



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

ORDER P-978

Appeal P-9500027

Ministry of Citizenship, Culture and Recreation



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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 Citizenship, Culture and Recreation (formerly the Ministry of Citizenship) (the Ministry) received a request for access to "records regarding the involvement of the Ministry and its staff in efforts to stop the performance of Show Boat, including records concerning the cost and rationale of the Ministry's involvement".

The Ministry located the responsive records and denied access to the majority of them, either in whole or in part. The Ministry also issued a fee estimate in the amount of \$80, indicating that access to the severed records would be granted upon payment of this fee.

The requester appealed the Ministry's decision regarding denial of access only.

The records which are at issue in this appeal consist of briefing information, issue notes, action plans, reports and other documents of the Ontario Anti-Racism Secretariat department (the Secretariat) of the Ministry, listed in Appendix A to this order. The Ministry relies upon the following exemptions to deny access to the records, either in whole or in part:

- advice and recommendations - section 13(1)
- invasion of privacy - section 21(1)

None of the records or portions of the records have been disclosed, despite the Ministry's decision to do so, because the appellant has not paid the fee requested by the Ministry. Some of these records appear to contain information to which the mandatory exemption in section 21 may apply. Therefore, I will review the relevant records on that basis.

A Notice of Inquiry was provided to the appellant, the Ministry and 41 persons referred to in the records (the affected persons). Representations were received from the appellant, the Ministry and six affected persons. Two of the affected persons consented to the disclosure of the requested information which relates to them. Accordingly, this information will not be considered any further in this order.

In its representations, the Ministry also confirmed that it had obtained the consent of one of the affected persons to release the severed information from Record 30. Accordingly, I will order this record to be disclosed in the order provisions below and this record is no longer at issue in this appeal.

DISCUSSION:

ADVICE AND RECOMMENDATIONS

The Ministry submits that Records 7, 9, 10, 11, 12, 21, 26, 27, 31, 32, 34, 35, 36, as well as portions of Records 1, 2, 4, 5, 6, 8, 13, 15, 20, 23, 24, 25, 29 and 33 are exempt from disclosure under section 13(1) which states that:

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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. Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 13(1) of the Act.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of the exemption in section 13(1). He stated that "[t]his exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making."

The Ministry's submissions refer to a number of previous orders which have considered the section 13(1) exemption. The submissions, however, do not discuss the records individually, nor do they identify the suggested course of action which may be accepted or rejected by the recipient during the deliberative process within any of the records which have been withheld in full.

I have carefully reviewed the records for which the section 13(1) exemption has been claimed and the representations of all the parties. The following are my findings.

Records 1, 2, 4, 5, 6, 7, 8, 15, 20, 24, 25 and 29 all constitute information, briefing or issue notes. Some of these records, specifically Records 1, 2, 4, 5, 6, 8, 15, 25 and 29, contain sections entitled "recommendation(s)", "proposed next steps" and/or "suggested response". I find that the information in these sections contains detailed recommendations as to specific courses of action which will ultimately be accepted or rejected by the Ministry. Similarly, the information severed from Record 29 also outlines a suggested response which falls under the same category. Accordingly, this information qualifies for exemption under section 13(1) of the Act.

I find, however, that the information severed from Records 7, 20 and 24, as well as the remainder of the information severed from Records 8, 15 and 25, does not contain "advice or recommendations" within the meaning of the Act. Rather, this information either describes the current status of the matters discussed in the records or outlines a plan of action which appears to have already been adopted by the Ministry. Accordingly, I find the exemption does not apply to this information.

Records 9, 10, 11 and 12 in their entirety pertain to the Ministry's proposed action plans for community education and development. I find that all the information in these records contain detailed recommendations as to a specific course of action which will ultimately be accepted or rejected by the Ministry in reference to the proposed plans. Accordingly, Records 9, 10, 11 and 12 qualify for exemption under section 13(1) of the Act.

Record 13 is a handwritten note which outlines a response to a certain plan. Record 31 consists of factual information detailing actions currently being undertaken by the Ministry on a certain issue, including the

Ministry's position on the matter. Neither of these records contain any advice or recommendations as to a course of action to be taken by its recipient. Accordingly, neither Record 31, nor the information severed from Record 13, qualify for exemption under section 13(1) of the Act.

Records 26, 27 and 32 are draft documents which contain proposed responses to certain questions, as well as the recommended strategic approach. I find that these records contain information that relates to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Accordingly, these records qualify for exemption under section 13(1) of the Act.

I find that the information severed from Record 33, however, does not contain any advice or recommendations. The portion of the record which was severed consists of several options for possible responses to a given issue; however, no preferred option is identified. Several previous orders have found that if a record does not provide advice or recommendations about which alternative should be selected, section 13(1) could not apply to it. Accordingly, I find that the options do not constitute advice or recommendations and, therefore, the section 13(1) exemption does not apply to the exempt information.

Records 21, 34, 35 and 36 are draft discussion papers outlining the Secretariat's position on a certain issue. I find that the only information which qualifies for the section 13(1) exemption is the section of the reports entitled "what can the Secretariat do". I have not been provided with any information which would link the remainder of these records with the deliberative process of government decision-making or policy-making. In my view, therefore, the remaining portions of the records do not contain information which would qualify as either advice or recommendations. Accordingly, I find the exemption does not apply to this information.

Similarly, I find that the only portion of the information severed from Record 23 which qualifies for the section 13(1) exemption is the section entitled "recommendations". The remainder of the information contained in this record is either opinion or factual material which does not reveal a recommended course of action, and accordingly, this information is not covered by the exemption.

In summary, I find that only Records 9, 10, 11, 12, 26, 27 and 32, as well as the highlighted portions of Records 1, 2, 4, 5, 6, 8, 15, 21, 23, 25, 29, 34, 35 and 36 satisfy the exemption in section 13(1) of the Act.

INVASION OF PRIVACY

The possible application of the mandatory exemption under section 21 of the Act has been claimed by the Ministry with regard to Records 2, 4, 5, 6, 7, 8, 9, 11, 15, 17, 19, 20, 23, 24, 25, and 37. Since section 21 of the Act is a mandatory exemption, I will also review its possible application to records 10, 12, 21, 27, 29, 32, 33, 34, 35 and 36.

I have previously found that Records 9, 10, 11, 12, 26, 27 and 32 together with parts of 1, 2, 4, 5, 6, 8, 15, 21, 23, 25, 29, 34, 35 and 36 qualify for exemption under section 13(1). Accordingly, it is not necessary for me to consider the exempt portions of these records any further.

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.

It has been held in a number of previous orders that information that relates to individuals in their professional capacity or in the execution of their employment responsibilities does not qualify as "personal information" for the purposes of the Act.

I have reviewed the information in the records remaining at issue. In my view, all the records contain recorded information about individuals other than the appellant.

The Ministry submits that the information about the individuals mentioned in the records constitutes the personal information of these individuals, as it either relates to their race, national or ethnic origin, colour and/or religion [section 2(1)(a)] or is the personal opinions or views of the individuals about Showboat [section 2(1)(e)].

The Ministry further submits that the opinions and views expressed by the individuals are personal opinions or views and that the attendance at any meetings by any of the named people was undertaken by them in their personal capacity.

Having reviewed the records at issue, I am satisfied that information relating to some of the individuals mentioned in Records 17, 36 and 37 satisfies the definition of personal information under section 2(1) of the Act. I agree that this information relates to the race, national or ethnic origin and/or religion of the individuals in question.

However, I find that the remainder of the information contained in Records 17, 36 and 37, as well as the information remaining at issue in Records 2, 4, 5, 6, 7, 8, 15, 19, 20, 21, 23, 24, 25, 29, 33, 34 and 35, cannot be characterized as personal information. The names, titles and any other information of the persons to whom these records refer denote their professional, rather than personal status. In these records, the names of some individuals appear in their professional capacity as part of their job responsibilities. Other individuals are mentioned in the records in their capacities as politicians or other publicly elected officials, community representatives or leaders and members of the media, just to name a few.

In my view, individuals in such positions, necessarily decide to forego an element of their personal privacy by taking a stand on an issue of importance to them or when attending events which are covered by the press and reported in the media. It is significant to note that some of the individuals referred to in the records, voluntarily lent their support to a matter of public concern. It is also significant that the issues surrounding the Show Boat performance have been well documented in the media. Under such circumstances, it is not reasonable to expect that these individuals' identities would be kept confidential. As such, it is my view that this information cannot be characterized as the personal information of these individuals.

In summary, I find that only some of the names and other information which appear in Records 17, 36 and 37 constitute the personal information of the individuals in question. I shall now consider whether the mandatory exemption provided by section 21 of the Act applies to the names of these persons.

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 the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where the personal information falls under section 21(4) or where a finding is made under section 23 of the Act.

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

The Ministry submits that the presumption contained in section 21(3)(h) (racial or ethnic origin) applies to the personal information at issue. The Ministry submits, therefore, that the disclosure of the personal information would represent a presumed unjustified invasion of personal privacy of individuals other than the appellant.

The Ministry further submits that factors listed under section 21(2)(f), (g) and (i) are relevant to support the view that the disclosure of the personal information of the affected persons **would** constitute an unjustified invasion of personal privacy.

In his representations, the appellant submits that the information in question falls clearly within section 21(2)(a) (public scrutiny). He argues that the question of the government's involvement in the Show Boat performance is an issue, that the subject matter of the records is of legitimate public interest and that the records should be disclosed on that basis.

Having reviewed the representations and the records, I have made the following findings:

- (1) The information at issue relates to the individuals' racial or ethnic origin. Accordingly, the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(h).
- (2) None of the information falls within the scope of section 21(4). Nor has the appellant submitted that section 23 of the Act applies to this personal information.
- (3) The submissions provided by the appellant to support disclosure of the information under section 21(2)(a) of the Act cannot rebut the presumption in section 21(3)(d) (Order M-170).

- (4) I find that the disclosure of the personal information referred to above would constitute an unjustified invasion of the individuals' personal privacy and that this information qualifies for exemption from disclosure under section 21(1) of the Act.
- (5) I have highlighted in yellow on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator those portions of records 17, 36 and 37 which qualify as personal information of the affected persons and are exempt from disclosure under section 21(1).

ORDER:

1. I uphold the decision of the Ministry to deny access to Records 9, 10, 11, 12, 26, 27 and 32 in their entirety and to those portions of Records 1, 2, 4, 5, 6, 8, 15, 17, 21, 23, 25, 29, 34, 35, 36 and 37 which are highlighted in yellow on the copy of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions of the records should not be disclosed.
2. I order the Ministry to disclose to the appellant Records 7, 13, 19, 20, 24, 30, 31, 33 in their entirety as well as those portions of Records 1, 2, 4, 5, 6, 8, 15, 17, 21, 23, 25, 29, 34, 35, 36 and 37 which have not been highlighted on the copies sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
3. I order the Ministry to disclose the information described in Provision 2, upon receipt of the payment of the fee, and 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.
4. 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 records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ August 16, 1995

APPENDIX A

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS CLAIMED
1	Information Note dated February 1, 1993	13(1)
2	Briefing Note dated February 18, 1993	13(1), 21(1)
4	Briefing Note dated February 23, 1993	13(1), 21(1)
5	Information Note dated February 25, 1993	13(1), 21(1)
6	Briefing Note dated February 24, 1993	13(1), 21(1)
7	Briefing Note dated March 2, 1993	13(1), 21(1)
8	Issue Note dated March 9, 1993	13(1), 21(1)
9	Community Education Strategy Action Plan, dated March 9, 1993	13(1), 21(1)
10	Community Development Action Plan dated March 9, 1993	13(1), [21]*
11	Community Education Strategy Action Plan revised March 22, 1993	13(1), 21(1)
12	Community Development Action Plan revised March 22, 1993	13(1), [21]*
13	Facsimile Transmission dated March 12, 1993	13(1)
15	Briefing Note dated March 24, 1993	13(1), 21(1)
17	Mediation Case Form	21(1)
19	Meeting Agenda dated March 24, 1993	21(1)
20	Information Note dated April 2, 1993	13(1), 21(1)
21	Memorandum dated April 2, 1993 and attached draft discussion paper	13(1), [21]*
23	Report dated April 16, 1993	13(1), 21(1)
24	Information Note dated April 19, 1993	13(1), 21(1)
25	Issue Note dated April 21, 1993	13(1), 21(1), 21(3)(h)
26	Draft response dated May 7, 1993	13(1)
27	Draft Report - undated	13(1), [21]*
29	Briefing Note dated September 27, 1994	13(1), [21]*
30	Letter to the Editor of the Toronto Star dated	21(1) (withdrawn)

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS CLAIMED
	September 27, 1994	
31	Ontario Anti-Racism Secretariat paper - undated	13(1)
32	Draft Report - undated	13(1), [21]*
33	Draft Report - undated	13(1), [21]*
34	Discussion Paper - undated	13(1), [21]*
35	Discussion Paper - undated	13(1), [21]*
36	Draft Report dated May 11, 1993	13(1), [21]*
37	Mediation Case Form dated March 8, 1993	21(1)

* Section 21 of the Act was raised by the Commissioner's office.