



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

ORDER P-1254

Appeal P-9600224

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

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 a report prepared by the Ontario Provincial Police (the OPP). The report concerned the re-investigation of the circumstances surrounding the death of the requester's son. The Ministry located records responsive to the request and granted access to them, in part. Access to the remaining responsive records was denied pursuant to the following exemptions contained in the Act:

- invasion of privacy - section 21(1)
- law enforcement - section 14(2)(a)

The requester, now the appellant, appealed the Ministry's decision. A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties. The appellant submits that by disclosing the documents which are at issue in this appeal to a private investigator retained by the appellant, the Ministry has waived its right to claim the application of the invasion of privacy exemption in section 21. I will address this submission below.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed those portions of the records which remain undisclosed and find that they contain the personal information of the appellant's son and a number of other identifiable individuals. Those portions of the records which contain the personal information of the appellant have been disclosed to her.

Section 2(2) of the Act states that:

Personal information does not include information about an individual who has been dead for more than thirty years.

As the appellant's son died in 1993, the information contained in the records which relates to him continues to be his personal information as defined by section 2(1).

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information contained in a record, the

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

If none of the presumptions 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 circumstances which are relevant in the circumstances of the case.

The Ministry submits that all of the information at issue in this appeal falls within the presumption contained in section 21(3)(b), which 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 argues that all of the documents at issue in this appeal were compiled by the OPP as a result of a criminal investigation and the subsequent re-investigation of the death of the appellant's son to determine whether his death was connected to a possible violation of the Criminal Code or some other statute. I have reviewed the records and the representations of the parties and make the following findings:

1. The personal information contained in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. As such, it is subject to the presumption contained in section 21(3)(b) of the Act.
2. The personal information contained in the records does not fall within the ambit of section 21(4) of the Act.
3. The disclosure of the personal information contained in the records would constitute an unjustified invasion of privacy and they are, accordingly, exempt from disclosure under section 21(1) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellant argues that there exists a public interest in the disclosure of the records under section 23 of the Act, which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The appellant submits that, in her view, her son's death was suspicious and the OPP did not conduct its investigation properly. She further argues that there exists a high degree of public interest in ensuring a full and impartial investigation into all deaths which occur in Ontario under

suspicious circumstances and that a Coroner's Inquest is necessary to determine whether her son was the victim of foul play. Finally, the appellant submits that there exists a public interest in the disclosure of the records in order to ensure the accountability of the OPP for the conduct of its investigation.

In Order P-1121, Inquiry Officer Holly Big Canoe made the following observations about the application of the "public interest override" contained in section 23:

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

"Compelling" is defined in the Oxford dictionary as "rousing strong interest or attention". In order to find that there is a compelling public interest in disclosure, the information at issue must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to effectively express opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of the exemption which has been found to apply. In my view, this balancing involves weighing the relationship of the information against the Act's central purposes of shedding light on the operations of government and protecting the privacy of personal information held by government. Section 23 recognizes that each of the exemptions listed in the section, while serving to protect valid interests, must yield on occasion to the public interest in access to information held by government. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

I adopt the approach expressed in Order P-1121 for the purposes of this appeal. In my view, the interest in the disclosure of records at issue in the present appeal is neither compelling nor public. I find that the disclosure of the information at issue would not serve the purpose of informing the public about the activities of government, but rather, would address only the appellant's personal suspicions about the investigation of her son's death.

As such, I find that section 23 has no application in the circumstances of this appeal.

WAIVER

The appellant further submits that the Ministry waived its right to claim any exemptions by granting access to some portions of the records to a private investigator retained by the appellant. While I accept that the investigator may have been granted access to some of the information which has been withheld from the appellant, I have not been provided with any evidence as to the circumstances surrounding this disclosure or the specific documents which were allegedly provided to the investigator.

The privacy rights protected by section 21 of the Act are those of the individuals to whom the information relates. Without the consent of those individuals under section 21(1)(a), there can be no waiver of their right to privacy by the Ministry. As such, because of the mandatory nature of the section 21 exemption, the Ministry cannot be said to have waived the privacy rights of the individuals to whom the information relates.

Because of the manner in which I have disposed of the records under section 21, it will not be necessary for me to address the application of section 14(2)(a) to them.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ September 4, 1996