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

ORDER P-312

Appeal P-910875

Ministry of Government Services

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O R D E R

BACKGROUND:

The Ministry of Government Services (the "institution) received a request under the Freedom of Information and Protection of Privacy Act (the "Act") for access to "a copy of [the requester's] personnel file, including copies of all documentation of allegations made against [the requester]" relating to an employment matter.

The institution informed the requester that access was granted to his personnel and payroll records. In addition, the requester was informed that the documentation of allegations made against him "contain information which may affect the interests of other parties". The institution gave these individuals an opportunity to make representations concerning disclosure of the remainder of the records.

Subsequently, the institution informed the requester that access was denied to the remainder of the records pursuant to sections 14(1)(b) and (e), 14(2)(c), 20, 21(2)(h) and (i), 21(3)(b) and 49(b) of the Act.

The requester appealed the institution's decision.

A copy of the records was obtained and reviewed by the Appeals Officer. They consist of 75 pages and are described as follows:

1. "Report for Toronto Region Property Management Division", dated March 14, 1991 (32 pages)

2. "Internal Audit Report with covering memo", dated March 20, 1991 (17 pages)

3. "Hearing Summary", dated April 15, 1991 (14 pages)

4. "Discussion", dated February 1, 1991 (7 pages)

5. "Introductory Remarks", not dated (2 pages)

I note that Appendices I and II, which are attached to Record 2, contain some information which is not responsive to the

appellant's request and falls outside the scope of this appeal. These non-responsive parts of the appendices should not be released to the appellant. Enclosed with the institution's copy of this order is a highlighted copy of the two appendices, indicating the portions that should be released.

During the course of mediation, the Appeals Officer identified six other persons whose interests might be affected by disclosure of the records to the appellant. These individuals were contacted by the Appeals Officer to ascertain whether they would consent to disclosure of the records at issue, and all refused.

Further attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the institution, the appellant and all persons whose interests could be affected by the appeal (the "affected persons"). Enclosed with each notice was a report prepared by the Appeals Officer, intended to assist the parties in making representations concerning the subject matter of the appeal.

Representations were received from the institution, the appellant and a representative for the affected persons. In its representations, the institution withdrew its claims under sections 14(1)(b) and (e) and 14(2)(c).

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. Whether the records qualify for exemption under section 20 of the Act.

C. If the answer to Issue B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

D. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

In all cases where a request involves access to personal information, it is my responsibility, before deciding whether exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" found in section 2(1) of the Act. I must also determine whether the information relates to the appellant, another individual, or both.

I have reviewed the records and, in my view, all of them contain recorded information about identifiable individuals and thereby satisfy the requirements of the definition of personal information. Pages 27 and 28 of Record 1 and all of Record 2 contain only the appellant's personal information; and the remainder of Record 1, and all of Records 3, 4 and 5 contain the personal information of the appellant and the affected persons.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. Two such exemptions are contained in sections 49(a) and (b) of the Act, which read as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15 , 16, 17, 18, 19, 20, or 22 would apply to the disclosure of that personal information; [emphasis added]
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I will first consider whether the exemption provided by section 49(a) applies to any of the records at issue in this appeal, by virtue of the application of section 20.

ISSUE B: Whether the records qualify for exemption under section 20 of the Act.

The institution claims that all of the records qualify for exemption under section 20 of the Act.

Section 20 provides that:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

Commissioner Tom Wright considered the application of section 20 in Order 188, dated July 19, 1990. At page 13 of that Order he stated:

> As in section 14, section 20 stipulates that the institution may refuse to disclose a record where doing so could reasonably be expected to [emphasis added] result in a specified type of harm. In my view, section 20 similarly requires that the expectation of a serious threat to the safety or health of an individual, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason.

Having considered the representations of all parties, and reviewed the contents of the records, in my view, I have not been provided with sufficient evidence to establish the requirements for exemption under section 20. Most of Record 1 and all of Records 3, 4 and 5 outline allegations made by various affected persons against the appellant in the context of an employment-related complaint. These records formed part of the evidence at a hearing under the Public Service Act in which the allegations were addressed. While I agree that some of the information contained in these records may be disturbing to some

individuals, I am not convinced, based on the information before me, that disclosing this information to the appellant would be reasonably expected to seriously threaten the safety or health of any person.

Because I have found that the records do not qualify for exemption under section 20, it is not necessary for me to consider the application of section 49(a) to those records which contain the personal information of the appellant only. Therefore, I order that pages 27 and 28 of Record 1 and all of Record 2 (with the exception of parts of the aforementioned appendices) be disclosed to the appellant.

I will now consider whether the exemption provided by section 49(b) applies to the records which contain the personal information of persons other than the appellant.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.

Under Issue A, I found that Records 1 (except pages 27 and 28), 3, 4 and 5 contain the personal information of the appellant and other identifiable individuals.

As has been stated in a number of previous orders, section 49(b) of the Act introduces a balancing principle, which requires the head to 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 his/her privacy. If the head determines the release of the information would constitute an unjustified invasion of the other individual's personal privacy, section 49(b) gives him discretion to deny the requester access to the personal information. (Order 37)

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

The institution has relied on section 21(3)(b) of the Act which reads as follows:

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

The institution claims that this section applies to the records because the Ontario Provincial Police had some involvement in the investigation, due to a concern regarding the use of firearms. However, I have been provided with no evidence to establish that the records were compiled and are identifiable as part of an investigation by the Ontario Provincial Police into a possible violation of law. In my view, the records were compiled in the context of an employment-related matter, not a possible violation of law. Accordingly, I find that the records do not satisfy the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) of the Act.

I will now consider the provisions of section 21(2).

The institution claims that sections 21(2)(f), (h) and (i) apply to the records, and the affected persons made representations which refer to the substance of section 21(2)(h). While not specifically mentioning section 21(2)(d), the appellant refers to the content of this section in his representations.

Sections 21(2)(d), (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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 21(2)(f)

In its representations, the institution submits that the records contain highly sensitive personal information. As mentioned earlier, these records describe a series of employment-related incidents involving the appellant and the affected persons.

I have reviewed the records and, in my view, the personal information contained in the records could properly be characterized as highly sensitive. Record 1 is a report prepared by consultants from outside and inside the Ontario government in response to complaints made about the conduct of the appellant. It contains a summary of interviews with various affected persons, wherein they describe highly sensitive incidents involving their interaction with the appellant. Records 3, 4 and 5 are reports relating to a disciplinary hearing involving the appellant, which repeat a number of the allegations contained in Record 1. Therefore, I find that section 21(1)(f) is a relevant consideration in the context of this appeal.

Section 21(2)(h)

In its representations, the institution states that the affected persons provided the information contained in the records at the request of the institution during the course of an investigation into the appellant's conduct. The institution maintains that the affected persons were given verbal assurances that any information they provided would remain confidential. The affected persons refer to these assurances of confidentiality in their representations, and submit that they would not have agreed to provide the information to the institution without these assurances. In addition, the covering page for Record 1 is marked "Confidential".

I am satisfied that section 21(2)(h) is a relevant consideration as it relates to the parts of Record 1 which contain the personal information of the affected persons. However, I do not accept that this section is a relevant consideration with respect to Records 3, 4 and 5, which relate to the disciplinary hearing under the Public Service Act. The relevant Regulations made under the Public Service Act provide that a public servant, whose conduct is subject to a hearing, may attend the hearing and conduct cross-examinations of witnesses reasonably required for a full and fair disclosure of the facts presented in evidence. Although the appellant did not attend the hearing in question, had he done so, he would have been

given the opportunity to cross-examine the affected persons with respect to the evidence summarized in Records 3, 4 and 5. In my View, it is not reasonable for the institution and the affected persons who presented evidence at this hearing to argue that there
was an expectation of confidentiality with respect to the evidence which is summarized in these records. I also note that Record 4 consists of notes taken at a meeting which was attended by the appellant.

Section 21(2)(i)

The institution submits that section 21(2)(i) is also a relevant consideration. However, having reviewed the records, and for the reasons I have expressed above with regard to Records 3, 4 and 5, it is my view that this section is not relevant in the circumstances of this appeal.

Section 21(2)(d)

A hearing was held regarding the allegations which were made against the appellant. Although the appellant did not attend this hearing, he had a right to do so under the provisions of the Public Service Act. As a result of this hearing, the appellant was dismissed from employment.

In his representations, the appellant submits that he should have access to all allegations made against him and the names of his accusors. He further submits that had he chosen to attend the hearing he would have been given access to this information.

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as apposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In the circumstances of this appeal, I find that the appellant has not established these requirements. No evidence has been provided by the appellant to indicate that the proceeding under the Public Service Act is still ongoing, and no other legal right has been identified. Therefore, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

It is important to note that in determining the appropriate balance of consideration under section 21(2), I am not restricted to a consideration of only those factors specifically listed in that section. As former Commissioner Sidney Linden stated at page 20 in Order 99, dated October 3, 1989:

> It should be pointed out that subsection 21(2) requires the head to consider all the relevant circumstances in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy. The [sub]section lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the

> head to consider the circumstances of a case that do not fall under one or more of the listed criteria.

In my view, one such "other relevant circumstance" exists in this appeal. As noted in my discussion of section 21(2)(h), Records 3, 4 and 5 consist of summaries of portions of a hearing conducted pursuant to regulations made under the Public Service Act. This hearing resulted in termination of the appellant's employment. The regulations state what when removal or dismissal of a public servant is contemplated, the testimony provided by witnesses at a hearing is subject to cross-examination "reasonably required for a full and fair disclosure of the facts". Although the appellant chose not to attend this hearing, if he had, he would have been

provided with "full and fair disclosure" of the facts. In the circumstances of this appeal, I find that the nature of Records 3, 4 and 5, and the circumstances under which they were created are relevant criteria for the purposes of section 21(2).

Having examined the records and considered the representations of all parties, in my view, disclosure of Record 1 (with the exemption of pages 27 and 28) would constitute an unjustified invasion of the personal privacy of the affected persons, and qualifies for exemption under section 49(b) of the Act. On the other hand, I find that disclosure of Records 3, 4 and 5, which are summaries of proceedings of a hearing at which the appellant was entitled to be present, would not constitute an unjustified invasion of these individuals' personal privacy, and these records should be released to the appellant.

Section 49(b) is a discretionary exemption giving the head the discretion to refuse to disclose personal information to the person to whom it relates. I find nothing improper with the head's exercise of discretion as it relates to Record 1 and would not alter it on appeal.

ORDER:

1. I uphold the head's decision not to disclose Record 1, with the exception of pages 27 and 28, to the appellant.

2. I order the head to disclose pages 27 and 28 of Record 1 and all of Records 2 (with the exception of the parts of

the appendices which are not responsive to the request), 3, 4 and 5 to the appellant.

3. I order that the institution not release the records referred to in provision 2 until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually released. Provided 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 records referred to in provision 2 be released within thirty-five (35) days of the date of this Order.

4. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 2, upon my request.

5. The institution 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. This 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: June 10, 1992
Tom Mitchinson
Assistant Commissioner