



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-872

Appeal P-9400673

Ministry of Community and Social Services



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Community and Social Services (the Ministry) received a request for access to a report which reviewed the operations of a named Physical and Sexual Assault Crisis Centre (the Centre).

The Ministry identified a draft report issued on May 25, 1994 as the record responsive to the request. The report was prepared by a Ministry Review Team and presented to the Board of the Centre. The Board rejected the report and decided to terminate its funding relationship with the Ministry.

The Ministry denied access to the document in its entirety based on the following exemption in the Act:

- advice and recommendations - section 13(1)

The requester appealed.

A Notice of Inquiry was sent to the Ministry, the appellant and counsel for the Centre. Representations were received from all three parties.

In his submissions, counsel for the Centre asserts that the report contains the personal information of an identifiable individual. He maintains that disclosure of this information would result in an unjustified invasion of personal privacy pursuant to section 21(1) of the Act. As this is a mandatory exemption, I will consider its application in this order.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

The report does not contain the names of any individuals. However, the report does contain information which pertains to an identifiable employee of the Centre.

Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Most of the information about the employee contained in the report falls into this category.

Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. It is true that the objective of the report was to address the policies, processes and philosophy of the Centre and not to be directed at the activities of any particular individuals. However, I am of the view that certain comments contained in the report are directed to a particular employee who is identifiable within the context of the report. I find that these passages constitute the personal information of this individual.

In addition, the report contains information on the amount of money received by certain staff members (the staff) in the form of bonuses and salaries. Although the staff are not identified by name, their positions are stated. As well, the number of individuals in each category is noted. In my view, because of the small numbers in each case, the monies received as salaries and bonuses can be said to relate to an "identifiable individual" and thus constitute the personal information of these staff members (Order P-644).

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

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 personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

Counsel for the Centre submits that disclosure of the personal information would result in a presumed unjustified invasion of the employee's personal privacy on the basis that the information consists of personal recommendations or evaluations, character references or personnel evaluations (section 21(3)(g)). In addition, he claims that the following factors in section 21(2) favour privacy protection:

- the personal information is unlikely to be accurate or reliable (section 21(2)(g));
- the personal information has been supplied by the individual to whom the information relates in confidence (section 21(2)(h)); and
- the disclosure may unfairly damage the reputation of any person referred to in the record (section 21(2)(i)).

While the appellant has submitted some general arguments on why the record should be disclosed, he has not articulated any reasons why disclosure of the personal information of the employee or the staff should be released. Accordingly, I find that disclosure of the personal information of the employee and the staff would result in an unjustified invasion of the personal privacy of these individuals. This information should not be

released. I have highlighted this information in yellow on the copy of the report being sent to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act states that:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

Both the Ministry and counsel for the Centre submit that, because the report is a draft, the entire document satisfies the section 13(1) exemption. Counsel states that "... it is specifically noted to be a provisional document, requiring further assessment and input before final, reliable or accurate conclusions could be reached". I do not agree that the exemption applies merely because a document is a draft. In my view, the determination of the application of the exemption depends on whether it contains a suggested course of action made within the deliberative processes of government. This approach is consistent with the purpose of the Act set out in section 1(a)(ii) that necessary exemptions from the right of access should be limited and specific.

I have carefully reviewed the report. Much of the information contained in it consists of background, factual and analytical material which does not relate to a suggested course of action. Counsel for the Centre submits that the report contains many factual inaccuracies, gossip, rumour and innuendo. Thus he contends that these portions of the report cannot be said to contain "factual material". In my view, these passages consist of "facts" as opposed to "advice or recommendations". Counsel may dispute the accuracy of this material in another forum. Therefore, I find that these parts of the report do not qualify for exemption pursuant to section 13(1).

There are some sections of the report which do set out recommendations. However, they are the Ministry's recommendations, as drafted by the members of the review team, to the Board of Directors of the Centre. The Centre is not recognized as an agency, board or commission of government. The Centre receives its funding from five different sources including the Ministry, four other institutions and private donations and honorariums.

As indicated above, Order 94 states that this exemption is intended to protect advice or recommendations **within the deliberative process of government decision-making and policy-making**. I agree with this interpretation. For this reason, I am of the view that this exemption is not intended to protect advice given by an institution to outside bodies such as the Centre. Accordingly, I find that section 13(1) does not apply to any portions of the report. Therefore, I need not consider the application of the exception in section 13(2)(f) of the Act.

ORDER:

1. I uphold the decision of the Ministry not to disclose the portions of the record which are highlighted on the copy I have provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order.
2. I order the Ministry to disclose the non-highlighted portions of the record to the appellant within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ February 20, 1995