



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

ORDER P-423

Appeal P-9200334

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>

INTERIM ORDER

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to any information pertaining to a named individual in the possession of the Ministry's Emergency Health Branch. The named individual is a former employee of the Ministry who was discharged in July 1991. The requester is his lawyer.

The Ministry responded by advising the requester that the existence of any responsive records could neither be confirmed nor denied, in accordance with sections 14(3) and 21(5) of the Act. The requester appealed the Ministry's decision.

Mediation was not possible in the circumstances, and notice that an inquiry was being conducted to review the decision was sent to the appellant and the Ministry. Written representations were received from both parties.

The sole issue in this appeal is whether the Ministry properly exercised discretion under sections 14(3) and/or 21(5) of the Act in refusing to confirm or deny the existence of responsive records.

Section 14(3) states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

and section 21(5) states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(3) and/or 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking sections 14(3) and/or 21(5), the Ministry is denying the requester the right to know whether a record exists, even when one does not. These sections provide the Ministry with a significant discretionary power which I feel should be exercised only in rare cases.

section 14(3)

I have outlined my views regarding the application of section 14(3) in a number of recent orders, as follows:

In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to

the requester which could compromise the effectiveness of a law enforcement activity [Orders P-338, P-344 and M-58].

In its representations, the Ministry states:

Disclosure of the fact that an investigation of one nature is underway does not mitigate or lessen the requirement of the Head to refuse to confirm or deny an investigation of another nature that is underway when circumstances necessitate such an action.

In my view, the Ministry has confused the exercise of discretion under section 14(3) with the analysis of the exemption claim under sections 14(1) and (2). Section 14(3) does not require the Ministry to confirm the "nature" of the investigation; it merely gives the Ministry the discretion to refuse to confirm or deny the existence of a record to which section 14(1) or (2) applies. In my view, the Ministry has failed to establish that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of any law enforcement activity. Accordingly, I find that the requirements of section 14(3) have not been met.

section 21(5)

In Order P-339, I discussed the application of this section as follows:

In my view, an institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy.

The Ministry states that confirming the existence of a record would result in the unjustified invasion of another individual's personal privacy. I do not agree. By simply confirming that records associated with an investigation exist, without indicating the nature of these records, the type of investigation or the parties involved, the Ministry would not be compromising the privacy interests of any individual. In my view, the Ministry has failed to establish that disclosure of the mere existence of the requested records would result in an unjustified invasion of personal privacy, and I find that the requirements of section 21(5) have not been met.

In addition, I feel that one other portion of the Ministry's representations is relevant to the proper application of sections 14(3) and 21(5). The Ministry states:

Record 4 indicates that [a Ministry employee] met with the individual being investigated and disclosed that there was, in fact, an investigation underway.

It is submitted that this is factual; however, the `nature' of the investigation was not disclosed to the individual at that time, ...

It is clear from these statements that the Ministry has in fact confirmed to the appellant that an investigation did take place. In my view, it is reasonable to assume that if an investigation was conducted some records would have been produced, and it is not open to the Ministry to raise sections 14(3) or 21(5) in these circumstances.

Accordingly, I find that sections 14(3) and 21(5) do not apply in the circumstances of this appeal.

In disposing of this issue, it was necessary for me to confirm that records do in fact exist. During the course of this appeal the Ministry made it clear that the interests of certain other individuals may be affected by disclosure of the records. Consequently, I have decided to send this matter back to the Ministry to issue a substantive decision under the access provisions of the Act. I remain seized of this matter to determine any issues arising from the Ministry's new decision.

ORDER:

1. In this order, I have disclosed the existence of records responsive to the appellant's request. I have released this order to the Ministry in advance of the appellant in order to provide the Ministry with an opportunity to review this order and determine whether to apply for judicial review.
2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant.
3. I also order the Ministry to make a substantive decision under the access provisions of the Act and to provide the appellant with a new decision within 15 days of the date of this order.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ February 26, 1993