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

ORDER PO-1768

Appeal PA-990300-1

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received a four-part request under the Freedom of Information and Protection of Privacy Act (the Act) relating to an incident that took place in Camp Ipperwash in August 1993. The Ministry issued a separate decision for part 3 of the request, which reads:

> The information gathered on the movements of [a named individual] within Camp Ipperwash and its vicinity.

The Ministry's decision was to refuse to confirm or deny whether responsive records exist, pursuant to sections 14(3) and 21(5) of the Act.

The requester, now the appellant, appealed the Ministry's decision.

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

I initially provided a Notice of Inquiry to the Ministry. After reviewing the Ministry's representations, I sent the Notice to the appellant, together with all non-confidential portions of the Ministry's representations. The appellant did not submit representations.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY EXISTENCE OF A RECORD AND THE PERSONAL INFORMATION EXEMPTION

Section 21(5) of the Act reads:

> 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.

For this reason, in relying on section 21(5), the Ministry must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. The Ministry must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P-339, P-808 upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)].

Therefore, before the Ministry is permitted to exercise discretion by invoking section 21(5), it must establish that:

1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[Order MO-1179]

Part one

An unjustified invasion of personal privacy can only result from the disclosure of personal information. Section 2(1) of the Act defines "personal information", in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph h).

The request names a specific individual. Accordingly, if any responsive records exist they would, by necessity, relate to this individual and would constitute his personal information. Responsive records might also contain personal information of other identifiable individuals contained in these records.

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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

Because of the nature of the section 21(5) exemption claim, I am unable to discuss the requirements of sections 21(2), (3) and (4) in detail. If records exist and, for example, they were created in the context of an investigation into a possible violation of law, or contain medical information about the named individual, then the presumptions in sections 21(3)(a) or (b) would apply. If records exist and, again for example, they contain highly sensitive information about the named individual, or were supplied to the Ministry in confidence, then the factors listed in sections 21(2)(f) or (h) would be relevant considerations.

The appellant is a law firm representing a client. The identity of the client is not known to me, and I have no evidence to suggest that any responsive records, if they exist, would contain the personal information of the appellant's client. On this basis, I have concluded that the request is not a request for the personal information of the appellant's client under section 47 of the Act, and any responsive records, should they exist, would be subject to the mandatory section 21(1) exemption claim. That being the case, the Ministry would be required to deny access unless disclosure would not constitute an unjustified invasion of the privacy of the named individual. Taking into account the absence of any apparent factors favouring disclosure, as well as the direction of the court in John Doe, I find that the disclosure of any responsive records, if they exist, would constitute an unjustified invasion of the privacy of the individual named in the appellant's request.

Part two

The Ministry submits that disclosure of the mere existence of the records would reveal personal information about the named individual, and that this disclosure would constitute an unjustified invasion of privacy. The Ministry submits:

> In the case at hand, the very nature of the request necessarily requires that the Ministry rely on the "confirm or deny" sections. The request is framed in such a manner that no other response is possible. Whether or not there are records, to do anything other than confirm or deny the existence of records would have the effect of potentially disclosing exempted information to the appellant.
>
> The importance of the ability of institutions to rely on the "confirm or deny" sections cannot be underestimated. The ability to do so is crucial for the proper administration of the Act and to avoid disclosures that would otherwise be exempted. It is not a question of being evasive with requesters. If there was no provision for refusing to confirm or deny the existence of records, the privacy protection and confidentiality principles of the legislation could easily be defeated.
>
> For example, if an institution maintained personal information about an individual, the mere confirmation of the existence of such personal information in response to a request would have the effect of disclosing personal information to the requester. Such an effect could be contrary to the Act. If records did exist in this case, it is clear that the request at hand could give rise to exactly this problem.
>
> A specific example of the purpose of the "confirm or deny" sections may be drawn from the field of law enforcement. If a requester were to request any information about them relating to police investigations, institutions must be able to rely on the "confirm or deny" provisions. To do otherwise might have the effect of disclosing that the requester is in fact subject to investigations. Such a disclosure could obviously compromise any investigation,

> and would indirectly provide the requester with information to which they would not otherwise be entitled.
>
> In these unique situations where a request gives rise to the problem of indirect disclosures in responding to the request, institutions rely on the "confirm or deny" provisions to avoid indirect disclosures. Institutions do so consistently and regularly in all cases where responding in a different manner to the request would indirectly disclose information to the requester. The IPC has repeatedly upheld such decisions in appropriate cases.

The Ministry provided additional details on this issue in the confidential representations submitted in response to the Notice.

I have been provided with sufficient evidence to satisfy me that disclosure of the existence or non-existence of records responsive to this request would itself reveal personal information about a named individual, specifically whether or not he has been involved with the Ministry in their law enforcement activities. I also find that disclosing the existence or non-existence of responsive records would constitute an unjustified invasion of the individual's personal privacy. As outlined in my part one discussion, any responsive records, should they exist, would not appear to contain the personal information of the appellant or his client, and I have been provided with no evidence in support of a finding that disclosure of the personal information of the named individual, if contained in any responsive records, would not constitute an unjustified invasion of that individual's personal privacy.

Accordingly, I find that both parts of the test for the application of section 21(5) have been established.

PUBLIC INTEREST OVERRIDE

During the course of mediation, the appellant raised the possible application of section 23 with respect to the section 21(5) exemption claim.

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

I included section 23 within the Notice of Inquiry and provided the appellant with an opportunity to submit representations on its applicability in the circumstances of this appeal. The appellant did not provided representations on this or any other issue in response to the Notice.

Based on the representations and other file materials before me, I am not persuaded that section 23 has application in the circumstances of this appeal.

Because I have found that the Ministry has established the requirements of section 21(5), it is not necessary for me to consider the section 14(3) exemption claim.

ORDER:

I uphold the Ministry's decision.

Original signed by: March 21, 2000
Tom Mitchinson
Assistant Commissioner