



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

ORDER P-672

Appeal P-9300321

Ministry of Community and Social Services



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ORDER

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documents received by the Ministry from a named individual which concern the requester's client. The Ministry responded by advising the requester that the existence of any responsive records could not be confirmed or denied, in accordance with section 21(5) of the Act. The requester appealed the Ministry's decision to the Commissioner's office.

Mediation 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. Representations were received from both parties.

The first issue to be addressed in this appeal is whether the Ministry properly exercised its discretion under section 21(5) in refusing to confirm or deny the existence of responsive records.

This provision states that:

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

In Orders P-339 and P-423, then Assistant Commissioner Tom Mitchinson described the circumstances in which section 21(5) might be applied by an institution in the following manner:

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.

In its representations, the Ministry indicates that it has applied section 21(5) in this case because of the nature of the request. The Ministry states that because the requester asked specifically for any documents which it had received from a named individual, if the Ministry were to confirm that such records exist, it would have conveyed to the requester information whose disclosure would constitute an unjustified invasion of personal privacy. I agree with the Ministry that by simply confirming the existence of any responsive records, information could be revealed to the requester.

Having reached that conclusion, I must now determine if the disclosure of the existence of any such records, if they exist, would constitute an unjustified invasion of the personal privacy of another individual.

Sections 21(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual other than the requester. Section 21(3) lists a series of circumstances which, if present, would raise the presumption of an unjustified invasion of personal privacy. Section 21(3)(c) of the Act provides that:

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

relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

In my view, records of the type requested by the appellant from the Ministry, if they exist, would relate generally to the "eligibility for social service or welfare benefits" of the appellant's client, as described in section 21(3)(c). Accordingly, in my view, the presumption of an unjustified invasion under section 21(3)(c) applies to the personal information which would be contained in records of the type requested, if they exist.

The only way in which a section 21(3) presumption may be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M_170).

I have considered section 21(4) and find that none of the personal information which might be contained in the type of record requested in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 applies.

Accordingly, I find that, as the presumption described in section 21(3)(c) has not been rebutted, the disclosure of personal information which may be contained in records of this sort, if they existed, would constitute an unjustified invasion of personal privacy. Such information would, therefore, be properly exempt from disclosure.

In my view, the Ministry has provided sufficient evidence to establish that the disclosure of the existence or non-existence of records responsive to the appellant's request would constitute an unjustified invasion of the personal privacy of other individuals under section 21(5) of the Act. Accordingly, I find that the Ministry has properly applied this provision in the present case.

Section 21(5) is a discretionary exemption. The Ministry has provided representations on its exercise of discretion in favour of claiming the application of this section and I find nothing improper in the manner in which this determination was made.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 4, 1994