



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario\_ 1 -**

# **ORDER P-612**

**Appeal P-9300346**

**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 pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to three occurrence "reports", dated March 5, 1993, submitted by three named individuals (affected persons 1, 2 and 3) relating to an incident involving the requester and another individual (affected person 5), which took place at a named correctional facility.

The Ministry denied the requester access to the responsive records pursuant to section 49(b) of the Act. The requester appealed the Ministry's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant, affected persons 1, 2 and 3 and a further individual whose name appears in Record 3 (affected person 4). Representations were received from all of the parties.

Accompanying the appellant's representations was a letter from affected person 5, whose information is also contained in some of the records, consenting to the disclosure to the appellant of any information relating to her. The Appeals Officer confirmed that the consent of affected person 5 had indeed been granted.

## RECORDS AT ISSUE:

The records at issue are:

1. Two page "Occurrence Report" submitted by affected person number 1, dated March 5, 1993.
2. Two page "Occurrence Report" submitted by affected person number 2, dated March 5, 1993.
3. One page "Occurrence Report" submitted by affected person number 3, dated March 5, 1993.

Records 1, 2 and 3 were written by affected persons 1, 2 and 3 respectively, based on observations made by affected persons 1 and 2 about the activity of the appellant and affected person 5. As a result of these recorded observations, the local police service was contacted following which, an investigation was undertaken by the police as to whether a possible violation of the Criminal Code may have occurred.

## ISSUES:

[IPC Order P-612/January 17, 1994]

The issues arising in this appeal are:

- A. Whether the records at issue contain "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the personal information relates to the requester and other individuals, whether section 49(b) of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the records at issue contain "personal information" as defined in section 2(1) of the Act.**

Section 2(1) of the Act states, in part:

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

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (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;

Having reviewed the records, I find that all of the records contain information which satisfies the definition of personal information described in section 2(1) of the Act. In my view, each of the records contain personal information which relate to the appellant and affected persons 1, 2, 4 and 5. As stated earlier, affected person 5 has consented to the disclosure to the appellant of her personal information which is contained in the records.

It is my opinion, however, that the records do not contain the personal information of affected person 3, the author of Record 3. In my view, the information contained in Record 3 was provided by affected person 3 during the execution of his employment duties as a "Control Supervisor" in the correctional facility where he is employed. It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities cannot be characterized as that individual's "personal information" (Orders M-71, M-74, P-326, P-328, P-329, P-333, P-377 and P-597). As a result, I find that Record 3 contains the personal information of the appellant and affected persons 1, 2, 4 and 5 only.

**ISSUE B: If the answer to Issue A is yes, and the personal information relates to the requester and other individuals, whether section 49(b) of the Act applies.**

Under Issue A, I found that the records contain the personal information of the appellant and affected persons 1, 2, 4 and 5.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves 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:

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/her own personal information against the rights of other individuals to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his own personal information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy [Order P-440].

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

Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the Ministry submits that it has relied upon the presumption described in section 21(3)(b) of the Act.

This provision states that:

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 records qualify for exemption under the presumption provided by section 21(3)(b) because the "information in question was compiled and is identifiable as part of a police investigation into the alleged [offence]". Section 21(3)(b) applies only to personal information which was compiled **and** is identifiable as part of an investigation into a possible violation of law. In my view, the section does not exempt from disclosure personal information which is compiled prior to police involvement or the commencement of a law enforcement investigation regardless of the fact that the personal information may eventually become part of an investigation into a possible violation of law. Accordingly, I find that the presumption provided by section 21(3)(b) of the Act has no application in the circumstances of this appeal.

I also find that none of the records at issue contain personal information which falls within the ambit of any other presumptions described in sections 21(3) or (4) of the Act.

Section 21(2) of the Act provides some criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The Ministry submits that the considerations contained in sections 21(2)(e) and (f) of the Act, which favour non-disclosure of personal information, are relevant in the circumstances of this appeal. In addition, the Ministry indicates that it is no longer relying on the consideration set forth in section 21(2)(h) of the Act. The affected persons, however, refer to this section as being relevant in determining, on balance, whether the disclosure of the personal information contained in the records would constitute an unjustified invasion of their personal privacy, in the circumstances of this appeal.

Sections 21(2)(e), (f) and (h) read 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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

I will deal with each of the section 21(2) factors individually.

### **Section 21(2)(e)**

With respect to section 21(2)(e), the Ministry states that the disclosure of the personal information contained in the records would subject the affected persons unfairly to harm as the appellant poses a threat to one or more of them. Affected persons 1, 2 and 3 concur with this objection and submit that they believe there will be a significant risk of retaliation against them should the records be disclosed to the appellant. In addition, the Ministry indicates that "in a custodial setting, any type of anxiety or increase in the general tension within the facility can be viewed as an increased threat to the health and safety of both staff and inmates".

Having carefully reviewed the representations of the Ministry and the affected persons, and based on the evidence provided to me, I am not satisfied that there is sufficient evidence to support the view that the affected persons will be exposed unfairly to pecuniary or other harm. I find, therefore, that section 21(2)(e) of the Act is not a relevant consideration in the circumstances of this appeal.

### **Section 21(2)(f)**

With regard to the consideration of the factor described in section 21(2)(f) of the Act, it is my view that when an allegation of inappropriate activity by an employee is made and investigated, it is reasonable for the parties directly involved to find the experience distressing and to restrict discussion of the subject with others. In my view, generally, section 21(2)(f) of the Act would be a relevant consideration in determining whether disclosure of personal information compiled when allegations of improper conduct on the part of an employee are made would constitute an unjustified invasion of the privacy of both parties. However, section 21(2)(f) is not a relevant consideration when the requester is one of the parties directly involved and the personal information relates to the identity of the complainants and the substance of a workplace-related complaint. In my view, the disclosure of the personal information to the subject of the allegations is essential to the proper and fair investigation and resolution of the complaint.

Accordingly, in the circumstances of this appeal, I find that section 21(2)(f) of the Act is not a relevant consideration in respect of information which reveals to the appellant the identity of the affected persons and the substance of their complaints.

### **Section 21(2)(h)**

With regard to section 21(2)(h) of the Act, affected persons 1, 2 and 3 state that the records were submitted by them to the Ministry in confidence. As previously stated, the Ministry has withdrawn its reliance on this section as a relevant consideration.

There is nothing on the face of the records to indicate that they were submitted in confidence and, in my view, I have not been provided with sufficient evidence that the records, or the information contained therein, was provided on the basis that it was to be kept confidential or that such confidentiality was expected or promised. Accordingly, I am unable to conclude that the personal information in the records was supplied to the Ministry by the affected persons in confidence within the meaning of section 21(2)(h). Therefore, I find that section 21(2)(h) of the Act is not a relevant consideration in the circumstances of this appeal.

As I have found no factors in section 21(2) which weigh in favour of the protection of the privacy of the affected persons, and after having considered all of the circumstances arising in this appeal, it is my view that the records do not qualify for exemption under section 49(b) of the Act as their disclosure would not constitute an unjustified invasion of the personal privacy of the affected persons.

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, and I find nothing to indicate that the exercise of discretion was improper in the circumstances.

**ORDER:**

1. I order the Ministry to disclose the records to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
2. 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 it has disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: \_\_\_\_\_

January 17, 1994

Donald Hale  
Inquiry Officer