



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

# ORDER P-428

Appeal P-910958

Ministry of the Solicitor General and Correctional Services



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# ORDER

## BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to an investigation by the Ontario Provincial Police into allegations that the requester had been wrongfully convicted of murder.

The Ministry initially responded by informing the requester that the majority of the responsive record was the subject of another of his access requests which was also under appeal. However, the Ministry subsequently identified 63 additional responsive pages which were not included in the other appeal, and issued a follow-up decision with respect to these pages. The Ministry provided the requester with full access to 44 pages, partial access to another 16 pages, and denied access in full to the remaining three pages. The exemptions claimed by the Ministry as the basis for denying access were sections 13(1), 14(1)(d), 14(2)(a), 19 and 21(1) of the Act. The requester appealed the Ministry's decision.

During the course of mediation, the Ministry issued a second decision letter granting the appellant access to one of the pages to which access had previously been denied (page FI0173). The Ministry also confirmed that one part of the record consisted of an audio cassette tape of a conversation between the investigating police officer and a witness. Access to this tape was denied in its entirety, pursuant to sections 14(1)(d), 19 and 21(1) of the Act, and the Ministry clarified that the only part of the record which was subject to the section 14(1)(d) exemption claim was the audio cassette tape.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Written representations were received from both parties.

In its representations, the Ministry withdrew its exemption claims under section 14(2)(a), and its section 21(1) claim with respect to page FI0150, but raised section 14(1)(k) of the Act as a new exemption claim for this page.

During the inquiry stage of the appeal, the Ministry agreed to release six pages which had previously been withheld, either in whole or part (pages FI0109, FI0110, FI0112A, FI0114, FI0115 and FI0176). Because page FI0176 was the only page of the record which was exempt under section 13(1), this exemption is no longer at issue in this appeal.

Therefore, the pages of the record which remain at issue in this appeal are pages FI0141-150, FI0152, FI0167 and the audio cassette tape.

## ISSUES:

The issues in this appeal are as follows:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21(1) of the Act applies.
- C. If the answer to Issue A is yes, whether the discretionary exemption under section 49(b) of the Act applies.
- D. Whether the discretionary exemption provided by section 14(1)(d) of the Act applies to the audio cassette tape.
- E. Whether the discretionary exemption provided by section 14(1)(k) of the Act applies to page FI0150 of the record.
- F. Whether the discretionary exemption provided by section 19 of the Act applies to the record.
- G. If the answer to Issue A and Issues D, E and/or F is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act reads, in part, as follows:

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

...

The Ministry submits that the severed portions of pages FI0141-149, FI0152, FI0167 and the information on the cassette tape contain personal information. I have examined these pages and listened to the tape and, in my view, all relevant information satisfies the requirements of the introductory wording of the definition of "personal information". The severed portions of pages FI0141-FI0142, FI0144-FI0148, FI0152 and FI0167 contain the personal information of persons other than the appellant; the severed portion of page FI0143 contains the personal information of the appellant only; and page FI0149 and the audio cassette tape contain the personal information of both the appellant and another identifiable individual.

The Ministry did not submit that the severed portion of page FI0150 contains personal information and, having reviewed this severance, I agree.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21(1) of the Act applies.**

Under Issue A, I found that the severed portions of pages FI0141-FI0142, FI0144-FI0148, FI0152 and FI0167 contain the personal information of persons other than the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances, to anyone other than the individual to whom the information relates. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

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.

Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy, and section 21(2) provides some criteria for the Ministry to consider in determining whether the disclosure of the record would result in an unjustified invasion of personal privacy.

The Ministry relies on section 21(3)(b) of the Act to support its decision to deny access to the severed portions of these pages.

Section 21(3)(b) reads as follows:

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;

The Ministry submits that the record was compiled during an investigation by the Ontario Provincial Police into allegations that the appellant had been wrongfully convicted of murder, and that his conviction represented a miscarriage of justice. I am satisfied that the personal

information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law. Therefore, in my opinion, the requirements for a presumed unjustified invasion of the personal privacy of individuals under section 21(3)(b) have been established.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy have been established, I must then 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 does not contain any information that pertains to section 21(4).

It is possible that a combination of circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under section 21(3); however, such a case would be extremely unusual [Order 20].

The appellant, in his submissions raises the factors outlined in section 21(2)(d) as relevant considerations. He submits that the information contained in the record is required because it "... is necessary for him to adequately prove his position of innocence on a charge of first degree murder." The appellant further submits that he is attempting to reopen his case and "... we require all exempted material and a full copy of the audio tape in question."

Section 21(2)(d) reads as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

In Order M-28, Commissioner Tom Wright considered section 14(2)(d) of the Municipal Freedom of Information and Protection of Privacy Act, which is identical in wording to section 21(2)(d) of the provincial Act. Commissioner Wright found that "... the application of 14(2)(d) alone is not sufficient to rebut the presumption contained in 14(3)(b) [21(3)(b) of the provincial Act]." In Order P-368, involving the same appellant and the Ministry of the Attorney General, I adopted Commissioner Wright's view. Similarly, in the circumstances of this appeal, I find that, regardless of whether or not section 21(2)(d) is a relevant consideration in the context of pages FI0141-FI0142, FI0144-FI0148, FI0152 and FI0167, the application of this section alone would not be sufficient to rebut the presumed unjustified invasion of personal privacy.

Therefore, I find that disclosure of the several portions of pages FI0141-FI0142, FI0144-FI0148, FI0152 and FI0167 would constitute an unjustified invasion of the personal privacy of

individuals other than the appellant, and the severed information on these pages qualifies for exemption under section 21(1) of the Act.

**ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption under section 49(b) of the Act applies.**

Under Issue A, I found that the severed portion of page FI0149 and the audio cassette tape contain the personal information of both the appellant and another identifiable individual.

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 provincial institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access, including section 49(b), 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;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his own personal information against other individuals' right to the protection of his/her personal privacy. If the Ministry 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 Ministry the discretion to deny the requester access to his personal information [Order 37].

For the same reasons outlined in my discussion of Issue B, I find that disclosure of the severed portion of page FI0149 and the audio cassette tape to the appellant would constitute a presumed unjustified invasion of the personal privacy of the other identifiable individual. Therefore, these portions of the record qualify for exemption under section 49(b) of the Act.

Section 49(b) is a discretionary exemption giving the Ministry the discretion to refuse to disclose personal information to the person to whom it relates. I have reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming section 49(b), and I find nothing improper in the circumstances.

Because of the way in which I have disposed of Issues A, B and C, it is not necessary for me to consider Issue D.

**ISSUE E: Whether the discretionary exemption provided by section 14(1)(k) of the Act applies to page FI0150 of the record.**

The Ministry claims that section 14(1)(k) of the Act applies to the information which has been severed from page FI0150. Under Issue A, I found that this page contains no personal information.

Section 14(1)(k) of the Act reads as follows

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

jeopardize the security of a centre for lawful detention;

The Ministry submits that the information severed from page FI0150 "could jeopardize not only the security of a federal penitentiary, but also the security, health and safety of its employees and inmates." The Ministry goes on to say that disclosure of the severed portions of the page could lead to the commission of unlawful acts which would compromise the security of the institution, its inmates and employees.

Section 14(1) of the Act provides the Ministry with the discretion to refuse to disclose a record where doing so could reasonably be expected to result in one of the specified types of harms enumerated in the various subsections. The expectation of harm must not be fanciful, imaginary or contrived, but rather one that is based on reason, and the Ministry bears the onus of providing sufficient evidence to substantiate the reasonableness of the anticipated harm [Order 188].

In my view, the Ministry has not provided sufficient evidence to establish that disclosure of the information severed from page FI0150 could reasonably be expected to result in the harm identified in section 14(1)(k) of the Act. The Ministry's concerns are, at best, speculative in nature, and I find that the severed portions of page FI0150 do not qualify for exemption under section 14(1)(k) of the Act.

**ISSUE F: Whether the discretionary exemption provided by section 19 of the Act applies to the record.**

Pages FI0143 and FI0150 are the only two pages of the record remaining at issue. Both of these pages are portions of the police officer's notes which were compiled during his investigation of the allegations that the appellant had been wrongfully convicted. Under Issue A, I found that page FI0143 contains the personal information of the appellant only and that page FI0150 contains no personal information.

The Ministry submits that section 19 of the Act applies to the record. Section 19 reads:

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.

This section consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry submits that the record was prepared for Crown counsel in contemplation of possible litigation [Branch 2]. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

In my view, the police officer's notes were compiled for his use in determining whether there was sufficient evidence to substantiate the allegations involving the appellant's conviction, not for use in existing or contemplated litigation. Therefore, I find that the severed portions of pages FI0143 and FI0150 do not qualify for exemption under section 19 of the Act.

**ISSUE G: If the answer to Issue A and Issues D, E and/or F is yes, whether the discretionary exemption provided by section 49(a) of the Act applies. applies**

As I stated in my discussion of Issue C, section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, section 49(a) provides an exemption to this general right of access, as follows:

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; (emphasis added)



Under Issue A, I found that the severed portions of page FI0143 contain the personal information of the appellant only, and under Issue F, that this information did not qualify for exemption under section 19 of the Act. Therefore, the exemption provided by section 49(a) is not available, and this page, together with page FI0150, should be released to the appellant.

**ORDER:**

1. I uphold the Ministry's decision not to disclose the information severed from pages FI0141, FI0142, FI0144, FI0145, FI0146, FI0147, FI0148, FI0149, FI0152 and FI0167, and the audio cassette tape.
2. I order the Ministry to disclose the information severed from pages FI0143 and FI0150 within 15 days of the date of this order.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of pages of the record which are disclosed to the appellant pursuant to Provision 2, **only** upon my request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ March 3, 1993