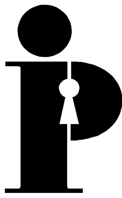

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 43

Appeal 880071

Ministry of the Solicitor General

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) of the Act a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 16, 1988, the Ministry of the Solicitor General (the "institution") received a request for access to the following records:

   "The complete results of all candidates interviewed for the position (Clerk/Stenographer OAG6 Blind River Detachment).

   First competition held 10 Nov. 87

   _ marked shorthand notes and typed letters
   _ marked typing tests
   _ complete list of questions asked and weighted marks if any for all candidates
   _ form recommending applicant to start work 10 Dec./87
   _ memo requesting that only I be retested for shorthand test

Test _ 10 Dec. 87 (Thessalon)

- marked shorthand notes and typed letter
- marked typing test
- marked shorthand notes and typed letters of [name of one of the candidates]

Second competition held 09 Feb. 88

- marked shorthand notes and typed letters of all candidates
- marked typing tests of all candidates
- complete list of questions asked and the weighted marks if any for all candidates
- form recommending chosen applicant to start job."

2. On March 16, 1988, the institution advised the requester that "...access is granted to documents containing your personal information relating to the job competitions for the O.A.G.6 position at Blind River Detachment. Access is denied to the documents containing personal information of other candidates under section 21 of the Act. This provision applies because the release of these documents would constitute an unjustified invasion of privacy."

3. By letter dated April 5, 1988, the requester appealed the decision of the head. I gave notice of the appeal to the institution.

4. Between April 5, 1988 and June 13, 1988, the records in question were obtained, affected persons were contacted, and efforts were made by an Appeals Officer to effect a settlement of the matter. These settlement efforts were unsuccessful.

5. On June 23, 1988, I gave notice to the institution, the appellant, and the affected persons, that I was conducting an inquiry to review the decision of the head. An Appeals Officer's Report accompanied this notice.

6. By letter dated July 13, 1988, I invited all parties to submit written representations on the issues arising from the appeal. I received representations from the institution, the appellant and certain of the affected persons, and have considered them in making my Order.

The issues that arise in this appeal are:

A. Whether the records contain personal information as defined in subsection 2(1) of the Act.

B. If the answer to Issue A is in the affirmative, whether disclosure of the information in issue would constitute an unjustified invasion of the personal privacy of any individual.

C. If the answer to Issue B is in the affirmative, whether any of the records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

The records at issue in this appeal relate to two job competitions for the same position of stenographer with the Ontario Provincial Police. The institution has indicated that both competitions followed the same two_step process: a practical typing and shorthand/dictaphone test; and an applicant interview before a selection board. The appellant was an unsuccessful candidate in these competitions. The appellant also requested information regarding the results of a competition for a similar position in which she was not an applicant.

Before addressing the specific issues raised in this appeal, it should be noted that the purposes of the Act as set out in subsections 1(a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record

falls within one of the specified exemptions in the Act lies upon the head.

ISSUE A: Whether the records contain personal information as defined in subsection 2(1) of the Act.

The records at issue in this appeal are:

1. Shorthand or speed writing notes:

   These notes are texts dictated to the candidates, taken by the candidates in shorthand or speed writing. These records were not subject to evaluation and contain no mark or score and therefore they fall outside the scope of the appellant's request.

2. Typed letters:

   The typed letters are the transcript of the shorthand or speed writing notes by the candidate who took the notes. All of these letters bear the names of the candidates as well as marks indicating errors, calculations and the evaluation scores awarded.

3. Typing tests:

   These are texts typed by the candidates. They bear the names of the candidates, marks indicating errors in typing, calculations, the evaluation scores awarded and in some cases the examiner's remarks.

In all cases where requests involve access to personal information, it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act.

Personal information is defined in subsection 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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 head submits that all records at issue in this appeal contain information that falls within the definition of personal information contained in subsection 2(1) Act. He states:

> In each of the competitions ... applicants were required to undergo interviews and tests of skills and knowledge. Questions used in interviews and the tests used to establish skills/knowledge levels cannot be considered personal information; however, the individual responses to these questions and resultant test scores are unquestionably the personal information of the respective individual.

Turning to the records at issue in this appeal, all typed letters and typing tests bear the name of the candidate and therefore, in my view, clearly qualify as "personal information" under subsection 2(1) of the Act.

ISSUE B: **If the answer to Issue A is in the affirmative, whether disclosure of the information in issue would constitute an unjustified invasion of the personal privacy of an individual.**

Having determined that all of the records contain "personal information", I must now decide whether the mandatory exemption provided by section 21 of the Act applies to bar the release of these records.

Subsection 21(1)(f) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> ...
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Subsections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. Specifically, subsection 21(3)(g) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> ...
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

The head has submitted that the records reveal the typing and shorthand test scores awarded to individual candidates in the competitions, and as such fit within the terms of subsection 21(3)(g).

The word "evaluate" (evaluation) is defined in the Oxford Dictionary to mean: "ascertain amount of; find numerical expression for; appraise; assess". Having examined the contents of the records in question, I find that both the scored typing tests and the scored typed letters transcribing the shorthand notes in the competitions are "personal ... evaluations or personnel evaluations" of the candidates within the meaning of subsection 21(3)(g) of the Act.

Subsection 21(3) is very important in terms of the privacy protection portion of the Act. As I indicated at page 8 of my

Order No. 20 (Appeal No. 880075) released October 7, 1988, subsection 21(3) "...specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason."

The presumption in subsection 21(3) is rebuttable, but only in specific circumstances. These are:

1. under section 23 of the Act, which provides that an exemption from disclosure of a record under section 21 "does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption";

2. under section 11 of the Act, which obliges the head to disclose any record "if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public";

3. a combination of the circumstances set out in subsection 21(2) might also be so compelling as to outweigh the presumption under subsection 21(3), however, in my view, such a case would be extremely unusual.

The appellant argues that the circumstances outlined in subsection 21(2)(d) of the Act are present in this case, and this should be sufficient to rebut the presumption created by subsection 21(3).

Subsection 21(2)(d) states:

> 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,
>
> ...
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request.

The appellant submits that as an unsuccessful candidate, she is entitled to know whether the same tests were administered to all candidates, and whether they were evaluated in accordance with the same government standards. She points out that her request does not include access to the applications, personal notes of the interview committee, or resumes of the candidates; she simply wants to be satisfied that the process followed in these competitions was fair and that "the requirements for a standardized fair and equal testing criteria" were used to evaluate each candidate.

Some affected persons have indicated a strong objection to the disclosure of these test results, while others did not respond to my request for representations.

In the present case, I find that the presumption of an unjustified invasion of personal privacy under subsection 21(3) has not been rebutted. In my view, unless the typed letters and typing tests can reasonably be severed under subsection 10(2), they cannot be disclosed to the requester without unjustly invading the personal privacy of the other applicants.

ISSUE C: If the answer to Issue B is in the affirmative, whether the record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

Subsection 10(2) states:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

The inclusion of subsection 10(2) in the Act has significant implications regarding the nature of a record which has met one of the criteria for exemption. By properly discharging the obligation to sever an exempt record under subsection 10(2), a head, in many instances, will alter the record in such a way that it no longer meets the requirements of the exemption. In other words, a record considered in its entirety may be exempt, but the same record, properly severed, may be eligible for release.

In my view, the purpose of subsection 10(2) is to require institutions to try, wherever possible, to sever records so as to remove them from the scope of the exemptions under sections 12 to 22. I feel that this interpretation is consistent with one of the fundamental purposes of the Act, that information should be available to the public, and that necessary exemptions from the right of access should be limited and specific.

In applying the requirements of subsection 10(2) to the circumstances of this appeal, the head must determine whether,

by severing all personal identifiers from the typed letters and typing tests, he has succeeded in removing these records from the scope of the definition of "personal information" under subsection 2(1). If such a severance is possible, then the records no longer meet the requirements for exemption under section 21 and the head is compelled to release these severed records due to the mandatory nature of the subsection 10(2) provision.

The head has argued that the records cannot reasonably be severed because "...the town of Blind River is a small northern community..." and "...all of the applicants in this case are known to each other". In the head's opinion, the "...release of any information on other candidates would either identify each applicant directly or would allow the requester to determine the respective applicant's identity by process of elimination".

In my view, the arguments presented by the head are not sufficient to outweigh the obligation to sever the records under subsection 10(2). The records which are the subject of this appeal are pages of typewritten materials submitted by six candidates in order to meet the institution's requirements for two job competitions. When objective typing and shorthand tests are included by an institution as part of a job competition, it is reasonable for candidates to assume and expect that these tests will be conducted fairly and consistently for all applicants. If a doubt is raised in the mind of any applicant, it is also reasonable for that person to seek assurances of fairness from the institution. In responding to such a request, the institution should be prepared to release whatever information is requested unless it falls clearly within one of the exemptions contained in the Act.

As far as the records at issue in this appeal are concerned, in my view, if the names of the applicants and test scores are severed from the typed letters and typing tests, the remaining portions of these records would fall outside the definition of "personal information" under subsection 2(1), and would no longer qualify for exemption under section 21.

In my view, the proper test to be applied by a head in considering the severance requirements of subsection 10(2) as they relate to records falling under the section 21 exemption, should not only be whether the requester could in some manner

use the severed information to determine the identity of the other applicants. Although, in some cases, this might be an appropriate consideration, the real exercise for the head is to determine whether after the records have been severed, the remaining information falls under the definition of "personal information" in subsection 2(1). In the case of objective typing test results and typed letters of the kind that are the subject of this appeal, it is my view that the severance of all personal identifiers would be sufficient to remove the records from the definition of "personal information" and therefore outside the scope of the section 21 exemption.

In summary, I order that the head disclose to the appellant, within twenty (20) days of the date of this Order, all typed letters and typing tests, with the names of the candidates, scores awarded, and remarks and notations severed from the records. The head is further ordered to advise me in writing,

within five (5) days of the date of disclosure of the date on which disclosure was made.

Original signed by: March 3, 1989
Sidney B. Linden Date
Commissioner