



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

ORDER P-984

Appeal P-9400823

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request from a member of the media for access to all information concerning the establishment of a Local Area Network in the Ministry's Computer and Telecommunications Branch. More specifically, the requester sought access to information concerning a named individual, including his job classification and work duties, the company through which he was hired, his access to the Ministry's computer records, information relating to the circumstances under which he was hired and terminated, details of complaints and investigations regarding his employment, and information regarding any changes in procedures regarding the hiring of contractual employees after the named individual was let go.

The Ministry refused to confirm or deny the existence of the requested records pursuant to section 21(5) of the Act. The requester appealed the Ministry's decision and claimed that there was a compelling public interest in the disclosure of the records.

A Notice of Inquiry was sent to the Ministry, the appellant, the individual named in the request (the affected person) and a consulting company (the company). Representations were received from all parties.

DISCUSSION:

EXISTENCE OF RECORD

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. In my view, records of the nature requested, if they exist, would contain personal information of the affected person and other individuals.

Section 21(5) states:

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.

A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), the Ministry is denying the requester the right to know whether a record exists, even when one does not. These sections provide the Ministry with a significant discretionary power which I feel should be exercised only in rare cases.

An institution relying on this section must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. An institution must provide sufficient information and reasoning to satisfy me that disclosure of whether records exist would in itself convey information to the requester, the nature of which is such that its disclosure would constitute an unjustified invasion of personal privacy (Order P-339).

The Ministry states that confirming the existence of a record would result in the unjustified invasion of another individual's personal privacy. I do not agree. By simply confirming that records responsive to the request exist, the Ministry would not be compromising the privacy interests of any individual. In my view, the Ministry has failed to establish that disclosure of the mere existence of the requested records would result in an unjustified invasion of personal privacy, and I find that the requirements of section 21(5) have not been met. Accordingly, I find that section 21(5) does not apply in the circumstances of this appeal.

In order to dispose of this appeal, it is necessary for me to confirm that records do in fact exist. The records at issue are proposals submitted by the consulting company (which includes resumes, references and per diem rates of proposed candidates for the position), a tracking sheet for the tender, an evaluation summary of the proposals, an Ontario government purchase order, interview results and score sheets, invoices and time sheets, a list of invoices in question, a log of the accumulated cost of the consultant, a memo related to the performance of the affected person and a critical issue sheet.

INVASION OF PRIVACY

Section 21 of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in the circumstances listed in sections 21(1)(a) through (f) of the Act. Section 21(1)(f) reads:

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

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

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

The Ministry claims that the records relate to the employment history, a personal evaluation and the financial activities of identifiable individuals, as well as an indication of the affected person's ethnic origin and, therefore, the presumptions found in sections 21(3)(d), (f), (g) and (h) apply. The Ministry also submits that the information contained in the record is highly sensitive (section 21(2)(f)), was supplied in confidence (section 21(2)(h)) and its disclosure is likely to damage the reputation of the affected person (section 21(2)(i)).

The appellant submits that there is a need for public accountability.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the

personal information would **not** constitute an unjustified invasion of personal privacy. I have considered section 21(4), and I find it is not applicable in the circumstances of this appeal.

Having considered the record, the representations and the provisions of the Act, I find that disclosure of the proposals submitted by the consulting company (with the exception of Appendix B), the tracking sheet for the tender, the evaluation summary of the proposals, the purchase order and the response section of the critical issue sheet (with the exception of the first paragraph) would not constitute an unjustified invasion of personal privacy, provided the per diem rate and ceiling price of the affected person and the names of the alternate candidates are severed. I find that the requirements of the presumptions claimed by the Ministry do not apply to this information and that the factors favouring disclosure outweigh the factors favouring the protection of privacy. This information is administrative in nature and I am satisfied that the exception to the mandatory exemption applies.

I am not convinced, however, that the exception to the exemption applies to Appendix B of the company's proposals, the interview results and score sheets, invoices and time sheets, list of invoices in question, log of the accumulated cost of the consultant, memo related to the performance of the affected person, the per diem rates and ceiling prices, the names of the alternate candidates and the remaining portions of the critical issue sheet. Accordingly, I find that section 21 of the Act applies to that information.

THIRD PARTY INFORMATION

The Ministry indicated during the processing of this appeal that it also intended to claim the application of section 17 with respect to the two proposals submitted by the company, and the application of this section was included as an issue in the Notice of Inquiry. However, the Ministry has not addressed this section in its representations.

The test for exemption under section 17(1)(a), (b) or (c) is as follows:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of section 17(1) will occur.

The company indicates that disclosure of the proposals would significantly prejudice the competitive position of the company (section 17(1)(a)). The company indicates that these records contain technical and pricing information which was supplied in confidence to the Ministry. The company stresses that it supplied the information on the express understanding that it was being provided on a confidential basis, as disclosure would contravene the agreement of confidentiality maintained between the company and the individuals

concerned, and the public disclosure of its technical and pricing information would prejudice its competitive position.

Having reviewed the records and the representations, I note that despite an indication that proprietary or confidential information should be identified as such and the desired treatment specified, there is no indication on the record itself regarding confidentiality. Additionally, the specific areas where the company expressed concern in its representations are exempt from disclosure under section 21 of the Act. Accordingly, I am not satisfied that all of the requirements of section 17(1)(a) have been met and I find that the exemption does not apply.

PUBLIC INTEREST IN DISCLOSURE

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.

"Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

The appellant alleges that the hiring of the affected person amounted to a breach of security, and placed the integrity of a sensitive section of the Ministry at risk. He raises serious questions about the activities of government, and submits that the public must know how the alleged incident happened, why it happened and if anything untoward occurred as a result of the breach.

In my view, issues of this nature do rouse strong interest or attention among members of the public, particularly in an age dominated by computer records. Whether there actually was a security risk and whether the Ministry's actions were appropriate is not the issue -- it is enough that serious questions have been raised. In my view, there is information contained in the records which I have found to be exempt under section 21 of the Act which would serve the purpose of informing the citizenry about the activities of government. There is, therefore, a compelling public interest in disclosure.

Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Section 23 recognizes that each of the exemptions listed therein, while

-serving to protect valid interests, must yield on occasion to the public interest in access to government information. Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

I agree with the appellant that the Ministry must be accountable to the public, and I find that section 23 applies to the portions of the critical issue sheet which I found to be exempt under section 21. I am not satisfied, however, that disclosure of any of the other information to which section 21 applies will contribute in any meaningful way to the public's understanding of the activities of government, and section 23 does not apply to that information.

ORDER:

1. I uphold the Ministry's decision to withhold Appendix B of the company's proposals, interview results and score sheets, invoices and time sheets, list of invoices in question, log of the accumulated cost of the consultant, memo related to the performance of the affected person, per diem rates, ceiling prices and names of the alternate candidates.
2. I order the Ministry to disclose the remaining portions of the records to the appellant within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. In this order, I have confirmed the existence of records responsive to the appellant's request. I have released this order to the Ministry and the affected parties in advance of the appellant in order to provide the Ministry and/or the affected parties with an opportunity to review this order and determine whether to apply for judicial review. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant within five (5) days of the expiration of the 15-day period.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ August 28, 1995