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

ORDER 17

Appeal 880078

Ministry of the Solicitor General

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Appeal Number 880078

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 personal information under subsection 48(1) a right to appeal any decision of a head under the Act to me.

The facts in this case are as follows:

1. On March 10, 1988 the Ministry of the Solicitor General (the "institution") received a request from the appellant for access to all "verbal or written" information relating to both the unclassified and classified job competitions for Classification Officer and all "verbal or written" information relating to the early termination of the appellant's employment contract.

2. On March 25, 1988 the institution granted the appellant access to her own personnel and job competition files. Information about other candidates in the job competition files was severed from the records pursuant to section 21 of the Act.

3. On April 12, 1988 the appellant appealed the decision of the head, asserting that none of the information she was seeking was an invasion of another person's privacy but was only information relating to herself.

4. Mediation took place between April 12, 1988 and July 4, 1988. During that period the institution located some additional documentation which was provided to the appellant. The appellant maintained her position that four classes of records relating to her were being withheld. These items are:

1. a test score;

2. a list of persons contacted for references;

3. notes of comments or recommendations from two superiors regarding the job competition for the classified position; and

4. notes of comments or recommendations from two superiors regarding the termination of her employment contract.

Further, the appellant maintained that the Act requires that conversations and comments be recorded. Both parties sought resolution of the issues by way of an inquiry.

It appears that the ground advanced for severances of personal information made to records relating to the job competition should have been subsection 49(b) of the Act, not section 21 as the institution has submitted. This is due to the fact that the request made by the appellant was pursuant to subsection 48(1) of the Act. In any event, the issue of severances does not form a part of this appeal.

5. On July 4, 1988 I gave notice to the institution and the appellant that I was conducting an inquiry to review the decision of the head.

6. By letter dated July 13, 1988, I advised both parties that I intended to conduct an oral inquiry.

7. Written representations were received in advance of the oral inquiry from both the appellant and the institution. On August 17, 1988 an oral inquiry was held and submissions were made by both parties.

The issues that arise in the context of this appeal are as follows:

A. whether the institution has made reasonable efforts to identify and locate the personal information requested by the appellant; and

B. whether the oral comments or recommendations of the appellant's superiors regarding the job competition and the termination of the appellant's employment contract are "personal information" which give rise to a right of access by the appellant.

ISSUE A: **Whether the institution has made reasonable efforts to identify and locate the personal information requested by the appellant.**

The appellant's right of access arises in subsection 47(1) of the Act which reads:

"Every individual has a 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."

In its representations the institution outlined the steps taken to identify and locate the personal information requested by the appellant. The appellant's request and a letter from the Freedom of Information Co_ordinator (FOIC) were forwarded to the Human Resources Branch. They in turn forwarded the original 174 pages of relevant documentation to the FOIC for review after which some 170 pages were released to the appellant. Upon appeal, the Human Resources Branch conducted a further search and ultimately located some interview notes prepared by a former employee of the institution. These documents were subsequently provided to the appellant. In the course of mediation, my office reviewed all of the relevant documentation.

The institution included in its representations explanations as to why the documentation which the appellant believes is being withheld does not exist. The institution submitted that the test score does not exist because the selection process did not include the scoring of the test. A test was administered but the responses were not graded. The appellant was satisfied with this explanation and I am satisfied that the test score does not exist.

With respect to the names of references contacted, the institution submitted that it is their policy to contact references near the end of the job competition. As the appellant was not successful in proceeding to that stage of the competition, none of her references were contacted. The appellant was satisfied with this explanation and I am satisfied that no references were contacted.

With respect to the notes of comments or recommendations regarding both the job competition and the termination of the appellant's employment contract, I am satisfied that no records exist which address these subjects.

It should also be noted that at the oral inquiry the institution provided the appellant with a copy of her "Training and Development" file, although this documentation did not form a part of the appellant's original request.

Taking into consideration all of the above, including the fact that no evidence has been put forward that additional records exist, I am satisfied that the institution has made reasonable efforts to identify and locate the personal information requested by the appellant and that they have provided to her all existing recorded information relating to her access request.

ISSUE B: **Whether the oral comments or recommendations of the appellant's superiors regarding the job competition and the termination of the appellant's employment contract are "personal information" which give rise to a right of access by the appellant.**

Having found that the institution made reasonable efforts to identify and locate the personal information requested, I am left to address the issue of whether the comments or

recommendations relating to the job competition and the termination of the appellant's contract are "personal information" which give rise to a right of access by the appellant.

As noted earlier, section 47 of the Act provides the appellant with a right of access to personal information. Subsection 47(a) states that the personal information must be "contained in a personal information bank in the custody or under the control of an institution". Subsection 47(b) adds that the right of access applies to "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".

"Personal information" is defined in subsection 2(1) of the Act as "recorded information about an identifiable individual ..." (emphasis mine). Also defined in subsection 2(1) is the term "personal information bank" which means "a collection of personal information that is organized and capable of being retrieved" (emphasis mine).

These key definitions indicate the Legislature's intention that an individual's right of access under the Act be to information already recorded or retrievable in some physical form. The oral comments or recommendations at issue in this case cannot be so characterized.

While the definition of the term "record" in subsection 2(1) of the Act does include a reference to a "record that is capable of being produced from a machine readable record", that phrase has a limited application to certain types of computer information and is not relevant to the issue at hand.

Part III of the Act speaks to the collection and retention of personal information. Subsection 38(1) expands the definition of personal information in sections 38 and 39 to include "information that is not recorded and that is otherwise defined as 'personal information' under this Act."

I am of the opinion that sections 38 and 39 apply only to the authority for and means of collection of personal information and that the subsections do not speak to any requirement under the Act to record personal information.

In her submissions, the appellant did not specifically address the interpretation of sections 38 and 39, but rather stated that the purposes of the Act were broad enough to include a duty to create a record from a conversation.

Subsection 1(b) of the Act provides that one of the purposes of the Act is "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". (emphasis mine)

I note that subsection 1(b) refers to "personal information" which is defined in the Act as "recorded information..." As I have already found that the institution has provided to the

appellant all existing recorded information relating to her request, I have concluded that the appellant has not been denied access to her personal information. In my view, the Legislative intent of the Act does not impose a specific duty on an institution to transcribe oral views, comments or discussions.

I find support for this position in the Williams Report, "Public Government for Private People" (1980). At Page 241 (volume 2) of the Report, the author addresses the question of to which kinds of information or documents access should be given:

> "A common feature of the freedom of information schemes in place in other jurisdictions is that the type of "information" to which access is given is material which is already recorded in the custody or control of the government institution. Thus, a right to "information" does not embrace the right to require the government institution to provide an answer to a specific question; rather, it is generally interpreted as requiring that access be given to an existing document on which information has been recorded. This is not to say, of course, that the government should feel no obligation to answer questions from the public. Indeed, as we have indicated in an earlier chapter [13], the government of Ontario has committed substantial resources to establishing citizen's inquiry services with this specific objective in view. It would be quite unworkable, however, to grant a legally binding right of access to anything other than information contained in existing documents or records.
>
> For obvious reasons, most freedom of information schemes broadly construe the concept of "document" or "record" to include the various physical forms in which information may be recorded and stored. Thus, the right of access normally extends to all printed materials, maps, photographs, and information recorded on film or in computerized information systems." (emphasis mine)

My conclusion is, therefore, that an individual's right of access to information under the Act relates to information already recorded, whatever its physical form. In the absence of existing recorded information, the Act does not require the creation of a new record.

In the circumstances, I uphold the decision of the head.

Original signed by: October 6, 1988
Sidney B. Linden Date
Commissioner