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

ORDER P-1265

Appeal P-9600240

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records regarding the "payment of monies or any agreement regarding O.P.P. police informant [a named individual], who was under the supervision of [a named police officer]".

In response, the Ministry advised the appellant that "access to OPP Intelligence files is denied" pursuant to sections 14(1)(d), (e) and (g) and 21(2)(e), (f) and (h) of the Act. The appellant appealed this decision.

On July 23, 1996 the Ministry issued a new decision, which stated:

> This is to advise you that subject to the provisions of the Notice of Appeal, dated June 12, 1996, [t]he Ministry has reconsidered its decision letter of May 10, 1996, and has decided to claim the following additional exemptions, namely:
>
> 14(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply:
>
> 21(5) 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.

This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from the Ministry only. While the appellant did not make written representations, he has requested that I refer to the submissions which he provided to this office during the course of the appeal.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

As noted above, the Ministry's decision letter of July 23, 1996 raised the possible application of the discretionary exemptions in sections 14(3) and 21(5) of the Act. This letter was not received within the time frames prescribed for the raising of discretionary exemptions in the Confirmation of Appeal sent by this office to the Ministry. This raises the question of whether these exemptions should be considered in this appeal, in view of this agency's policy regarding the raising of new discretionary exemptions late in the appeal process.

As part of its efforts to expedite the processing of appeals and in order to sensitize institutions about the prejudice to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, states that:

> The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be

> informed and given the opportunity to comment on the applicability of the new exemption claims. This additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.
>
> Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Confirmation of Appeal sent to the Ministry when this appeal was filed, stated that the Ministry had 35 days from the date of the Notice (until July 18, 1996) to claim any additional discretionary exemptions. The new decision letter from the Ministry was issued on July 23, 1996.

The appellant and the Ministry were invited to comment on whether these exemptions should be considered. I did not receive any representations from the appellant with respect to this issue.

In my view, the issue of whether records of the nature requested exist impacts significantly on the privacy interests of the named individual. By its very nature, the request carries with it certain sensitivity. In the circumstances of this appeal, these factors outweigh the objective of an expeditious resolution of an appeal which underlies the approach outlined in the edition of IPC Practices referred to above. In addition, I find that as the additional exemptions were raised only five days after the 35-day deadline, the integrity of the process has not been compromised and the interests of the appellant have not been significantly prejudiced.

Accordingly, I am prepared to consider the possible application of the exemptions provided by sections 14(3) and 21(5) in this appeal.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

The Ministry relies on section 21(5) as one of the bases for refusing to confirm or deny whether any records responsive to the request exist. This section 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 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 appellant the right to know whether a record exists, even if one does not.

For this reason, in relying on section 21(5), the Ministry must do more than merely indicate that the disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. The Ministry must establish that the disclosure of the mere existence or non-existence of the requested records would convey information to the requester, the disclosure of which would constitute an unjustified invasion of personal privacy (Order M-328).

Accordingly, I will begin by considering whether the disclosure of records of the type requested, if they exist, would constitute an unjustified invasion of personal privacy. If the answer to this question is yes, I will then consider whether the disclosure of the existence or non-existence of records of the type requested would constitute an unjustified invasion of personal privacy.

An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

Records of the nature requested, if they exist, would contain information that the individual named in the appellant's request had been engaged as a paid informant by the Ministry in certain law enforcement matters. I find that such information, if it exists, would qualify as the personal information of the named individual.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law (section 21(3)(b)). The Ministry submits that if records responsive to the request exist, access to them would be denied as they would fall within the ambit of this presumption.

The appellant submits that the identity of the named individual as an informant is already known through trial proceedings and is, therefore, a matter of public knowledge. He submits, accordingly, that there is no basis for refusing to confirm or deny the existence of the requested records.

In my view, the disclosure of records of the type requested, if they exist, would constitute a presumed unjustified invasion of personal privacy within the meaning of section 21(3)(b). Records of this type are not among those listed in section 21(4) and the appellant has not raised the possible application of section 23. Therefore, I find that records of the type requested, if they exist, would be exempt from disclosure under section 21.

Further, I find that the disclosure of the existence or non-existence of records of the sort requested would reveal personal information about an identifiable individual; specifically, whether or not that individual has been engaged by the Ministry as a paid informant.

In my view, the analysis relating to the disclosure of responsive records, if they exist, also applies to this discussion. I find that the disclosure of the fact that records of the nature requested exist or not would fall within the presumption in section 21(3)(b) and would, accordingly, constitute a presumed unjustified invasion of the personal privacy of the named individual. The fact that such information does or does not exist is, therefore, exempt under section 21.

I find that the Ministry has established the requirements for the application of section 21(5) of the Act. Accordingly, it is not necessary for me to consider the application of the other exemptions claimed by the Ministry.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 25, 1996
Donald Hale
Inquiry Officer