



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

ORDER P-1147

**Appeals P-9500467, P-9500468, P-9500469, P-9500471, P-9500472,
P-9500473, P-9500476 and P-9500489**

Ministry of the Attorney General



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NATURE OF THE APPEALS:

The Ministry of the Attorney General (the Ministry) received a 13-part request under the Freedom of Information and Privacy Act (the Act) for access to information regarding:

- the Special Investigations Unit's (the SIU) policies and procedures for the hiring of investigators
- the circumstances surrounding the recruitment and employment of a named individual, and
- information relating to the investigation and review of the SIU's hiring policies in general and the hiring of the named individual in particular.

The Ministry granted partial access to the records identified as responsive to the request and denied access to the remainder based on the following exemptions:

- advice or recommendations - section 13(1)
- invasion of privacy - section 21
- information published or available - section 22(a)

The requester appealed the Ministry's decisions relating to 11 of the 13 parts of the request. During the course of mediation, the number of appeal files was reduced to eight due to duplication of records, the transfer of a request to another institution and a narrowing of the request. A Notice of Inquiry was provided to the appellant, the Ministry and the named individual (the affected person). Representations were received from all parties.

In its representations, the Ministry withdrew the exemptions it had claimed for the following portions of the records:

- Appeal P-9500468 - pages 97 to 99
- Appeal P-9500471 - pages 1 to 12, 17 to 22 and 23 to 25
- Appeal P-9500472 - pages 25 to 27
- Appeal P-9500473 - pages 92 to 98

In response to the Notice of Inquiry, the affected person consented to the disclosure of his personal information contained in the records, in accordance with section 21(1)(a) of the Act.

As a result of the Ministry's and the affected person's representations, I find that the pages listed above should be disclosed to the appellant. With the disclosure of pages 92 to 98 in Appeal P-9500473, it is not necessary for me to address the application of section 22(a) of the Act to the records.

After being notified of the consent provided by the affected person, the Ministry disclosed additional portions of the records to the appellant. The record in Appeal No. P-9500469 was disclosed to the appellant in its entirety. As a result, there are no outstanding issues in that appeal and it is not subject to 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 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.

Having reviewed the records remaining at issue in each of the appeal files, I am satisfied that the records related to Appeals P-9500471, P-9500472, P-9500473, P-9500476 and pages 73-90 in Appeal P-9500467 contain personal information. The records related to Appeal P-9500489 do not contain information about any identifiable individuals, and do not qualify as personal information for the purposes of the Act. No other exemptions have been claimed for these records and they should be disclosed to the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. One exception which applies in this appeal is section 21(1)(a), which permits disclosure “upon the prior written request or consent of the individual ...”.

The overwhelming majority of the information which I have found to qualify as personal information relates to the affected person. He has provided the Ministry with written consent to disclose the personal information relating to him to the appellant. Accordingly, the section 21 exemption does not apply to this information and it should be disclosed to the appellant.

The only other exception which might apply in this appeal is section 21(1)(f), which permits disclosure if it “... does not constitute an unjustified invasion of personal privacy.” Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

The personal information which remains relates to other candidates in the competition for the position of investigator. Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of the 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 Ministry 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.

The Ministry submits that the personal information constitutes primarily employment and educational histories, personal recommendations and evaluations, character references and personnel evaluations and, therefore, the presumptions found in sections 21(3)(d) and (g) apply.

The representations of the appellant are focused on the need for disclosure of the personal information of the affected person. The appellant has not advanced any evidence or argument weighing in favour of finding that disclosure of the personal information of the other candidates would **not** constitute an unjustified invasion of personal privacy. Accordingly, I find that the exception under section 21(1)(f) does not apply.

Having found that parts of the records contain information which qualifies for exemption under section 21, section 10(2) of the Act requires the Ministry to "... disclose as much of the record as can reasonably be severed without disclosing information that falls under one of the exemptions." Applying the principle of severance to the records at issue in these appeals, I find that by removing the names of the other candidates and the results of a check of their criminal records, disclosure of the remaining parts of the records would not constitute an unjustified invasion of their personal privacy.

ADVICE OR RECOMMENDATIONS

The Ministry claims that section 13(1) of the Act applies to the records remaining at issue in five of the appeals. This section of the Act reads as follows:

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.

Previous orders of the Commissioner have established that advice and recommendations, for the purposes 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 which would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act.

The Ministry submits that this interpretation ignores the plain and unambiguous wording of the Act, which expressly provides for an exemption for advice as well as recommendations. The Ministry argues that both terms must have separate and distinct meanings, and advocates a broader interpretation of the word "advice", such that information provided to a decision maker to assist him or her in deciding upon the proposed course of action (the "recommendation") would also qualify for exemption under section 13(1).

Whether the information is a recommendation suggesting a particular course of action, or is in the nature of advising a decision-maker in a more general sense, it must relate to a suggested course of action under consideration which a decision-maker may accept or reject during the deliberative process. To adopt the Ministry's interpretation would involve drastically broadening the scope of the exemption beyond its purpose and intent. Further, the interpretation relied on in

previous orders has been endorsed by the Divisional Court (Ontario Human Rights Commission v. Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner et al. (25 March 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)). Accordingly, in my view, information such as concerns or facts which is provided to a decision maker to assist him or her in deciding upon the proposed course of action do not qualify for exemption under section 13(1).

The information which the Ministry submits qualifies as “advice or recommendations” in the records relates to the design of interview questionnaires, administrative issues associated with the competition process, and the process through which the affected person assumed a new position.

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

In Order P-434, Assistant Commissioner Tom Mitchinson elaborated on the comments of Commissioner Linden:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt by the Ministry under section 13(1) in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the exemption beyond its purpose and intent.

In my view, the information contained within the records is not sufficiently connected to the deliberative process of government decision-making and policy-making referred to by former Commissioner Linden and Assistant Commissioner Mitchinson to bring it within the scope of section 13(1). Further, the “deliberative process” referred to by the Ministry involved the application of well-established government policies. The decisions were made with reference to these existing policies, and no new policy-making was considered. Accordingly, I find that section 13(1) of the Act does not apply.

PUBLIC INTEREST IN DISCLOSURE

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called “public interest override”: there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The only information which I have found to be exempt is the personal information of the other candidates in the competition for the position of investigator. I am not satisfied that there is a compelling public interest in the disclosure of this information, and I find that section 23 does not apply.

ORDER:

1. I order the Ministry to disclose the records to the appellant, with the exception of the names and criminal record information of the candidates other than the affected person, by sending the appellant a copy no later than **April 22, 1996** but not earlier than **April 18, 1996**.
2. I uphold the Ministry's decision to deny access to the names and criminal record information of the candidates other than the affected person.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.
4. If the Ministry is unable to comply with Provision 1 of this order due to the current OPSEU strike, I order the Ministry to contact me through the Registrar of Appeals by **April 12, 1996** so that I may then consider any required adjustment to the compliance date(s) and respond accordingly with notice to all parties.

Original signed by: _____ March 18, 1996
Holly Big Canoe
Inquiry Officer