



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

ORDER P-223

Appeal 890234

Ministry of Community and Social Services



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O R D E R

INTRODUCTION:

On March 28, 1989, a request was made to the Ministry of Community and Social Services (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

All information relating to the applicant on file with the Ministry of Community and Social Services, Director of Income Maintenance. Contents of my file [file number] as outlined in #3.

On May 16, 1989, the institution responded, granting the requester access to all of the requested records with the exception of certain information contained in the report of the Eligibility Review Officer (E.R.O.) (the "record"). Access to this information was denied pursuant to subsection 49(b) of the Act.

On August 11, 1989, the requester, through her lawyer (the "appellant"), appealed the decision of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution under the Act to the Commissioner. In his letter of appeal, the appellant stated:

[The requester] requires the third party information that was excluded from the report in order to assess the quality of the Eligibility Review Officer's

investigation. Should she receive this information, it is our intention to contact the third parties to determine the nature and content of any discussions that they had with the Eligibility Review Officer and confirm the accuracy of the Eligibility Review Officer's notes, which we believe are questionable. It is necessary for this to be done at once in order to preserve evidence for future court proceedings.

On August 15, 1989, notice of the appeal was given to the institution and the appellant.

In accordance with the usual practice, the appeal was assigned to an Appeals Officer who contacted the institution's Freedom of Information and Privacy office in order to obtain a copy of the requested records and discuss possible mediation of the appeal.

In an attempt to settle the appeal, the E.R.O. contacted the three individuals whom he had interviewed regarding the requester (the "affected persons") with a view to ascertaining whether they objected to disclosure to the requester of their names and the information they had given to the E.R.O. All three declined to consent to disclosure.

The Appeals Officer then contacted these three individuals herself to determine if they would consent to the disclosure of the information and they declined to do so.

As mediation of the appeal was unsuccessful, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and the three affected persons. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of

the appeal, and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer or any of the parties, to be relevant to the Appeal. The Appeals Officer's Report indicates that the parties, in making representations, need not limit themselves to the questions set out in the report.

Written representations were received from the appellant and the institution. No representations were received from the three affected persons.

In its representations, the institution raised another exemption with respect to the information at issue in this appeal. It claimed that subsection 14(1)(d) applied. Accordingly, the appellant was notified by this office of the new claim for exemption, and was afforded the opportunity to submit further representations concerning this new issue. No additional representations were received from the appellant on this issue.

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution.

BACKGROUND:

The requester was the recipient of social assistance allowance pursuant to the Family Benefits Act, R.S.O. 1980, c.151. The E.R.O. had received a "tip" that the requester was not living as a single person, a situation which could result in her benefits being terminated. On the basis of the information he received from this source, the E.R.O. instituted an investigation into the requester's living arrangements.

During the course of his investigation, the E.R.O. interviewed three individuals who provided him with information regarding the requester's living arrangements. It is the names, addresses and portions of the information provided by these three individuals that is at issue in this appeal. The requester has already obtained access to nearly all of the other information contained in her file.

After the completion of the E.R.O.'s investigation and the receipt of his report, the institution initially decided to cancel the requester's benefits because it was determined that she was not living as a single person. Subsequently staff of the institution met with the requester and her lawyer. As a result of that meeting it was decided that no legal proceedings would be launched against the requester and the investigation was

terminated. The requester's social assistance allowance was not varied or terminated.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the requested record qualifies as "personal information", as defined by subsection 2(1) of the Act.
- B. If the answer to Issue A is in the affirmative, whether the discretionary exemption provided by subsection 49(b) of the Act applies.
- C. Whether the discretionary exemption provided by subsection 14(1) (d) of the Act applies.
- D. If the answer to Issue C is in the affirmative, whether the discretionary exemption provided by subsection 49(a) of the Act applies.

ISSUE A: Whether the information contained in the requested record qualifies as "personal information", as defined by subsection 2(1) of the Act.

In all cases where the request involves 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, and to determine whether this information relates to the requester, another individual or both.

Subsection 2(1) of the Act states:

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

- (a) information relating to the 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;

In my view, the severed information contained in the record at issue falls within the definition of personal information contained in subsection 2(1). The names and addresses of the affected persons together with the statements and/or allegations contained in the record are properly considered recorded information about the requester and other individuals and are, therefore, personal information as defined in the Act.

ISSUE B: If the answer to Issue A is in the affirmative, whether the discretionary exemption provided by subsection 49(b) of the Act applies.

I have found under Issue A that the information severed from the report of the E.R.O. qualifies as "personal information" under the Act. I must now determine if access could be denied to this information on the basis that it falls within the exemption provided by subsection 49(b).

Subsection 47(1) of the Act gives individuals a general right of access to:

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the

control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, as former Commissioner Sidney B. Linden stated in Order 37 (Appeal Number 880074), dated January 16, 1989, this right of access is not absolute. Section 49 of the Act provides a number of exceptions to this general right of disclosure of personal information to the person to whom the information relates. Specifically, subsection 49(b) provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

At page 9 of Order 37 supra, Commissioner Linden explained the operation of subsection 49(b):

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his own personal information against another individual's

right to the protection of their privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then subsection 49(b) gives him discretion to deny access to the personal information of the requester.

Subsections 21(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of another individual's personal privacy. Subsection 21(2) provides some criteria for the head to consider in making this determination. Subsection 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy.

In its submissions, the institution specifically relied on the application of subsections 21(3)(b) and (g) to raise the presumption that disclosure of the severed information would constitute an unjustified invasion of personal privacy. These subsections read as follows:

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

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (g) consists of personal recommendations or evaluations,

character references or personnel
evaluations;

I will first address the application of subsection 21(3)(b). I note that this subsection does not specify whether the "investigation into a possible violation of law" must be one which examines the activities of the individuals who are subject to investigation or is more properly referable to those of the individuals interviewed in the course of such investigations. It is my opinion that the subsection may be interpreted in either way. Accordingly, I will now address the institution's submission that the personal information in question was compiled as part of an investigation into a possible violation of law by the requester.

The institution submitted that:

... Ministry staff met personally with [the requester] and her solicitor. During the meeting, the evidence and information received by the Ministry was discussed. It was determined that no legal proceedings would ensue and the investigation was terminated. The appellant's social assistance allowance was not varied or terminated.

In my opinion this submission does not respond to the issue raised by subsection 21(3)(b), that is, what kind of violation of law was being investigated. However, an examination of the applicable legislation is instructive.

Social assistance benefits are provided to those in need in the Province of Ontario pursuant to the provisions of the Family

Benefits Act. This legislation creates a scheme under which allowances are paid and an administrative and enforcement system is established.

If a recipient fails to comply with the requirements of the Family Benefits Act or the regulations passed thereunder, two major consequences may follow:

- 1) the recipient's benefits may be suspended or cancelled (ss.7(2)); or
- 2) if the recipient knowingly obtains or receives a benefit to which he or she is not entitled under the Family Benefits Act, he or she may be guilty of an offence and on conviction is subject to a fine of not more than \$5000 or to imprisonment for a term of not more than six months, or to both a fine and imprisonment (s.19).

In this appeal, these potential consequences are reflected in the E.R.O.'s recommendations which are listed at the end of his report:

- 1) Cancel - not living as a single person
- 2) Establish O.P. [overpayment] from date of Grant (01/02/85)
- 3) Refer to OPP for fraud investigation

In this particular case, the E.R.O. met with the Income Maintenance Supervisor of the institution's Kingston office to discuss his report and the recommendations. At the time this discussion took place only the Supervisor had the authority to decide which option, if any, to pursue.

The Supervisor advised the Appeals Officer that her initial decision after this meeting was to cancel the requester's benefits. She changed her mind after receiving information at a subsequent meeting she had with the requester and her lawyer.

In my opinion, both the legislative sanctions and the E.R.O.'s recommendations satisfy the subsection 21(3)(b) criteria. The presumption in subsection 21(3)(b) only requires that there be an investigation into a possible violation of law. Therefore, in this case, the fact that the institution did not initiate any legal proceedings against the requester does not negate the applicability of subsection 21(3)(b). Thus there is a presumption raised that disclosure of the severed information would result in an unjustified invasion of the personal privacy of the affected persons. As I have found that the requirements for a presumed unjustified invasion under subsection 21(3)(b) have been satisfied, it is not necessary for me to consider the requirements of the presumption under subsection 21(3)(g).

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption. Subsection 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under subsection 21(3).

In my view, the records do not contain any information as it pertains to subsection 21(4). Consequently, none of the circumstances listed in subsection 21(4) operate to rebut the presumed unjustified invasion of personal privacy under subsection 21(3).

In Order 20 (Appeal Number 880075), dated October 7, 1988, Commissioner Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual." While the appellant has not specifically raised the issue of the application of subsection 21(2)(d) in his written submissions, he does refer to the substance of that subsection in his letter of appeal. That subsection reads as follows:

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 claims:

... The third party's privacy interest [sic], must be weighed against the public's interest and [the requester's] interest, in determining whether or not the Eligibility Review Officer was following its [sic] own guidelines and acting within the boundaries of fairness in investigating the personal circumstance of a recipient of family benefits. This is an issue of considerable importance to the public and to recipients of benefits, because where a person's benefits are cancelled, s/he becomes financially vulnerable, and in addition, many recipients are disabled and suffer disproportionately.

It is no answer to suggest that a recipient whose benefits are cancelled have sufficient relief by

reason of her/his right of appeal to the Social Assistance Review Board. These appeals frequently take months and the Board cannot compensate a successful applicant for her/his anxiety and anguish that s/he suffered when his/her sole source of income has been cut off.

Without the third party information, it will be impossible for [the requester] to make out her case that the Eligibility Review Page Officer, the Director or the Minister failed in their statutory duties towards her. If she is required to commence an action and go forward without the third party information, the Ministry will have available to it facts in support of a defence which are not available to [the requester]. Neither will it be sufficient that [the requester] might be able to obtain this information later on discovery because by that time memories of third parties of what was discussed with the Eligibility Review Officer will likely have been faded considerably.

In Order 139 (Appeal Number 890008), dated January 19, 1990, Commissioner Linden addressed this very issue. In that appeal, the facts were somewhat different: the appellant had received an adverse decision from the Director of Family Benefits as a result of an investigation arising from a complaint. A hearing to review that decision was pending before the Social Assistance Review Board. At pages 14 and 15 of that Order Commissioner Linden stated:

In the instant case, the appellant has had disclosure of most of the evidence held by the institution. He has not, however, had disclosure of the names of some

of the informants (and the complainant) who have refused to consent to disclosure of their personal information.

This information may be relevant in the context of the fair determination of the requester's rights at the hearing before the Social Assistance Review Board, from the point of view of testing the evidence to be led by the institution and establishing the credibility of the sources of information.

... However, in balancing this informant's right to personal privacy with the right of the requester to access the personal information, I find that it would be an unjustified invasion of this informant's personal privacy to disclose her personal information, and I uphold the head's decision not to release it.

As I have previously noted at page 4 of this Order, the requester has suffered no financial detriment as a result of the information at issue having been supplied to the E.R.O. For whatever reasons, the institution decided not to pursue the issue. Thus the rights of the requester regarding her eligibility for social assistance are not currently at stake. Therefore, in my opinion, this is not a situation in which disclosure of the information at issue is relevant to a fair determination of the requester's rights.

Accordingly, it is my view that disclosure of the severed information would constitute an unjustified invasion of the personal privacy of the affected persons, and I uphold the head's decision to deny access to this information.

As I have answered Issue B in the affirmative, I do not have to consider Issues C and D.

ORDER:

I uphold the head's decision to withhold the severances in the report of the Eligibility Review Officer.

Original signed by: _____
Tom A. Wright
Assistant Commissioner

_____ March 1, 1991
Date