



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1755

Appeal PA-990151-1

Ministry of Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General and Correctional Services, now the Ministry of the Solicitor General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the complaint filed by a named Ontario Provincial Police (OPP) officer against him on December 1, 1998.

The Ministry located the typed incident report in response to the request and provided partial access to it. The Ministry denied access to the remaining portions of this record on the basis of sections 14(2)(a) and 49(a) (law enforcement/discretion to refuse requester's own information) and 21(1) and 49(b) (invasion of privacy) with particular reference to section 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law).

The appellant appealed the denial of access and indicated that he believed more records should exist.

During mediation, the Ministry conducted a further search for responsive records and determined that there was no written complaint. The Ministry also located the investigating officer's handwritten notes and on August 6, 1999, provided access to all information in the notes except for names.

Also during mediation, the appellant indicated that he was not seeking access to the names and/or addresses of individuals.

On September 3, 1999, the Mediator sent out the Mediator's Report to the parties. This document sets out the request, the decision and the results of mediation. It also identifies the issues and exemptions remaining in dispute. The purpose of sending this document to the parties is to notify them of the issues that will be forwarded on to adjudication and to provide them with an opportunity to correct any factual errors, inconsistencies or omissions.

On September 7, 1999, the appellant wrote to the Mediator and indicated that he "disagreed with your fact sheet, and such differences will be addressed at Notice of Inquiry, in my representations". The Mediator responded to this letter on September 14, 1999. She advised the appellant as follows:

Please note that the Mediator's Report forms the basis of the adjudication file and it should be as accurate as possible. Before I can pass this file on to adjudication I must know, in particular, whether the issues remaining in dispute accurately reflect the information in this appeal which you are still seeking access to. If not, please indicate what else you are appealing. Any other comments about the Mediator's Report are welcome.

She then advised the appellant that if she did not hear back from him by September 24, 1999, she would assume that no additional issues were to be added. The appellant did not respond to this letter.

I sent a Notice of Inquiry to the appellant and the Ministry. In this Notice I indicated that as a result of the above exchange of correspondence, I am only prepared to consider the application of the exemptions in sections 14(2)(a)/49(a) and/or 21(3)(b)/49(b) to the information in the records which I have described below.

The Ministry submitted representations in response to the Notice. I received a letter from the appellant indicating that he did not intend to submit representations. He also stated, however, that in his opinion, "when mediation fails, any mediation discussions [are] not relevant". I will address these comments below as a preliminary matter.

RECORD:

The record at issue consists of the following portions of the typed incident report:

- two lines of information under the heading "Complaint"; and
- the last sentence under the heading "History".

PRELIMINARY MATTER:

WHAT HAPPENS WHEN MEDIATION IS NOT COMPLETELY SUCCESSFUL?

As I indicated above, the appellant takes the position that since mediation as a whole was not successful, none of the agreements made during this time are in effect. In other words, the appellant believes that I should consider nothing to have been resolved. I do not accept the appellant's position in this regard.

When a file is placed in mediation, the task of the mediator is to attempt to identify and clarify issues and records, and to attempt to settle all or some of them. There is a recognition, however, that in many cases an appeal will not be completely mediated but will be narrowed to fewer issues or records. The general expectation is that the parties, having agreed to participate in the mediation process, will honour or adhere to agreements reached in mediation. In the absence of clearly articulated disagreement from a party regarding the results of mediation, the appeal will proceed to inquiry on that basis.

In some cases, the mediator will engage in discussions with both parties in which a tentative settlement is reached dependent on one party taking a particular action. For example, an institution may agree to disclose a record to which an exemption has been applied on condition that the appellant agrees not to pursue another record. Or, an appellant may agree not to pursue certain records or issues on the condition that the institution does certain things. If the settlement dissolves because of inaction or because the other party does not agree to the offered terms, very often the fact and content of the settlement discussions are

considered to be "mediation privileged" which means that any information pertaining to these discussions would not be made available to the adjudicator who will ultimately be determining the issues in the appeal.

In other cases, a party may wish to provide some information to a mediator strictly in confidence in order to facilitate or advance the mediation process. However, there is a clear intention on the part of the individual providing the information that it not be made available to any other individual, including the adjudicator. Again, this information is "mediation privileged".

In the circumstances of this appeal, the appellant agreed to narrow the issues and records in this appeal during mediation. There is no indication in the file that he considered his agreements to be contingent on full settlement of the appeal. Further, had any of his discussions been mediation privileged, they would not have been forwarded on to me. It is important to note that the appellant was notified that the Mediator's Report will go to the Adjudicator. In reading the appellant's correspondence relating to the Mediator's Report, I find that it does not indicate that he considered any information to be privileged in the sense referred to above. Although he stated that he disagreed with the contents of the Report, he did not provide particulars of his disagreement even though he was clearly requested to do so.

The appellant has essentially stated to me that he withdraws any agreements he made during mediation. In my view, it is too late to make such a claim at this stage in the process, particularly in light of the steps taken by the Mediator to clarify his concerns. In so finding, I am not saying that a party may not change his or her mind and back away from an agreement made in mediation, but that a decision must be made in a timely fashion and within the procedures which have been established by this office and which have been clearly communicated to the parties. To find otherwise would not only delay the inquiry process in that I would be required to essentially start the inquiry over again in order to introduce the new issues, but it would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

Consequently, I will only consider the possible application of the exemptions in sections 21(1)/49(b) and 14(2)(a)/49(a) of the Act to the portions of the records identified above.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined as recorded information about an identifiable individual.

The record at issue is an "incident report". As I indicated above, only portions of this document are at issue. The record overall pertains to a complaint made against the appellant and as such, it contains his personal

information as well as that of the complainant, the OPP officer. The appellant has been provided with the portions of the record which pertain to him. The portions of the record which have been withheld contain information about the OPP officer and the appellant but are inextricably intertwined.

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 institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

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

In this case, the only exception to the section 21(1) exemption which could apply is section 21(1)(f). The Ministry has cited the presumption in section 21(3)(b) to support its position that section 21(1)(f) does not apply.

Section 21(3)(b)

The Ministry describes the history between the appellant and the OPP officer relating to a previous investigation conducted by this officer into the appellant's activities. The Ministry states that the complaint

against the appellant was made by the OPP officer as a result of the appellant's actions subsequent to the conclusion of the previous investigation.

The Ministry submits that a law enforcement investigation into an allegation of the commission of a criminal offence was commenced as a result of the complaint. The Ministry states that the investigation was conducted by the OPP, which is an agency that has the function of enforcing and regulating compliance with a law. In this regard, the Ministry states that the OPP, as provided under the Police Services Act, has a legislative mandate to maintain traffic patrol in designated areas. It states further that the investigation of criminal offences, while occurring within its designated jurisdiction would be its responsibility.

The Ministry indicates that in this case, the entire record was compiled and is identifiable as part of a law enforcement investigation into possible violations of the law under the Criminal Code and/or Highway Traffic Act, and that all personal information contained in the record was compiled and is identifiable as part of this investigation.

Having reviewed the record, I am satisfied that it pertains to a complaint regarding an alleged activity which would constitute a breach of the Criminal Code. I am also satisfied that this record, which initiated the OPP investigation, contains personal information which was compiled and is identifiable as part of that law enforcement investigation. I find, therefore, that the disclosure of the personal information at issue would constitute a presumed unjustified invasion of personal privacy pursuant to section 21(3)(b).

I find that none of the circumstances outlined in section 21(4) of the Act operate to rebut the presumption under section 21(3)(b). The appellant has not raised the application of the public interest override in section 23 and in the circumstances of this appeal, I find that it does not apply. Accordingly, I find that the withheld portions of the record are exempt under section 49(b) of the Act.

Because of this finding, it is not necessary for me to consider the possible application of sections 14(2)(a) and 49(a) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ February 14, 2000