



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

ORDER P-1207

Appeal P-9500701

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of all records in its possession concerning a named individual. The requester indicated that she was acting as the agent of the named individual and enclosed a waiver authorizing the release of the requested information to her. The requester advised the Ministry that the named individual had been investigated by the Ontario Provincial Police in 1989 but that no charges had been laid. For ease of reference, in this order I will refer to the named individual as “the appellant”.

The Ministry located numerous records responsive to the request and granted partial access to them.

The appellant filed an appeal of the denial of access. During mediation, the appellant substantially narrowed the scope of the appeal. As a result, only the following exemptions remain at issue:

- third party information - section 17(1)
- invasion of privacy - sections 21(1) and 49(b)
- information publicly available - section 22(a)

The Ministry has applied these exemptions to the records at issue in the following manner:

- (1) Page 126 of Record N - a letter dated January 31, 1989 from a named organization to the executive of an umbrella organization: sections 21(1) and 49(b)
- (2) Record 109 - a videotape from the television program NOVA entitled “Cheating Scientists” - sections 17(1) and 22(a)
- (3) Record 110 - a videotape of a debate involving the appellant - sections 17(1) and 22(a)
- (4) Record 111 - an audiotape of the radio program Talkback, dated January 27, 1989 in which the appellant was interviewed - sections 17(1) and 22(a)

I shall refer to the records as numbers 1, 2, 3 and 4 in this order.

This office sent a Notice of Inquiry to the Ministry, the appellant, and both the author and the recipient organizations of Record 1 (the affected parties). Representations were received from the appellant and the Ministry. In its submissions, the Ministry indicated that it was no longer relying on the application of the exemption in section 17(1) of the Act.

PRELIMINARY ISSUE:

THE APPLICATION OF SECTION 17

This is a mandatory exemption which reads, in part, as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

As it is mandatory, I have independently reviewed the records to determine if this section could apply despite the Ministry's indication that it is no longer relying on it. In my view, given the nature of Records 2, 3 and 4 as tapes of publicly broadcast television and radio programs, the element of confidentiality necessary for the application of section 17(1) is absent with respect to these records. Accordingly, I will only consider whether the Ministry properly exempted them pursuant to section 22(a) of the Act.

Based on the content of Record 1, and, in the absence of submissions from either of the affected parties, I cannot conclude that any of the harms set out in section 17(1)(a), (b) or (c) could reasonably be expected to occur upon disclosure of this document. Therefore, I will only consider whether sections 21(1) or 49(b) apply to Record 1.

INVASION OF PRIVACY - PERSONAL INFORMATION

In order for either of sections 21(1) or 49(b) of the Act to apply to Record 1, it must contain the personal information of an individual or individuals **other than the appellant**.

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.

The record contains the personal information of the appellant in that it discusses certain legal options involving him. The issue is whether it contains the "personal information" of any other identifiable individuals.

The letter was written by an individual in her capacity as the president of the organization that sent it. It conveys the results of a resolution passed by the organization, and the manner in which the organization proposes to support the recipients of the letter in dealing with the legal matter

involving the appellant. The recipients are only referred to as "The Executive" of the umbrella organization.

In my view, correspondence submitted to an institution by a representative of a group or association is not the personal information of the author of the correspondence (Order P-300). Furthermore, where, as here, any views or opinions of the author have been endorsed by the organization's corporate Board, they are referable to the Board and the organization, as opposed to the individual author and, as such, do not constitute the personal information of the author (Order P-78).

Accordingly, I find that Record 1 does not contain the personal information of any identifiable individuals apart from the appellant. In these circumstances, sections 21(1) or 49(b) of the Act cannot apply. As the Ministry has not claimed that any other exemptions apply to the record, it should be disclosed to the appellant.

INFORMATION PUBLICLY AVAILABLE

The Ministry submits that Records 2, 3 and 4 are subject to the exemption in section 22(a) which reads as follows:

A head may refuse to disclose a record where,

the record or the information contained in the record has been published or is currently available to the public;

The Ministry's submissions on this point state:

The Ministry submits that the audio cassette and the two video cassettes contain information which has been broadcast over the public airwaves and accordingly, should be considered as "published" information subject to the s.22 exemption. In addition, this information may be subject to copyright. The appellant should be directed to contact the broadcasters of these programs.

In its decision letter, the Ministry provided the appellant with a list of all the records it claimed were exempt pursuant to section 22(a). The decision letter described the three tapes at issue in the manner I have indicated on page 1 of this order.

It has been established in a number of previous orders that in order for this exemption to apply, the records must either be published or available to members of the public generally, through a regularized system of access such as a public library or a government publications centre (Orders P-327 and P-496).

In addition, whenever an institution relies on subsection 22(a), the head has a duty to inform the requester of the specific location of the records or information in question. Where the head fails to properly discharge his or her responsibility to do so, the Commissioner may order the head to provide the appellant with information sufficient to identify the precise location of the records or information in question (Orders P-123, P-124 and P-191).

In Order P-204, former Assistant Commissioner Tom Wright made the following comments about the definition of the term "published" as it relates to the purpose of section 22(a) of the Act:

The definition of "**published**" in the Black's Law Dictionary reads in part "**to make known to people in general ... An advising of the public or making known of something to the public for a purpose**".

A purposive approach to subsection 22(a) of the *Act* dictates an acceptance of a more expansive definition of "**public**" tending toward what is set out in the first portion of the definition of "**public**" in the Black's Law Dictionary, i.e. "**(t)he whole body politic, or the aggregate of the citizens of a state, county, or the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town or county; the people**".

In this case, Record 2 is a videocassette of a NOVA program which aired on the United States Public Broadcasting System on a channel which is available on cable throughout southern Ontario. At the end of the program, viewers are invited to request transcripts of the program from the address provided on the screen. Record 3 is a videocassette of a live television broadcast from a station in London, Ontario. The audiotape, Record 4, is a record of a radio interview of the appellant from a London radio station.

I accept the position of the Ministry that the information contained on these tapes was "published" in the sense of having been made "known to the public in general". However, before an institution decides to rely on section 22(a), it has an obligation to ensure that the information is actually available from the alternative source (Order P-327). In this case, the Ministry has not provided this office or the appellant with any information to indicate that the tapes sought by the appellant are, in fact, **accessible** and/or still accessible from the respective broadcasters. In this regard, I note that Records 3 and 4 were aired in 1989. As well, the Ministry has not provided the appellant with sufficient information to enable him to access Records 2, 3 and 4 from the respective broadcasters assuming that the tapes are, in fact, currently accessible from these sources.

In summary, on the basis of the limited information provided by the Ministry in this appeal, I am not satisfied that the information contained in Records 2, 3 and 4 may be said to have been "published" for the purposes of section 22(a) and I find that the records do not qualify for exemption under this section. Therefore, they should be released to the appellant.

As far as the Ministry's submissions to the effect that the tapes may be subject to "copyright" are concerned, I would refer the Ministry to the findings of Commissioner Wright in Order M-29 where he dealt with the issue of copyright and its relationship to a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act. He stated:

I think that it is important to note that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not

constitute an infringement of copyright. Specifically, sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the Copyright Act read as follows:

The following acts do not constitute an infringement of copyright:

- (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
- (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

Just as the Municipal Freedom of Information and Protection of Privacy Act is a "... like Act of the legislature of a province ..." so is its provincial equivalent which is the applicable legislation in the current appeal. Accordingly, even if the information in the tapes may be subject to copyright, **disclosure** of it pursuant to the Act is not an infringement of copyright.

ORDER:

1. I order the Ministry to disclose Records 1, 2, 3 and 4 to the appellant by sending him copies by **July 16, 1996**.
2. 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 which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

Anita Fineberg
Inquiry Officer

June 14, 1996