is that disclosures made as a result of previous access requests by the requester have resulted in publication. The College states that it suspects that the intent is to attempt to “embarrass” the affected party and cause undue stress.

Further, the College submits that Records 1 and 2 contain confidentiality provisions, evidencing a reasonable expectation of privacy.

I have decided not to describe the affected party’s representations in detail because of the nature of some of the information provided in them.

The appellant submits, among other things, that the post held by the affected party at the College is “arguably the most influential of college administrators setting his or her vision for academic and access issues for the public of Ontario”. This position “creates an entitlement for the public to know the employment status of the named individual”. It is submitted that there is uncertainty about the employment status of the affected party, and release of the requested documents is necessary for the academic community to end this confusion. The appellant also states that the public is entitled to review the stewardship of the college including all financial entitlements given the impact of financial cuts to post-secondary education in general and the specific deficit problems of the institution. He submits that “severance arrangements to senior college officials should be open to public scrutiny”.

The appellant therefore relies on the factor in section 21(2)(a), submitting that disclosure is “desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny”.

The appellant disagrees that sections 21(2)(e) or (f) have any relevance, stating that any suggestion of pecuniary or other harm is highly speculative and, further, that information about the affected party has been previously released to the appellant in a prior request under the *Act*.

On my review, I am not convinced that the affected party has provided evidence that disclosure of the information will result in pecuniary or other harm to him within the meaning of section 21(2)(e). I agree with the appellant that the likelihood of such harm ensuing is speculative. I am also not convinced that section 21(2)(g) has any relevance. The objection of the affected party is that the records only represent part of a complete picture, but there is no reason to conclude that the information in the records is neither accurate nor reliable.

I agree with the appellant that the factor in section 21(2)(a) has some relevance to the circumstances of this appeal. Other orders have accepted that the contents of similar agreements entered into between institutions and high-ranking employees represent the sort of records for

which a high degree of public scrutiny is warranted: see, for instance, Orders PO-1885, MO-1405 and MO-1184. I am not convinced, however, that s.21(2)(a) is as significant as it was in Order PO-1885 which involved, as I stated there, “a significant amount of public funds, and the highest ranking employee in one of the most important cultural institutions in the country.”

The interest in public access to this type of information must be weighed against the privacy interests of affected individuals. In the circumstances before me I accept that the personal information is highly sensitive. Other orders, such as Order MO-1184, have found that the details of records similar to the ones before me are highly sensitive, and the evidence provided by both the appellant and the affected party support a conclusion that disclosure of the information in the records would likely cause significant personal stress to the affected party.

In considering whether disclosure of the records would result in an unjustified invasion of personal privacy, I am drawn to the conclusion that the factors favouring access are essentially equal in weight to those arguing against disclosure. I conclude that it has not been established that the disclosure of the remaining information would **not** constitute an unjustified invasion of the personal privacy of the affected party.

My finding above relates to Records 1 and 2. Record 3 is different, in that it is an intranet message sent by the President of the College throughout the College. Information before me suggests that a large number of College employees received this message. Further, the contents have been published in the College’s employee newsletter. The information in the message does not (with one exception) fall within the presumptions in section 21(3), nor do the factors in section 21(2) weighing against disclosure apply. One portion falls within the presumption in section 21(3)(d) as it relates to the employment history of the affected party. With respect to the balance of the information in Record 3, the fact that the information has already been disseminated throughout the College community in its employee newsletter suggests that its disclosure here would not constitute an unjustified invasion of personal privacy. I accordingly find that the disclosure of Record 3 (with the exception of one portion subject to a presumption) would not result in an unjustified invasion of personal privacy.

By way of summary, I have found that Records 4 and 5 are excluded from the scope of the *Act* under section 65(6)3. I have also found that section 21(1) exempts Records 1 and 2 from disclosure. Finally, Record 3 is not exempt from disclosure, with the exception of one portion.

ORDER:

1. I order the disclosure of Record 3 with the exception of one portion, which I have highlighted on the copy sent to the College with my order.
2. I order disclosure to be made by sending the appellant a copy of Record 3, as severed, by no later than October 7, 2003 but not before September 30, 2003.

3. In order to verify compliance with the terms of Provision 1, I reserve the right to require the College to provide me with a copy of the material which it discloses to the appellant.

Sherry Liang

September 9, 2003