



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

ORDER P-301

Appeal 900418

Ministry of the Solicitor General



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ORDER

BACKGROUND:

The Ministry of the Solicitor General (the "institution") received a request under the Freedom of Information and Protection of Privacy Act (the "Act"). The requester sought access to the results of an investigation by the Ontario Provincial Police (the "OPP") into allegations of assault made by him against an OPP constable with regard to an incident at a conservation area. The allegations of assault were investigated by the OPP Criminal Investigation Branch under the Police Act, which was in force at that time.

After receiving the request, the institution clarified with the requester that he was only seeking access to notes of the officer who investigated the complaint; statements taken during the investigation; notes and memoranda relating to the complaint; and audio-visual material.

The institution granted access to some records. Access to the remaining records was denied, either in whole or in part, under sections 14(1)(a), 14(2)(a), 19 and 21(1)(f) of the Act.

The requester appealed the institution's decision to this office.

During the course of mediation, several additional records were released to the appellant. Further attempts at mediation proved unsuccessful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution, and eight persons identified in the record (the "affected persons"). Enclosed with each notice was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. In the Appeals Officer's Report, documents to which the appellant was granted partial access were described as "Severances"; and documents to which the appellant was denied access in their entirety were described as "Records". For consistency, I will continue to use this terminology.

Written representations were received from the institution and six affected persons. No representations were received from the appellant.

After issuance of the Appeals Officer's Report, the institution released three additional Severances and two Records.

In its representations, the institution points out that Severance 1 is not responsive to the appellant's request, because it relates to a different investigation. I have examined Severance 1 and agree that it falls outside the scope of the request and is not at issue in this appeal. The institution also clarified that Severance 4 was released to the appellant at the request stage, and is no longer at issue.

The records remaining at issue in this appeal are Severances 2 and 3, Record 1 and Records 4-12. These records consist of a letter, Duty Reports, Security Reports and statements of anticipated evidence.

A number of the records originally identified by the institution have duplicates. The decisions I reach on a particular Severance or Record will be applicable to all duplicates, as identified in the numbering system contained in the Appeals Officer's Report.

PRELIMINARY ISSUE:

In his letter of appeal, as well as in subsequent correspondence to this office, the appellant raises some general issues related to the Charter of Rights and Freedoms (the "Charter"). The appellant suggests that the OPP's investigation of its own officers, as well as some aspects of the Information and Privacy Commissioner's processes may violate sections 1, 7, 15(1) and/or 24(1) (2) of the Charter.

The question of whether an administrative tribunal, such as the Office of the Information and Privacy Commissioner, has jurisdiction to entertain a Charter challenge has been discussed in previous orders (Orders 106, P-254). In Order P-254, Commissioner Tom Wright reviewed a number of recent decisions of the Supreme Court of Canada which addressed the issue of the jurisdiction of administrative tribunals to determine Charter issues [see Tetrault-Gadoury v. Canada (Canada Employment and Immigration Commission) (1991), 122 N.R. 361, (S.C.C.), rel. June 6, 1991, Cuddy-Chicks Limited v. (Ontario) Labour Relations Board, (1991), 81 D.L.R. (4th) 121 (S.C.C.) rel. June 6, 1991 and Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570.]. In his Order, Commissioner Wright assumed that he had jurisdiction to determine a Charter challenge to provisions of the Act arising in matters properly before him. I agree with

his reasoning, and assume that I have similar jurisdiction in the circumstances of this appeal.

I also accept Commissioner Wright's reasoning that it is incumbent upon the appellant to provide "clear and compelling argument" in support of the Charter issues he has raised. The Appeals Officer's Report asked for specific representations from the appellant on the provisions of the Act which he believes offend the Charter, the basis on which those provisions offend the Charter, and the remedy sought. No representations were received from the appellant and I find that he has not provided sufficient argument to establish the Charter challenge.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the Severances and/or Records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the Severances and/or Records.
- C. Whether any of the Severances and/or Records qualify for exemption under section 19 of the Act.
- D. Whether any of the Severances and/or Records qualify for exemption under either section 14(1)(a) or section 14(2)(a) of the Act.
- E. If the answers to Issues A and Issue C or Issue D is yes, whether the head has properly exercised his discretion under section 49(a) of the Act.

DISCUSSION:

ISSUE A: Whether the information contained in the Severances and/or Records qualifies as "personal information" as defined in section 2(1) of the Act.

Personal information is defined in section 2(1) of the Act, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (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.

I have examined the Severances and Records and, in my view, they all contain information which satisfies the requirements of the introductory wording of the definition of "personal information" and/or subparagraphs (g) and (h). None of the Severances or Records satisfy the requirements of subparagraph (f) of the definition. Record 1 contains the personal information of the appellant only, while Severances 2 and 3 and Records 4-12 contain the personal information of the appellant and other individuals.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the Severances and/or Records.

Under Issue A, I found that Severances 2 and 3 and Records 4-12 contain personal information of the appellant and other individuals.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As has been stated in a number of previous orders, section 49(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against the other individual's right to protection of his/her privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the head the discretion to deny the requester access to personal information (Order 37).

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the information relates. Section 21(3) lists the type of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the institution submits that "all of the personal information in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law, section 21(3)(b)".

Section 21(3)(b) provides:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In my view, Severances 2 and 3 and Records 4-12 were compiled as part of an investigation into a possible violation of law, namely, the Police Act, and I find that disclosure would constitute an unjustified invasion of personal privacy under section 21(3)(b) of the Act.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the record at issue in this appeal does not contain information relevant to section 21(4).

It could be that in an unusual case, a combination of the circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under section 21(3). However, in my view, such a case would be extremely unusual (Order 20).

I have reviewed the various provisions of section 21(2), the content of all Severances and Records, and the correspondence submitted by the appellant during the course of this appeal, and I find that the presumption raised by section 21(3)(b) of the Act has not been rebutted.

In the circumstances of this appeal, I am of the opinion that disclosure of Severances 2 and 3 and Records 4-12 would constitute an unjustified invasion of the personal privacy of the affected persons, and, therefore, these Severances and Records qualify for exemption under section 49(b) of the Act.

In reviewing the head's exercise of discretion in favour of refusing the disclosure of these Severances and Records, I have found nothing to indicate that the exercise of discretion was improper and will not alter it on appeal.

ISSUE C: Whether any of the Severances and/or Records qualify for exemption under section 19 of the Act.

The only Record remaining at issue in this appeal is Record 1, which is a letter from a solicitor to the conservation authority which manages the conservation area where the incident involving the appellant took place. In its representations, the institution states that it obtained this letter in order to establish certain facts which were relevant to its investigation under the Police Act.

Section 19 of the Act reads as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

In order for a record to be subject to the common law solicitor-client privilege the institution must provide evidence that the record satisfies either of the following tests (Order P-218):

1. (a) There is a written or oral communication, and
- (b) The communication must be of a confidential nature, and
- (c) The communication must be between a client (or his agent) and a legal adviser, and
- (d) The communication must be directly related to seeking, formulating or giving legal advice;

OR

2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Having reviewed Record 1 and the institution's representations, I find that it qualifies for exemption under section 19. It is a written communication of a confidential nature between a lawyer and a client, and is directly related to the giving of legal advice.

ISSUE D: Whether any of the Severances and/or Records qualify for exemption under either sections 14(1)(a) or 14(2)(a) of the Act.

Because all Severances and all Records which were subject to a claim for exemption under sections 14(1)(a) and/or 14(2)(a) have been found to qualify for exemption under section 49(b) of the Act, it is not necessary for me to consider Issue D.

ISSUE E: If the answers to Issue A and Issue C or Issue D is yes, whether the head has properly exercised his discretion under section 49(a) of the Act.

In Issue C, I found that Record 1 qualifies for exemption under section 19 of the Act.

Section 49(a) provides an exception to the general rule that a requester has a general right of access to his or her own personal information in the custody or control of an institution.

Section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) provides a head with the discretion to refuse to disclose to the appellant his own personal information where section 19 applies. In any case in which the head has exercised discretion under section 49(a), I look very carefully at the manner in which the head has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view it should not be disturbed on appeal.

In reviewing the head's exercise of discretion in favour of refusing to disclose Record 1, I find nothing to indicate that the exercise of discretion was improper and will not alter it on appeal.

ORDER:

I uphold the head's decision to deny access to Severances 2 and 3, and Records 1 and Records 4-12.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 22, 1992