



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

# ORDER P-1622

Appeal P\_9800099

Ministry of the Attorney General



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## **NATURE OF THE APPEAL:**

The appellant is a Board of Education (the Board). It submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry) for access to all documentation including photographs and exhibits in the Crown Attorney's possession relating to the investigation and trial of a named individual. The named individual was a teacher employed by the Board. Following an investigation by the Ontario Provincial Police (the OPP), the teacher was charged and subsequently convicted of a number of counts of sexual assault. The teacher has since served his sentence.

Subsequent to the completion of the criminal matter, statements of claim were issued by two of the victims naming the Board and the teacher as defendants.

The Ministry located the records responsive to the request and provided partial access to them. Access to the remaining records was denied on the basis of sections 19 (solicitor-client privilege), 21 (invasion of privacy) and 22(a) (information available to the public) of the Act. The Board appealed the denial of access and Appeal P-9700266 was opened. Appeal P-9700266 was later placed on hold and re-activated as the current appeal.

During the course of this appeal, the Board agreed to eliminate those records withheld by the Ministry under section 22(a) of the Act. The following pages have therefore been eliminated from the scope of the appeal: pages 1-9, 72-269 and 546-555. As these were the only records for which section 22(a) was claimed, this exemption is no longer at issue.

The Board also agreed to eliminate pages 649-996 and 1002-1055 from the scope of the appeal.

This office sent a Notice of Inquiry to the Board, the Ministry and the teacher. Representations were received from all three parties. In its representations, the Board raised the possible application of the public interest override in section 23 of the Act. The Ministry and the teacher were given an opportunity to address this issue. Supplemental representations were received from the Ministry.

In its representations, the Ministry indicates that it is prepared to release pages 633, 645 and 648. These pages consist of OPP press releases pertaining to the investigation and arrest. As these documents were intended for publication, I find that no mandatory exemption applies to them. Therefore, these pages are no longer at issue. Because the Ministry does not indicate that these pages have been provided to the Board, I will order their disclosure.

## **RECORDS:**

The records remaining at issue in this appeal are listed in Appendix "A" to this Order. They consist, generally, of correspondence, witness statements, victim impact statements, exhibit lists and documentary evidence, memoranda and two Crown Briefs.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, “personal information” is defined to mean, in part, recorded information about an identifiable individual. I have reviewed the records and find that they all contain the personal information of the teacher in that they either directly or indirectly refer to him in the context of the investigation and subsequent charges and trial. Many of the records also contain the personal information of other individuals, including the teacher’s family, and the victims of the sexual assaults and their families.

### **INVASION OF PRIVACY**

I have found that the records only contain the personal information of individuals other than the Board. In this case, section 21(1) of the Act prohibits the Ministry from disclosing this information except in the circumstances listed in sections 21(1)(a) through (f). In particular, section 21(1)(f) permits disclosure if it “does not constitute an unjustified invasion of personal privacy.” Accordingly, in such a case, I must be satisfied that disclosure **would not** constitute an unjustified invasion of another individual’s personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption.

#### **Section 21(3)(b)**

The Ministry submits that section 21(3)(b) applies to exempt the records at issue from disclosure. This section 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.

Pages 523 - 524 consist of a list of names and addresses of witnesses which was provided to the Crown Attorney by the OPP. Pages 568 - 633 consist of police officers’ notes and witness statements taken during the investigation. The two Crown Briefs contain a number of documents, including particulars about the teacher, a synopsis, warrants, informations, police

officers' notes, investigation and interview notes, evidence and statements taken during the police investigation into the teacher's activities. I find that all of these records contain information which was compiled and is identifiable as part of an investigation into a possible violation of law (sexual assault). Therefore, I find that the presumption in section 21(3)(b) applies to them.

The Board refers to the exception in section 21(3)(b) and submits that this section contemplates disclosure of documents necessary to prosecute a violation of law. The Board argues that the requested records would have been disclosed within the criminal trial process and would have been necessary to prosecute the violation.

While it may be the case that some or all of the records were disclosed to the teacher during his criminal trial, that fact, in and of itself, is not relevant to whether section 21(3)(b) applies to this information in the circumstances under which the Board has requested them. In my view, the past disclosure of the records (or some of them) during the criminal trial of the teacher does not mean that the presumption in section 21(3)(b) can no longer apply to them. The Act clearly contemplates that the rights to privacy in the context of court (particularly criminal) proceedings will be somewhat diminished. However, beyond that very specific use, the Act specifies that their disclosure would constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the Act.

Accordingly, in the context of an access request for records which may have been used in a criminal trial, I find that the presumption in section 21(3)(b) applies to those which were compiled and which are identifiable as part of an investigation into a possible violation of law.

The Board has raised a number of factors and considerations under section 21(2). However, even if I were to find any of them relevant in the circumstances of this appeal, the Ontario Court's (General Division) decision in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) held that the factors and considerations in section 21(2) cannot be used to rebut a presumption in section 21(3).

I find that all of the remaining records were either created or obtained by the Crown in order to prepare for and use in the teacher's criminal trial, or contain communications between the Crown and various parties, including the police and the teacher's lawyer regarding this matter. In my view, these records were not compiled nor are they identifiable as part of the investigation into the possible violation of law, but rather, relate to the prosecution of that violation. As such, they do not fall within the presumption in section 21(3)(b) (Order P-849). I will, therefore, consider the relevance of the factors and circumstances in section 21(2) to these records.

### **Factors and considerations favouring disclosure**

The Board claims that the factor in section 21(2)(d) is relevant in the circumstances of this appeal. In this regard, the Board indicates that it has been named as a defendant in two actions which arise out of the sexual assaults. The Board indicates further that the teacher has also been named as a defendant, but that he has not responded in any way to the actions and has been noted in default. The Board indicates that had the teacher filed a defence in the civil actions, the documents which were disclosed to him during the criminal trial would have been producible

within the civil actions. The Board contends that it will be hindered in its ability to defend the allegations made against it because the teacher has failed to defend the actions. The Board concludes that the failure of the teacher to respond should not prevent ordinarily relevant and producible documents from being produced and relied upon within the litigation when the documents can be obtained from another source (presumably meaning disclosure under the Act).

In respect of this last point, I draw the Board's attention to sections 64(1) and (2) of the Act, which provide:

- (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
- (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

These sections have been interpreted in previous orders as meaning that although the alternate means of obtaining information may be available to the appellant, its availability under the Act must be determined independently (Orders 48, P-447 and P-689).

It is clear that the Board is involved in civil proceedings as a defendant in relation to the sexual assaults committed by the teacher. I am satisfied that information obtained as a result of the investigation and trial may well be relevant in the ultimate determination of liability in the civil action. Accordingly, I find that the personal information in the records is relevant to a fair determination of the rights of the Board in this matter. Section 21(2)(d) is a factor which weighs in favour of disclosure. However, as a party to an action, the Board has full use of the Rules of Civil Procedure, including discovery, to obtain information relevant to the actions. I am not persuaded, therefore, that access under the Act is the only way in which the Board will be able to obtain at least some of the information it seeks to enable it to defend the actions. I find that this lessens the weight of this factor.

While I do not accept the Board's argument that prior and necessary disclosure during the criminal trial triggers the exception to the presumption in section 21(3)(b), I am prepared to accept that the prior disclosure during trial of (at least) some of this information is a relevant circumstance insofar as the remaining records are concerned. This consideration also weighs in favour of disclosure. However, it is not clear exactly what information was disclosed during the trial. Further, in my view, the passage of time renders the public aspect of the criminal trial less significant. Therefore, I do not give this consideration much weight.

### **Factors and considerations favouring privacy protection**

The Ministry raises, generally, issues regarding the sensitivity of the matter and the harms to all of the parties involved resulting from disclosure of the records after completion of the trial. The teacher reiterates these concerns. In particular, he indicates that this matter is behind him and he simply wishes to move on with his life. In this regard, the Ministry and the teacher have raised the application of the factors in sections 21(2)(e) (pecuniary or other harm) and (f) (the personal information is highly sensitive). These factors both weigh in favour of privacy protection.

I find that disclosure of information relating to the criminal prosecution of charges of sexual assault would cause a great deal of distress to the individuals involved. Therefore, I find that the information contained in the records is highly sensitive and section 21(2)(f) is relevant. I find further that, in the circumstances, the resurgence of this information several years after the criminal proceeding was completed would be extremely painful and distressing to both the victims and the accused. I find, therefore, that this factor weighs considerably in favour of privacy protection.

In my view, any civil proceeding resulting from the teacher's actions is a consequence that is neither unexpected nor unfair, and disclosure of his personal information in this context would, therefore, not be unfair. Consequently, I am not persuaded that the teacher would be unfairly exposed to any harm by disclosure of the records at issue as contemplated in section 21(2)(e).

Similar considerations, however, do not apply to the teacher's victims. In my view, disclosure of their personal information after the matter has been completed would be extremely harmful to their well-being and their privacy and would have the effect of revictimizing them. This is not only harmful, but unfair. Accordingly, I find that section 21(2)(e) applies to the personal information of the victims and their families. That being said, however, I acknowledge that two of the victims have chosen to continue this matter in the civil courts and I find it difficult to accept that they would suffer harm to the same degree. Therefore, I find that this factor holds less weight with respect to the records relating to these two individuals.

It is important to note that, although civil proceedings have been commenced which will no doubt result in repetition of the details of the events involving the teacher and the victims, the request for records in this appeal was made under the Act. In my view, all of the consequences of disclosure under the Act must be considered in determining whether disclosure under the Act would constitute an unjustified invasion of privacy.

In considering the arguments presented by the Ministry and the teacher, I find it particularly pertinent that the teacher has been tried and convicted for his crimes and has served the sentence imposed on him by the courts. In my view, upon completion of this public aspect of the criminal proceeding, the teacher should, thereafter, be able to move on in his life without fear that this matter will resurface at any point in the future. I am satisfied that release of the personal information in the records after the criminal matter has been closed will prevent the teacher from establishing closure and moving on even though he has, at least under the criminal law, paid his debt to society. Similarly, the victims and witnesses and other individuals involved in this matter must also be able to bring closure to this unfortunate time in their lives without fear that a request under the Act will bring it all back. In my view, this is a relevant consideration weighing in favour of privacy protection.

In balancing the interests of the Board to access the records and the interests of the teacher and the other individuals identified in the records to privacy, I find the factors and consideration weighing in favour of privacy protection to be of greater weight. In saying this, I note that although the Board seeks the information to assist it in its defence of the civil action, disclosure under the Act is, effectively, disclosure to the world (Orders P-1499 and P-1538). The seriousness of the matter, the fact that the individuals involved in the criminal matter have already received public exposure, the fact that the teacher has been convicted and has served his

time, and, generally, the impact it has had on the lives of the individuals involved are all considerations I took into account in balancing the rights of the parties in this appeal.

I find that section 21(4) is not applicable in the circumstances of this appeal. The Board has raised the possible application of section 23, the so-called "public interest override".

## **PUBLIC INTEREST IN DISCLOSURE**

Section 23 of the Act provides:

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]

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

The Board submits that the compelling public interest in disclosure is that it would be unjust for the parties to a lawsuit to be denied access to properly produced documents simply because one of the defendants elects not to defend the action. The Board goes on to state that it is patently unfair that documents properly disclosed in the criminal matter will not be disclosed in the civil actions because the teacher has failed to respond to the actions.

The Ministry submits that the interest in disclosure of the records is a purely "private" interest as opposed to a "public" one. I agree. It is clear that the Board's interest in obtaining the records at issue is solely for the purpose of defending the action against it. In my view, the Board's arguments may have some relevance in the litigation context, but they do not relate to any public interest as it is understood in matters arising under the Act. Therefore, I find that section 23 is not applicable in the circumstances.

Accordingly, I find that the records are properly exempt under section 21(1) of the Act.

Because of the findings I have made, it is not necessary for me to consider the possible application of section 19 to the records.

## **ORDER:**

1. I order the Ministry to provide the Board with copies of pages 633, 645 and 648 by **October 28, 1998.**

2. I uphold the Ministry's decision to withhold the remaining 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 disclosed to the Board pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ October 8, 1998



## APPENDIX "A"

### RECORDS AT ISSUE FOR APPEAL P-9800099

PAGE NUMBER	DESCRIPTION
10	Witness list
11-12	Exhibit list
13	Exhibit list (handwritten)
14-15	Pre-Hearing Conference Report Form
16	Not at issue. (The Ministry clarified that this record, a map, was disclosed).
17-19	Sketches
20-25	Reference Letters
26-31	Attendance Register
32	Due to a numbering error, there is no page 32
33-35	School records of individuals
36-38	Class photos
39-44	Resume and evaluations
45-60	Victim impact statements
61-68	Pre-Sentence Report
69-70	Probation Order
71	Certificate of Sentence
270-514	Crown Briefs #1 and #2
515-524	Correspondence from Crown to individuals (Sept.11, 1996) and a list of addresses
525-527	Correspondence between Police and Crown (May, 1996)
528	Letter from Crown to Registrar (June 21, 1996)
529	Memo (January 8, 1996)
530-531	Correspondence from a law firm to Crown (December 15 and 20, 1995)
532	Correspondence from Crown to law firm (December 7, 1995)

PAGE NUMBER	DESCRIPTION
533-534	Memos from Deputy Registrar to Crown (October 10 and July 10, 1995)
535-540	Correspondence from law firm to Crown (April 27 and May 5, 1995)
541	Memo from Deputy Registrar to Crown (April 4, 1995)
542	Correspondence from a law firm to Deputy Registrar (January 13, 1995)
543-545	Correspondence, memos between Crown and Registrar's Office (December 29, October 28 and October 6, 1994)
556-632	Correspondence relating to disclosure (September 1994) and various attachments
633	News Release (Sept. 3, 1994)
634-638	Correspondence from a law firm to Police and to Crown (September 1 and August 29, 1994)
639	Correspondence from Crown's Office to Police (August 29, 1994)
640-642	Correspondence from a law firm to Crown (same as pages 636-638)
643-644	Correspondence from a law firm to Crown (January 12, 1994)
645	News Release (Jan 1, 1994)
646-647	Correspondence from a law firm to Crown (December 7, 1993)
648	News Release (December 2, 1993)
997-1001	Victim Impact Statement