

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2708

Appeal MA11-310

County of Simcoe

March 28, 2012

Summary: The appellant sought access to any personal information about himself that might be contained in an identified individual's Ontario Works file. The county refused to confirm or deny the existence of any such records under section 14(5) on the basis that information of this sort, if it existed, would fall within the ambit of the presumption in section 14(3)(c). The adjudicator found that responsive records, if they exist, would contain the personal information of the Ontario Works applicant and that the disclosure of that information, or even the confirmation of its existence, would result in a presumed unjustified invasion of personal privacy under section 14(3)(c). As a result, the county's reliance on section 14(5) was upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 14(3)(c) and 14(5).

OVERVIEW:

[1] The County of Simcoe (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information contained in an Ontario Works file relating to a specified individual. Specifically, the requester sought access to the following information:

...

I would like to see and receive a copy of all records, recordings and documents, however stored, digitally or otherwise, as they relate to me or

what has been said about me.

...

[2] The county issued a decision advising that it cannot confirm or deny the existence of responsive records, citing section 14(5) of the *Act*.

[3] The requester (now the appellant) appealed the county's decision. During mediation, the appellant indicated that he is pursuing access to the information contained in any responsive records which relates only to him, and not that relating to other individuals. The county reiterated its reliance on section 14(5) of the *Act* and advised that to confirm or deny the existence of any records would constitute a presumed unjustified invasion of personal privacy under section 14(3)(c) of the *Act*, which reads:

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

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

[4] No further mediation was possible and the file was transferred to the adjudication stage of the process in which an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the county, initially, a complete copy of which was shared with the appellant. I also received representations from the appellant, which I shared, in their entirety, with the county. Finally, I invited the county to submit additional representations by way of reply, and it did so.

[5] In this decision, I uphold the county's application of section 14(5) and dismiss the appeal.

ISSUES:

Issue A: Would records responsive to this request, if they exist, contain "personal information" as defined in section 2(1) and, if so, to whom would this information relate?

Issue B: Has the county properly applied section 14(5) of the *Act* in the circumstances of this appeal?

DISCUSSION:

A: Would records responsive to this request, if they exist, contain "personal information" as defined in section 2(1) and, if so, to whom would this information relate?

[6] The county takes the position that records that are responsive to the appellant's request, if they exist, would by their very nature contain information that qualifies as "personal information" as that term is defined in section 2(1) of the *Act*, which reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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;

[7] The county goes on to submit that this personal information, if it exists, would relate to an identifiable individual other than the appellant. Such information would include, but not be limited to, correspondence sent to or from that individual [paragraph (f) of the definition], the views or opinions of another individual about the individual [paragraph (g) of the definition] and the individual's name, along with other personal information about the individual [paragraph (h)] of the definition.

[8] The appellant has provided extensive submissions which indicate that he is aware of the existence of responsive records that contain personal information relating not only to other identifiable individuals, but also to him. He claims to only be seeking access to his own personal information, particularly any information that reflects the views of others about him which would fall within the ambit of paragraph (e) of the definition.

[9] Based on my review of the request itself and the representations of the parties, I am of the view that responsive records, if they exist, would consist of records containing the personal information of one or more identifiable individuals other than the appellant, as contemplated by the definition of that term in section 2(1) of the *Act*. The very nature of the records which would respond to the request, which seeks access to records compiled by the county as a result of an application for Ontario Works benefits by an individual known to the appellant, lead to this conclusion.

[10] In addition, I find that because of the appellant's relationship with the applicant for benefits, responsive records, if they exist, could reasonably be expected to contain his personal information, as well as that of other identifiable individuals, within the meaning of the definition of that term in section 2(1) of the *Act*.

B: Has the county properly applied section 14(5) of the *Act* in the circumstances of this appeal?

Introduction

[11] Section 14(5) 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.

[12] Section 14(5) gives the county discretion to refuse to confirm or deny the existence of a record in certain circumstances. A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the county is denying the requester the right to know whether a record exists, even when one does not. This section provides

institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

[13] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and
2. Disclosure of the fact that the record exists (or does 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.

[14] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.¹

Part one: disclosure of the record (if it exists)

Unjustified invasion of personal privacy

[15] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

Section 14(3): disclosure presumed to be an unjustified invasion of privacy

[16] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

¹[Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802].

[17] The county takes the position that personal information contained in any records responsive to the request, as framed, would by definition fall within the ambit of the presumption in section 14(3)(c) which states:

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

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

[18] The county argues that any responsive records, if they existed, "would be records belonging to another individual and would be records compiled for the sole purpose of determining one's eligibility for social service or welfare benefits or to the determination of benefit levels." Therefore, the county adds, "any disclosure of this type of information, if it existed, would constitute an unjustified invasion of privacy for the individual who the requester has named in the request."

[19] The appellant argues that the application of section 14(5) "is really rendered completely moot by the circumstances." He provides evidence to demonstrate his knowledge of the fact that an identified individual is in receipt of benefits under Ontario Works. Therefore, he submits that the disclosure of that fact by the acknowledgement of the existence of responsive records has been made redundant. However, the appellant also concedes that the presumption in section 14(3)(c) could apply in this case though he argues that there is no "personal information" relating to other individuals in the records he is seeking. He argues that the presumption is overcome by the fact that the information used to determine the individual's eligibility for Ontario Works made use of "defamation and deceit".

[20] In my view, the county has established that records that are responsive to the request, if they exist, would fall within the ambit of the presumption in section 14(3)(c). As the request was originally framed, the appellant clearly was seeking records about himself that were included with those relating to the determination of another specified individual's eligibility for Ontario Works benefits. As a result, I conclude that the records sought, if they exist, would contain information whose disclosure is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(c). I conclude that the exceptions to the section 14(1) exemption in section 14(4) do not apply and there is no public interest in the disclosure of such information, if it existed, under section 16. Any such information would, accordingly, be exempt from disclosure under section 14(1). Further, I conclude that if any responsive records which also contain the personal information of the appellant exist, they would qualify for exemption under section 38(b).

Part two: disclosure of the fact that the record exists (or does not exist)

[21] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[22] In support of its position that part two of the test under section 14(5) has been satisfied, the county submits that:

To disclose facts with regard to whether or not any such records exist would require disclosing whether or not an individual (who is not the appellant) is or has ever sought eligibility for social service benefits. Such information, in and of itself, is deemed personal information in accordance with [the *Act*] and to convey any information in this regard, if it existed, would in accordance with section 14(3)(c) of the *Act* constitute an unjustified invasion of privacy for the individual named in the request.

[23] The appellant's representations do not directly address part two of the test under section 14(5).

[24] In my view, the county has demonstrated that the disclosure of the very existence of responsive records would disclose information that is, itself, exempt from disclosure under section 14(1). Confirmation that responsive records do, in fact, exist would disclose that the individual referred to in the request is or has been in receipt of social benefits. The disclosure of such information is presumed to constitute an unjustified invasion of the personal privacy of that individual under section 14(3)(c). As a result, I find that part two of the test under section 14(5) has been met by the county and I uphold its application in the circumstances of this appeal.

ORDER:

I uphold the county's decision to apply section 14(5) and I dismiss the appeal.

Original Signed by: _____
Donald Hale
Adjudicator

_____ March 28, 2012