



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-1394

Appeal P\_9700055

Ministry of Community and Social Services



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## **NATURE OF THE APPEAL:**

The appellant provides home care services for children in a small community. An individual (the affected person) believed that the number of children in the appellant's care was in contravention of the Day Nurseries Act (the DNA), and reported this information to the Ministry of Community and Social Services (the Ministry). As a result of this complaint, the Ministry investigated the appellant and laid charges against her under the DNA.

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry for access to the name of the affected person. The Ministry identified the "Intake Complaint Form" as responsive to the request and provided the appellant with partial access to this record. The Ministry denied access to the name and telephone number of the affected person pursuant to the following sections of the Act:

- danger to safety or health - section 20
- invasion of privacy - section 21(1).

The appellant appealed this decision. During the course of this appeal, the appellant raised the possible application of section 23 of the Act, the so-called "public interest override".

This office provided a Notice of Inquiry to the Ministry, the appellant and the affected person. Because the record appeared to contain the personal information of the appellant, the Appeals Officer raised the possible application of section 49(b) (invasion of privacy). Representations were received from all three parties.

## **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.

I have reviewed the record at issue. In my view, the record as a whole contains recorded information about the appellant and the affected person and, thereby, qualifies as the personal information of both within the meaning of section 2(1) of the Act.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and another individual and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the appellant access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information **would not**

constitute an unjustified invasion of personal privacy of another person. Since the appellant has a right of access to her own personal information, the only situation under section 49(b) in which she can be denied access to the information is if it can be demonstrated that the disclosure of the information **would** constitute an unjustified invasion of another individual's 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. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made that section 23 of the Act applies to the personal information.

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

The Ministry submits that the presumption contained in section 21(3)(b) of the Act applies. This section states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

In Order P-640, I had occasion to consider the DNA, and found that:

The DNA provides a complete scheme for the licensing and operation of day nurseries in Ontario and contains provisions for enforcing and regulating compliance with the DNA.

Section 11(1) of the DNA stipulates that no person shall establish, operate or maintain a day nursery without a licence. When allegations are made that a premises is operating as a day nursery, section 16(4) of the DNA authorizes a program advisor to investigate.

Pursuant to section 21 of the DNA, every person who contravenes the provisions of the DNA, specifically, sections 11(1) and 16, is liable to a fine or imprisonment, or both.

In my view, these findings are equally applicable in the current appeal. In this case, the Ministry undertook a formal investigation as a result of the complaint made by the affected person against the appellant. As I indicated above, as a result of this investigation, the Ministry laid charges against the appellant under the DNA.

In my view, the information at issue in this appeal was compiled by the Ministry in the course of its investigation into a possible violation of the DNA. Accordingly, I find that the presumption afforded by section 21(3)(b) of the Act applies.

The appellant submits that the factors in sections 21(2)(a) (public scrutiny) and 21(2)(c) (promote informed choice in the purchase of goods and services) are relevant in the circumstances of this appeal. Even if I were to find that the factors in sections 21(2)(a) and (c) applied in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that the factors and considerations in section 21(2) cannot be used to rebut the presumptions in section 21(3).

None of the information falls under section 21(4). As I indicated above, the appellant has raised the possible application of section 23 of the Act, which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 23 of the Act to apply to a record, two requirements must be met. First, there must be a **compelling** public interest in the disclosure of the record, and second, this interest must **clearly** outweigh the **purpose** of the exemption which otherwise applies to the record.

The appellant questions the manner in which the Ministry undertook its investigation into the allegations brought by the affected person. In this regard, she believes that the conduct of Ministry staff was harassing and threatening, and as such, was an abuse of the Ministry's statutory powers. She concludes:

While I appreciate the need of the Ministry to use its discretionary powers to protect those who assist the Ministry in carrying out its legislated duties, I believe that the details of this case warrant special attention and investigation. Given the questionable actions of the Ministry officials assigned to investigate the complaint made against me by the affected person, it hardly seems just to authorize the same Ministry to determine whether I should have access to the affected person's name.

I have reviewed the information which I have found to qualify for exemption under section 21(3)(b). I find that the appellant's arguments are not sufficiently compelling to outweigh the purpose of this exemption. Moreover, I find that the appellant's interest in the information is essentially a private one, that is, to determine who made the complaint against her. Accordingly, I find that there is no compelling public interest in disclosure of the affected person's name and telephone number, and section 23 of the Act is not applicable.

Therefore, I find that the information withheld by the Ministry is exempt from disclosure under section 49(b) of the Act. Because of the decision I have made, it is not necessary for me to consider the application of section 20 of the Act.

## **ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ May 15, 1997