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

ORDER P-1456

Appeal P_9700150

Ministry of Consumer and Commercial Relations

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NATURE OF THE APPEAL:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the Sheriff's report of November, 1996 regarding the investigation of an incident at the requester's premises which involved a named bailiff company.

The Ministry granted access to a number of records related to this matter but denied access to the Sheriff's report and a witness statement pursuant to sections 21(3)(b) and 49(b) (invasion of privacy) of the Act.

The requester appealed the decision. In his letter of appeal, the appellant has raised sections 11 and 23, claiming that there is a public interest in the disclosure of the records.

This office sent a Notice of Inquiry to the appellant, the Ministry and two affected parties. Representations were received from all four parties. In his representations, the appellant requested an opportunity to provide oral representations. The appellant also requested a copy of the representations and supporting documentation submitted by the other parties. I will deal with these matters below under the heading "Preliminary Matters".

RECORDS:

The records at issue in this appeal consist of a 7-page Sheriff's Report and attached witness statement.

PRELIMINARY MATTERS:

ORAL REPRESENTATIONS

As I indicated above, the appellant has requested an opportunity to provide oral representations regarding the issues in this appeal.

Except in the most unusual of cases, this office routinely receives written representations in inquiries under the Act. I have considered the appellant's request in light of the issues in this appeal. I do not find that this case involves anything unusual, either in terms of the issues or in respect of the appellant's ability to provide written representations.

The appellant has provided detailed and well articulated written representations regarding the issues in this appeal. Moreover, I find that the appellant's written representations are clear, understandable and thorough with respect to the issues in this appeal.

Accordingly, I have decided that it is not necessary for me to hear oral representations.

EXCHANGE OF REPRESENTATIONS

The appellant also requested a copy of the representations and supporting documentation submitted by the other parties.

Section 52 of the Act establishes the Commissioner's authority to hold an inquiry into the issues in an appeal under the Act, and sets out the procedures to be followed. Section 52(13) of the Act provides:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order M-796, Inquiry Officer Holly Big Canoe dealt extensively with this issue in the context of a request made under the municipal Act. I have set out her comments on this issue in their entirety:

> The issue of access to representations has been addressed by both former Commissioner Sidney B. Linden in Order 164 and by Commissioner Tom Wright in Orders 207 and P-345. In Order 164, former Commissioner Linden stated that section 52(13) of the provincial Freedom of Information and Protection of Privacy Act, which is similar in wording to section 41(13) of the Act, does not confer a right on a party to an appeal to obtain access to the other party's representations. He noted that while section 52(13) does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be an extremely unusual case where such an order would be issued.
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> Former Commissioner Linden also stated that since the Statutory Powers Procedures Act does not apply to an inquiry under the Act, the only statutory procedural guidelines that govern inquiries under the Act are those which appear in the Act. He went on to discuss the procedures respecting inquiries:
>
> > ... while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
> >
> > ...
> >
> > Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure.

> However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

In Order 207, Commissioner Wright adopted the reasoning of former Commissioner Linden and noted that:

> If an appellant were provided with access to the [representations] or other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant.

Access to representations and section 52(13) of the provincial Act were the subject of further discussion by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 16, 1991, in the context of an application for judicial review of Order 167. At pages 11 and 12 of his decision, Mr. Justice Isaac commented:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the provincial Act. The latter provision prohibits the Commissioner and his staff from disclosing information which comes to their knowledge in the performance of their duties.

> In the circumstances, I conclude that the appellant has no right of access to the records which were sent to the IPC during the inquiry stage of the appeals process.

I agree fully with these comments. I find that this is not the "extremely unusual case" where an order for the exchange of representations should be issued. In my view, an exchange of representations in the circumstances of this appeal would provide the appellant with the very information he is seeking in his access request, the protection of which is at issue in this appeal.

The appellant has been provided with a copy of the Notice of Inquiry which describes the record at issue, and explains the exemption which has been relied on and the onus requirements under the Act. In my view, the appellant has been provided with sufficient information to enable him to address the issues in this appeal. Accordingly, I will not order the parties to exchange their representations in the circumstances.

GRAVE ENVIRONMENTAL, HEALTH OR SAFETY HAZARD

The appellant claims that section 11(1) is applicable in the circumstances of this appeal. This section provides that:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Section 11 of the Act is a mandatory provision which requires the head to disclose records in certain circumstances. Previous orders of this office have found that the duties and responsibilities set out in section 11 of the Act belong to the head alone (Orders 65, 187 and P_293). As a result, the Information and Privacy Commissioner or her delegate do not have the power to make an order pursuant to section 11 of the Act.

DISCUSSION:

PERSONAL INFORMATION

"Personal information" is defined in section 2(1) of the Act to mean "recorded information about an identifiable individual...". I have reviewed the records at issue and I find that they contain the personal information of the appellant and other identifiable individuals. However, the record is clearly one which can be severed in accordance with section 10(2). Accordingly, I find that the records can be severed as follows:

- Pages 1 and 2 of Record 1 are cover pages and contain the personal information of the appellant. These two pages also contain information about other individuals. However, this information pertains to these individuals in their professional capacity and does not qualify as personal information. These pages also contain references to the Bailiff company and as this pertains to a company, it does not qualify as personal information. Neither section 21(1) nor section 49(b) are applicable to records or parts of records which contain only the personal information of the appellant. Therefore, these two pages of the record should be disclosed to the appellant.

- With respect to Page 3 of Record 1, all of this page except the last three lines contains the personal information of the appellant. The last three lines also contain the personal information of other individuals. The information pertaining to the appellant only is clearly severable from the information in the last three lines. Neither section 21(1) nor section 49(b) are applicable to the portions of this page which pertain only to the appellant, and these portions of the record should be disclosed to the appellant.

- Pages 4 - 6 of Record 1 contain a summary of the facts regarding the incident. This portion of the record concerns an investigation into the

actions of two bailiffs and as such constitutes their personal information. As I indicated above, this portion of the record also contains the personal information of the appellant. The personal information in this portion of the record is so intertwined that it cannot be severed.

- Page 7 of Record 1 contains the date the report was written, the signatures and badge numbers of the investigators responsible for preparing the report. The signatures and badge numbers are provided in these individuals' official capacity. The information on this page does not qualify as personal information and should be disclosed to the appellant.

- Record 2 contains a statement given by one of the bailiffs referred to in Record 1 and qualifies as this individual's personal information. The record also contains the appellant's personal information. Similarly, the personal information in this record is so intertwined that it cannot be severed.

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 appellants and another individual 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 requesters access to that information.

The appellant argues that it is arguable whether section 21(1)(f) is applicable to a determination under section 49(b), as it is contained within section 21 and not a separate definition section such as section 2(1).

I do not agree. Previous orders of this office have determined that 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 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.

The Ministry submits that the disclosure of the record would constitute a presumed unjustified invasion of personal privacy as it contains personal information which was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b). The Ministry indicates that the record contains personal information which was compiled by the Court Services Manager, acting in the capacity as a sheriff under section 12 of the Bailiffs Act. The Ministry argues that such an investigation could result in a finding that a violation of law,

section 9 of the Bailiffs Act, had occurred and that penalties ranging from fines to the revocation of an appointment as a bailiff could result from a conviction.

The appellant submits that sections 21(2)(b) and (d) are relevant in the circumstances of this case. In this regard, the appellant states:

> ... a prosecution of a criminal bailiff is certainly going to promote public safety or his illegal acts certainly constitute a danger and the response they are likely to provoke may frequently be dangerous.
>
> The information is relevant to a fair determination of rights, both mine in instigating a prosecution which is virtually impossible without the requested material and possibly with respect to determination of the prospective defendant's or defendants' charges. I must convince a Justice of the Peace to lay such charges and in order to do so I require the requested documents to persuade a J.P. that there is sufficient grounds for such charges...

Section 21(3)(b) 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.

I have carefully reviewed the portions of the records at issue and the representations of the parties and find that the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law (the Bailiffs Act). Accordingly, the presumed unjustified invasion of personal privacy under section 21(3)(b) applies.

However, the appellant submits that the exception clause in section 21(3)(b) applies in this case. He states that disclosure of the records is necessary to "prosecute the violation". He submits that the information in the records is "necessary" for the criminal prosecution of the individual(s) who broke into his home and stole his property.

In this regard, the appellant states that the police refused to investigate the matter as they considered it a "civil matter". Further, following its investigation into the matter, the Ministry decided not to prosecute "on the basis that this was the first complaint about this bailiff". The appellant states that:

> If I do not prosecute privately there will be no prosecution and no possible justice, and the criminals will be free to commit further crimes with impunity!

As I noted above, the appellant wishes to obtain this information in order to place it before a Justice of the Peace to persuade him/her that there are sufficient grounds for criminal charges.

The Concise Oxford Dictionary, 8th Edition, defines "prosecute" as "institute proceedings against (a person)".

While I accept that the appellant wishes to "prosecute" this matter, I am not persuaded that he would be unable to initiate proceedings without the information at issue. Accordingly, I find that the exception to the presumption in section 21(3)(b) is not applicable in the circumstances.

The appellant submits that section 21(3)(b) is rebuttable, and that the factors he raised in support of disclosure outweigh the presumption.

Even if I were to find that sections 21(2)(b) and (d) applied in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy commissioner) (1993) 13 O.R. 767 held that the factors in section 21(2) cannot be used to rebut the presumptions in section 21(3). Accordingly, this consideration cannot apply to the records as I have found that section 21(3)(b) applies.

Section 21(4) does not apply. The appellant has raised the application of section 23 of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there is a compelling public interest in the disclosure of the records which outweighs the purpose of the section 49(b) exemption. This raises the possible application of 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. [emphasis added]

Section 23 does not refer specifically to the exemption in section 49(b). This matter has been previously considered in Order P-541, where Inquiry Officer Anita Fineberg made the following comments:

> In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

I agree, and accordingly, I will consider the possible application of section 23 to the records at issue.

The appellant relies on previous arguments he made in his submissions regarding the prosecution or continued investigation of this matter and refers to the exception to the section 21(3)(b) presumption. He states:

> ... it explicitly limited the exemption where the [information] was necessary for prosecution or continued investigation of that specific violation of law, which indicates a compelling public interest in disclosure which the statute itself indicates outweighs the purpose of the exemption.

In Order P-1121, Assistant Commissioner Tom Mitchinson 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 only address the appellant's personal interest in pursuing charges against the affected persons.

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

I have reviewed the Ministry's representations regarding the exercise of its discretion in favour of denying access under section 49(b). I find nothing improper in the exercise of discretion and, accordingly, I would not alter this determination on appeal.

I find, therefore, that the disclosure of the personal information contained in the records would constitute an unjustified invasion of personal privacy of the affected persons and is properly exempt under section 49(b) of the Act.

ORDER:

1. I order the Ministry to disclose to the appellant Pages 1, 2, 7 and all of Page 3 except the last three lines by sending him a copy of these pages on or before **October 31, 1997** but not earlier than **October 27, 1997**.

2. I uphold the decision of the Ministry to withhold the remaining portions 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: September 26, 1997
Laurel Cropley
Inquiry Officer