



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

ORDER P-355

Appeal P-9200365

Ministry of the Solicitor General



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act (the Act) and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Ministry of the Solicitor General (the Ministry) received a request under the Act for access to information pertaining to two witnesses who appeared in a criminal trial. Specifically, the requester was seeking access to the proper name, age and occupation of one witness, and one sentence from the signed statement of a second witness. The Ministry had severed this information from a record disclosed to the requester in response to a previous request. The requester also sought access to a letter and envelope referred to in the previously disclosed record as having been filed as an exhibit at the trial.

The Ministry informed the requester that access was denied to the information pertaining to the witnesses pursuant to sections 14(2)(a) and 21 of the Act. With respect to the exhibit, the Ministry informed the appellant that its search had failed to locate any such record. The requester appealed the Ministry's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from the appellant and the Ministry. In its representations, the Ministry withdrew its claim that section 14(2)(a) applied to part of the record which pertains to one of the witnesses.

ISSUES:

The issues arising in this appeal are:

- A. Whether the Ministry's search for responsive records was reasonable in the circumstances.
- B. Whether the requested information qualifies as "personal information" as defined in section 2(1) of the Act.
- C. If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies.
- D. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry's search for responsive records was reasonable in the circumstances.

The appellant requested access to a record which had been referred to in a previously disclosed record as having been filed as an exhibit at a criminal trial. The Ministry informed the appellant that a search had been conducted, but this record could not be located. While it was not evident from the appellant's letter of appeal that this part of the Ministry's decision was at issue, her submissions in response to the Notice of Inquiry clearly indicate her wish to have this issue addressed. Accordingly, in response to a request by the Appeals Officer, the Ministry provided representations respecting the steps it took to attempt to locate the requested record.

The Ministry does not dispute the fact that a responsive record may exist or, at least, may have existed. However, based on its search, the Ministry's position is that it has no such record in its custody or control. The Ministry outlined the steps taken by Ministry officials to locate the record, which included two separate searches of the Criminal Investigations Branch of the Ontario Provincial Police. The Ministry also suggested that the appellant contact the court house where the trial in which the record was filed as evidence took place, and the Ministry of the Attorney General.

The appellant's representations do not contain any evidence or explanation to support the position that the record does exist in the custody or control of the Ministry. She did, however, indicate that she has made a similar request for the record to the Ministry of the Attorney General.

Taking into account all of the considerations I have outlined, I am satisfied that the Ministry's search for the record requested by the appellant was reasonable in the circumstances.

ISSUE B: Whether the requested information qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"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,

...

- (d) the **address**, telephone number, fingerprints or blood type of the individual,

...

[Emphasis added.]

The records requested by the appellant contain the age and medical condition of a named witness and the age, address, place of employment and occupation of a second named witness. In my view, this information qualifies as the personal information of the individual to whom it relates.

ISSUE C: If the answer to Issue B is yes, whether the mandatory exemption provided by section 21 of the Act applies.

Once it has been determined that a record contains personal information, section 21 of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f), reads:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy. In its representations, the Ministry specifically relies on section 21(3)(a), (b) and (d) which read as follows:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

- (d) relates to employment or educational history;

The Ministry claims that section 21(3)(b) applies to both records.

I have reviewed the circumstances under which the records were created by or submitted to the Ministry. I am satisfied that the records were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) have been established.

Once it has been 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 at issue in this appeal do not contain information relevant to section 21(4).

The appellant, in her representations, raises the application of section 21(2)(d) of the Act, which states:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

In order for section 21(2)(d) of the Act to be regarded as a relevant consideration in the circumstances of an appeal, the appellant must establish each part of the following four-part test:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

The appellant submits that she requires the information at issue so "the truth ... will be known" about the matter, which involved herself and the two witnesses. However, the appellant has not identified any **legal** right, nor has she provided any evidence which would indicate that such a right is related to an existing or contemplated proceeding. Accordingly, in the circumstances of this appeal, I find that section 21(2)(d) is not a relevant consideration.

Having carefully considered the records at issue, the representations which have been provided and the provisions of the Act which may rebut the presumption of an unjustified invasion of personal privacy, I find that the presumption raised by section 21(3)(b) of the Act has not been rebutted.

Therefore, in the circumstances of this particular appeal, I find that disclosure of the personal information of the two witnesses would constitute an unjustified invasion of their personal privacy and is properly exempt under section 21 of the Act.

Because of the manner in which I have disposed of Issue C, it is not necessary for me to consider Issue D.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____ October 7, 1992
Holly Big Canoe
Inquiry Officer