



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

ORDER P-273

Appeal 900437

Ministry of Consumer and Commercial Relations



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I N T E R I M O R D E R

BACKGROUND:

On July 9, 1990, the Ministry of Consumer and Commercial Relations (the "institution") received a request for access to personal information of the requester contained in personnel records and information pertaining to the job competition for the position of Manager of Investigations in which he was an unsuccessful candidate.

On August 13, 1990, the institution granted partial access to the requested records. The institution denied access to records containing the names, personal correspondence, resumes and responses to interview questions of other individuals under sections 21 and 49(b) of the Act.

On September 26, 1990, the requester appealed the institution's decision. Notice of the appeal was sent to the institution and the appellant.

Independent of the mediation process, the appellant succeeded in obtaining the consent of four other unsuccessful candidates to the release of certain of their personal information contained in the records. These records were provided to the appellant by the institution and are no longer at issue. During mediation, the section 49(b) exemption claim was withdrawn by the institution, and the appellant was granted access to some additional records.

Because settlement of this appeal was not possible, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution, the two

unsuccessful candidates who had not provided their consent to the appellant, and the successful candidate. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Written representations were received from the appellant, the institution, and the successful candidate (the "affected person").

In his representations, the appellant indicated that he was only seeking access to the personal information of the affected person and not the other candidates. He also indicated that he was not seeking access to the residential address, telephone number, marital status, children, Social Insurance Number, or date of birth of the affected person, and described the records he was interested in receiving. These records are listed in Appendix A to this Order, in the same numerical order as set out in the index of records provided to the appellant by the institution. In addition, the appellant raised the possible application of section 23 of the Act, and the Appeals Officer then invited the institution to make representations on that section.

During the course of this appeal, a question arose regarding the date contained on Record 1. This record identifies the affected person as the only qualified candidate after the interviews. Record 1 is, however, dated prior to the commencement of the interviews. The institution has provided the Appeals Officer with a letter explaining this apparent discrepancy. According to the institution, this type of record is typically completed in stages: sections A and B are completed upon finalization and approval of a staffing requirement; section C is completed after

advertisement of the position and closing of the competition; and section D is completed after the interviews have been completed, the successful candidate identified, the job offered and accepted and rejection letters sent to all the other candidates. Based on the explanation provided by the institution, I am satisfied that the date reflects completion of one of the earlier stages of the competition process, and that the name of the qualified candidate was entered following completion of the interviews. However, it would appear to me that

the date should normally only be entered after the entire form has been completed.

The appellant believes that there is one additional record which would respond to his request and the institution claims that this record does not exist. In order to resolve this issue, I have asked a Compliance Investigator from this office to attend at the institution and conduct an independent search for this record. However, I have decided to issue this interim Order with respect to the records which have been identified, so as not to delay matters. The determination of the issues involving the remaining record will be the subject of my final Order in this appeal, and I remain seized of this matter for that purpose.

ISSUES:

The institution, the appellant and the affected person all agree that the records contain the personal information of the affected person, and I am satisfied that the information qualifies as "personal information" as defined in section 2(1) of the Act. Accordingly, the only issues arising in this appeal are:

- A. Whether disclosure of the information contained in the records would constitute an unjustified invasion of personal privacy.
- B. Whether the provisions of either sections 21(2) or 21(4) of the Act are relevant in the circumstances of this appeal.
- C. With respect to any exempt records, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the section 21 exemption.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether disclosure of the information contained in the records would constitute an unjustified invasion of personal privacy.

The institution claims that the personal information contained in the records meets the requirements of a presumed unjustified invasion of personal privacy under either sections 21(3)(d) or (g) of the Act. These sections read as follows:

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

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations character references or personnel evaluations;

Consistent with previous Orders (Orders 11, 97 and 99), it is my view that the information contained in Record 34 satisfies the requirements of the presumption contained in section 21(3)(d).

I also find that the information contained in Records 39 and 40 satisfies the requirements of section 21(3)(d). Similarly, as in previous Orders (Orders 20, 97, 99, 196, and P-230), I find that the information contained in Records 4, 10, and 35-38 satisfies the requirements of the presumption contained in section 21(3)(g). I am also satisfied that the information contained in Records 41 (with the exception of the first sentence) and 42 meets the requirements of section 21(3)(g).

The institution submits that the information contained in Records 1, 2, 3, 12 and 13 relates to the affected person's employment history and should qualify under section 21(3)(d). In my view, the information contained in Records 1, 12 and 13 (with the exception of the affected person's continuous service date) relates to the affected person's current employment, rather than his employment history. Records 2 and 3 contain a list of candidates who were

interviewed in the job competition, and it is only the name of the affected person that is at issue in this appeal. The fact that the affected person applied for the position and was subsequently interviewed was disclosed to the appellant by the institution through the release of other records, and is no longer at issue in this appeal. In the circumstances, I find that the disclosure of this information through the release of Records 2 and 3 would not constitute an unjustified invasion of the privacy of the affected person.

The institution also submits that the information contained in Records 1, 2, 3, 12 and 13 consists of personal recommendations or evaluations and should qualify under section 21(3)(g). In my view, the information contained in these records does not, in

and of itself, consist of personal recommendations or evaluations. These records are documents which implement the decision of the institution to appoint the affected person to the position, and the information contained in the records is more accurately characterized as the results of personal recommendations or evaluations.

Accordingly, I find that the presumptions contained in sections 21(3) (d) and/or (g) of the Act do not apply to Records 1, 2, 3, 12 and 13, with the exception of the affected person's continuous service date which appears in Record 13 and satisfies the requirements of section 21(3) (d).

I have reviewed the records to determine whether any other presumption in section 21(3) might apply and, in my view, only section 21(3) (f) is relevant. Section 21(3) (f) states:

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

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

Portions of Records 12 and 13 identify the salary being paid to the affected person and, in my view, this information meets the requirements of section 21(3) (f).

The institution also raises sections 21(2) (a), (b) and (c) in support of its position that the records are exempt. These sections read 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;

I am not convinced, in the circumstances of this appeal, that these sections provide the institution with any basis for maintaining that disclosure of the records would result in an unjustified invasion of the personal privacy of the affected person.

In summary, it is my view that a portion of the information contained in Record 13 (the affected person's continuous service date), and all of the information contained in Records 34, 39 and 40 satisfies the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(d). As well, I am of the view that the affected person's salary information (found on Records 12 and 13) satisfies the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(f). Finally, it is my view that the information contained in Records 4, 10, 35-38, 41 (with the exception of the first

sentence) and 42 satisfies the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(g).

ISSUE B: Whether the provisions of either sections 21(2) or 21(4) of the Act are relevant in the circumstances of this appeal.

Section 21(4) of the Act outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). Specifically, section 21(4)(a) states:

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

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 his representations, the appellant submits that section 21(4)(a) applies to a portion of Record 34. In his view, the most accurate description of the successful candidate's previous employment responsibilities is contained in this record, which consists of the successful candidate's letter of application and resume. I do not

agree with the appellant's position. In my view, an individual's resume and letter of application represent a statement of employment-related accomplishments which that person feels are relevant to the position being applied for. These records do not necessarily reflect objective statements of fact and are, by their very nature, subject to individual

interpretation. Section 21(4)(a) contains a list of types of employment-related information which exists with respect to most positions. This information is objectively verifiable and, in my view, the subjective nature of an individual's application for employment and personal resume remove them from the scope of this section.

In the circumstances of this appeal, I find that none of the other enumerated circumstances under section 21(4) are relevant.

In Order 20, former Commissioner Sidney B. Linden stated "... 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".

The appellant made extensive representations on the relevance of each of the circumstances listed under section 21(2) to the disclosure of the records, and submitted that sections 21(2)(a) and (d) are particularly relevant. He added other considerations to those listed under section 21(2) such as his own reputation, the morale of the institution, the dangers of management by unqualified individuals and exposure of a biased process.

I have considered both the enumerated circumstances under section 21(2) and all the other concerns raised by the appellant, and I find that only sections 21(2)(a) and (d) are potentially relevant considerations in the circumstances of this appeal. These sections provide 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;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

The appellant submits that disclosure of the records is desirable for the purpose of subjecting the career development and human resource practices of the Government of Ontario to public scrutiny [s. 21(2)(a)].

He also submits that disclosure is relevant to a fair determination of his rights, in that he believes he was not treated fairly and was discriminated against in the competition [s. 21(2)(d)].

In response to his request, the appellant was provided with access to a considerable amount of information relating to the competition. He received access to all of his personal information, as well as some of the personal information of the other unsuccessful candidates. In my view, the extent of disclosure in the circumstances of this appeal was adequate, with respect to this particular job recruitment competition, to subject the activities of the institution to public scrutiny. The disclosure of the personal information of the affected

person, in my view, is not necessary in order to achieve the purposes of section 21(2) (a).

As far as section 21(2) (d) is concerned, I have been advised that the appellant instituted grievance proceedings against the institution and was informed that the Public Service Grievance Board had no jurisdiction in the matter. He then tried to report the alleged mishandling of the job competition to the institution's internal auditor and was advised that the matter was outside the scope of an audit. Based on the information provided by the appellant I am not convinced that release of the personal information of the affected person is relevant to a fair determination of any identified rights affecting the appellant.

In considering whether the factors listed in sections 21(2) (a) and (d) are sufficient to rebut a presumed unjustified invasion of personal privacy, the Commissioner's considerations are restricted to the contents of the records themselves, and any evidence elicited during the course of the appeal which ties the records to a particular section of the Act.

Records relating to job competitions frequently contain personal information of affected persons, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy under section 21(3). In attempting to rebut this presumption using sections 21(2)(a) and (d), the appellant must demonstrate that the contents of the records themselves, when considered in conjunction with all relevant evidence, satisfy the requirements of these sections. If the requirements are not satisfied, the presumption is not rebutted. For example, a successful candidate's application and resume has been found in

a number of orders to satisfy the requirements of a presumed unjustified invasion of personal privacy under section 21(3)(d). In order to rebut this presumption using sections 21(2)(a) and (d), it is not sufficient for an appellant to claim that the information contained in the record should be disclosed in order to satisfy generalized concerns for public accountability in the job recruitment process, or unsubstantiated

allegations that the information contained in the record is required to assist in the fair determination of the appellant's rights. The Commissioner must be provided with evidence demonstrating that the institution's hiring practices have been publicly called into question, necessitating disclosure of the application and resume in order to subject the activities of that institution to public scrutiny; and/or that the contents of the application/resume have a demonstrated relevance to the fair determination of rights affecting the appellant. In making a proper determination, the Commissioner is restricted to the contents of the record and the relevant evidence.

I have reviewed the records which are subject to the presumed unjustified invasion of the personal privacy of the affected person in this appeal and, in my view, the factors raised by the appellant in the context of sections 21(2)(a) and (d) are not sufficient to outweigh this presumption.

ISSUE C: With respect to any exempt records, whether there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the section 21 exemption.

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. [Emphasis added.]

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 23. Where the application of section 23 to a record has been raised by an appellant, it is my view that

the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant. Accordingly, I have reviewed the records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The appellant submits there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption.

The institution submits that the section 23 provisions should only be used in "extremely unusual circumstances" and that the privacy protection afforded to individuals under section 21 of the Act should not easily be negated. The institution states that there is no compelling public interest at stake in this

appeal, only the appellant's "private interest". It feels that in order for section 23 to apply, the appellant must establish a cloud of wrongdoing or impropriety on the part of the institution, and that no such evidence is present in this case.

In Order 12, Commissioner Linden stated:

... section 23 bolsters the privacy protection portion of the Act It provides that an exemption from disclosure of a record under section 21 does not apply where a "compelling public interest" in the disclosure of the record outweighs the purpose of the exemption. It is noted that section 23 does not refer to a 'private' interest ... and it also requires that the public interest be a 'compelling' one.

Having carefully considered the circumstances of this appeal and the representations of the appellant and the institution, I am not satisfied that there is a public interest in the disclosure of the records. Accordingly, I am of the view that section 23 does not apply.

ORDER:

1. I order the head to release Record 1 in its entirety, the name of the affected person as it appears on Records 2, 3, 12, and 13, and the first sentence of Record 41 to the appellant.
2. I uphold the decision of the head to deny access to Records 4, 10, 34, 35-40 and 42, and portions of Records 2, 3, 12, 13, and 41 not referred to in Provision 1.

3. I order that the institution not disclose the records described in Provision 1 of this Order until thirty (30) days following the date of issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the records listed in Provision 1 of this Order be disclosed within thirty-five (35) days of the date of this Order.

4. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

5. I remain seized of this appeal pending the outcome of the Compliance Investigator's search.

Original signed by:
Tom Mitchinson
Assistant Commissioner

February 20, 1992
Date

APPENDIX A

- 1) Form CSC 302 (Staffing Requisition and Recruitment Summary) - name of successful candidate severed under s. 21(1)
- 2) List of candidates to whom acknowledgement letters sent - names of successful candidate and other candidates severed under s. 21(1)
- 3) List of candidates to whom postponement letters sent - names of successful candidate and other candidates severed under s. 21(1)
- 4) Selection criteria pre-screening sheet - names of successful and other candidates severed under s. 21(1)
- 10) Rating sheet with competition results with name of successful candidate severed under s. 21(1)
- 12) Letter dated June 22, 1990 to the successful candidate with his name, address and salary severed under s. 21(1)
- 13) Form CSC 303 with successful candidate's name, S.I.N., service date and salary severed under s. 21(1)
- 34) Application and resume of successful candidate exempt under s. 21(1)
- 35-38) Evaluations of the successful candidate's interview by the selection board, exempt under s. 21(1)
- 39-40) Correspondence between the successful candidate and the Human Resources Branch, exempt under s. 21(1)
- 41) Memo dated June 19, 1990 from Acting Director, Consumer Services Branch to Personnel Administrator, Human Resources Branch with the successful candidate's personal information severed under s. 21(1)
- 42) Memo dated June 19, 1990 from Acting Director, Consumer Services Branch to Personnel Administrator, Human Resources Branch exempt under section 21(1)