



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

ORDER 61

Appeal 880166

Ministry of Health



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On April 25, 1988, the Ministry of Health (the "institution") received a request for access to the specific salaries for the following positions at Peterborough Civic Hospital (the "hospital"):

- Executive Director

- Assistant Executive Directors for the following areas:
 - clinical services
 - patient care services
 - hospital services
 - financial services
 - personnel, community relations and fund-raising.

2. Institution denied access to the information pursuant to subsection 21(3)(f) of the Act.
3. On June 7, 1988, the requester appealed the decision of the institution, and I gave notice of the appeal to the institution.
4. The records at issue were obtained from the institution and reviewed by the Appeals Officer assigned to the case.
5. Between June 7, 1988, and October 4, 1988, attempts were made to settle the appeal, but no settlement was reached as the parties retained their respective positions.
6. By letter dated October 4, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a copy of a report by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.
7. On October 17, 1989 I wrote to the appellant and the institution and invited them to provide me with their written representations.
8. I received written representations from both parties and I have considered them in making my Order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the 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 counter-balancing privacy protection purpose of the Act. The 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 the record falls within one of the specified exemptions in the Act lies upon the head.

The issues arising in this appeal are as follows:

- A. Whether the records at issue in this appeal contain personal information as defined in subsection 2(1) of the Act.
- B. If the answer to Issue A is in the affirmative, whether disclosure of the personal information would constitute an unjustified invasion of personal privacy of any individual.
- C. If the answer to Issue B is in the affirmative, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.

ISSUE A: Whether the records at issue in this appeal contain personal information as defined in subsection 2(1) of the Act.

In all cases where an institution purports to rely on the mandatory exemption provided by subsection 21(1) of the Act, it is my responsibility, before deciding whether the exemption applies, to ensure that the information withheld falls within the definition of "personal information" in subsection 2(1) of the Act.

Subsection 2(1) of the Act states:

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to

that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (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 its submissions, the institution points out that each of the salaried positions identified in the request is occupied by only one individual, and argues that the specific salaries for these positions would therefore qualify as "personal information" under subparagraph (b) of the definition.

The appellant argues that the requested information "...is public information and doesn't fall under any of the definitions..." in section 2 of the Act.

The use of the phrases "employment history of the individual " and "relating to financial transactions in which the individual has been involved" in subparagraph (b), restricts its application to past activities related to an individual. (emphasis added) In my view, current salary information about an individual does not fall within the scope of this subparagraph.

However, the eight subparagraphs included under the definition of "personal information" do not provide an exhaustive list of the types of information which qualify for inclusion under the definition. In my view, information which does not qualify under any of these subparagraphs will still meet the requirements of the definition if it can be said to be " . . . any recorded

information about an identifiable individual . . . ", as provided by the introductory wording to the definition.

In this case, the salaries of specific hospital positions are clearly "recorded information"; the only remaining question is whether they are "about an identifiable individual".

In my view, the requirements of the definition have been satisfied in this case. An individual's salary is clearly information "about" that person. And, because only one person holds each hospital position, the salary associated with that position can automatically be equated with the salary of the identifiable individual who holds the position.

Therefore, I find that the records at issue in this appeal do contain "personal information" as defined in subsection 2(1) of the Act.

ISSUE B: If the answer to Issue A is in the affirmative, whether disclosure of the personal information would constitute an unjustified invasion of personal privacy of any individual.

Having determined that the records contain "personal information", I must now decide whether the mandatory exemption provided by subsection 21(1) of the Act applies to bar the release of these records.

Subsection 21(1)(f) provides that:

A head shall refuse to disclose personal information to any person other than the individual to whom the individual relates except,

...

- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Subsections 21(2) and (3) of the Act provide guidance in determining if the disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) sets out a list of the types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. I discussed the proper application of subsection 21(3) in my Order 20 (Appeal Number 880075), released on October 7, 1988. At page 8 of that Order I state:

[Subsection 21(3)] specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason.

Subsection 21(3) reads, in part, as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

...

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

...

The institution argues that disclosure of the specific salary figures would reveal "...the income of persons occupying specific positions within the hospital...", and thereby meets the requirements of a presumed unjustified invasion of personal privacy under subsection 21(3)(f).

I am in agreement with the institution's position. Because, in the circumstances of this appeal, each position at the hospital has only one incumbent, disclosure of the requested information is tantamount to disclosure of the actual salaries being earned by these individual employees. Therefore, in my view, the information, if disclosed, would "describe an individual's... income...", and fall within the scope of the subsection 21(3)(f) presumption.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provisions of the Act comes into play to rebut this presumption. In my Order 20, supra, I outlined what I understand to be the situations in which the presumption provided by subsection 21(3) might be overcome. At page 9 of that Order I state:

It is clear that the types of information listed in subsection 21(4) operate to rebut the presumptions set out in subsection 21(3). The application of section 23 of the Act, which provides that an exemption from disclosure of a record under, among other sections, section 21 "does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption", may also result in disclosure. A further instance that is clear arises when a type of information listed under

subsection 21(3) also triggers section 11 of the Act, which obliges the head to disclose any record "if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Turning first to subsection 21(4), this subsection outlines a number of circumstances which rebut the presumption under subsection 21(3). Subsection 21(4) provides:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

...

In my view, subsection 21(4)(a) does not apply in the circumstances of this appeal for two reasons: (1) the information sought by the appellant is the actual salary of certain hospital employees, not the "salary range", as required by the subsection; and (2) the hospital is not an "institution", as defined by the Act. Subsection 21(4), therefore, does not act to rebut the presumed unjustified invasion of personal privacy under subsection 21(3).

The proper application of section 23 of the Act in the circumstances of this appeal is discussed under Issue C, below. However, before leaving Issue B, I want to briefly address the

possible application of subsection 21(2) in rebutting the presumption created by subsection 21(3).

In my Order 20, supra, I stated:

I believe that it is premature at this stage of the development of the Act to state that only the application of subsection 21(4), section 23 and section 11 can effectively rebut the presumptions set out in subsection 21(3). It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual.

Subsection 21(2) reads as follows:

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.

The appellant argues that the salaries in question are effectively paid by the public, and disclosure would be "desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny". He also submits that the requested information is not highly sensitive, would not unfairly expose the hospital employees to pecuniary or any other harm, and would not unfairly damage the reputation of these individuals.

The institution, on the other hand, submits that the specific salary information does constitute "sensitive personal information", and that the denial of access is justifiable, taking into consideration all of the provisions of subsection 21(2).

Having considered the representations of both parties, in my view, the provisions of subsection 21(2) as they relate to the circumstances of this case are not sufficient to rebut the presumption created by subsection 21(3).

I find, therefore, that disclosure of the actual salaries of the specified hospital employees would constitute a presumed unjustified invasion of personal privacy under subsection 21(3)(f) of the Act, and that this presumption has not been rebutted by either subsections 21(4) or 21(2). Unless the provisions of section 23 of the Act apply in the circumstances of this appeal, in my view, the requested records must be withheld from disclosure under the mandatory exemption provided by subsection 21(1) of the Act.

ISSUE C: If the answer to Issue B is in the affirmative, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.

Section 23 of the Act reads as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The two requirements contained in section 23 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, as distinct from the value of disclosure of the particular record in question (emphasis added).

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party that is asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

The appellant points out that the hospital receives public funds, and argues that "...the public has the right to know how much of its money is going to pay specific salaries and that, alone, is compelling public interest for the release of the information".

The institution, on the other hand, submits that there is nothing so "compelling or in the public interest" in the proposed disclosure of information which is sufficient to outweigh "the purpose of the exemption".

In considering the proper application of section 23, I am mindful that the operation of publicly-funded organizations should be open to scrutiny. The question in this case is whether it is necessary to disclose the specific salaries paid to individual hospital employees in order to provide this public accountability.

My staff have confirmed that the salary ranges for each of the requested positions at the hospital have already been disclosed to the appellant. In my view, this is sufficient to satisfy the public interest in the circumstances of this appeal.

In drafting the personal information exemption provided by section 21 of the Act, the legislature weighed the competing interests of access and privacy and determined that, as a general rule, individual salary figures of public servants

should be protected from disclosure, while salary ranges for positions held by these individuals should be accessible to the public. In this case, the appellant has received no more and no less information than he would have been given if the hospital was an "institution" under the Act, and, in my view, he has failed to demonstrate a compelling public interest in disclosure of these specific salaries which clearly outweighs the purpose of protecting individual privacy under section 21 of the Act.

In the circumstances of this appeal, I uphold the head's decision.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ May 26, 1989
Date