



Information and Privacy
Commissioner/Ontario

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

ORDER 138

Appeal 880335

Ministry of Community and Social Services



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December 28, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 138
Appeal Number 880335
Ministry of Community and Social Services

This letter constitutes my Order in your appeal from a decision of the Ministry of Community and Social Services (the "institution") to disclose certain records pursuant to a request under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On September 26, 1988, a requester wrote to the institution asking for access to the following information:

...all documentation in possession of your office and specifically any other department in the Ministry of Community & Social Services pertaining to the Second Base Youth Shelter, proposed for the Scarborough area.

Upon receipt of the request by the institution, you, in your capacity as Chairman of the Board of Directors of Second Base (Scarborough) Youth Shelter ("Second Base"), were notified pursuant to section 28 of the Act, as a person whose interest might be affected by disclosure of the records. You were invited to make representations as to whether these records

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should be released, and you submitted representations to the institution, objecting to disclosure. After considering your representations, the head of the institution issued a decision on November 17, 1988, granting access to certain records and portions of other records.

By letter dated November 30, 1988, you wrote to me appealing the head's decision, and I gave notice of the appeal to you, the requester and the institution.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and to attempt to mediate a settlement. The Appeals Officer obtained and reviewed the requested records, and undertook settlement discussions. As a result of mediation efforts, you agreed to release certain records and parts of certain other records to the requester.

Although mediation was partially successful, full settlement of all issues could not be effected. As a result, an Appeals Officer's Report was prepared and sent to you, the institution, and the requester, together with a Notice of Inquiry dated August 31, 1989. At that time all parties were invited to make representations in response to the issues raised in the Appeals Officer's Report. The requester chose to rely on representations submitted earlier, and written representations were received from both you and the institution. In your representations you indicated that you also wished to rely on notes taken by the Appeals Officer at a meeting held on February 13, 1989. I have considered all representations and the Appeals Officer's notes in making this Order.

The records at issue in this appeal can be described as follows:

- #1. a one_page history;
- #2. five pages of severed information contained in a letter with attachments written in the autumn of 1987;
- #3. a functional program outline;
- #4. a letter dated August 9, 1988;
- #5. a one_page sheet titled "The Facts";
- #6. minutes of a meeting which took place on June 10, 1986;
- #7. a blank chart;
- #8. an agenda for a meeting which took place on June 17, 1986;
- #9. a letter dated March 29, 1988.

In your representations you agreed to the release of Record #7. Therefore, my Order is restricted to the proper disposition of the remaining eight records.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that a record or part of a record falls within one of the specified exemptions in the Act lies upon the head. However, as I decided in my Order 3 (Appeal Number 880031), dated June 21, 1988, where a third party appeals the head's decision to release a record, the burden of proving that the record falls within the specified exemption rests upon the party resisting disclosure.

The issues arising in this appeal are as follows:

- A. Whether any of the records are properly exempt from disclosure pursuant to subsection 17(1) of the Act.
- B. Whether information contained in any of the requested records is "personal information" as defined in subsection 2(1) of the Act.
- C. If the answer to Issue B is in the affirmative, whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsection 17(1) of the Act.

Subsection 17(1) of the Act reads as follows:

17.__(1) 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

I have had occasion to deal with the mandatory provisions of subsection 17(1) in a number of previous Orders. At page 4 of my Order 36 (Appeal Number 880030), dated December 28, 1988, for example, I noted:

In order for the subsection 17(1) to apply, the information at issue must meet a three_part test:

- 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

After examining the records at issue in this appeal, I find that the information contained in these records does not, on the face of it, fall within any of the categories of information referred to in the first part of the test. Also, your representations do not explain why the information contained in these records should qualify for consideration under this part of the test.

I also find that the second part of the section 17 test has not been established. In my view, there is nothing in the records themselves or in the representations received from the various parties to suggest that the information contained in these records was supplied in confidence. In fact, I note that you have acknowledged to the Appeals Officer that "most of the information" contained in the records has been released publicly in the past.

Because you have failed to satisfy the requirements of either the first or second parts of the section 17 test, it is not necessary for me to deal with the third part.

Therefore, I uphold the decision of the head to release the nine requested records, subject to my findings in Issues B and C.

ISSUE B: Whether the information contained in any of the requested records is "personal information" as defined in subsection 2(1) of the Act.

You raised arguments concerning the personal privacy of individuals identified in Records #2, #4 and #6 as directors or staff of Second Base. This raises the possible application of the personal information exemption provided by section 21 of the Act.

In all cases where a request may involve access to personal information, it is my responsibility, before deciding whether the section 21 exemption applies, to ensure that the information contained in the records falls within the definition of "personal information" in subsection 2(1) of the Act. This definition reads in part as follows:

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

...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

(h) 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;

In my view, the names of individuals, combined with the fact that they are employees or supporters of the proposed youth shelter, is sufficient to bring this information within the definition of personal information under subsection 2(1) of the Act.

ISSUE C: If the answer to Issue B is in the affirmative, whether any of the records are properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Once it has been determined that a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances. You have raised this exemption with respect to parts of Records #2, #4 and #6. Subsection 21(1)(a) provides:

21.__(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

...

The relevant part of Record #2 consists of a piece of letterhead with the names of Board members and one staff member of Second Base. As far as letterhead is concerned, I feel it is reasonable to assume that when a person's name appears on a piece of letterhead, that person has consented to its use. A

letterhead is, by its nature, used widely and publicly, and, in my view, the privacy protection afforded by the Act no longer attaches to the information that can be gleaned by the presence of a name on the letterhead. Having reviewed the contents of Record #2 and considered the representations of all parties, I find that the persons listed on the letterhead can be deemed to have consented to the disclosure of the personal information contained on the letterhead under subsection 21(1)(a) of the Act, in the circumstances of this appeal.

Records #4 and #6 are quite different. Record #6, which is minutes of a meeting of the organization, contains the names and titles of various officials within the organization. Some of these names are the same as those on the letterhead in Record #2, but many are not. Record #4 is a letter from the appellant to Board members advising them of a meeting at a particular individual's home, a person who is not included on the letterhead in Record #2. This record also includes the person's home address. It is unclear whether either of Records #4 and #6 have ever been made publicly available.

After considering the contents of Records #4 and #6, in my view, the circumstances are not sufficient to warrant a finding of implied consent with respect to the release of personal information, and the requirements of subsection 21(1)(a) have not been satisfied. However, I must also consider whether any of the other exceptions listed in subsection 21(1) applies.

Subsection 21(1)(f) permits the disclosure of personal information "if the disclosure does not constitute an unjustified invasion of personal privacy."

Subsection 21(2) of the Act lists various criteria which must be considered when determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy within the meaning of subsection 21(1)(f). Subsection 21(2) reads as follows:

- (2) 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,
 - (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Having considered all the relevant circumstances, including those listed in subsection 21(2), in my view, the release of the names, and in one case the address, of individuals which do not appear on the letterhead in Record #2 would constitute an unjustified invasion of these individuals' personal privacy. Therefore, with respect to Record #6, I order the head to sever the names of all individuals not appearing on the letterhead in Record #2, and to release the balance of the record. As far as Record #4 is concerned, I order the head to sever the name and address of the individual hosting the meeting, and to release the balance of the record to the requester.

In summary, I uphold the decision of the head to release Records #1, #2, #3, #5, #7, #8 and #9 in their entirety. I order the head to release Records #4 and #6, with appropriate severances as outlined above. I further order the institution not to release these records until 30 days following the date of the issuance of this Order. This time delay is necessary to give you, the appellant, sufficient opportunity to apply for judicial

review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution within this 30_day period, I order that the records be released within 35 days of the date of this Order. The head is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Yours truly,

Sidney B. Linden
Commissioner

cc: _The Honourable Charles Beer,
_Minister of Community and Social Services
_Mr. Robert Ratcliffe, Counsel
_Ms Elizabeth Flavelle, FOI Co_ordinator
_Original Requester