

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3063

Appeal PA11-51

Ministry of Training, Colleges and Universities

March 22, 2012

Summary: The appellant college, is an affected third party to a request made to the Ministry of Training, Colleges and University (the ministry) for access to the transcripts of three conversations that took place between a representative of the ministry and representatives of the appellant. The appellant took the position that the transcripts are exempt under the law enforcement exemption at section 14 of the *Freedom of Information and Protection of Privacy Act* and the personal privacy exemption at section 21. This order decides that the appellant may not claim the section 14 discretionary exemption, and that section 21 is not applicable as the conversations were of a professional nature and therefore not the personal information of the appellant's representatives. The ministry's decision to disclose the records at issue is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 2, 14 and 21.

Orders and Investigation Reports Considered: P-247, P-270, PO-1705, PO-2225, R-980015

OVERVIEW:

[1] The Ministry of Training, Colleges and University (the ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

The first request was for:

- All correspondence, communications, emails, records, memorandums, notes and material (electronic or hard copy) that reference or relate to [a named private career college] between:
 - the Superintendent of Private Career Colleges or any of his designates and [a named college]; and
 - the Superintendent of Private Career Colleges or any of his designates and [a named individual]; and
 - the Superintendent of Private Career Colleges or any of his designates and [a second named individual].

[2] The second request was for all correspondence, communications, emails, records, memorandums, notes and material between the Superintendent of Private Career Colleges or any of his designates and the named college and the Superintendent of Private Career Colleges or any of his designates and a named individual.

[3] The Ministry notified the named college under section 28 of the *Act* regarding the disclosure of the responsive records and received a response in which the college objected to the disclosure of the records. The Ministry subsequently issued a decision to the requester providing partial access to the records. The Ministry denied access to the remaining portions of the records, relying on sections 21 and 14(1)(d) of the Act.

[4] The requester appealed the application of the above exemptions to the two requests and appeal files PA11-52 and PA11-53 were opened.

[5] The named college (now the appellant) also appealed the Ministry's decision to disclose portions of the records and this appeal file (PA11-51) was opened. All three files moved to the mediation stage of the process.

[6] During mediation, the requester decided that he no longer required the portions of the records that were withheld on the basis of sections 14(1)(d) and 21. Consequently, appeal files PA11-52 and PA11-53 were closed.

[7] In this appeal, the appellant originally claimed that sections 14(1), 17(1), 18.1 and 21 applied to all of the records listed in the ministry's Index of Records. However, during the inquiry, the appellant advised that its objections were limited to the records listed on the Index of Records as Tracks 1, 2 and 3 and the transcripts of those tracks. The appellant also advised that it was no longer relying on sections 17(1) and 18.1.

[8] During my inquiry into this appeal, I sought and received representations from the appellant, the ministry and the requester. The ministry informed this office that it would not be taking a position in this inquiry. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[9] In the discussion that follows, I find that the requester is entitled to obtain access to the records under consideration in this appeal and that none of the records are exempt under sections 14(1) and 21.

RECORDS:

[10] The records at issue in this appeal are the transcripts of three conversations between two individuals employed by the appellant and the Superintendent of Private Career Colleges, listed as Tracks 1, 2 and 3 in the Index of Records.

PRELIMINARY ISSUE

The Third Party Notification Process

[11] As a preliminary issue, I note that in its representations, the appellant alleges that the third party notification process undertaken by the ministry pursuant to section 28(1) of the *Act* was unfair. In short, the appellant claims that it was not provided sufficient time to review the records at issue and provide its position on their possible disclosure. The appellant stated that while the ministry provided it with 20 days to respond to the notification, the ministry's letter was received on the last day before the two week holiday season. When the appellant requested an extension of two weeks to submit representations, the ministry granted a one week extension. The appellant argues that seven days was not sufficient to properly review, analyze and prepare representations, particularly since it was not provided with a transcript of the recorded conversations at issue.

[12] Third party notification by institutions at the request stage is governed by section 28(1) which states:

Before a head grants a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting the information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[13] Even though the ministry did not claim sections 17(1) or 21(1) to exempt the records from disclosure, it did provide the appellant with notice as per section 28(1). Further, the ministry also granted the appellant the statutory 20 day period, plus additional seven days, to make representations as to why the record or part thereof should not be disclosed, in accordance with section 28(2). As such, I find that the appellant's allegation that the third party notification process was unfair and unjust to be unfounded.

[14] Moreover, I find that this office has provided the appellant with multiple opportunities and ample time to make full representations during the course of this inquiry on all of the issues that it has raised. Therefore, even if the ministry did not provide it with sufficient time to make representations in response to the disclosure, the appellant has had ample opportunity to make full representations as part of the inquiry process and has not, accordingly, been prejudiced in this appeal.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. If the records do contain "personal information", does the mandatory exemption in section 21(1) apply to the records at issue?
- C. Does the discretionary exemption in section 14 apply to the records at issue?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[15] The appellant submits that the records contain the personal information of its employees and that the transcripts are, therefore, exempt under the mandatory exemption in section 21(1) of the Act.

[16] In order to determine whether section 21(1) of the Act applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. The appellant claims that the records contain its employees' personal views and opinions and as such, it qualifies as their personal information under paragraph (e) of the definition of that term in section 2(1), which reads:

"personal information" means recorded information about an identifiable individual, including,

the personal opinions or views of the individual except where they relate to another individual....

[17] Past orders of this office state that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹

[18] Even if the information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²

[19] In order to determine whether the information in the record is personal information, I must consider whether the information relates to the named individuals in a professional rather than their personal capacity. Only information about individuals in a personal capacity can qualify as personal information for the purposes of the *Act*. The appellant submits that the records contain information about the named individuals in both their professional and personal capacities. It argues that the records include professional information which relates to their identities as employees of the appellant, as well as personal information which relates to their personal opinions with regard to the issues discussed.

[20] The current approach of this office in determining whether information relates to an individual in a personal or professional capacity was set out by former Assistant Commissioner Tom Mitchinson in Order PO-2225. This approach has been followed in numerous decisions and essentially involves the consideration of the following two questions:

...the first question to ask in a case such as this is: "*in what context do the names of the individuals appeal*"? Is it a context that is inherently

¹ Orders P-257, P-427, P-2142, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders-1409, R-980015, PO-2225 and MO-2344.

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 inherently personal in nature?³

[21] I adopt this approach for the purposes of this appeal.

[22] In Order P-270, former Commissioner Tom Wright found that opinions given by a person in their professional capacity are not "personal information". Further, Adjudicator Donald Hale stated in Reconsideration Order R-980015 that "the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message."⁴

[23] The appellant takes the position that although these records were created in a professional context, the nature of the records is personal. The appellant further submits that while the telephone recordings were made in the course of its representatives' employment, the opinions and views expressed by the participants relate to them primarily as individuals. Moreover, the appellant states that the tone of the conversations suggest that the conversations were informal and personal in nature.

[24] On the other hand, the requester submits that the opinions contained on the tape records cannot be characterized as personal in nature because the calls were between the appellant's representatives, in their professional capacities, and the Superintendent of Private Career Colleges. The requester argues that the information in the records represent the appellant's official position in relation to the issue discussed, rather than the individuals' personal opinions on the subject.

[25] After carefully reviewing the records at issue, I find that the employees expressed their opinions in the context of their employment responsibilities and were relaying the position of the appellant to the Superintendent. Throughout the records, the employees are providing their professional opinions with regard to the issues discussed, and at no point do they provide their personal opinions or opinions. As

³ PO-2225, page 7-8.

⁴ Order R-980015, page 17.

such, the opinions expressed are not those of the appellant's employees for the purposes of the definition of personal information contained in section 2(1)(e) of the *Act*. In coming to this conclusion, I take note of the context within which the conversations took place; that is, discussions between a named college and the Superintendent Private Career Colleges. As Adjudicator Hale said in Order R-980015, "The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message."⁵

[26] Therefore, I find that the information contained in this record cannot be considered personal information as that term is defined in section 2(1) of the *Act*.

B. If the records do contain "personal information", does the mandatory exemption under section 21 apply to the records at issue?

[27] Since I have found that the records do not contain "personal information", I need not consider whether the mandatory exemption under s. 21 applies to them.

C. Does the discretionary exemption under section 14 apply to the records at issue?

[28] The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under that particular section. A discretionary exemption uses the permissive "may". It is important to note that the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions.

[29] In this appeal, the appellant seeks to rely on the law enforcement exemption provided under s. 14 of the *Act*. The appellant argues that this exemption applies to the records because there was an ongoing investigation and proceeding that took place before the appellant organization and there was an ongoing investigation by the ministry under its own processes. Further, the appellant notes that the matter under investigation proceeded before the Division Court and had yet to be disposed of.

[30] The ministry did not claim that the law enforcement exemption applied to the records at issue in this appeal.

⁵ Ibid.

[31] In Order PO-1705, former Assistant Commissioner Mitchinson dealt with a situation in which an affected party rather than the institution raised the possible application of discretionary exemptions in the context of the *Act*. He wrote:

During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision. This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

The *Act* includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in sections 17 or 21(1) of the *Act*.⁶

[32] I agree with these conclusions and adopt them for the purposes of this appeal.

[33] In its representations, the requester argues that the fact that the ministry did not cite the law enforcement exemption for the records at issue should be fatal to the appellant's attempts to rely upon the law enforcement exemption. The requester cites Order P-247, in which Assistant Commissioner Mitchinson stated that:

As a general rule, with respect to all [discretionary] exemptions... it is up to the head to determine which exemptions, if any should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released.... There may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*... In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption and the Commissioner has no obligation to consider it.⁷

[34] The requester argues that this appeal is not one of those rare occasions when a discretionary exemption, not raised by the ministry, should be considered.

[35] In its representations, the appellant has not provided this office with sufficiently compelling evidence demonstrating that this case is one of the "most unusual of cases"⁸ in which it, as an affected person, can raise the application of an exemption which has not been claimed by an institution.

⁶ Order PO-1705, pages 5-6.

⁷ Order P-257, pages 5-6.

⁸ Order PO-1705, pages 6.

[36] After reviewing the representations of the parties, I find that this is not one of the "rare occasions" in which an appellant ought to be permitted to raise the application of a discretionary exemption which was not claimed by the institution with custody of the records.

[37] As such, the law enforcement exemption provided under s. 14 of the *Act* cannot apply to the records at issue and I dismiss this aspect of the appeal.

ORDER:

1. I uphold the ministry's decision to disclose the records to the requester.
2. I order the ministry to disclose the records identified as Tracks 1, 2 and 3 in the Index of Records to the requester by **April 27, 2012** but not before **April 23, 2012**.

Original Signed By: _____

Brian Beamish
Assistant Commissioner

March 22, 2012 _____