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

ORDER P-1108

Appeal P_9500341

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all personal information relating to the requester in the possession of the Ministry, specifically in the Office of the Police Complaints Commissioner (the PCC). The requester also sought continuing access to any additional records which may come into the custody or control of the Ministry for the next two years. Finally, in addition to receiving a copy of the information sought, the requester asked to view in person the records which respond to the request.

The Ministry granted access to the majority of the records which it identified as responsive to the request, identified other portions as "not relevant" to the request and denied access to the remainder based on the following exemptions contained in the Act:

- discretion to refuse requester's own information - section 49(a)
- law enforcement - sections 14(2)(a) and 14(2)(c)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)

The requester appealed the denial of access. He also appealed the Ministry's lack of response to his request for continuing access and for the opportunity to view the originals of the records. Finally, he is of the view that further records exist which are responsive to his request.

During the mediation of the appeal, the appellant narrowed the scope of the request to include only the information contained in the records which relates to a complaint against him specifically. He indicated that he is not seeking access to any information relating to complaints made against other police officers which may also be contained in the records.

I have reviewed the records to determine whether they are responsive to the appellant's request, as narrowed. I find that Records 7, 8, 14, 15, 17, 18, 19, 20, 111, 112, 113, 114, 115, 119, 120, 124, 132 and 144 in whole or in part, relate specifically to the complaint made against the appellant by several individuals. The remaining records or parts of records deal with the complaint made by the same individuals against other police officers and are, accordingly, outside the scope of this appeal.

The Appeals Officer provided a Notice of Inquiry to the appellant, the Ministry and the individuals who had filed the complaint against the appellant (the affected persons). Representations were received from all of the parties. In its representations, the Ministry advised that it had located two additional responsive records which had been stored by the PCC electronically. As the Ministry indicates that it has no objection to the disclosure of these records to the appellant, I order them to be released to him.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the views or opinions of another individual about that individual. I have reviewed the information contained in each of the records and find that it relates to the appellant and to the affected persons. Accordingly, I find that the information constitutes the personal information of both the appellant and the affected persons.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found that the records contain the appellant's personal information. Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states 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)

In order to determine whether the exemption provided by section 49(a) applies to the records, I will begin by considering the Ministry's claim that it qualifies for exemption under section 14, which is referred to in section 49(a).

LAW ENFORCEMENT

The Ministry submits that Record 144 is exempt from disclosure under section 14(2)(a) of the Act. In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

In addition, for a record to qualify for exemption under section 14(2)(a) of the Act, the Ministry must satisfy each part of the following three part test:

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.

In Order 221, Commissioner Tom Wright made the following comments about part one of the test:

> The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to Record 144. This document consists of a handwritten account of a telephone contact between one of the affected persons and an employee of the PCC. The employee who prepared the record simply has recorded the information which one of the affected persons gave to her in the course of their conversation. No collation or consideration of the information is apparent on its face. I find, therefore, that Record 144 cannot be described as a "report" within the meaning of section 14(2)(a). As the first part of the test has not been met, I find that section 14(2)(a) and, accordingly, section 49(a), have no application to Record 144.

The Ministry has also claimed the application of section 14(2)(c) of the Act to Records 7, 8, 14, 15, 113, 114, 115, 119 and 120. This section states:

> A head may refuse to disclose a record,
>
> > that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

I have not been provided with sufficient evidence to demonstrate that it is reasonable to expect that the author or person quoted in each of these records could be exposed to civil liability through their disclosure. Although these records contain comments by one of the affected persons about the manner in which the appellant has performed his professional duties, I am not satisfied that their disclosure could reasonably be expected to expose the affected persons to any civil liability whatsoever. Accordingly, Records 7, 8, 14, 15, 113, 114, 115, 119 and 120 do not qualify for exemption under sections 14(2)(c) and 49(a).

INVASION OF PRIVACY

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49(b) provides an exception to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the Ministry has the discretion to deny the requester access to that information.

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. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only

way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) of where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act as well as all other considerations which are relevant in the circumstances of the case.

The Ministry submits that the presumption contained in section 21(3)(b) of the Act applies to all of the personal information in the records. This provision states:

> 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 has provided evidence that the records were compiled by the PCC in the course of its investigation into the complaint against the appellant brought by the affected persons. The investigation, had it proceeded, could have resulted in the initiation of a legal proceeding against the appellant under the Police Services Act (the PSA). It has been established in a number of previous orders that records which are compiled in the course of an investigation under the PSA fall within the presumption provided by section 21(3)(b) [Orders P-285 and P-372].

In Order P-666, Assistant Commissioner Irwin Glasberg determined, following a review of the applicable authorities, that the term "compiled" was intended to be interpreted broadly to mean "to gather or collect", rather than more narrowly as "to create at first instance". I adopt the definition cited by Assistant Commissioner Glasberg for the purposes of this order.

The Ministry states that all of the records identified as responsive to the request were compiled by the PCC in the course of its investigation into a possible violation of the PSA by the appellant. Following my review of the records and the representations of the parties, I find that the presumption under section 21(3)(b) applies to the personal information contained in each of the records at issue in this appeal.

The appellant submits that as no violation of law was found by the investigation, section 21(3)(b) is not applicable to the present appeal. However, in Orders P-223 and P-237, Commissioner Tom Wright held that the fact that legal proceedings against the individual who was the subject of an investigation were not conducted does not negate the applicability of section 21(3)(b) to records compiled in the course of such an investigation.

The appellant has raised the possible application of section 21(2)(a) (public scrutiny), section 21(2)(d) (fair determination of rights) and section 21(2)(g) (the information is unlikely to be accurate or reliable). As stated above, when a finding is made that one of the presumptions in

section 21(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information falls within section 21(4) or where a finding is made that section 23 applies to the personal information. A combination of considerations under section 21(2) cannot rebut the presumption which I have found to apply to the personal information contained in the records.

In my view, none of the exceptions contained in section 21(4) apply in the present appeal. In addition, the appellant has not raised the application of section 23 to the records.

As I have found that the presumption found in section 21(3)(b) applies to the records, the disclosure of the personal information contained in them would constitute an unjustified invasion of personal privacy and the information is exempt from disclosure under section 49(b).

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records that it is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

With its representations, the Ministry provided an affidavit sworn by the Manager of Information and Research Services in the PCC in which she describes in detail the nature and extent of the searches undertaken in the head office of the PCC as well as its Central East Region Office. The Manager also describes how she located the electronically stored records which I have ordered disclosed above which relate to the affected persons' complaint against the appellant.

I have carefully reviewed the representations of the parties and the affidavit provided by the Ministry. Based on the evidence before me, I am satisfied that the Ministry has taken reasonable steps to locate records responsive to the appellant's request.

CONTINUING ACCESS

In his request, the appellant asked that the Ministry provide him with continuing access to any records responsive to his request for a period of two years, pursuant to section 24(3) of the Act. Section 24(4) sets out the procedure to be followed by the Ministry to comply with a request for continuing access.

In Order 164, former Commissioner Sidney B. Linden made the following comments about the application of section 24(3):

> I am of the view that subsections 24(3) and (4) are intended by the Legislature to apply to the kind of record which is likely to be produced and/or issued in series; for example, the results of public opinion polls which are conducted by an institution on a regular basis. These subsections are not intended to provide

> ongoing access to the kind of record of which only one edition is produced, as in the present case.

I agree with this interpretation. I find that records relating to complaints made against a police officer are not the kind of records which will be produced or issued in series. Accordingly, section 24(3) of the Act does not apply to permit continuing access to records relating to complaints received by the Ministry about the appellant.

ACCESS TO ORIGINAL RECORDS

Section 48(3) of the Act provides:

> Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,
>
> (a) permit the individual to examine the personal information; or
>
> (b) provide the individual with a copy thereof.

The appellant requests that he be given the opportunity to view the responsive records in person and that the Ministry compile the responsive records which are located at the PCC office in Peterborough with those in the PCC's main office in Toronto.

The Ministry submits that it is not reasonably practicable to give the appellant the opportunity to view the records in person. It argues that to bring the responsive records together from two locations and provide staff members to accompany the appellant while he examines the records would be unduly disruptive to its operations. It also points out that the appellant has now received copies of those records which are not exempt under the Act and that he will not be prejudiced by not having access to the original copies of the records.

In my view, the appellant has been granted access to copies of all of the records which are not exempt under the Act. Some of the documents which were disclosed to him had severances made to them, and, in my view, it would not be reasonably practicable for the Ministry to grant access to the originals while ensuring that the exempt information contained in these records is not disclosed. I find, therefore, that it is not reasonably practicable to give the appellant the opportunity to view the original records. In addition, I accept that the Ministry is not obligated under section 48(3) to compile the responsive records in one location, either in Toronto or in Peterborough. Accordingly, the Ministry's decision not to do so is upheld.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed portions of the responsive records.

2. I find the Ministry's search for records to be reasonable and this part of the appeal is denied.

3. I uphold the Ministry's decision that this is not an appropriate case for granting continuing access to future records which are responsive to the request and the decision not to allow the appellant to view the original records in a centralized location.

4. I order the Ministry to disclose to the appellant the electronic records which are referred to in the affidavit provided by the Ministry by February 28, 1996, but not earlier than February 23, 1996.

5. In order the verify compliance with the terms 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 4.

Original signed by: January 24, 1996
Donald Hale
Inquiry Officer