



**Information and Privacy
Commissioner/Ontario**

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

ORDER 183

Appeal 890102

Ministry of Health



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

July 4, 1990

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order #183
Ministry of Health
Appeal No. 890102

This letter constitutes my order in your appeal of the decision of the Ministry of Health (the "institution"), regarding your request for information under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act").

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

On January 20, 1989, you wrote to the institution requesting access to:

a list of the salary rates of those employees on staff on March 31, 1988, where the annual rate is in excess of \$50,000.00; including the annual rates for employees who are employed under flexible working arrangements.

On March 17, 1989, the institution responded to your request by granting access to part of the information you had requested. Specific salaries and job classifications were disclosed, but the names and social insurance numbers of the individuals

receiving the salaries were withheld under the provisions of section 21 of the Act.

On April 4, 1989, you wrote to this office appealing the institution's decision. Notice of the appeal was given to the institution on April 19, 1989.

As you know, as soon as your appeal was received by this office, an Appeals Officer was assigned to investigate the circumstances of the appeal. A copy of the record at issue was obtained and reviewed.

During mediation, you indicated to the Appeals Officer that you were seeking the surnames of the individuals in question. On June 23, 1989, the Appeals Officer sent you a copy of an Order of Commissioner Sidney B. Linden (Order 61, Appeal Number 880166, dated May 26, 1989) wherein Commissioner Linden found that information similar to that which you had requested was exempt from disclosure pursuant to the provisions of section 21 of the Act. The Appeals Officer's letter also outlined the facts of the appeal and set out questions which paraphrased those sections of the Act which appeared to the Appeals Officer to be relevant to the appeal.

When you indicated that you wished the appeal to proceed to an inquiry, the Appeals Officer wrote to both you and the institution inviting representations. You have relied on representations made during the course of mediation, and the institution has provided written representations. I have considered all representations in making this Order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to

information under the control of institutions in accordance with the principles that information should be made available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with the right of access to their own personal information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in the Act lies upon the head.

The record at issue in this appeal is the severed portion of a computer printout 19 pages in length. The first page of the printout consists of a legend explaining certain short forms used in the remainder of the record. The remaining 18 pages are each titled "Classification Report". They set out a variety of employment information concerning certain employees of the institution.

On the copy of the record provided to you, much of the information in these 18 pages was severed because it was not responsive to your request. The information that was not blocked out related solely to individuals employed by the institution and earning \$50,000 per annum or more. You were given access to job classifications and salary levels for each of these employees, but names and social insurance numbers were severed.

The institution has indicated that these severances are justified under the provisions of section 21 of the Act, and has referred specifically to subsection 21(3)(f).

The issues arising in this appeal are as follows:

- A. Whether any of the information withheld by the institution is "personal information", as defined in subsection 2(1) of the Act.
- B. If the answer to Issue "A" is in the affirmative, whether the information withheld is properly exempt from disclosure pursuant to subsection 21(1) of the Act.
- C. If the answer to Issue B is in the affirmative, whether there is a compelling public interest in disclosure of the record exempted under section 21 that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

ISSUE A: Whether any of the information withheld by the institution is "personal information", as defined in subsection 2(1) of the Act.

The institution has argued that the severed information should not be disclosed because it comprises personal information exempt from disclosure under the provisions of section 21 of the Act. In all cases where a request involves access to personal information, it is my responsibility, at the outset, to determine whether the information contained in the record falls within the definition of "personal information" under subsection 2(1) of the Act.

"Personal information" is defined in subsection 2(1), as follows:

In this Act,

...

"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 where 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 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.

In my view, the specific salary earned by an individual is clearly information "about" that person. Reviewing the circumstances of this case, I note that you have already been supplied with the job classifications and salaries of the individuals in question. Therefore, I find that disclosure of the surnames of the employees, coupled with the information already supplied to you, would reveal other "personal information" about the employees within the meaning of subsection (h) of the definition of personal information. Accordingly, the information at issue in this appeal is "personal information".

ISSUE B: If the answer to Issue "A" is in the affirmative, whether the information withheld is properly exempt from disclosure pursuant to subsection 21(1) of the Act.

Once it has been determined that a record contains personal information, subsection 21(1) of the Act prohibits the disclosure of this personal information, except in certain circumstances. One such circumstance is contained in subsection 21(1)(f) of the Act which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

...

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Guidance is provided in subsections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Subsection 21(3)(f) provides that:

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

...

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The institution points out that the salary column in the record reveals the incomes of "each individual listed on the record". The institution therefore argues that release of the names would disclose information describing these individuals' incomes.

In your representations, you do not specifically address the application of subsection 21(3)(f). Rather, you emphasize the need for the accountability of funds paid by the Ministry of Health.

It is my view that disclosure of the surnames would constitute a presumed unjustified invasion of personal privacy under subsection 21(3)(f). In the circumstances of this appeal, given that the specific salaries have been released to you, disclosure of the surnames would describe an individual's income.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3)

have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption. In Order 20 (Appeal Number 880075) dated October 7, 1988, Commissioner Linden outlined the situations in which the presumption provided by subsection 21(3) might be overcome. At page 9 of that Order, he stated:

It is clear that the type of information listed in subsection 21(4) operate to rebut the presumption set out in subsection 21(3). The application of section 23 of the Act, which provides that an exemption from disclosure of a record under,

among other sections, section 21 "does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption", may also result in disclosure.

I will first consider the application of subsection 21(4). This subsection outlines a number of circumstances which rebut the presumption under subsection 21(3). Subsection 21(4)(a) provides:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

- (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

...

In my view, subsection 21(4)(a) does not apply in the circumstances of this appeal because the release of the surnames would have the effect of revealing the actual salary of certain employees and not the "salary range" as provided in subsection

21(4) (a). Subsection 21(4), therefore, does not act to rebut the presumed unjustified invasion of personal privacy under subsection 21(3).

I will now consider the possible application of subsection 21(2) in rebutting the presumption created by subsection 21(3). In reviewing your representations, it appears that they relate most strongly to the possible application of subsection 21(2) of the Act.

Subsection 21(2) states as follows:

21.__(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;

- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Commissioner Linden had the occasion to consider the application of subsection 21(2) in Order 20 supra and at page 9 of that Order he stated:

It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual.

In your representations you argue in favour of public accountability. You state, "my request, again, is for the accountability of the censored sum of \$364,484,865, by the Ministry of Health in the 'Salaries and Wages' section. Who was paid what, with PUBLIC funds, and why?"

By implication, you raise the possibility that disclosure may not be an unjustified invasion of personal privacy, in that it may be "desirable for the purpose of subjecting the activities of the Government of Ontario ... to public scrutiny" within the meaning of subsection 21(2) (a) of the Act.

The institution, on the other hand, submits that the salaries paid to specific individuals constitute "information of a highly sensitive nature" and that the denial of access is justifiable,

taking into consideration all of the provisions of subsection 21(2).

Having considered your representations and those of the institution, I feel that the provisions of subsection 21(2) as they relate to the circumstances in this case are not sufficient to rebut the presumption created by subsection 21(3).

Accordingly, I find that disclosure of the individuals' names would constitute a presumed unjustified invasion of personal privacy under subsection 21(3)(f) of the Act, and that this presumption has not been rebutted by either subsections 21(4) or 21(2). Unless the provisions of section 23 of the Act apply in the circumstances of this appeal, in my view, the requested information must be withheld from disclosure under the mandatory exemption provided by subsection 21(1) of the Act. The proper application of section 23 is discussed under Issue C below.

As a final point, in your representations you state that in previous years the information that you are now seeking was publicly available. You question why such information should not continue to be available. The question of access to information that was publicly available prior to the introduction of the Act is addressed in subsection 63(2) of the Act. Subsection 63(2) reads as follows:

This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.
(Emphasis added.)

As I have found that the information at issue in this appeal is personal information, subsection 63(2) is not available in this case.

ISSUE C: If the answer to Issue B is in the affirmative, whether there is a compelling public interest in disclosure of the record exempted under section 21 that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

Section 23 of the Act reads as follows:

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)

Two requirements must be satisfied in order to invoke the application of section 23 of the Act: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The Act is silent as to who bears the burden of proof with respect to the application of section 23. However, it is a general principle that a party that is asserting a right or a duty has the onus of proving its case. Therefore, the burden of establishing the application of section 23 lies upon you as the appellant.

In your representations, you question the idea that the provisions of section 23 are "not applicable to individuals, like myself, but only to a 'compelling public interest'." You

go on to question that you do not qualify, as a member of the public, with respect to the application of section 23.

The institution argues that there is no compelling public interest in the disclosure of employee names, in the circumstances of this case.

In considering whether section 23 applies in this case, I am mindful that the expenditure of public funds must be open to scrutiny. However, the question in this case is whether identifying individuals and their specific salaries achieves this public accountability. In the circumstances of this appeal, I am not convinced that there is a compelling public interest in disclosure of the record which clearly outweighs the purpose of the exemption, which is to say the protection of personal privacy as provided in subsection 21(1) of the Act. In reaching my conclusion, I find myself in agreement with the following statement made by Commissioner Linden at page 12 of Order 61 supra:

In drafting the personal information exemption provided by section 21 of the Act, the legislature weighed the competing interests of access and privacy and determined that, as a general rule, individual salary figures of public servants should be protected from disclosure, while salary ranges for positions held by these individuals should be accessible to the public.

In conclusion, I find that section 23 does not apply and I uphold the head's decision.

Yours truly,

Tom A. Wright
Assistant Commissioner

cc: The Honourable Elinor Caplan
Ministry of Health

Mr. Andrew Parr, FOI Co-ordinator