Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4600

Appeal PA23-00086

Ministry of Labour, Immigration, Training and Skills Development

January 31, 2025

Summary: An individual seeks access under the *Act* to a copy of an arbitrator's decision relating to the termination of an identified college professor. The ministry refused to confirm or deny the existence of the record.

In this order, the adjudicator upholds the ministry's decision, accepting that the disclosure of any responsive records, if they exist, and disclosure of whether the responsive records exist would be an unjustified invasion of privacy. She also finds no compelling public interest in disclosing whether the responsive records exist that would outweigh the purpose of the exemption claimed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 21(5).

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Labour, Immigration, Training and Skills Development (the ministry) for a copy of an arbitrator's decision relating to the termination of an identified college professor (the professor).

[2] The ministry issued an access decision advising the appellant it would neither confirm nor deny the existence of the requested records pursuant to section 21(5) (refuse to confirm or deny existence of record) of the *Act*.

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the ministry maintained its decision to claim section 21(5) of the *Act* in response to the appellant's access request. The appellant confirmed his interest in the records responsive to his request and raised the possible application of the public interest override in section 23.

[5] Mediation did not resolve the appeal, and it was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry. I sought and received representations from both the ministry and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] I note the appellant raises concerns regarding the professor's termination and the hearings that were conducted. The appellant raises procedural issues with the arbitration hearings as well as human rights issues in relation to the professor's termination. The appellant also alleges some individuals have been targeted for reprisal by the college. It appears the appellant submitted this information to provide context to his request and submissions on public interest. In any case, I confirm I cannot comment on the appellant's allegations in relation to the circumstances or appropriateness of the professor's termination or the subsequent arbitration hearings.

[7] In this order, I uphold the ministry's decision and dismiss the appeal.

ISSUES:

A. Would the records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*?

B. Did the institution properly apply section 21(5) of the *Act* when it refused to confirm or deny the existence of a record?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(5) exemption?

DISCUSSION:

Issue A: Would the records, if they exist, contain "personal information" as defined in section 2(1) of the *Act*?

[8] The ministry refuses to confirm or deny the existence of responsive records on the basis that section 21(5) of the *Act* applies because disclosure of the records and disclosure of whether the records do or do not exist would be an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of

personal information.

[9] In these circumstances, I must first determine whether records, if they exist, would contain the personal information of individuals other than the appellant. The term "personal information" is defined, in part, in section 2(1) of the *Act* as "recorded information about an identifiable individual." Section 2(1) provides examples of information considered "personal information" under the *Act*. Relevant to this appeal, section 2(2) states, "personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity."

[10] In its representations, the ministry submits the appellant seeks access to a copy of the decision by an arbitrator relating to the termination of a professor at an identified college. The ministry submits the college conducted hearings regarding the professor's termination. The ministry submits the record, if it exists, would contain personal information relating to the professor for the following reasons:

- The definition of personal information in section 2(1) of the *Act* includes a written or electronic record of information relating to the "employment history" of an identifiable individual.[1]

- The term "employment history" comprises of a "comprehensive overview of the job or work activities which an individual has undertaken in the course of his or her professional life."[2]

- The requested arbitrator's decision, if it exists, is a grievance arbitration award. The ministry submits that this type of decision is, by its very nature, related to employment history as it relates to an employment-related dispute.[3]

- More specifically, the IPC has found information about an employee's dismissal or termination to be "employment-related" by the IPC.[4]

[11] Therefore, the ministry submits that the requested arbitrator's decision, if it exists, would arise from a grievance arbitration challenging the employer's decision to terminate the professor, an event "clearly related" to the professor's employment history. As such, the ministry argues the resolution of the arbitration, written or recorded, if it exists, would be personal information within the meaning of section 2(1) of the *Act*.

[12] In his representations, the appellant submits an arbitrator's decision contains information provided during a public hearing. As such, the evidence and testimony

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[1] See paragraph (b) of section 2(1) of the *Act*.
[2] Reconsideration Order R-980015.
[3] The ministry refers to *Weber v. Ontario Hydro* [1995] 2 SCR 929 in which the Supreme Court of Canada found that "any employment-related dispute must be dealt with by way of arbitration."
[4] The ministry refers to Order MO-1654-I.

presented at the public hearings is in the public record. The appellant submits that, "the very 'public' nature of public hearings has made the information sought subject to public debate." In this manner, it appears the appellant takes the position that the public hearings negated the "personal" nature of the information at issue, despite it relating to the professor and their employment history.

[13] The appellant also claims the termination of a tenured professor is a professional matter and is therefore not "about" the professor in a personal capacity. Referring to section 2(2), reproduced above, the appellant submits the information in the record, if it exists, relates to the professor in a business or professional capacity and is therefore not their personal information.

[14] The appellant's claims are not correct. As stated above, personal information means "recorded information about an identifiable individual" in section 2(1) of the *Act*. The *Act* does not require personal information to be kept private or confidential for it to be considered "personal" in nature.

[15] Further, while the record, if it exists, would reveal professional information about the professor, it would also reveal information about them in a personal capacity. Specifically, the record, if it exists, would reveal the circumstances surrounding the professor's termination and the award of the arbitrator. Therefore, even if the record, if it exists, contains information relating to the professor in a professional, official, or business capacity, it will also contain "personal information" because it will reveal something of a personal nature about them.[5] In particular, I agree the record, if it exists, would contain information relating to the professor's employment history, which is considered "personal information" in paragraph (b) of the definition of "personal information" in section 2(1). In addition, I find the record would contain the professor's name where it appears with their employment history, which is considered "personal information" in paragraph (h) of the definition. Therefore, in consideration of the parties' representations, I am satisfied the record, if it exists, would contain personal information relating to an identifiable individual.

Issue B: Did the institution properly apply section 21(5) of the *Act* when it refused to confirm or deny the existence of a record?

[16] Section 21(5) of the *Act* gives an institution the discretion to refuse to confirm or deny the existence of a record if confirming or denying the record's existence would lead to an "unjustified invasion of personal privacy."

[17] While this section gives the institution this discretion, it should be used only in rare cases.[6] By choosing to rely on its section 21(5) powers, the institution is denying the requester the right to know whether a record even exists or not. This is very different from the usual case, where even if the institution denies access to a record, the requester

[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order P-339.

is at least told whether there is a record.

[18] For section 21(5) to apply, it must be the case that:

1. Disclosure of the record (if it exists) would lead to an unjustified invasion of personal privacy, and

2. Disclosure of the fact that the record exists (or does not exist) would give some information to the requester, and disclosure of that information would lead to an unjustified invasion of personal privacy.

[19] The Ontario Court of Appeal has upheld this approach and two-part test.[7]

Part one: would disclosure of the record (if it exists) be an unjustified invasion of personal privacy?

[20] Under part one of the section 21(5) two-part test, the ministry must demonstrate that disclosure of the record, if it exists, would be an "unjustified invasion of personal privacy" of the individual to whom the personal information relates. Above, I found that if the requested record exists, it would contain information that qualifies as the personal information of the professor.

[21] Sections 21(1) to (4) are relevant in deciding if disclosure of the information would be an "unjustified invasion of personal privacy" under section 21(5). If any of the sections 21(1)(a) to (e) exceptions exist, disclosure would not be an unjustified invasion of personal privacy. I find none of the exceptions in section 21(1)(a) to (e) are present.

[22] Sections 21(3)(a) to (h) outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.[8] If one of these presumptions applies, the personal information cannot be disclosed unless:

- There is a reason under section 21(4) that disclosure of the information would not be an "unjustified invasion of personal privacy," or

- There is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed (the public interest override).[9]

[23] If the personal information being requested does not fit within any presumptions under section 21(3), one must next consider the factors set out in section 21(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy.

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[7] Orders PO-1809 and 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.

[8] If a section 14(3) presumption is found to apply, it cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

[9] *John Doe v. Ontario* (*Information and Privacy Commissioner*), (1993), 13 O.R. (3d) 767 (Div. Ct.).

However, if one of the situations in section 21(4) is present, then disclosure would not be an unjustified invasion of personal privacy and the institution may not rely on section 21(5).

[24] The ministry acknowledges the exemption in section 21(5) of the *Act* should only be applied when the disclosure of the personal information at issue constitutes a presumed unjustified invasion of personal privacy. The ministry submits it applied this exemption and exercised its discretion appropriately in this case.

[25] The ministry submits the disclosure of the record, if it exists, would lead to an unjustified invasion of personal privacy for the following reasons:

- The record, if it existed, does not contain information relating to the appellant.
- None of the exceptions allowing for disclosure in sections 21(1)(a) to (f) would apply; in other words, if a record exists, the *Act* would require the head to refuse to disclose it because it would result in an unjustified invasion of personal privacy.
- Section 21(3)(d) provides that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information relates to an individual's employment history. As discussed above, the ministry takes the position that the record, if it exists, relates to the professor's employment history.

[26] The ministry submits none of the exceptions in section 21(4) applies to the record, if it exists. Therefore, the ministry submits the disclosure of the record, if it exists, would presumptively constitute an unjustified invasion of personal privacy, thereby satisfying the first part of the test for section 21(5).

[27] I agree with the ministry that the presumption in section 21(3)(d) applies to the record, if it exists. This presumption covers several types of information connected to employment or education history. I find the responsive record, if it exists, would relate to the employment history of the professor. Accordingly, I accept that the section 21(3)(d) presumption applies and disclosure of the record, if it exists, would be an unjustified invasion of personal privacy.

[28] In their representations, the appellant raises the application of the factor favouring disclosure in section 21(2)(a) which requires the head to consider whether "the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny." The appellant submits that, without the ability to review the decision requested, there is no public scrutiny of the arbitration process relating to the professor. The appellant submits the disclosure of this record, if it exists, would subject the Government of Ontario, the college and the arbitrator to public scrutiny and accountability. However, I have found the presumption section 21(3)(d) would apply to the record, if it exists. As such, none of the factors favouring disclosure can apply to outweigh the application of the presumption.

[29] I have also considered whether any of the exceptions to the exemption in section 21(4) are engaged in this appeal and find none do.

[30] Therefore, I find that disclosure of the record, if it exists, would be an unjustified invasion of the personal privacy of the professor identified in the appellant's request. I find the ministry has established part one of the two-part test for the application of section 21(5).

Part two: Would disclosure of the fact that the records exist (or do not exist) be an unjustified invasion of personal privacy?

[31] Under part two of the section 21(5) two-part test, the ministry must show that disclosure of just the fact that a record does or does not exist would disclose some personal information to the appellant, and this would be an unjustified invasion of personal privacy.

[32] The ministry argues the fact that a grievance arbitration award exists or does not exist conveys information about the professor's termination grievance to the appellant. In other words, the ministry submits this information would confirm whether the professor's employment was resolved through the arbitration process or not. The ministry submits this information is related to the professor's employment history and is their personal information. The ministry submits the professor's employment-related dispute and its resolution, whether it be through arbitration, settlement or otherwise, is personal information relating to the professor's employment history which is presumed to be an unjustified invasion of personal privacy under section 21(3)(d). Therefore, the disclosure of the existence or non-existence of the arbitrator's decision would be an unjustified invasion of their personal privacy.

[33] The appellant does not directly address this part of the section 21(5) test in his representations. The appellant asserts the record, if it exists, should be subject to public scrutiny and there is a public interest in the record.

[34] I agree with the ministry that the disclosure of the fact that the responsive record does or does not exist would reveal personal information relating to the professor's employment history. As such, I find the presumption in section 21(3)(d) applies because the disclosure of the fact that the responsive record does or does not exist would in turn disclose whether the professor's employment was resolved through arbitration, which would be an unjustified invasion of personal privacy.

[35] As a result, I find the ministry established part two of the two-part test for the application of section 21(5). Having found the ministry established both parts of the test, I find the ministry established that section 21(5) of the *Act* applies.

Exercise of Discretion

[36] Section 21(5) is a discretionary exemption. As noted above, the IPC has found that

the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases. I must, therefore, review the ministry's exercise of discretion in deciding to rely on this section to refuse to confirm or deny the existence of the responsive record.

[37] On appeal, the IPC may review the ministry's decision to determine whether the ministry exercised its discretion and, if so, whether it erred in doing so. I may find the ministry erred in exercising its discretion and send the matter back to the ministry for a re-exercise of discretion based on proper considerations if I determine the ministry exercised its discretion in bad faith or for an improper purpose, considered irrelevant considerations, or failed to consider relevant considerations.

[38] The ministry submits it exercised its discretion to apply section 21(5) appropriately. The ministry submits it considered the following factors in deciding to apply section 21(5):

- The nature of the record at issue, if it exists,
- The nature and quantity of the personal information contained in the record at issue, if it exists,
- The record does not contain information relating to the appellant,
- There is no compelling public interest in disclosure of the record,
- The nature of the statutory scheme (*Colleges Collective Bargaining Act, 2008*[10]) under which the decision, if it exists, would have been made; and specifically, the fact that the *Colleges Collective Bargaining Act, 2008* does not require the ministry to maintain a repository of arbitration decision to be made available to the public, and
- The disclosure of the fact that the record exists or not would in itself convey information to the appellant, which would also constitute an unjustified invasion of personal privacy.

[39] The appellant does not address the ministry's exercise of discretion in their representations.

[40] I reviewed the parties' representations and the circumstances of this appeal. Upon this review, I find the ministry considered relevant considerations and did not act in bad faith or for an improper purpose. I find no evidence to support a finding that the ministry exercised its discretion in applying section 21(5) to the appellant's request in bad faith or for an improper purpose, considered irrelevant considerations, or failed to consider relevant considerations. The appellant seeks access to personal information of an identified professor. I have found the disclosure of that personal information, including

[10] S.O. 2008, c.15.

the confirmation or denial of whether that personal information exists, would be an unjustified invasion of personal privacy of the professor. The ministry appropriately considered the nature of the information at issue and the purpose of the personal privacy exemption.

[41] Accordingly, I conclude the ministry exercised its discretion appropriately in relying on section 21(5) to refuse to confirm or deny the existence of records responsive to the appellant's request, and I uphold its decision.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(5) exemption?

[42] Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 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.

[43] For second 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[44] The appellant asserts there is a compelling public interest in the disclosure of the requested record that "outweighs the purpose of any exemption, including section 21(5)." The appellant submits there is a significant public interest in "the disclosure of accountability of government and its agencies, such as [the college identified in their request], the Ministry of Labour, and the appointment and governance of Arbitration processes." The appellant submits there is no integrity in the arbitration process if its processes and decisions are kept secret.

[45] The appellant asserts there is a "basic public interest" in ensuring the arbitration process be transparent to allow the public to know more about the operations of government, generally. The appellant submits the arbitrator's decision should be disclosed because it sets precedent and would provide insight into the arbitration process and any potential transgressions or issues that arose.

[46] The appellant asserts the compelling public interest outweighs the purpose of the personal privacy exemption. The appellant notes they attended the public arbitration hearings as a member of the public. The appellant submits the arbitrator has not issued a decision and "without a decision justice is neither done or seen to be done." The appellant submits the absence of a decision or ruling implies the hearing was not a fair process. As such, the appellant submits it is important that the decision be disclosed in the public interest of ensuring a fair adjudication process.

[47] Previous IPC orders have stated that, in order to find a compelling public interest

in disclosure, the information in the record must serve the purpose of informing or enlightening citizens about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[11] The IPC has also found that a "public interest" does not exist where the interests being advanced are essentially private in nature.[12] However, if a public interest raises issues of more general application, the IPC may find there is a public interest in disclosure.[13]

[48] I am not satisfied there is a compelling public interest in disclosure of the fact that responsive records do or do not exist that outweighs the purpose of the section 21(5) exemption.[14] While previous IPC orders have found a compelling public interest in situations where a record relates to the integrity of the criminal justice system,[15] for example, I am not convinced similar considerations apply in this refuse to confirm or deny appeal. The appellant argues the record requested should be disclosed to him because there is a compelling public interest in its disclosure. However, the issue before me is not whether the record exists, but whether the ministry appropriately refused to confirm or deny the existence of the record.

[49] In the circumstances of this appeal, even if there was a compelling public interest in knowing whether there is an arbitration decision or award relating to the professor, I find it would not outweigh the purpose of the section 21(5) exemption.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: January 31, 2025

Justine Wai
Adjudicator

[11] Orders P-984 and PO-2556.
[12] Orders P-12, P-347, and P-1439.
[13] Order MO-1564.
[14] Order MO-4261.
[15] Order PO-1779.