



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

ORDER P-282

Appeal P-910201

Ministry of Consumer and Commercial Relations



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ORDER

BACKGROUND:

On February 9, 1991, the Ministry of Consumer and Commercial Relations (the "institution") received a request for access to certain information. This request sought clarification of the response provided by the institution to a previous request submitted by the same requester, and reiterated his request for information concerning the academic background and professional experience of the Registrar of the Real Estate and Business Brokers Act.

The institution responded on May 2, 1991, advising the requester that access to the information relating to the Registrar was denied, pursuant to section 21(3) of the Freedom of Information and Protection of Privacy Act ("the Act"). [The institution's responses to other portions of the request were resolved during the course of mediation, and are not at issue.]

On May 6, 1991, the requester appealed the institution's decision, and notice of the appeal was sent to the institution and the appellant.

During the course of mediation, the scope of the appeal was narrowed. The parties agreed that the only record which remains at issue in the appeal is a copy of the Registrar's resume submitted at the time of his appointment to the position in 1988. The institution confirmed that the Registrar has not consented to the release of this record.

Because settlement of this appeal was not possible, notice that an inquiry was being conducted to review the decision of the head of the institution was sent to the appellant, the institution and the Registrar (the "affected person"). Written representations were received from the institution and the appellant. The institution

also provided representations on behalf of the affected person. I have considered all representations in reaching my decision in this appeal.

ISSUES:

- A. Whether the information contained in the record qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether disclosure of the record would constitute an unjustified invasion of the affected person's personal privacy.
- C. If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the section 21 exemption.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record qualifies as "personal information", as defined in section 2(1) of the Act.

The definition of "personal information" found in section 2(1) of the Act states, in part:

"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 [emphasis added]

...

In my view, the record contains information relating to the education and employment history of the affected person, and clearly falls within the definition of personal information as set out in paragraph (b).

ISSUE B: If the answer to Issue A is yes, whether disclosure of the record would constitute an unjustified invasion of the affected person's personal privacy.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this personal information, except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act, which 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.

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

21(2) provides a non-exhaustive list of criteria for the head to consider in making this determination, and section 21(3) identifies types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The institution has cited section 21(3)(d) as the basis for refusing to disclose the record. This section 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;

I have reviewed the record and, consistent with previous orders (Orders 11, 97, 99, P-273 and M-7), I find that the personal information contained in the record satisfies the requirements of the presumption contained in section 21(3)(d), and that disclosure of the record would constitute an unjustified invasion of the affected person's personal privacy.

Having determined that the presumption of unjustified invasion of personal privacy has been established under section 21(3)(d), I must now 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 record at issue in this appeal does not contain any information relevant to section 21(4).

In Order 20, dated October 7, 1988, former Commissioner Sidney B. Linden stated that "... 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 (d) are relevant considerations in the context of this appeal. These two 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;
- (d) the personal information is relevant to the fair determination of rights affecting the person who made the request;

In Order P-273, dated February 20, 1992, I dealt with a similar request involving an affected person's resume which I found to satisfy the requirements of a presumed unjustified invasion of personal privacy under section 21(3)(d). At page 10 of that Order, I outlined what I felt was necessary in order to rebut this presumption using sections 21(2)(a) and (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 this appeal, the appellant submits that because the person holding the position of Registrar is responsible for licensing real estate and business brokers, his academic qualifications and legal experience should be public knowledge and open to public scrutiny.

He also submits that disclosure is relevant to a fair determination of his rights, specifically in the context of his hearing before the Commercial Registration Appeal Tribunal of a proposal by the Registrar to refuse to renew his real estate licence.

In its response to the appellant's request, the institution provided a detailed description of the affected person's professional background in the real estate industry, as well as copies of both the job specification and the recruitment advertisement. Similar information was also included in a press release issued at the time of the affected person's appointment. In my view, the extent of disclosure in the circumstances of this appeal was adequate 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's hearing before the Commercial Registration Appeal Tribunal has been completed, and the original proposal of the Registrar has been upheld. In its representations the institution points out that the appellant was given an opportunity at that hearing to make representations and to pose any relevant questions to the Registrar. In the circumstances of this appeal, I find that section 21(2)(d) is not a relevant consideration.

Accordingly, I find that the factors raised by the appellant in the context of sections 21(2)(a) and (d) are not sufficient to outweigh the presumption of the unjustified invasion of the personal privacy of the affected person.

ISSUE C: If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the section 21 exemption.

The appellant has raised a public interest argument in his representations, which gives rise to consideration of section 23 of the Act. Section 23 reads as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply if 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 record 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 record, 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 that the educational background and employment history of public officials are relevant to their ability to fulfil the responsibilities associated with the positions they hold. He maintains that it is in the public interest that such information should be publicly available.

The institution submits that the section 23 provision 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.

In the circumstances of this appeal, I am not satisfied that there is a public interest in disclosure of the personal information contained in the record which clearly outweighs the purpose of the section 21 exemption. Accordingly, I am of the view that section 23 does not apply.

ORDER:

I uphold the head's decision to deny access to the record.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ March 18, 1992