



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

ORDER P-347

Appeal P-910276

Ministry of Consumer and Commercial Relations



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ORDER

BACKGROUND:

The Ministry of Consumer and Commercial Relations (the institution) received a request for access to the educational history of five individuals, four of whom were either currently or formerly employed within the Fuels Safety Branch of the institution. Specifically, the requester wanted to know the level of formal education of the individuals and whether they had completed secondary school. The requester also wanted to know whether one of the individuals is a Certified Engineering Technician and whether he attained this designation through formal training.

The institution provided access to the job specifications for certain relevant positions, and denied access to records containing the educational history of four of the individuals pursuant to section 21 of the Freedom of Information and Protection of Privacy Act (the Act). The institution advised the requester that the fifth individual was not employed by the institution, therefore it did not have custody of the requested information. The requester was content with that advice.

The requester appealed the institution's decision to deny access to the employment history of the four individuals.

During mediation, the Appeals Officer attempted to obtain the consent of the four individuals to the release of their personal information. None of the individuals consented.

Because further mediation was not successful, notice that an inquiry was being conducted to review the head's decision was sent to the institution, appellant and the four named individuals (the affected persons). The notice was in the form of a letter from the Appeals Officer, which included information designed to assist the parties in making representations on the subject matter of the appeal. The institution, the appellant and one of the affected persons provided representations.

ISSUES:

The appellant agrees that the information he is requesting qualifies as personal information of the affected persons as defined in section 2(1) of the Act, and that its disclosure would constitute a presumed unjustified invasion of these persons' privacy under section 21(3)(d) of the Act. I agree. Accordingly, the only issues arising in this appeal are:

- A. Whether any provisions of section 21 of the Act operate to rebut the presumed unjustified invasion of the affected persons' personal privacy under section 21(3)(d).
- B. 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 any provisions of section 21 of the Act operate to rebut the presumed unjustified invasion of the affected persons' personal privacy under section 21(3)(d).

Section 21(3)(d) of the Act states:

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

relates to employment or educational history;

All parties agree that release of the requested information would result in a presumed unjustified invasion of the personal privacy of the affected persons as set out in section 21(3)(d) of the Act. Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the records do not contain any of the types of information described in section 21(4).

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 submits that sections 21(2)(a) and (b) are relevant considerations in the circumstances of this appeal. These sections read:

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;

The appellant alleges that over the past ten years the public has been placed in danger because of the technical incompetence of the four affected persons and of the Fuels Safety Branch, which has as its mandate to ensure the "public safety with respect to propane, natural gas and oil." The appellant provides several examples of accidents involving various products which are subject to regulation by the Fuels Safety Branch.

The appellant further states that where deaths occurred during some of the described incidents, the victims were blamed because the inspectors from the Fuels Safety Branch, and in particular, the four affected persons, were not qualified to accurately identify the real cause of the accidents. In the appellant's view, release of the affected persons' educational history will prove that they were incompetent as inspectors for Fuels Safety Branch, and that as a result of this incompetence, the public has been misled as to the nature of these accidents and the safety of these products.

The institution submits that the circumstances of this case do not justify overriding the personal privacy of the affected persons, particularly since there has been no public outcry or "cloud of impropriety or wrong-doing" regarding the activities of these individuals.

The affected person who provided representations states that the release of his educational history would not fulfil the appellant's view that the Government or its agencies should be subject to public scrutiny. He states that the appellant should focus attention on the Fuels Safety Branch and its hiring practices, and not on any specific individual's educational history.

I agree with the position taken by the institution and the affected party. In my view, in order for section 21(2)(a) to be a relevant consideration, there must be a public demand for scrutiny of the Government or its agencies, not one person's subjective opinion that scrutiny is necessary. No such public demand has been established in this case and, accordingly, I find that section 21(2)(a) is not a relevant consideration in the circumstances of this appeal. Similarly, with respect to section 21(2)(b), I find that the appellant's assertion that the release of the affected persons' educational history may promote public safety is too remote to establish the requirements of section 21(2)(b) and, in my view, this section is not a relevant consideration.

Therefore, I find that the presumed unjustified invasion of the affected persons' personal privacy has not been rebutted by any provision of section 21 of the Act, and the records are properly exempt.

ISSUE B: 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.

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

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 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 all parties I am not satisfied that there is a compelling **public** interest in the disclosure of the records. Accordingly, I am of the view that section 23 does not apply.

ORDER:

I uphold the head's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ August 28, 1992