



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

ORDER P-602

Appeal P-9300381

Ministry of the Solicitor General and Correctional Services



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ORDER

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a two-part request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the "original" version of a letter dated June 1, 1993 and another letter dated September 11, 1992.

The Ministry located the records responsive to the request and disclosed the June 1, 1993 letter to the requester in its entirety, stating that the enclosed copy was the only version of the letter in existence. The Ministry granted the requester partial access to the letter dated September 11, 1992. The portion of this letter which was not disclosed was withheld pursuant to the exemption provided by section 49(b) of the Act.

The requester appealed the decision.

Mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and an individual whose interests might be affected by the disclosure of the portion of the September 11, 1992 letter that was not disclosed to the appellant (the affected person). Representations were received from the Ministry and the affected person only.

The information at issue in this appeal consists of the severed portion of a letter dated September 11, 1992.

ISSUES:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the information relates to the appellant and the affected person, whether the discretionary exemption provided by section 49(b) of the Act applies.
- C. Whether the Ministry's search for records responsive to the request was reasonable in the circumstances.

SUBMISSIONS/CONCLUSIONS:

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

The Ministry submits that the severed portion of the record contains personal information. Personal information is defined in section 2(1) of the Act, in part, as follows:

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

I have carefully reviewed the representations and the record at issue in this appeal and in my view, the information contained in the record falls within the definition of "personal information" pursuant to section 2(1) of the Act. In my opinion, it relates to both the appellant and the affected person.

ISSUE B: If the answer to Issue A is yes, and the information relates to the appellant and the affected person, whether the discretionary exemption provided by section 49(b) of the Act applies.

Under Issue A, I found that the record contains the personal information of the appellant and the affected person.

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 exceptions to this general right of access. One such exception is found in section 49(b) of the Act, which reads:

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

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

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his or her personal information against the rights of other individuals to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Generally speaking, if a record contains information of the type described in section 21(4), disclosure of the information would not constitute an unjustified invasion of personal privacy (Order M_23). The information at issue is not of the type described in section 21(4). Section 21(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In my view, the information contained in the record does not satisfy any of the presumptions contained in section 21(3) of the Act.

Section 21(2) provides a non-exhaustive list of criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In her representations, the affected person states that she feels uncomfortable consenting to the disclosure of any information which may unfairly damage her reputation. In my opinion, she has raised the application of section 21(2)(i) of the Act.

The Ministry submits that section 21(2)(f) applies to the information which has not been disclosed to the appellant. Sections 21(2)(f) and (i) of the Act state:

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,

- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In its representations, the Ministry argues that the record at issue is highly sensitive because it would expose the affected person to reprisals in the workplace causing her extreme personal distress, that the opinions expressed in the record were preliminary in nature, and that the record contains information of a confidential nature which should remain between the affected person and her employer.

It is my opinion that section 21(2)(f) is a relevant consideration in respect of part of the information at issue.

The applicability of section 21(2)(i) of the Act is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Orders P-256 and P-469).

In my view, the severed portion of the record contains preliminary information only. There is no indication from the representations or from the face of the record that the affected person was found to have acted inappropriately. I find that disclosure of any of the information contained in the record may **unfairly** damage the reputation of the affected person and, therefore, section 21(2)(i) is a relevant consideration. The factors in both sections 21(2)(f) and (i) both weigh in favour of privacy protection.

I have considered all of the circumstances arising in this appeal and find that, on balance, disclosure of the personal information withheld from the appellant would constitute an unjustified invasion of the personal privacy of the affected person.

Section 49(b) is a discretionary exemption. The Ministry has provided me with representations regarding its exercise of discretion in favour of withholding the severed information. I have found nothing improper, and would not alter it on appeal.

ISSUE C: Whether the Ministry's search for records responsive to the request was reasonable in the circumstances.

In his written request to the Ministry, the appellant stated that he believed the June 1, 1993 letter which was disclosed to him to be altered because it was not the same version that was read to him over the telephone.

In a sworn affidavit, provided as part of the Ministry's representations, the Manager of the Employment Equity Office at the Ministry attests that a search was conducted and no other record responsive to the request was created or found.

The Ministry also affirms that the version read to the appellant over the telephone included information contained in a "sticky note" which was subsequently removed and destroyed.

Having reviewed the representations and the affidavit submitted to me, I am satisfied that the search conducted by the Ministry for records responsive to the appellant's request was reasonable in the circumstances.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 16, 1993