



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-759

Appeal P-9400187

Ministry of the Attorney General



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of the Attorney General (the Ministry) to provide her with copies of all documents relating to the appointment of a named individual as a Judge of the Ontario Court (Provincial Division). This appointment is now a matter of public record.

The Ministry identified a total of 54 pages of documents that were responsive to the request and granted access to three of these pages in full. The Ministry decided, however, to withhold the remaining 51 pages in their entirety under one or more of the following exemptions contained in the Act:

- Cabinet records - section 12
- Advice or recommendations - section 13
- Invasion of privacy - section 21

The requester appealed this decision to the Commissioner's office. The requester also took the position that there was a compelling public interest in the release of this information under section 23 of the Act.

A Notice of Inquiry was provided to the appellant, the Ministry and the Judge. Representations were received from all parties.

In its submissions, the Ministry indicated that it had disclosed pages 35 and 53 of the record to the appellant and that it was no longer relying on the advice or recommendations exemption with respect to any of the other pages at issue.

PRELIMINARY MATTER:

Following a review of the record identified by the Ministry in its decision letter, and having regard to the nature of the appellant's request, I formed the preliminary impression that pages 36 to 47 and portions of pages 1A and 16 to 18 of the record were not responsive to the request. These pages either relate to administrative matters which were addressed following the appointment of the Judge or with the candidacy of other named individuals.

On this basis, I asked the Appeals Officer assigned to this case to inform the appellant that this issue had arisen and to solicit her comments on this subject. The appellant stated that she had no submissions to make.

Having again reviewed these documents, my conclusion is that the information in question falls outside the scope of the request. Consequently, I will not consider this information further in this appeal.

The contents of the 38 pages which remain at issue are described more fully in Appendix "A" which is attached to this order. It should be noted that pages 19 to 31 are duplicates of pages 3 to 15. My decision respecting pages 3 to 15 will also apply to their duplicates.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual including information relating to the education or employment history of the individual. In my view, all of the pages at issue contain information that qualifies as the personal information of the named Judge. The record does not contain any personal information about the appellant.

Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates. There are a number of exceptions to this rule, one of which is found in section 21(1)(f) of the Act. This section provides that a government institution must refuse to release the personal information of another individual except if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of this sort.

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

In its representations, the Ministry relies on the following presumptions against disclosure to deny access to the record:

- The information relates to employment or educational history - section 21(3)(d)
- The information consists of personal recommendations or evaluations, or personnel evaluations - section 21(3)(g)
- The information pertains to origins, beliefs and associations - section 21(3)(h)

The Ministry also submits that the following considerations in section 21(2) of the Act weigh in favour of protecting the privacy interests of the Judge:

- The information is highly sensitive - section 21(2)(f)
- The information was supplied in confidence - section 21(2)(h)

Based on a careful review of the evidence before me, I have made the following findings:

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1. The information found in page 1A of the record, which indicates that the Judge was a candidate for judicial appointment, does not constitute his employment history for the purposes of section 21(3)(d) of the Act. Since this appointment is a matter of public record, I order that this information be disclosed to the appellant.
2. The information contained in pages 1 through 15 of the record, which includes the Judge's resume, the application form and various biographical materials, relates to his employment and educational history and, thus, falls within the section 21(3)(d) presumption against the disclosure of personal information.
3. In order for the information found on pages 16 to 18 to fall into the category of a personal evaluation for the purposes of the section 21(3)(g) presumption, such information must constitute an assessment made according to measurable standards (Order P-470). Based on this interpretation, I conclude that the information found on these three pages (which contains advice from the Judicial Appointments Advisory Committee (JAAC) to the Attorney General on the selection of judicial candidates) does not constitute a personal evaluation for the purposes of the Act.

I also find that these pages do not comprise a personal recommendation or personnel evaluation under section 21(3)(g). Finally, there are no other presumptions or considerations outlined in section 21 of the Act which would favour the protection of this information.

4. In my view, pages 50 and 52, which pertain to security clearance matters, constitute highly sensitive information for the purposes of section 21(2)(f) of the Act. This factor weighs in favour of privacy protection. None of the other factors outlined in section 21(2) apply to this information.
5. The information contained on page 48 of the record, which indicates that the Judge is to be appointed to the bench, is a matter of public record. On this basis, the release of this document would not constitute an unjustified invasion of the Judge's personal privacy.
6. None of the considerations set out in section 21(4) of the Act apply to the personal information contained in the record.

CABINET RECORDS

The Ministry claims that the Cabinet records exemption found in section 12(1)(a) of the Act applies to page 48 of the record and that the related exemption set out in 12(1)(b) of the Act applies to pages 49 and 51. These exemptions specify that:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees,
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

I will first consider page 48 of the record which contains part of the text of an Order-in-Council for the appointment of the Judge to his new position. This draft is essentially identical to the final version which the Ministry has already released to the appellant. On this basis, I find that no useful purpose would be served by withholding this earlier draft from disclosure under section 12(1)(a) or any other provision of the Act.

Pages 49 and 51 are letters from the Ontario Judicial Council to the Attorney General respecting the appointment of the Judge. In its representations, the Ministry indicates that these pages were provided to the Lieutenant Governor in Council as part of the Attorney General's recommendation under section 42(1) of the Courts of Justice Act. I have carefully reviewed these letters and agree that they contain recommendations submitted to an Executive Council for the purposes of section 12(1)(b) of the Act.

The result is that only pages 49 and 51 are exempt from disclosure under section 12(1) of the Act.

PUBLIC INTEREST IN DISCLOSURE

In her representations, the appellant argues that the information not disclosed to her should nonetheless be released pursuant to the public interest override contained in section 23 of the Act. In the context of this appeal, section 23 can only apply to those pages of the record which have been exempted under the invasion of privacy exemption. This provision is not applicable to information withheld under the Cabinet records exemption.

For section 23 to apply on the facts of this appeal, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling interest must clearly outweigh the purpose of the invasion of privacy exemption.

The appellant submits that the Judge did not act professionally in a previous position which adversely affected the legal proceedings in which she was involved. The specific allegations which the appellant has made, however, have not been substantiated by an external source nor has she provided the Commissioner's office with relevant supporting documentation to verify the accuracy of her contention.

In determining whether section 23 should apply in the present case, I am also mindful of the fact that section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is protected, except where infringements on this interest can be justified.

On this basis, and because I would characterize the appellant's interest in seeking this information as

predominantly personal in nature, I am not prepared to say that there exists a compelling public interest in the disclosure of the record, nor can I conclude that such a public interest clearly outweighs the purpose of the invasion of privacy exemption. I find, therefore, that section 23 of the Act does not apply in the circumstances of this appeal.

The result is that the personal information found on pages 1 to 15, 19 to 31, 50 and 52 is exempt from disclosure under section 21(1) of the Act.

ORDER:

1. I uphold the Ministry's decision to deny access to pages 1-15, 19-31 and 49-52 of the record in their entirety and to those portions of pages 1A and 16-18 which I have highlighted on the copy of these pages provided to the Ministry's Freedom of Information and Privacy Co-ordinator along with this order.
2. I order the Ministry to release to the appellant page 48 in its entirety and those portions of pages 1A, 16, 17 and 18 which have **not** been highlighted within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with this order, I reserve the right to require that the Ministry provide me with a copy of the pages of the record which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Glasberg
Assistant Commissioner

September 20, 1994 _____ Irwin

APPENDIX "A"

INDEX OF PAGES OF RECORD AT ISSUE			
	DESCRIPTION OF RECORD WITHHELD IN WHOLE OR IN PART	EXEMPTION(S) CLAIMED	
1A	Memorandum from the Chair of the JAAC respecting a list of recommended candidates for judicial appointment, dated April 30, 1993	21	Disclosed in part
1-15	Resume, application form and biographical materials regarding a named applicant	21	Withheld
16 and 17	Letter from the Chair of the JAAC to the Attorney General regarding judicial vacancies in the Metropolitan Toronto area, dated November 5, 1992	21	Disclosed in part
18	Letter from the Chair of the JAAC respecting a list of recommended candidates, dated April 30, 1993	21	Disclosed in part
19-31	Resume, application form and biographical materials regarding a named applicant. (Note these pages are duplicates of pages 3 to 15)	21	Withheld
48	Draft Order-in-Council appointing a Provincial Judge	12	Disclosed
49	Letter from the Ontario Judicial Council respecting the proposed appointment of a judicial candidate, dated May 14, 1993	12, 21	Withheld
50	Memorandum to file respecting a security search, dated May 25, 1993	21	Withheld
51	Covering letter from the Ontario Judicial Council to the Attorney General regarding the appointment of several judicial candidates, dated May 14, 1993	12, 21	Withheld
52	Release of information authorization form, dated May 5, 1993	21	Withheld