



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

# **ORDER P-1196**

**Appeal P-9500733**

**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 access to a letter and related documents containing allegations made by a named individual (the affected person) of wrongdoing by public officials in the City of Thorold (the City). The Ministry identified 37 pages of records as responsive to the request. The records consist of e-mails and correspondence to and from the Ministry, along with the letter of complaint, to which was attached 29 pages of enclosures.

The Ministry denied access to the records claiming the application of the following exemptions contained in the Act:

- solicitor client privilege - section 19
- invasion of privacy - section 21

The appellant appealed the Ministry's decision.

During the mediation of the appeal, the appellant advised that he was not seeking access to any records which could be characterized as business-related correspondence to or from officials of the City. Accordingly, the 29 pages of enclosures appended to the letter of complaint are no longer at issue. The records remaining at issue in this appeal consist of a single page letter dated May 28, 1995 (Page 2-1), one page of e-mail (Page 1-1), and six pages of correspondence (Pages 3-1 to 7-1).

A Notice of Inquiry was provided to the Ministry, the appellant and the affected person. Because the records at issue appeared to contain the personal information of the appellant, the Notice of Inquiry raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) of the Act (invasion of privacy). Representations were received from Ministry and the affected person.

## **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 individual's name where it appears with other personal information relating to the individual or correspondence to an institution sent by the individual which is implicitly or explicitly of a confidential nature.

I find that the information contained in Page 2-1 qualifies as the personal information of the affected person as it represents correspondence to the Ministry which is implicitly of a confidential nature. I further find that Pages 1-1 and 3-1 to 7-1 also contain the affected person's name along with other information about this individual. This information qualifies, therefore, as the personal information of the affected person.

The Ministry submits that the records at issue do not relate to the appellant and that section 49 of the Act has no application. Following my review of the records, I find that Pages 1-1 and 3-1 contain passages raising allegations of wrongdoing which relate to the appellant. As the nature

of those allegations go beyond the scope of the appellant's "professional capacity", I find that these two pages contain the personal information of the appellant, as well as that of the affected person. Therefore, I must consider whether section 49 of the Act applies to Pages 1-1 and 3-1.

## 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 provides a number of exceptions 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 another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits the Ministry from releasing this information.

Under both sections 21(1) and 49(b), sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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) or 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 that are relevant in the circumstances of the case.

The Ministry argues that the personal information in the records was compiled as part of an investigation by the Ontario Provincial Police (the OPP) into a possible violation of law, the Criminal Code. The Ministry submits that since the presumption found in section 21(3)(b) of the Act applies, the disclosure of the personal information of the affected person or any of the investigative targets would constitute a presumed unjustified invasion of personal privacy.

The affected person indicates that the information was supplied to the Ministry in confidence and opposes the disclosure of any material which could identify him or her.

I have carefully reviewed the records at issue, the representations of the parties and all of the circumstances of this appeal. The following are my findings:

1. All of the documents were compiled as part of an investigation into a possible violation of law, the Criminal Code. Therefore, the disclosure of Page 2-1 in its entirety and the personal information of the affected person which is contained in Pages 4-1 to 7-1 would constitute a presumed unjustified invasion of the personal privacy of the affected person

under section 21(3)(b) of the Act. This information is, therefore, exempt from disclosure under section 21(1) of the Act.

2. Pages 1-1 and 3-1 of the record contain the personal information of the appellant as well as the affected person. As these pages were also compiled as part of an investigation into a possible violation of law, the disclosure of the personal information pertaining to the affected person would similarly result in a presumed unjustified invasion of his or her personal privacy. Accordingly, those portions of Pages 1-1 and 3-1 which contain the personal information of the affected person are also exempt from disclosure under section 49(b) of the Act.
3. Factors under section 21(2) which may favour the disclosure of the information contained in the records are not sufficient to rebut the presumption of an unjustified invasion of personal privacy in section 21(3)(b). I find that none of the personal information contained in the records falls under section 21(4). The appellant has not raised the possible application of section 23 of the Act.

I have highlighted those portions of Pages 1-1 and 3-1 to 7-1 which are exempt from disclosure under sections 21(1) and 49(b) on a copy of these records which I have sent to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The highlighted information is **not** to be disclosed.

### **SOLICITOR-CLIENT PRIVILEGE**

The Ministry also claims the application of section 19 to pages 1-1 and 3-1 to 7-1 of the records. This section consists of two branches, which provides 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 indicates that it is relying on Branch 2 of the exemption. A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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.

Having reviewed the records, I find that all of the pages at issue were prepared by or for Crown counsel. Therefore, the first criteria of Branch 2 has been met.

The Ministry submits that the records were prepared for use in contemplation of litigation in that the initial letter of complaint was forwarded to the police to assist in commencing an investigation which could have ended in litigation, i.e. criminal charges.

In order for a record to qualify as being prepared in contemplation of litigation, it must be established that:

- (a) the dominant purpose for the preparation of the record must be contemplation of litigation, and
- (b) there must be a reasonable prospect of such litigation at the time of preparation of the record; litigation must be more than just a vague or theoretical possibility (Order 52).

Page 1-1 contains e-mails transmitted within the Crown Attorney's office in response to the correspondence sent by the affected person. The remaining pages contain correspondence to or from the Crown Attorney's Office and the OPP regarding the Ministry's request that the OPP conduct an "initial review of the matter" and the follow-up correspondence relating to this request.

Having reviewed the contents of these records and the circumstances surrounding their creation, it appears that the prospect of litigation at the time they were prepared was no more than a theoretical possibility. As such, I am not satisfied that the dominant purpose for their preparation was contemplation of litigation. Accordingly, the second part of the Branch 2 test has not been met and I find that the records do not qualify for exemption under Branch 2 of section 19.

### **ORDER:**

1. I order the Ministry to disclose to the appellant those portions of Pages 1-1 and 3-1 to 7-1 which are **not** highlighted on the copy of the records which I have provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order by sending the appellant a copy by **June 21, 1996**.
2. I uphold the Ministry's decision not to disclose Page 2-1 and the highlighted portions of Pages 1-1 and 3-1 to 7-1 of the records.
3. In order to verify compliance with the provisions 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 1.

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

May 30, 1996 \_\_\_\_\_

Donald Hale  
Inquiry Officer