



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

# **ORDER P-256**

**Appeal 900209**

**Liquor Control Board of Ontario**



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## O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

### INTRODUCTION:

The following request was made to the Liquor Control Board of Ontario (the "institution"):

I wish to make formal application under the FOI Act for a copy of the report prepared by [a named individual] following his investigation of my complaint regarding travel expense claims by [a named individual].

The institution responded by denying access to the requester under section 21(1) of the Act. The institution stated that disclosure of the report which was responsive to the request (the "record") would constitute an unjustified invasion of the personal privacy of persons referred to in the record.

The requester wrote to this office appealing the institution's decision to deny access.

Notice of the appeal was given to the institution and the appellant. The Appeals Officer assigned to the case subsequently obtained and reviewed a copy of the requested record.

Because mediation efforts were not successful, notice that an inquiry was being conducted to review the head's decision was sent to the institution and the appellant. Notice was also given to 11 persons whose names appeared in the record (the "affected persons"). One of these persons was the individual named in the

request as the subject of the investigation (the "primary affected person"), and another was the author of the record. The other persons were employees of the institution who worked in the same department as the appellant, all of whom were interviewed as part of the investigation which led to the production of the record at issue in this appeal (the "other affected persons") . An Appeals Officer's Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry.

Representations were received from the institution, the appellant, the primary affected person, the author of the record, and 8 of the other affected persons.

**BACKGROUND:**

The requester is a former employee of the institution who, while still employed by the institution, complained that his supervisor/department head had submitted claims for reimbursement of travel expenses not actually incurred. The institution responded to this complaint by asking its Director of General Audit to investigate the allegations regarding the named individual's expense claims and to report on any contraventions of the institution's policies and procedures.

The record at issue in this appeal is the report of the findings of that investigation. It consists of: a summary of witness interviews and supporting exhibits; a brief outline of the audit process used to conduct the investigation; and specific findings as they relate to expense claims involving the primary affected person and the other affected persons. It should be noted that the record includes conclusions, but does not contain recommendations for action in response to these conclusions.

**BURDEN OF PROOF:**

It should be noted that section 53 of the Act provides that the burden of proof that a record, or part of a record, falls within one of the specified exemptions, lies upon the head. Affected persons who rely on the exemption provided by section 21 of the Act to resist disclosure of certain parts of the record share with the institution the onus of proving that this exemption applies to the record or parts of it.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the record or any part thereof falls within the scope of the mandatory exemption provided by section 21(1) of the Act.

**DISCUSSION:**

**ISSUE A: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.**

Personal information is defined in section 2(1) of the Act, which states, in part:

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

...

(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,

...

(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; ("renseignements personnels").

The institution claims that some of the information contained in the record constitutes personal information under subparagraph (b), because it is information relating to the employment history of the individuals mentioned in the record; under subparagraph (g), because it is information consisting of the views or opinions of individuals about the actions of other individuals as to the propriety of certain expense claims; and,

under subparagraph (h), because it consists of individual names appearing together with views or opinions of those individuals.

I have reviewed the contents of the record and, in my view, it contains recorded information about identifiable individuals, namely the primary affected person and the other affected persons, and therefore meets the requirements of the introductory wording of the definition of personal information. In my view, some of the information also meets the requirements of subparagraphs (g) and (h) of the definition of personal information. The record contains: the views and opinions of the Director of General Audit about the primary affected person and other affected persons, and

the manner in which these individuals have submitted expense claims to the institution (subparagraph (g)); and the names of the primary affected person and other affected persons together with other personal information relating to them (subparagraph (h)). The bulk of the report contains the personal information of other individuals, while a small portion also contains personal information about the appellant.

Although I have found that the information contained in the record constitutes personal information as defined by the Act, I think it is relevant to point out that the information at issue relates exclusively to the named individuals in their professional capacities as employees of the institution, and does not include any information which could be said to concern the "private lives" of these individuals.

**ISSUE B: If the answer to Issue A is yes, whether the record or any part thereof falls within the scope of the**

**mandatory exemption provided by section 21(1) of the Act.**

Section 21 of the Act sets out a mandatory rule of non-disclosure of personal information except in certain limited circumstances. clause (f) of subsection 21(1) 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.

In my view, the character of the record is an important factor in considering whether disclosure would constitute an unjustified invasion of personal privacy. On a review of the record, it is

clear that it is a report prepared by internal audit staff of the institution in response to a request from senior management to investigate the propriety of expense claims submitted by a particular employee. As mentioned earlier in this order, the personal information contained in the record was restricted to information which was required to be recorded in order for the internal audit staff to complete their assigned task. Further, it relates solely to the actions of certain named persons in the context of submitting expense claims for reimbursement.

Of the 10 affected persons who responded to the Notice of Inquiry, two felt that the record should be disclosed to the appellant, and one other person consented to the release of his own personal information.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of any individual's personal privacy.

Turning first to section 21(3), this section lists certain types of information, the disclosure of which would raise the presumption of an unjustified invasion of personal privacy. In its representations, the institution submitted that sections 21(3)(d) and (g) were applicable, and the primary affected person relied on section 21(3)(b). These sections 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;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Dealing first with section 21(3)(d), the institution has characterized the information contained in the record as relating to the employment history of the named individuals. I have reviewed the record, and I do not agree with this characterization. In my view, expense claims submitted by



individual employees in and of themselves are not sufficiently connected to an individual's employment history to meet the requirements of the subsection. A person must be an employee in order to incur expenses on employment-related matters and submit claims for reimbursement, but, in my view, that is where the connection to employment ends. The policies relating to expense claims are developed by institutions on a corporate basis and apply to employees. They have no connection to an individual's position, job responsibilities, career history, performance appraisal, or other human resource-related characteristics which are normally associated with a person's employment history. A report which outlines the results of an investigation into expense claim administration is also, in my view, not properly considered to be part of an individual's employment history. Therefore, I find that section 21(3)(d) does not apply in the circumstances of this case.

Turning to section 21(3)(g), the institution has submitted that the sections of the record which deal with the propriety and type of judgment used by the primary affected person in the handling of his expense claims constitute "personal evaluations". The primary affected person has not raised clause (g). Again, I do not accept the institution's interpretation. Although it could be argued that the comments of the record's author are "evaluations" in the broad sense, in my opinion, it is not possible to characterize them as "personal evaluations", and certainly not "personnel evaluations". In my view, the author of the record has been asked to determine

whether a group of expense claims were filed in accordance with established policies and procedures. The conclusions which he reaches as a result of his investigation are based on whether

these policies and procedures have been complied with, and have no "personal" or "personnel" component, as required by section 21(3)(g). Therefore, I find that section 21(3)(g) does not apply to the information contained in the record.

The primary affected person has submitted that clause (b) of section 21(3) should apply, on the basis that the record was prepared as part of an investigation into alleged fraud, which, if demonstrated, could have resulted in criminal prosecution. The institution does not agree. It states that the purpose of the investigation was to determine if the primary affected person had contravened the institution's employment policies and practices, but not a law. The institution referred to Order 165, in which former Commissioner Sidney B. Linden stated that employment policies and practices do not fall within the meaning of the word "law" as contemplated by section 21(3)(b). I agree with the institution's position, and feel that viewing the record as results of an investigation into certain employment policies and practices is consistent with its characterization as an audit.

In summary, I find that release of the information contained in the record would not constitute a presumed unjustified invasion of personal privacy as contemplated by section 21(3) of the Act.

I will now turn to section 21(2) of the Act, and determine if the various considerations outlined in this section would support the conclusion that the release of the information contained in the record would constitute an unjustified invasion of personal privacy.

The institution raised clauses (a), (e), (f), (h), and (i) in support of its position that disclosure would represent an

unjustified invasion of the personal privacy of the primary affected person. The primary affected person restricted his submissions to clause (i). Two other affected persons supported disclosure of the record under clause (a), and the others (with the exception of the person who consented to disclosure) were not specific in their reasons for resisting disclosure, pointing out that they had not seen the record and would not consent to its release without being given an opportunity to assess whether the contents were accurate. The appellant raised clauses (a) and (d) in support of his position that the record should be disclosed.

Sections 21(2) (a), (d), (e), (f), (h) and (i) of the Act read 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 21(2)(a)

The appellant and two of the other affected persons submitted that clause (a) is applicable because the report concerns the expenditure of public funds, and this type of information should be accessible by the public in order to ensure accountability.

The institution submitted that:

"Disclosure is not desirable for subjecting the activities of the Liquor Control Board of Ontario to public scrutiny. Upon notification by [the appellant] of a potential problem the Liquor Control Board of Ontario took immediate action by way of a thorough investigation to ensure that the problem was resolved quickly. An internal investigation was carried out and senior management of the LCBO interviewed and discussed the matter with [the primary affected person] and the matter was reflected in [the primary affected person's] performance appraisal. . . . The LCBO has not dealt with [the primary affected person's] case in any way that is dishonest, irregular, or different from any other employment problem."

It is not my role to comment on the nature of the institution's internal procedures or its response to the conclusions set out in the audit report. However, I do not accept the institution's submission that the desirability of public scrutiny is negated when internal procedures are properly followed and a decision is

made. The actions which are necessary to ensure that the activities of a particular government institution are subjected to an adequate level of public scrutiny will vary depending on a wide range of circumstances. In my view, simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in

considering whether disclosure is desirable for the purposes outlined in clause (a). In the circumstances of this case, the report contains information regarding the use and/or alleged misuse

of public funds by an employee of the institution, and, in my view, this is a relevant factor which must be considered in determining whether release of the report is desirable for the purposes of subjecting the activities of the institution to public scrutiny.

Section 21(2)(d)

The appellant has raised section 21(2)(d), and alludes to a connection between his complaint and the end of his employment with the institution. However, the appellant has not provided evidence to indicate that any of his rights are at stake, and, therefore, I find that clause (d) is not a relevant consideration.

Section 21(2)(f)

The institution has submitted that the record contains highly sensitive personal information about the primary affected person. However, the primary affected person has not relied on

clause (f). One of the other affected persons has claimed that information regarding travel expenses and potential travel expense overclaims should not be categorized as highly sensitive. In my view, the nature of the information contained in the record cannot properly be characterized as "highly sensitive". It relates solely to an examination of expense claims which are routinely submitted by government employees for verification and approval. I do not believe that this type of information is considered as highly sensitive in the normal course and, further, the primary affected person has not characterized it as such in the context of this appeal. In my view, clause (f) is not a relevant factor.

Section 21(2)(h)

The institution has submitted that there was an implicit understanding that the information provided by the primary affected person was given in confidence, and also relies on the fact that

the record itself is marked "personal and confidential". The appellant and one of the other affected persons disagree, and the primary affected person does not rely on clause (h) in his submissions. In my view, it is not reasonable to imply that the information supplied by employees of the institution about the factual details in support of various expense claims was provided by these people in confidence. Therefore, I find that clause (h) is not a relevant factor in this appeal.

Sections 21(2)(e) and (i)

Finally, clauses (e) and (i) were claimed by the appellant, the institution, the primary affected person, and one other affected person as relevant in the circumstances of this appeal.

The primary affected person submitted that release of the record could unfairly damage his reputation (clause (i)) because he has no idea how the appellant will use it and who he will give it to; and that release would unfairly expose him to pecuniary harm by affecting his ability to obtain a new position in the future (clause (e)). He provided no evidence to substantiate either of these claims.

The institution supported the primary affected person's view, and added that: "The fact that there was an investigation at all would be harmful to [the primary affected person's] reputation. If it becomes publicly known, it will cast a shadow not only on [the primary affected person] but on everyone working under him."

The appellant feels that the applicability of clauses (e) and (i) turn on the interpretation of the word "unfairly". One of the other affected persons argued that any government employee is accountable for expending the taxpayer's money in an economical and prudent manner, and he goes on to question the proper use of the word "unfairly" in relation to the accountability of a public servant.

As all parties acknowledge, the applicability of both of these clauses is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.

Considering clause (e), in my view, the institution and the primary affected person have not presented evidence to establish a sufficient connection between the release of the report and the possible pecuniary or other harm which the primary affected person might suffer. In the absence of this evidence, I feel that the content of the report itself does not establish this connection and, therefore, I do not feel that clause (e) is relevant in the circumstances of this appeal.

Turning to clause (i), I am convinced that the reputation of the primary affected person could be damaged as a result of disclosure of the audit report. The applicability of the clause comes down to a determination of whether or not this damage would be "unfair".

In my view, the public has a right to expect that expenditures made by employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures. It has a further right to expect that these policies and procedures are carefully developed, in accordance with sound and responsible administrative principles; clearly communicated and understood by all employees; applied fairly and consistently; and that audit systems are in place to ensure that they are followed and adhered to by all employees. In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public. As a general principle, I feel that this level of disclosure of expense account information is, as



section 21(2)(a) states: "... desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny."

The record which is at issue in this appeal does not contain the actual expense claims of the various parties, but does contain the results of an investigation into the propriety of these claims. The record was prepared in response to a complaint made by an employee, which, in the opinion of senior management of the institution, warranted investigation by internal audit staff. I feel that some level of disclosure of this record is required in order to satisfy the public accountability requirements of section 21(2)(a). The issue, in my view, is whether disclosure of the names of the various affected persons is a necessary component of this disclosure, or whether the release of their names would "unfairly damage the reputation" of these people.

The balancing of competing interests under section 21(2) of the Act is usually difficult, and this case is no exception. In my view, what we are dealing with in this appeal is balancing the interests of public accountability under clause (a), against the potential damage to the reputation of the individuals referred to in the report under clause (i). In the circumstances of this appeal, I find that an adequate level of public scrutiny can be achieved without releasing the names of the individuals contained in the record. In reaching this conclusion I am aware that by simply severing the names of all persons (with the exception of the person who has consented to disclosure) certain inferences may be drawn by knowledgeable individuals as to the identity of some persons referred to in the record. However, to deny access to the record on this basis or to require further

severances would, in my view, represent an inadequate response to a legitimate expectation on the part of the appellant and others that the expense claim verification policies and procedures in place in the institution are being properly administered.

In summary, I find that the disclosure of the names of the individuals contained in the record would constitute an unjustified invasion of their personal privacy, and that the names of all individuals, with the exception of the appellant and the one affected person who has consented to disclosure, should be severed from the record prior to release to the appellant.

**ORDER:**

I order the institution to disclose the record to the appellant, subject to severance of the names of all affected persons who have not consented to disclosure. (The proper severances are identified to the institution by way of the enclosed copy of the record).

I also order that the institution not make that disclosure until thirty (30) days following the date of the issuance of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided that notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the parts of the record be disclosed within thirty-five (35) days of the date of this Order. The institution is further ordered to

advise me in writing within five (5) days of the date on which disclosure was made.

Any notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by:  
Tom Mitchinson  
Assistant Commissioner

November 27, 1991  
Date