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

ORDER PO-2541

Appeal PA-040215-1

Archives of Ontario

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NATURE OF THE APPEAL:

The Archives of Ontario (the Archives), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for two correctional centre files, identified by file number, which relate to a named individual believed to be the requester's birth father. Attached to the request was a letter addressed to the requester from the Adoption Disclosure Registry at the Ministry of Community, Family, and Children's Services (now the Ministry of Community and Social Services) which states:

> Your birth father was [name] born approximately 1913, according to your birth mother. At the time of your birth he was said to be in the [a named correctional facility in Ontario]. He was not married.
>
> No further information was provided about him. His full date of birth is unknown, as is the place of his birth or the names of his relatives.
>
> A search was completed to see if he was born in Ontario but no birth certificate could be found. There is no record of anyone with his name and year of birth marrying in Ontario and no one with this name and age was found to have died here.

In its decision letter, the Archives cited section 21(5) of the *Act* to refuse to confirm or deny the existence of any records relating to the name provided by the requester. In addition, the Archives stated that section 21 of the *Act* prohibits an institution from releasing personal information without the consent of the individual to whom the information relates. The decision letter noted that an individual's criminal record is included in the definition of personal information.

The Archives also informed the requester that the *Act* states that personal information does not include information about an individual who has been dead for more than 30 years. The Archives indicated that since the requester had been unable to provide any evidence that the named individual was deceased, the release of responsive records, if they exist, would violate section 21 of the *Act*.

The requester (now the appellant) appealed the Archives' decision to this office. In his appeal letter, the appellant's representative raised the possible application of section 21(1)(b) (an exception to section 21 that applies in "compelling circumstances affecting the health or safety of an individual").

Mediation did not resolve the appeal, which was moved to adjudication. The appeal was then put on hold, pending the Ontario Court of Appeal's decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 95. As outlined in more detail below, this decision upheld the Commissioner's approach to section 21(5) of the *Act*.

Subsequent to the decision being issued in *Minister of Health and Long-term Care*, the appeal was reactivated. I began the adjudication process by sending a Notice of Inquiry to the Archives, outlining the facts and issues in the appeal and inviting it to provide representations. The Archives responded with representations. I then sent the Notice of Inquiry, along with a copy of the Archives' representations, to the appellant and invited his representations. The appellant submitted representations in response. I then sent the appellant's representations to the Archives, inviting their representations in reply. The Archives advised this office by telephone that they would not be submitting reply representations.

SUMMARY OF CONCLUSIONS:

In this order, I have decided not to uphold the Archives' section 21(5) claim because, in my view, the requirements for the application of this section are not met. I therefore confirm the existence of responsive records. In addition, I am satisfied on all of the evidence before me that the individual named in the records is the appellant's birth father. With respect to disclosure of the records, I have concluded that the information of a medical nature in the records is not exempt under section 21(1) of the *Act* and should be disclosed to the appellant. The remaining information is exempt under section 21(1).

RECORDS:

There are 19 pages of responsive records. Of these, pages 4, 12, 13, 14, 15 and 16 are of a medical nature and include notes that record medical appointments involving the named individual, two records comprising a Summary of Medical Examination and Summary of Physical Findings regarding the named individual, and a serological report concerning a test he had. The remaining records relate to his arrest and his incarceration at the named correctional facility (the correctional facility).

DISCUSSION:

PERSONAL PRIVACY/REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 21(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.

Section 21(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record even exists. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 21(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.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5), 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.
>
> [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (cited above), upholding Orders PO-1809, PO-1810]

As outlined above, requirement 1 raises the issue of whether disclosure of the records would constitute an unjustified invasion of personal privacy. This question overlaps with the issue of whether the records are exempt under section 21(1). I will therefore begin my analysis with requirement 1, and in the course of doing so, I will also decide whether the records are exempt under section 21(1).

Definition of personal information

As already discussed, under part one of the section 21(5) test the institution must demonstrate that disclosure of the records, if they exist, 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, 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The Archives states:

> The request was for information about a named individual and as a consequence, the request on its face is for "personal information" as defined in section 2 of the Act. No information has been provided that the named individual is deceased and therefore there is nothing to suggest that the exception in subsection 2(2) applies.

Section 2(2) of the *Act* states:

> Personal information does not include information about an individual who has been dead for more than thirty years.

The appellant does not dispute that the information he has requested is personal information; nor does the appellant claim that the exception in section 2(2) of the *Act* applies in the circumstances of this appeal.

As noted above, the records contain information about the named individual relating to his arrest and his incarceration at the correctional facility, as well as notes that record medical appointments involving the named individual, two records comprising a Summary of Medical Examination and Summary of Physical Findings regarding the named individual, and a serological report concerning a test he had. I am satisfied that this is "recorded information about an identifiable individual" and I find that the records contain the named individual's personal information.

Personal Privacy

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21 and disclosure is not an unjustified invasion of personal privacy. As stated above, the appellant raised the application of section 21(1)(b) during the mediation stage of this appeal.

Section 21(1)(b) of the *Act* states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

The appellant submits that "compelling circumstances affecting the health or safety of an individual …" exist in the circumstances of this appeal. The appeal letter indicates that the appellant is:

> …seeking information regarding his father because his own daughter [named individual and her date of birth] is suffering from serious medical difficulties that have, as yet, gone [undiagnosed]. She is losing the function of her arm and the medical profession has been unable to isolate the reason and is suggesting that medical history may provide essential information.

The Archives submits that, if records exist, section 21(1)(b) would not apply as:

> …. the appellant has not provided sufficient information to accurately establish that the individual named in the request is in fact the biological father of the

> appellant. In the absence of that information, it cannot be considered that there are "compelling circumstances affecting the health or safety of an individual" to vitiate the application of the exemption. Even if the medical information the appellant seeks exists, there is no indication that the medical information would be biologically related to the appellant; in the absence of that, it would not assist the appellant, and no 'compelling circumstances' would exist for its disclosure. Moreover, technically the exception only applies if the individual named is notified at a last known address and, in this context, nothing credible has been provided to enable such notice to be effected.

The Archives' submission suggests that the appellant must meet a high standard of proof, in the nature of the criminal law "beyond a reasonable doubt" standard. In my view, this standard is inappropriately high. In *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300, the Court of Appeal commented on the related issue of the standard of proof required to establish that information in a record qualifies as personal information:

> The appellant submits that the "detailed and convincing" test applied by the Divisional Court in its review of the Commissioner's decision is unreasonably high. […]
>
> We note that the impugned formulation of the test has been used to express the onus to bring a case within one of the exemptions in the Act (see ss. 12-23), and that in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.) it was held that these words have been used by the Supreme Court of Canada "to describe the quality of evidence required to satisfy the burden of proof in civil cases."
>
> Notwithstanding this latter point, having regard to the substantive test of what is "personal information", referred to in paragraph 2 above, we think that reference to an evidentiary standard of "detailed and convincing evidence" is too demanding to be realistically appropriate. *What is required to satisfy or persuade the Commissioner, on the balance of probabilities, will depend on the circumstances of a case and the issues arising in it.* [Emphasis added.]

In my view, a similar approach should be taken in deciding whether information in a record is the personal information of a particular individual. In other words, on a balance of probabilities, I must be satisfied that the individual who is the subject of the records is in fact the person who he is claimed to be. The quality of evidence that is required to meet this standard of proof will vary, depending on the circumstances.

On the quality of evidence question, the Archives in essence suggests that the appellant must provide ironclad proof that the subject of the records is his birth father. I disagree. In the circumstances of this appeal, and in view of the age of the records and the fact that this incarceration took place 65 years ago, I have concluded that the appellant has provided evidence that is sufficiently persuasive.

There are persuasive reasons for believing that the individual referred to in the records is the appellant's birth father. These reasons include the following:

- the name of the appellant's birth father given in the request is identical to the name of the individual named in the records;

- as noted in the letter from the Adoption Disclosure Registry referred to above, the appellant's birth father was in the correctional facility when he was born, and in fact, based on the information provided to me about the appellant's birth date, and the dates of incarceration as recorded in the records, this was in fact the case;

- the records contain information about the particulars of the offence that also support this view, which I am not able to disclose in further detail without disclosing the contents of the records;

- although the birth date of the individual named in the records is later by six years than the approximate year of birth provided by the appellant's birth mother (again, as noted in the letter from the Adoption Disclosure Registry), this does not, in my view, negate the other factors showing the named individual is likely to be the appellant's birth father.

Accordingly, I am satisfied, on a balance of probabilities, that the individual named in the records is the appellant's birth father. That is not to say that in other circumstances (for example, where the records are more recent and/or the identity of the individual is subject to more conclusive proof), further evidence might not be required to show that something is a particular individual's personal information. Where, for instance, an institution seeks to establish that a requester is actually the individual mentioned in requested records, that institution might, in appropriate circumstances, require photo identification, or some other type of proof. In this case, however, further proof is not available and in my view, the evidence supports the conclusion I have reached.

As a matter of substance, section 21(1)(b) applies "in compelling circumstances affecting the health or safety of an individual…." The Archives' representations do not specifically comment on whether this standard is met. As noted above, the appellant's purpose for seeking the information he has requested is because his daughter, the named individual's grand-daughter, "is losing the function of her arm and the medical profession has been unable to isolate the reason and is suggesting that medical history may provide essential information". In my view, this is precisely the sort of situation contemplated in section 21(1)(b), and the "compelling" threshold is met.

In these circumstances, I have concluded that section 21(1)(b) does not require me to decide whether the information in the records actually relates to the condition described by the appellant; that assessment can, in my view, only be made by a physician with a full

understanding of the grand-daughter's medical situation. It is sufficient in this case that the records in fact contain medical information whose possible relevance has not been ruled out. Also, in my view, section 21(1)(b) only applies to the information of a medical nature in the records, and not to more general information about the named individual's offence and/or correctional history.

On a more procedural note, the Ministry contends that section 21(1)(b) cannot apply in this case because of the requirement to send notification to "the last known address of the individual." In this case, there is no "last known address" of the named individual. It is clear from the records that he left the correctional facility more than 60 years ago. Therefore, as a practical matter, it is not reasonably possible to notify him. However, as a matter of legislative intent, it is in my view inconceivable that the notice requirement was enacted to create a barrier to disclosure under section 21(1)(b) where the last address is unknown. This would be completely contrary to the purpose of the section, which is to permit disclosure of potentially significant (and in some cases, possibly even life-saving) medical information. In these circumstances, the potential health interest must be paramount. Accordingly, the inability to notify the subject individual of the appeal does not negate the application of section 21(1)(b).

To conclude, I find that section 21(1)(b) applies to pages 4, 12, 13, 14, 15 and 16, and they are not exempt under section 21(1). An exception to this finding is the continuation of the record reproduced at page 11 on the top of page 12, which does not relate to medical matters and is therefore not subject to section 21(1)(b). As no other exemptions have been claimed, I will order that pages 4, 12 (except the top portion), 13, 14, 15 and 16 be disclosed to the appellant.

With respect to the requirements under section 21(5), I find that the disclosure of information that is subject to one of the exceptions enumerated in section 21(1) (including section 21(1)(b)) is not an "unjustified invasion of personal privacy," with the result that the first requirement under section 21(5) has not been met. It is clear that the exceptions in sections 21(1)(a) through (e) were enacted to address situations where personal information should not be withheld, and accordingly, disclosure of this information could not be an "unjustified" invasion of personal privacy. As well, it would be patently absurd to hold otherwise since this would permit institutions to refuse to confirm or deny the existence of records that are not exempt from disclosure.

Both requirements under section 21(5) set out above must be met in order for the section to apply. Because the first requirement is not met, I find that section 21(5) does not apply in relation to pages 4, 12 (except the top portion), 13, 14, 15 and 16. The Archives is therefore not entitled to rely on this provision to refuse to confirm or deny the existence of these records. I therefore confirm that responsive records exist.

Under the circumstances, it is not necessary for me to consider the second requirement under section 21(5) with respect to pages 4, 12 (except the top portion), 13, 14, 15 and 16.

Disclosure of pages 1-3, 5-11, 17-19 and top portion of page 12

I have found that the section 21(1)(b) exception to the mandatory section 21(1) exemption does not apply to 1-3, 5-11, 17-19 and the top portion of page 12. The only other exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "…does not constitute an unjustified invasion of personal privacy". In order to find that this exception is established, I must therefore be satisfied on the evidence that disclosure would *not* constitute an unjustified invasion of personal privacy.

The appellant's representations focus on the medical information which I am ordering disclosed under section 21(1)(b). I have considered the appellant's representations, the evidence before me, and the overall circumstances of this appeal and I find nothing to persuade me that disclosure of the remaining records would not constitute an unjustified invasion of personal privacy. I therefore find that the section 21(1)(f) exception to the mandatory section 21(1) exemption is not established for the remaining records, and they are therefore exempt under section 21(1). I will therefore order the Ministry not to disclose them.

Confirming the existence of pages 1-3, 5-11, 17-19 and top portion of page 12

My finding that section 21(5) does not apply, above, relates to pages 4, 12 (except the top portion), 13, 14, 15 and 16. On the issue of disclosing the existence of the remaining records, I have found them exempt under section 21(1), and this meets the first requirement under section 21(5) specified above. The second requirement for the application of section 21(5) requires that disclosure of the existence or non-existence of these records 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.

The only information to be conveyed by disclosing the existence of these additional records is information that is already conveyed by disclosing the existence of the medical records, namely the fact that the appellant's birth father was an inmate at the correctional facility. This is also referred to in the earlier letter to the appellant from the Adoption Disclosure Registry, which he enclosed with his letter of appeal. I also note that the appellant's request specified particular file numbers at the correctional facility. In my view, therefore, disclosing the existence of the additional records does not convey any further information to the appellant, and the second requirement is therefore not met. In addition, it is abundantly clear that the appellant was already aware of the involvement of the correctional facility, and in my view, refusing to confirm or deny the existence of the additional records would not protect anyone's privacy, and would be absurd under the circumstances. I find that section 21(5) does not apply.

ORDER:

1. I do not uphold the application of section 21(5) by the Archives.

2. I order the Archives to disclose pages 4, 12 (except the top portion), 13, 14, 15 and 16 to the appellant by sending a copy to him on or before **February 6, 2007**.

3. I order the Archives not to disclose the remaining records.

4. As this order discloses the existence of records, I will not release it to the appellant until **January 31, 2007.**

5. I reserve the right to require a copy of the records that are disclosed pursuant to order provision 2, above.

Original signed by: January 16, 2007
John Higgins
Senior Adjudicator