



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

ORDER P-392

Appeal P-910489

Ministry of the Attorney General



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to a charge of sexual assault laid against the requester's former husband (the named individual). The requester indicated that she was requesting access to the file on behalf of herself and her 11 year old child, who was the victim of the alleged assault.

The Ministry granted partial access to the records, citing section 21 to deny access to a psychological assessment of the named individual and parts of three pieces of correspondence where reference was made to the psychological assessment; sections 19 and 21 to deny access to a statement of the named individual; and sections 14(2)(a), 19 and 21 to deny access to a record prepared by a police officer. The requester appealed the Ministry's decision.

During mediation of this appeal, the Ministry provided partial access to the named individual's statement, and the appellant indicated that she was not seeking access to the psychological assessment. Further mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and the named individual. Written representations were received from the Ministry and the appellant.

The Ministry did not make representations in support of its application of sections 19 and 21 to the record prepared by the police officer. Because section 21 is a mandatory exemption, I will consider its application to this record. Section 19 is a discretionary exemption, however, and its application to this record will not be considered in the absence of representations in support of the Ministry's position.

PRELIMINARY MATTER:

The appellant indicated in her request that she was requesting the information on behalf of herself and her child, who is less than 16 years of age. Section 66(c) of the Act states:

Any right or power conferred on an individual by this Act may be exercised,

where the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

The Ministry did not indicate that any personal information of the appellant's child was severed from the records disclosed to the appellant. It is apparent, therefore, that the Ministry was satisfied that the appellant has lawful custody of her child, and that it was appropriate to consider the request under section 66(c).

The appellant has provided me with evidence of her lawful custody of the child, and I am satisfied that it is appropriate to consider the request under section 66(c).

ISSUES:

The issues arising in this appeal are:

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act.
- B. Whether the record prepared by the police officer qualifies for exemption under section 14(2)(a) of the Act.
- C. If the answer to Issues A and B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.
- D. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.
- E. Whether the discretionary exemption provided by section 19 of the Act applies.
- F. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records contain "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 "... recorded information about an identifiable individual ..."

The severed portion of the named individual's statement and the references to the psychological assessment consist of recorded information about the named individual and, in my view, this information qualifies as the personal information of the named individual. These severances do not contain any personal information of the appellant or her child.

The record prepared by the police officer contains recorded information about the appellant, her child and the named individual which, in my view, qualifies as personal information of all three parties.

ISSUE B: Whether the record prepared by the police officer qualifies for exemption under section 14(2)(a) of the Act.

Section 14(2)(a) of the Act reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The Ministry must satisfy each part of the following three-part test in order to properly exempt a record under section 14(2)(a):

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In Order 200, Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact.

I have reviewed the record and I find that it is a report, and this report was prepared in the course of an investigation, thereby satisfying the first two parts of the test.

As far as the third part of the test is concerned, the Ministry submits that when law enforcement institutions, such as itself and the Ministry of the Solicitor General, are investigating allegations of wrongdoing in the conduct of a prosecution, it is incumbent upon the Ministry to require its employees to provide candid and full details of their activities. The Ministry submits that it is entitled to maintain a position that will foster candid reports to Crown Attorneys so that the public's confidence in the functioning of its institutions can be maintained.

The report was prepared by an Ontario Provincial Police officer, and the Ontario Provincial Police is properly considered to be an agency which has the function of enforcing and regulating compliance with a law. However, in my view, this particular record was prepared in the course of a supervisor's internal investigation into the conduct of an officer of the court, not an investigation which carried with it the possibility of a "law enforcement" proceeding. Therefore, I find that section 14(2)(a) is not applicable in the circumstances of this appeal.

Because I have found that the answer to Issue B is no, it is not necessary for me to consider Issue C.

ISSUE D: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.

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. Specifically, section 21(1)(f) of the Act 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.

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

The Ministry submits that section 21(3)(a) applies to the references to the psychological assessment, and that section 21(3)(b) applies to the remaining portion of the named individual's statement. Sections 21(3)(a) and (b) state:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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 appellant submits that because a copy of the psychological assessment was disclosed to her by the named individual's lawyer, the named individual has voluntarily waived his right to privacy in reference to the assessment and, therefore, also to the passages which refer to it.

In my view, the fact that the appellant is in possession of the psychological assessment does not negate the application of section 21(3). The references to the psychological assessment relate to a psychological evaluation of the named individual, and the presumption that disclosure would constitute an unjustified invasion of privacy found in section 21(3)(a) applies.

The appellant submits that statements made by the named individual were given to Crown counsel with the intent that they be used in a public prosecution, and therefore the named individual has waived his privacy rights in respect of statements in the possession of the Ministry. She also submits that because the charge was withdrawn and will not be re-laid, there is no possible violation of the named individual's rights as an accused man.

I am aware of the fact that certain personal information will be disclosed to the public during a public court proceeding. However, in my view, it does not necessarily follow that by becoming involved in such a proceeding an individual has waived his or her privacy rights and the personal information should, therefore, be freely and routinely available to anyone who asks, particularly if a public court proceeding has not commenced. Further, the fact that the charge was withdrawn and will not be re-laid does not negate the applicability of section 21(3)(b). The presumption only requires that there be an investigation into a possible violation of law. I am satisfied that the named individual's statement was compiled and is identifiable as part of an investigation into a possible violation of law, and the presumption found in section 21(3)(b) applies.

Once it is 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, section 21(4) is not relevant in the circumstances of this appeal.

Section 21(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 21(3); however, such a case would be extremely unusual.

The appellant submits that section 21(2)(d) is a relevant consideration in the circumstances of this appeal. This section reads:

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 P-312, Assistant Commissioner Tom Mitchinson stated:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant submits that her child has a right to equal protection under the law, which has been grossly violated as a result of the withdrawal of the charge.

In my view, section 21(2)(d) is not a relevant consideration in the circumstances of this appeal. The appellant has not established that the personal information which the appellant is seeking access to has any bearing on or is significant to the determination of the right in question, or that the personal information is required to prepare for a proceeding or to ensure an impartial hearing.

The appellant also submits that all records created in the course of responding to the allegation of sexual assault ultimately concern her child, and she believes that she and her child have the right to view all material relating to a possible sexual assault on her child by the named individual.

In my view, the victim of the alleged offence, and/or the mother of the victim, does not have an absolute right under the Act to view all material related to the allegation. The appellant's and her child's right of access must be balanced against the named individual's right to the protection of his privacy.

In summary, it is my view that the presumptions raised by sections 21(3)(a) and (b) of the Act have not been rebutted. Accordingly, I find that the disclosure of the references to the psychological report and the remaining portion of the named individual's statement would constitute an unjustified invasion of the personal privacy of the named individual, and should not be disclosed.

Because I have found that the named individual's statement is properly exempt under section 21, it is not necessary for me to consider Issue E.

ISSUE F: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) applies.

In Issue A I found that the record prepared by the police officer contains the personal information of the appellant, her child and the named 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 government institutions. 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 Ministry must look at the information and weigh the requester's right of access to his or her own personal information against other individuals' right to the protection of his or her 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 the personal information (Order 37).

In determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the named individual, I have reviewed the presumptions listed in section 21(3). In my view, none of the presumptions apply to the record prepared by the police officer. I have also reviewed the factors listed under section 21(2), and I find that none of the factors which weigh in favour of not disclosing the information are relevant in the circumstances of this appeal. While the record does contain the name and section of the Criminal Code under

which the named individual was charged, this information has been disclosed under the Act to the appellant by the Ministry. Accordingly, I find that, on balance, the disclosure of the record prepared by the police officer would not be an unjustified invasion of the named individual's personal privacy, and section 49(b) does not apply.

ORDER:

1. I uphold the Ministry's decision to deny access to the references to the psychological assessment and the remaining portion of the named individual's statement.
2. I order the Ministry to disclose to the appellant the record prepared by the police officer within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: _____
Holly Big Canoe

January 4, 1993

Inquiry Officer