Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4683

Appeal PA23-00512

Ministry of Labour, Immigration, Training and Skills Development

July 23, 2025

Summary: An individual made a request under the *Freedom of Information and Protection of Privacy Act* for access to a copy of an arbitrator's decision relating to the termination of a 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 there is 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, sections 2(1) (definition of "personal information"), 21(5) and 23.

OVERVIEW:

[1] The appellant made a 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 access to a copy of an arbitrator's decision relating to the termination of an identified college professor (the professor) that occurred in June 2017.

[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) 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 sought and received representations from the ministry and the appellant.[1]

[6] In this order, I uphold the ministry's decision to refuse to confirm or deny the existence of records responsive to the appellant's request and dismiss the appeal.

PRELIMINARY ISSUE:

[7] In his representations, the appellant submits the requested record has already been released by the ministry to the public in response to another access request made under the *Act*. The appellant provided me with a heavily redacted copy of an access decision relating to an arbitrator's decision from December 2020 relating to the professor.

[8] Upon review of the access decision provided by the appellant in relation to arbitrator's decision, it is unclear whether the record subject to the redacted decision letter the appellant provided is responsive to his request that is being considered in this appeal. The appellant did not provide me with a copy of the record disclosed in response to the other access request. Therefore, I am unable to confirm whether the record that may have been disclosed by the ministry in response to this other access request is responsive to the appellant's request.

[9] In any case, the issue of whether the record disclosed in response to another access request is responsive to the access request at issue in this appeal is not before me. The issue before me is whether the ministry properly refused to confirm or deny the existence of the record responsive to the appellant's request under section 21(5). In other words, even though a responsive record may exist, under section 21(5), the ministry may still exercise its discretion and refuse to confirm or deny its existence to the appellant. I cannot determine whether the responsive record exists. I can only review the ministry's decision to refuse to confirm or deny the existence of a record responsive to the appellant's request.

[1] I note the appellant raised concerns regarding whether the arbitration hearings relating to the professor's termination were "a secret process" in his representations. I confirm I cannot comment on this issue.

ISSUES:

A. Would the record, if it exists, contain "personal information" as defined in section 2(1) of the *Act*?

B. Did the ministry 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 the confirmation of whether the record exists that clearly outweighs the purpose of the section 21(5) exemption?

DISCUSSION:

Issue A: Would the record, if it exists, contain "personal information" as defined in section 2(1) of the *Act*?

[10] 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 record and disclosure of whether the record does or does not exist would be an unjustified invasion of personal privacy.

[11] An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[12] In these circumstances, I must determine whether records, if they exist, would contain the personal information of individuals other than the appellant first. 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(b) of the *Act* holds information relating to the employment history of an individual is considered personal information under the *Act*. I also note that 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."

[13] In its representations, the ministry submits the appellant seeks access to a "copy of the decision on the termination" of the professor. The ministry submits the decision the appellant requested would be about the professor's termination. Therefore, the ministry submits the disclosure of the arbitrator's decision, if one exists, would contain the personal information of the professor for the following reasons:

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

- 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."[3]

- The responsive record, if it exists, is a grievance arbitration award. The ministry submits this type of decision is, by its very nature, related to employment history as it relates to an employment-related dispute.[4]

- The ministry notes the IPC has found information about an employee's dismissal or termination to be "employment-related."[5]

[14] In this case, the ministry submits 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. The ministry concludes by submitting that resolution of the arbitration, written or recorded, if it exists, would be personal information within the meaning of section 2(1) of the *Act*.

[15] The appellant does not directly address the issue of whether the record, if it exists, would contain the personal information of an identifiable individual.

[16] I have reviewed the parties' representations and the wording of the request and find the record, if it exists, would contain the personal information of an identifiable individual, the professor. I acknowledge section 2(2) provides that information relating to an individual in a business or professional capacity is not their personal information. I also acknowledge at least some of the information at issue in the record, if one exists, would reveal professional information about the professor. However, I also find the record, if it exists, would contain information relating to the professor in a personal capacity, such as the circumstances around their termination and the award of the arbitrator. I also find the record, if it exists, would contain information relation 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.

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[2] See paragraph (b) of section 2(1) of the *Act*.
[3] Reconsideration Order R-980015.
[4] 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."
[5] The ministry refers to Order MO-1654-I.

[17] I further find the disclosure of the fact that the record exists or does not exist would also reveal something personal about the professor, such as the fact that they were engaged in arbitration to resolve an employment-related dispute. In other words, revealing the record's existence would reveal "personal information" about the professor because it would reveal something of a personal nature about them.[6]

[18] In conclusion, I find the record, if it exists, would contain the personal information of the professor. In addition, I find disclosing whether the record exists would, in and of itself, reveal the professor's personal information.

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

[19] 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."

[20] While section 21(5) gives the institution this discretion, it should be used only in rare cases.[7] By choosing to rely on its section 21(5) powers, the ministry is denying the appellant the right to know whether a record even exists or not. This is very different from the usual case where, even if an institution denies access to a record, the requester is at least told whether there is a record.

[21] 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.

[22] The Ontario Court of Appeal has upheld this approach and two-part test.[8]

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

[23] 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. I have found that if the record exists, it would contain information that qualifies as the personal information

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[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order P-339.
[8] 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.

of the professor.

[24] In his representations, the appellant claims the personal privacy exemption cannot apply because the disclosure of the record "unequivocally cannot be an 'unjustified invasion of personal privacy' based on information already disclosed to the public during the public hearing." I have not been provided with the information the appellant alleges has already been disclosed through the public hearing. Therefore, I will not make any determination regarding what the appellant alleges was disclosed through the public hearing and whether the record, if it exists, would be based on that information.

[25] 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. The appellant has not claimed raised any of the exceptions in sections 21(1)(a) to (e) and I find that none of them apply to the circumstances of this appeal.

[26] Sections 21(3)(a) to (h) outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.[9] 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).[10]

[27] 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 disclosure would be an unjustified invasion of personal privacy. I note the factors in sections 21(2)(a) to (d) weigh in favour of disclosure of the personal information at issue and the factors in sections 21(2)(e) to (i) weigh against disclosure.

[28] 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).

[29] The ministry submits the disclosure of the record, if it exists, would presumptively constitute an unjustified invasion of personal privacy for the following reasons:

- The record, if it exists, does not relate to the appellant.

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[9] If a section 21(3) presumption is found to apply, it cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1) exemption has been established.
[10] *John Doe v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 767 (Div. Ct.).

- 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. The ministry submits the record, if it exists, relates to the professor's employment history.

[30] 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 educational history. I find the responsive record, if it exists, would relate to the employment history of the professor. Accordingly, I accept the section 21(3)(d) presumption applies and disclosure of the record, if it exists, would be an unjustified invasion of personal privacy.

[31] The ministry submits none of the exceptions in section 21(4) applies to the record, if it exists. I agree with the ministry.

[32] In conclusion, I find the presumption in section 21(3)(d) applies to the record, if it exists. As such, 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 or 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?

[33] 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. I found above that the fact that the record does or does not exist will disclose some personal information about the professor to the appellant.

[34] The ministry submits the fact that a grievance arbitration award exists or does not exist, in and of itself would convey information about the professor's termination grievance to the appellant. In other words, the disclosure of the fact that the record exists or does not exist would confirm that the professor's employment was or was not resolved through the arbitration process. 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.

[35] 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.

[36] 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.

[37] I further find that the exceptions in section 21(4) are not relevant here.

[38] 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. I will consider the appellant's claim that the public interest override applies below.

Exercise of Discretion

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

[40] 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.

[41] 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, if it exists
- The nature and quantity of the personal information contained in the record, if it exists
- There is no compelling public interest in the disclosure of the record
- The nature of the statutory (*Colleges Collective Bargaining Act, 2008*[11]) 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

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

- 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

[42] The appellant does not address the ministry's exercise of discretion in his representations. However, the appellant submits the requested record has already been released by the ministry to the public in response to another request made under the *Act*. I cannot confirm whether this is true. Further, this is allegation is not relevant to whether the ministry exercised its discretion to deny the appellant access under section 21(5) properly.

[43] I have reviewed the parties' representations and the circumstances of this appeal. 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 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.

[44] Accordingly, I conclude the ministry exercised its discretion appropriately in relying on section 21(5) to refuse to confirm or deny the existence of the records responsive to the appellant's request, and subject to my finding below regarding the possible application of the public interest override.

Issue C: Is there a compelling public interest in the confirmation of whether the record exists that clearly outweighs the purpose of the section 21(5) exemption?

[45] 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 clearly outweighs the purpose of the exemption.

[46] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the fact that the responsive record does or does not exist. Second, this interest must clearly outweigh the purpose of the exemption.

[47] The appellant submits it is in the public interest to release the record, if it exists, as well as any non-disclosure agreement that may relate to the arbitration hearings that took place. The appellant submits any responsive record would result from the outcome of a public hearing process and its disclosure is desirable for public scrutiny. He submits

the public hearings were paid for by taxpayers. The appellant submits "the disclosure of a secretive process about the termination of [the professor] is a compelling public interest."

[48] However, the issue before me is not whether there is a public interest in the disclosure of the record, if it exists. Rather, the issue is whether there is a public interest in the confirmation of whether the record exists.

[49] Previous IPC orders have stated that, in order to find a compelling public interest in disclosure of a record or other information, the information 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.[12] In this case, the confirmation of whether the record exists or not must serve to inform the public about the activities of their government or agencies or add in some way to the information the public has to express their opinions effectively. The IPC has also found a "public interest" does not exist where the interests being advanced are essentially private in nature.[13] However, if a public interest raises issues of more general application, the IPC may find there is a public interest in disclosure.[14]

[50] I have reviewed the appellant's representations and am not satisfied there is a compelling public interest in disclosure of the fact that a responsive record does or does not exist that outweighs the purpose of the section 21(5) exemption.[15] While previous IPC orders have found a compelling public interest in situations where a record relates to the integrity of the criminal justice system,[16] 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 and whether there is a public interest in the disclosure of the fact that the record does or does not exist.

[51] In the circumstances of this appeal, I find the appellant has not established there is a compelling public interest in the disclosure of the fact that a responsive record does or does not exist. Further, I find that even if there was a compelling public interest in knowing whether there is an arbitration decision or award relating to the professor, there is no evidence to support a finding that the public interest outweighs the purpose of the section 21(5) exemption.

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

ORDER:

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

Original Signed by: July 23, 2025

Justine Wai
Adjudicator