



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

# ORDER P-1624

Appeal PA\_980161\_1

Ministry of Community and Social Services



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## **NATURE OF THE APPEAL:**

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records contained in a file compiled by an Eligibility Review Officer (the ERO) on behalf of the Ministry. The records relate to an investigation into the requester's entitlement to assistance under the Family Benefits Act (the FBA). As a result of the ERO's investigation, the Director of Family Benefits (the Director) made a decision terminating the requester's benefits and assessing an overpayment. The requester has asked for a review of that decision by the Social Assistance Review Board (SARB).

The Ministry located both the ERO's file and a general file relating to the requester. The Ministry granted access to the general file and denied access to the ERO's file under the law enforcement exemption contained in section 14(1)(b) of the Act.

The requester, now the appellant, appealed the Ministry's decision to deny access to the ERO's file.

A Notice of Inquiry was provided to the Ministry and the appellant. Because the records appeared to contain the personal information of the appellant, the parties to the appeal were also asked to consider the possible application of section 49(a) of the Act. Representations were received from both parties.

A Supplementary Notice of Inquiry was then provided to the appellant, the Ministry and to four other individuals whose rights may be affected by the disclosure of the information contained in the records (the affected parties). The Supplementary Notice requested the submissions of the parties on the possible application of section 49(b) to the records. Additional representations were received from the Ministry and the appellant, who also made submissions on the possible application of section 23 of the Act to the information contained in the records.

## **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 any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Having reviewed the information contained in the records, I find that all of them contain information relating to the ERO's investigation to determine whether the appellant was entitled to continue to receive family benefits assistance. On that basis, I find that all of the records contain the personal information of the appellant. I further find that some of the records also

contain personal information which relates to other identifiable individuals, including the affected persons, the appellant's alleged co-resident, children, mother and former spouses.

In addition, some of the records contain references to certain individuals by virtue of their employment functions or duties, including the ERO. However, in the circumstances of this appeal, because these references are made to these individuals in their professional or employment capacity, I find that the information does not constitute their personal information.

### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT**

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. The Ministry submits that section 14(1)(b) applies to all the records included in the ERO's file.

Section 14(1)(b) states as follows:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

In order for a record to qualify for exemption under this section, the investigation which generated the records must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

### **Was the ERO's investigation a "law enforcement" investigation for the purposes of section 14(1)(b)?**

The Ministry submits that previous orders of the Commissioner's office have found that investigations conducted under the FBA qualify as "law enforcement". It goes on to state that "This supports definition of law enforcement in that the records do contain investigative reports" [sic]. The Ministry then acknowledges that "although the investigation has been completed, the case is currently before the Social Assistance Review Board pending a decision."

The appellant has submitted very detailed and carefully reasoned submissions. While she acknowledges that several orders (P-139, P-963, P-967 and P-969) have found that ERO investigations are law enforcement investigations for the purposes of the section 14(1) exemption, she also refers to Investigation Report I95-031M, dated October 23, 1995. In that report, Commissioner Ann Cavoukian considered the jurisdiction of the SARB and whether an investigation undertaken solely to recover an overpayment under section 17 of the FBA qualified as “law enforcement”. In that report, Commissioner Cavoukian found that:

In our view, an investigation conducted solely with a view to recovering an overpayment under section 17 of the Family Benefits Act does not qualify as “law enforcement” since, by definition, recovery of money to which a recipient is not entitled does not qualify as a “penalty or sanction” imposed by a “court or tribunal”, under paragraph (b) of section 2(1) of the Act.

The appellant goes on to submit that:

On the particular facts of [the appellant’s] case, the Director of Family Benefits has made a decision terminating her benefits and assessing an overpayment. Neither of these decisions are penalties or sanctions. SARB’s role is limited to reviewing the Director’s decision. As it has no independent ability in [the appellant’s] case to order any penalty or sanction, it is our position that the ERO investigation should not be considered as being undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result on the basis that the investigation could lead to proceedings before SARB.

The appellant also acknowledges that it is theoretically possible that the ERO might involve the Police in a criminal investigation if he suspects that a criminal offence has taken place. Section 19 of the FBA describes the offence of knowingly obtaining benefits and the penalties which may flow from a conviction. The appellant submits that it is a question of fact to be determined in each case whether the investigation which gave rise to the creation of the record is likely to lead to proceedings in court.

The appellant further submits that she is not aware of any potential charges under section 19 of the FBA. Rather, the investigation appears to have led to the Director making a decision to simply terminate the appellant’s benefits and assess an overpayment. I note that the Ministry has not made reference to any pending prosecution of the appellant under section 19 of the FBA, the Criminal Code or any other statute.

In my view, the investigation undertaken by the ERO was designed to assist the Director in making a determination as to whether to curtail the appellant’s assistance under the FBA and/or to order that an overpayment be recovered. I cannot agree that the investigation was intended only to make a determination of the amount of overpayment to be assessed as suggested by the appellant. Rather, the ERO’s investigation could have (and ultimately did) lead to the appellant’s family benefits assistance being terminated, as well as the assessment of an overpayment.

I find that the situation present in this appeal is distinguishable from that in Investigation Report I95-031M referred to above. In that case, the investigation was undertaken only with a view to recovering an overpayment under section 17 of the FBA. In the present case, the ERO's investigation mandate extended beyond that limited function to include a determination as to whether the appellant was ineligible under section 12 of the FBA to receive assistance.

I find that the ERO's investigation could, and ultimately did lead to, proceedings before the Director which resulted in the appellant's assistance being terminated and an assessment of overpayment being made. I do not accept the position taken by the appellant that this decision cannot be properly characterized as a sanction or a penalty. In my view, the loss of one's family benefits assistance through proceedings before the Director can be characterized as a penalty or sanction in a way that the simple calculation of an overpayment cannot. I find, accordingly, that the ERO's investigation qualifies as a law enforcement investigation for the purposes of sections 2(1) and 14(1)(b).

By way of summary, I find that the investigation by the ERO was an investigation undertaken with a view to a law enforcement proceeding, the determination by the Director to terminate the appellant's benefits, within the meaning of section 14(1)(b).

### **Is the investigation ongoing?**

The purpose of the section 14(1)(b) exemption is to provide the Ministry with the discretion to preclude access to records only in circumstances where disclosure would interfere with an **ongoing** law enforcement investigation [Orders P-324 and P-403].

As noted above, the Ministry indicates that the investigation by the ERO is completed and the appellant has asked for a review by the SARB of the Director's decision to terminate her assistance. There is nothing in the record or the submissions of the Ministry which would lead me to believe that the investigation remains open.

Accordingly, I find that the investigation by the ERO which is the subject of the records at issue in this appeal is no longer ongoing. These records cannot, therefore, be subject to the exemption in sections 14(1)(b) and 49(a).

### **Will the disclosure of the records interfere with the investigation?**

I will also address the final element in the application of the section 14(1)(b) to the subject records, despite my findings with respect to the completed investigation.

Section 14 of the Act requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one that is based on reason. Because the Ministry is relying on the section 14 exemption, it bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act [Order P-188]. The requirement in Order P-188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the Ministry seeks to avoid by applying the exemption

[Order P-948].

The Ministry's submissions make no reference whatsoever to any potential interference with a law enforcement investigation which may result from the disclosure of the records. As the Ministry bears the onus of establishing the expectation of harm, I find that it has failed to establish the reasonableness of the expected interference under section 14(1)(b).

## **INVASION OF PRIVACY**

I have found above that all of the records contain the personal information of the appellant. In addition, many of the records contain the personal information of the affected persons, including their names, addresses and details about their observations with respect to the appellant and her putative spouse. Some of the records also contain information about the appellant's children, mother, alleged spouse and former spouses which was supplied to the Ministry by the appellant herself.

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, section 49(b) provides the Ministry with the discretion to deny the requester access to that information.

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 submits that the information contained in all of the records was compiled as part of an investigation conducted by the ERO into a possible violation of law, specifically the FBA.

Section 21(3)(b) of the Act, 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 appellant submits that:

section 21(3)(b) is directed at protecting a person who is the subject of an investigation from having any personal information collected in that investigation released to third parties. It is not directed at a situation where an individual is requesting information concerning an investigation directed at her.

The appellant also submits that the disclosure of the personal information contained in the records is relevant to a fair determination of her rights under section 21(2)(d) in order to allow her to prepare properly for the pending hearing before the SARB. While the appellant will receive disclosure of the Ministry's case ten days prior to the SARB hearing, she will require further time in order to fully prepare her arguments and there may be a discrepancy between the information disclosed and that which was compiled by the ERO.

I cannot agree with the position taken by the appellant with respect to the meaning which she has ascribed to section 21(3)(b). In my view, the section is not limited in application only to those situations where a third party requests an individual's personal information. The provisions of sections 21(2) and (3) are also clearly intended to be applicable to requests made under section 47(1) of the Act which originate with the individual whose personal information is contained in the records.

Previous orders have held that records compiled and identifiable as part of an investigation into the entitlement of a person to collect benefits under the FBA qualify as an investigation into a possible violation of law [Orders P-223, P-963, P-967 and P-969]. I adopt this finding for the purposes of this appeal. In my view, the records at issue in this appeal were compiled and are identifiable as part of an investigation by the ERO into a possible violation of the FBA's provisions with respect to entitlement to benefits. As such, I find that the presumption in section 21(3)(b) applies to such information.

As indicated above, once a presumption under section 21(3) is found to apply, the only way it can be rebutted is if the information falls under section 21(4) or where section 23 is found to apply. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. (3d) 767. Therefore, the records qualify for exemption under section 49(b).

However, a number of previous orders of the Commissioner's office [Orders M-384, M-444, M-1093 and P-1457] have held that the withholding of personal information from a requester in circumstances where the person requesting the information originally supplied it to an institution would lead to an absurd result. Accordingly, the disclosure of this information would not result in an unjustified invasion of personal privacy. In my view, this conclusion applies to the information contained in Pages 5, 8, 11, 12, 13 and 14 and portions of Pages 1 and 2. Each of these records, a Caution signed by the appellant (Page 5), a Declaration signed by the appellant (Page 8), four letters sent to her (Pages 11, 12, 13 and 14) and the statement which she provided to the ERO (portions of Pages 1 and 2), contain information which either originated with or were provided to her previously. I have highlighted on the copy of Pages 1 and 2 of the records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator those portions that contain the information provided by the appellant to the investigator and whose disclosure would not result in an unjustified invasion of personal privacy.

The appellant concedes that section 21(4) has no application, but submits that there exists a compelling public interest in the disclosure of the information contained in the records with the meaning of section 23 of the Act.

### **COMPELLING PUBLIC INTEREST**

The appellant argues that there exists a compelling public interest in having full disclosure of investigator's reports and files in order to allow individuals to have ample time to prepare their cases. She indicates that it is in the public interest to have SARB hearings scheduled and proceed in a timely fashion without any delays caused by a lack of time to prepare arguments because of the late disclosure of information by the Ministry. The appellant submits that the need to prepare properly for an appeal concerning the removal of a person's social assistance clearly outweighs other individuals' right to privacy. The appellant also suggests that all of the requested information will eventually be disclosed under the SARB disclosure mechanisms in any case.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the personal information exemption.

I have reviewed the records and the submissions of the appellant and find that there does not exist any **compelling public** interest in the disclosure of the records. I find that any interest which may exist in the disclosure of this information is purely personal to the appellant. In addition, I find that any interest which may exist in the disclosure of the records does not clearly outweigh the purpose of the personal information exemption. As such, I find that section 23 has no application in the present appeal.

### **ORDER:**

1. I order the Ministry to disclose Pages 5, 8, 11, 12, 13 and 14 and the highlighted portions of Pages 1 and 2 to the appellant by providing her with a copy by **November 24, 1998** but not before **November 20, 1998**.
2. I uphold the Ministry's decision not to disclose the Pages 3, 4, 6, 7, 9, 10, 15, 16 and 17 and those portions of Pages 1 and 2 which are not highlighted.
3. In order to 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 1.



Original signed by: \_\_\_\_\_ October 20, 1998  
Donald Hale  
Adjudicator