



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1843

Appeal PA-000137-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of the Solicitor General (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to documentation which led to a verbal Ontario Provincial Police (OPP) order against him, directing him to stay away from a certain township. In its decision, the Ministry granted partial access to the records it identified as responsive to the request. In withholding portions of the records, the Ministry relied on sections 49(a) and (b) of the *Act* (discretion to deny requester's personal information), with reference to the exemptions found in section 14(1)(l) (facilitate commission of unlawful act or hamper control of crime), the factor in section 21(2)(f) (highly sensitive personal information) and the presumption in section 21(3)(b) (investigation into a possible violation of law). Further, the Ministry has withheld portions of the records it identified as containing information which is not relevant to the request.

The Ministry has submitted representations in response to a Notice of Inquiry which have, with the exception of certain portions withheld for confidentiality reasons, been shared with the appellant. The appellant has submitted representations in response to those of the Ministry.

RECORDS:

Eleven pages of documents were located in response to the appellant's request. Pages 1 - 7 consist of an occurrence report and supplementary report, which appear to have been printed from a computer. These pages provide an account of a call to the OPP in the fall of 1999, and the subsequent contact between the OPP and the appellant. Included in the account are names and addresses of individuals interviewed by OPP officers, a description as to the action taken by the OPP, and summaries of the statements of various individuals.

Pages 8 - 11 consist of handwritten notes taken from the police notebook of the officer who filed the above occurrence reports. The notes also provide details as to the events leading up to the contact between the OPP and the appellant, the nature of that contact and its conclusion.

All of the pages contain portions which have been withheld by the Ministry on the basis of the application of section 49(b) of the *Act*, with reference to sections 21(2)(f) and 21(3)(b). Further, portions of pages 8, 9 and 10 have been withheld in reliance on section 49(a) of the *Act*, with reference to section 14(1)(l).

Pages 1, 8 and 11 of the records contain information which has been withheld and marked by the Ministry as "information not relevant to your request".

CONCLUSION:

With the exception of two portions of the records, I uphold the Ministry's decision to deny access to the information severed from the records.

DISCUSSION:

NON-RESPONSIVE RECORDS

As has been noted in many orders, the determination by an institution of which documents are relevant to a request is a fundamental first step in responding to a request under the *Act*. Further, as was stated in Order P-880, it is the request itself that “sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request.” In applying the notion of “responsiveness,” prior orders have generally looked to whether information in the documents is “reasonably related” to the request. Further, it is well-established that a record may contain information which is responsive to a request alongside information which is non-responsive, the latter which may properly be withheld (Order P-880).

I agree with this analysis and adopt it for the purposes of this appeal. As I have set out above, the appellant’s request was for "documentation which led to a verbal OPP order" against him, directing him to stay away from a certain township. The Ministry has submitted that the information marked as "not relevant" on page 1 of the records relates to options shown on the computer and has "no investigative substance". Further, it is submitted that the portion withheld on page 8 on the same basis relates to "administration matters" and not investigative, and that the portion on page 11 also relates to "non-investigation" matters.

Whether or not it is meaningful to distinguish between "administrative" and "investigative" matters, I am satisfied on my review of the records that the portions identified as "not relevant" by the Ministry on pages 1, 8 and 11 of the records are not reasonably related to the appellant's request, and were properly withheld on this basis.

PERSONAL INFORMATION/INVASION OF PRIVACY

I now turn to the exemptions relied on by the Ministry to withhold the remaining severed portions of the records. I will decide first whether the records contain personal information, and if so, to whom that personal information relates, for the answer to these questions determines which parts of the *Act* may apply.

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.

On my review of the material, each of the records (the occurrence report, supplementary report and excerpt from the OPP officer's notebook) contains the personal information of the appellant. Each of them also contains the personal information of other individuals, such as names, addresses, and information about their actions and thoughts.

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access.

Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b), 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. The institution may also decide to grant access despite this invasion of privacy.

Section 49(b) introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In considering the application of section 49(b), sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. 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.

With respect to section 21(3), 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 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

Among other things, the Ministry submits that the personal information contained in the records is covered by the presumption set out in section 21(3)(b):

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 submits that the OPP is established under the *Police Services Act* (the *PSA*), which gives the OPP responsibility, among other things, for providing police services in respect of the parts of Ontario that do not have municipal police forces other than by-law enforcement officers. Here, it is said, all of the records at issue were compiled during the course of a law enforcement investigation, in that the OPP

conducted an investigation to determine if any person(s) committed an offence contrary to any statute, or a criminal offence. The Ministry also submits that individuals have given their comments in a candid and subjective manner, and the release of the records would cause personal distress to the individuals or families of those named in the records. The Ministry states that prior orders have spoken to the sensitivity of statements provided by named witnesses, in a candid manner, taken by police during a criminal investigation.

The appellant's representations do not address this issue, but make general assertions as to the senselessness of the scheme for privacy protection and access to information in the province, and of the public service.

As I have indicated, portions of each page in the records have been withheld on the basis, among other things, that their disclosure would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. I have reviewed the withheld portions. With two exceptions, which will be discussed below, each of them contains either the personal information of individuals other than the appellant only, or a mixture of the personal information of the appellant and of other individuals.

On my review of the records, and having regard to the submissions as to the role and purpose of the OPP in gathering the information, I am satisfied that the personal information in them was compiled and is identifiable as part of an investigation into a possible violation of law, and therefore falls under section 21(3)(b) of the *Act*. The absence of charges does not negate the application of section 21(3)(b) see, for instance, Order PO-1715. Disclosure of this information must therefore be presumed to constitute an unjustified invasion of the personal privacy of those individuals. This does not necessarily end the matter, for section 49(b) gives the Ministry a discretion to disclose this information even if it would constitute an unjustified invasion of an individual's personal privacy. However, having regard to the context within which this information was gathered, as described by the Ministry, I am satisfied that the Ministry has properly exercised its discretion against disclosure.

I also find that it would not be reasonable to attempt to sever the personal information of the appellant from the personal information of other individuals in the records in order to provide the appellant with greater disclosure of his own information, beyond that which has already been done by the Ministry.

As I have indicated, there are two severed portions which require further discussion. On pages 6 and 11 of the records are accounts of a meeting between an OPP officer and the vice-principal at an elementary school. The accounts essentially consist of the names of the vice-principal and the principal, and the advice given by the officer to the vice-principal about the appellant. I find that these parts of the record contain personal information of the appellant, but not of any other individuals. Prior orders have found that where information about an individual relates only to that person in his or her professional or employment capacity, such information is not "personal information" within the meaning of the *Act*: see, for instance, Reconsideration Order P-1538.

Given this, I find that disclosure of this information to the appellant would not constitute an unjustified invasion of the personal privacy of any other individual, within the meaning of section 49(b) of the *Act*. I will accordingly order disclosure of these specific portions of the records.

LAW ENFORCEMENT

As I have indicated, portions of pages 8, 9 and 10 have been withheld by the Ministry in reliance on section 49(a) of the *Act*, with reference to section 14(1)(l). These portions contain OPP message codes, commonly known as "ten-codes". As with section 49(b), section 49(a) provides an exception to the general right of individuals to have access to their own personal information under section 47(1) of the *Act*, in circumstances where the exemptions found in sections 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 14(1)(l) provides:

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

- (l) facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry claims that section 14(1)(l) applies to the references to ten-codes in the records. In its representations, the Ministry states, among other things, that release of the ten-codes would leave OPP officers more vulnerable and compromise their ability to provide effective policing services. It asserts that if individuals engaged in illegal activities were monitoring OPP radio communications and had access to the meanings of the various ten-codes, it would be easier for them to carry out criminal activities and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

Prior orders have upheld the application of section 14(1)(l) or its municipal equivalent to "ten-codes" (see Orders M-393, M-757 and PO-1777), and I agree with the approach in these decisions. I am satisfied that disclosure of the ten-codes would leave OPP officers more vulnerable and compromise their ability to provide effective policing services and accordingly could "reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime" within the meaning of section 14(1)(l). I also find that the Ministry has properly exercised its discretion under section 49(a) to deny access to the information.

ORDER:

1. I order the Ministry to disclose the portions of pages 6 and 11 which I have found contain the personal information of the appellant only. For greater certainty, I have provided a copy of the unsevered records for the Ministry highlighting those portions which shall be disclosed.
2. I uphold the Ministry's decision to deny access to the other parts of the records at issue.
3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which it provided to the appellant.

4. I order disclosure to be made by sending the appellant a copy of the records, excluding the exempted portions, by no later than **January 22, 2001**, but not before **January 16, 2001**.

Original signed by: _____
Sherry Liang
Adjudicator

_____ December 13, 2000