



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

# **INTERIM ORDER PO-1857-I**

Appeal PA-000125-1

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), under the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to records found at the Ontario Civilian Commission of Policing Services (the OCCOPS) and the Solicitor General's Office, Policing Services Division (the PSD), in five parts:

1. November 96 to February 97 any notes or reports of conversations between the appellant and a named individual in the OCCOPS, and any information regarding the appellant's initial complaint to that agency.
2. OCCOPS correspondence with a named individual regarding the appellant and another individual's complaint.
3. Report of a named individual, to the OCCOPS, regarding a meeting held on March 13, 1997 with the appellant and other individuals.
4. Report by a named individual to the Solicitor General's office.
5. Report filed by a named advisor.

The Ministry dealt with the appellant's request by identifying 13 pages of responsive records from the OCCOPS, and 9 pages of responsive records from the Policing Services Division. It should be noted that pages 9 to 13 of the OCCOPS records, and pages 5 to 9 of the Policing Services Division records are identical.

The Ministry disclosed 7 pages of the OCCOPS records and 3 pages of the Policing Services Division records, in their entirety. The remaining pages were disclosed in part. Some information was withheld on the basis that it was not responsive to the request. The balance of the information was withheld by the Ministry on the basis of the exemptions found in sections 14(1)(a) (interference with a law enforcement matter) and 49(a) (discretion to refuse a requester's own information) and sections 21 and 49(b) of the *Act* (invasion of privacy). In its decision, the Ministry relied on the consideration described in section 21(2)(f) (highly sensitive personal information) and the presumption found in section 21(3)(d) (personal information relating to employment or educational history).

The appellant appealed the Ministry's decision to deny access to the withheld information. His appeal raises the issue of whether additional responsive records exist, beyond those which have been identified by the Ministry. Further, the appellant has raised the application of section 23 of the *Act*, the "public interest override".

During the mediation stage of the appeal, the appellant agreed that the information which the Ministry has identified as not responsive to his request is not at issue in this appeal.

I sent a Notice of Inquiry to the Ministry, initially, inviting it to make representations on the facts and issues raised by the appeal. The representations submitted by the Ministry were shared with the appellant, with

the exception of one portion which was severed since it was no longer relevant to the appeal. During the course of the inquiry, the appellant indicated that he is no longer seeking notes and reports of one of the individuals named in his request. Accordingly, parts 3 and 4 of the request, as described above, have been withdrawn, and are no longer at issue. The appellant has also submitted representations on the appeal.

Further, it should be noted that the Ministry has issued a new decision letter in which it has provided full disclosure of page 13 of the OCCOPS records (page 9 of the PSD records). Because of this disclosure, section 14 of the *Act* is no longer in issue.

## **RECORDS:**

The records which remain at issue consist of pages 10 to 12 of the OCCOPS records, and pages 6 to 8 of the PSD records, which are identical to each other. The Ministry has withheld identical portions of each set of documents, relying on section 49(b), with reference to sections 21(3)(d) and 21(2)(f).

The records are typewritten, and form part of a memorandum from two named advisors to the Director of the Police Support Programs Branch of the Ministry. The first and last pages of this memorandum has been disclosed to the appellant. The memorandum contains a review by the advisors of six issues, including their assessments and recommendations.

## **CONCLUSION:**

I uphold the Ministry's decision in relation to pages 11 and 12 of the OCCOPS records (pages 7 and 8 of the PSD records). I order disclosure of the information withheld from page 10 of the OCCOPS records (page 6 of the PSD records). I also order further searches to be conducted, and the provision of affidavits.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine whether the exemptions found in sections 21 and/or 49(b) apply to the severed portions of pages 10 to 12 of the OCCOPS records (pages 6 to 8 of the PSD records), it is necessary, firstly, to determine whether the records contain "personal information" within the meaning of the *Act*, and to whom that personal information relates. The Ministry's representations assert that the records contain information about identifiable individuals other than the requester, as they contain the personal information of individuals named in a report prepared by PSD and detail the views and opinions about identifiable persons who were named in the report. The appellant's representations do not address this issue.

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.

I am satisfied that the memorandum which constitutes the records at issue contains the personal information of the appellant, since it refers, among other things, to proceedings under the *Police Act* (now the *Police Services Act*) against the appellant. In prior orders, it has been found that information about police officers qualifies as their personal information when it appears in the context of a complaint about the professional conduct of these individuals, even though some of this information would normally be considered professional and not personal information (see Orders MO-1288 and MO-1383).

I am also satisfied that the records contain personal information of individuals other than the appellant. There has been much discussion in prior orders about the distinction between personal and professional or business information about an individual. In Order P-1409, former Adjudicator John Higgins reviewed the history of the Commissioner's treatment of information associated with an individual's name in his or her employment, professional or official capacity. At page 26 of the order, he stated:

To summarize the approach taken by this office in past decisions on this subject, information which identifies an individual in his or her employment, professional or official capacity, or provides a business address or telephone number, is usually not regarded as personal information. This also applies to opinions developed or expressed by an individual in his or her employment, professional or official capacity, and information about other normal activities undertaken in that context. When not excluded from the Act under section 65(6), other employment-related information, whether of an evaluative nature, or in relation to other human resources matters, has generally been found to qualify as personal information.

Some of the information about an identified individual in the records (specifically, that on page 11 of the OCCOPS records and page 7 of the PSD records) qualifies as personal information because although it relates to an employee of a police service, it goes beyond that which pertains to his or her normal employment or professional activities. There is also personal information of individuals other than the appellant on page 12 of the OCCOPS records (page 8 of the PSD records), insofar as there is an account of a complaint of improper professional conduct against certain members of a police force. Although the officers are not named, in my view, the record contains sufficient information which would enable the officers to be identified.

Some of the information about certain individuals (specifically, that severed from page 10 of the OCCOPS records and page 6 of the PSD records) does not qualify as personal information. The information on these pages relates to the conduct of 18 police officers involved in an incident in 1987, which took place during the course of their employment. There are observations by the writers of the memorandum about the incident and about the reporting of the incident by the officers. The police officers are not identified by name. Given the number of officers involved, any individual piece of information is unlikely to be linked to a specific officer. Nothing in the representations before me suggest that there is any likelihood of any specific officer being identified. One individual is referred to as an Identification Officer, but the information relating to this person is not of a personal nature. I conclude, therefore, that there is no personal information of any individual in the portions severed from page 10 of the OCCOPS records (page 6 of the PSD records).

## UNJUSTIFIED INVASION OF PERSONAL PRIVACY

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,

if 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 other individuals' rights to the protection of their personal privacy. If the institution determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

I have found, above, that the information severed from page 10 of the OCCOPS records (page 6 of the PSD records) is not the personal information of any *identifiable* individuals. Accordingly, section 49 has no application to these pages.

In considering the application of section 49(b) to the other portions of the records which I have found contain personal information, 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.

In this case, the Ministry has relied on the factor in section 21(2)(f) and the presumption in section 21(3)(d), in claiming that disclosure of the parts of the records which have been withheld would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. These sections provide:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history;

I will deal first with the application of the presumption in section 21(3)(d). On my review, the information severed from page 11 of the OCCOPS records (page 7 of the PSD records) qualifies as information relating to employment or educational history, as it describes changes to the job status of a named individual as a result of tensions in the workplace. Accordingly, I am satisfied that the information severed from page 11 of the OCCOPS records (page 7 of the PSD records) is covered by the presumption under section 21(3)(d) of the *Act*. Disclosure of this information would be presumed to constitute an unjustified invasion of the personal privacy of the individual to whom it relates.

The information severed from page 12 of the OCCOPS records (page 8 of the PSD records) conveys information about an incident which occurred in the course of employment-related activities and about documents in relation to that incident. In Order M-673, Adjudicator Laurel Croyley found that records containing information concerning employment-related incidents could not accurately be characterized as the employment history of any of the individuals to whom they related. Likewise, although the information severed from page 12 relates to employment-related incidents, and complaints made by a police officer about the conduct of other police officers, it does not pertain to the employment history of those individuals.

I find, therefore, that the information severed from page 12 of the OCCOPS records (page 8 of the PSD records) is not covered by the presumption in section 21(3)(d) of the *Act*. I will therefore turn to section 21(2), in order to consider whether disclosure of that information would nonetheless constitute an unjustified invasion of personal privacy. The Ministry has referred in its representations to Order P-1055, in which former Inquiry Officer Mumtaz Jiwan stated, on the issue of section 21(2)(f) as it relates to professional conduct:

All of the records contain information relating to allegations of improper professional conduct against one of the affected parties. I find that this information in the records is highly sensitive and therefore section 21(2)(f) of the Act, which weighs in favour of the protection of privacy, is a relevant consideration.

I accept the approach in the above order, and in applying it here, I find that the information severed from page 12 of the OCCOPS records (page 8 of the PSD records), about allegations of improper professional conduct against identifiable individuals, is highly sensitive. There are no factors either identified in the

representations or found in other parts of section 21(2) which would support a finding that the disclosure of this information would *not* constitute an unjustified invasion of the personal privacy of those individuals. Accordingly, I find that the disclosure of the information severed from these pages would constitute an unjustified invasion of personal privacy.

In sum, I have found that section 49(b) has no application to the information severed from page 10 of the OCCOPS records (page 6 of the PSD records). Since no other exemptions have been relied on for the severance of this information, and no other mandatory exemptions appear to apply, the appellant is entitled to receive this information. I find, however, that disclosure of the information severed from pages 11 and 12 of the OCCOPS records (pages 7 and 8 of the PSD records) would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and that the Ministry has exercised its discretion appropriately under section 49(b) of the *Act* to deny access to this information.

## **PUBLIC INTEREST**

Section 23 of the *Act* provides:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.[emphasis added]

In this case, the appellant raised the application of section 23 of the *Act* to the records at issue. If section 23 applied, it would require the disclosure of the portions of the records which I found to be covered by the exemption in section 21, in conjunction with section 49(b).

It has been said in prior orders that for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

No submissions were received by the appellant in relation to section 23. In the absence of any basis on which I can conclude that there is a compelling public interest in disclosure, and that this interest clearly outweighs the purposes of the sections 21 and 49(b) exemptions, I find that the application of section 23 has not been established.

## **REASONABLE SEARCH**

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In this appeal, the Ministry responded to the appellant's request by stating, among other things, that two of the individuals named in his request (one of whose records are no longer in issue) advised it that "there were verbal exchanges pertaining to this matter but no written report was created as it fell outside the purview of their agency." The appellant requested the Ministry to provide him with affidavits from the individuals in question with respect to the assertion that no written report was created. The appellant provided the Ministry with a copy of a cover page to a report filed by the individuals (not the relevant report) which he feels supports his assertion that a written report must have been produced.



In its representations, the Ministry states, among other things:

A search for records was conducted at OCCOPS with regard to any records responsive to the request. As a result of this search responsive records were located. The Ministry was also advised that an extensive search was conducted in their files for any records relating to Commission Minutes for 1997 to 1998. No references or records were located.

An employee of the agency who was familiar with the records and their possible locations conducted this search. The appellant was also advised in the March 9, 2000, decision letter that the persons named in the request were contacted and provided the following information. There were verbal exchanges pertaining to this matter but no written report was created as the matter raised by the appellant fell outside the purview of their agency.

...

The Ministry conducted searches at PSD in response to the request. The searches were conducted by persons who were familiar with the records and their location. The Ministry located the records of the former Manager of Police Support Programs and the senior zone advisor report which were requested by the appellant were located. The appellant was provided with a partial release of these records.

In his representations, the appellant states, among other things, that he was told by the individual named in part 1 of his request that "a report would be filed". He also states that in discussions, the Director of the Police Support Programs Branch and one of the authors of the memorandum (which forms pages 9 to 13 of the OCCOPS records) "referred to reading a report". The appellant expresses disbelief that the OCCOPS would fail to report or record what individuals describe to them as police corruption. He also expresses disbelief that the individuals involved conduct their business by verbal responses only.

In the Notice of Inquiry which was sent to the parties in this appeal, I asked certain questions designed to elicit details of the searches carried out in response to the request. I also asked the Ministry to provide documents or evidence in support of its position, which could be in affidavit form. The Ministry has chosen not to submit an affidavit. The extent of the Ministry's answers to the questions which I posed to it is set out above.

In Order PO-1852, Assistant Commissioner Tom Mitchinson found that an affidavit of an individual who co-ordinated the searches in response to a request did not provide sufficient detail about the steps taken to respond to the request. He ordered the Ministry in that case to conduct further searches for responsive records, and to provide the appellant with a decision outlining the results of these searches, as well as a letter summarizing the search results.

In Interim Order M-386, Inquiry Officer Laurel Cropley stated that although the institution provided her with general information about the process it went through in contacting the appropriate personnel to search for responsive records, it did not provide details of the steps taken in conducting the actual search for responsive records. In that case, the institution also did not provide an affidavit detailing its search, despite being requested to in the Notice of Inquiry. In the result, the institution was ordered to conduct a further search for responsive records and to provide this office with a detailed affidavit(s) sworn by the employee(s) of the institution who have specific knowledge of and understand the subject matter of the request.

The same approach was followed in Interim Order P-457, in which former Inquiry Officer Asfaw Seife stated:

The Ministry has not identified in its representations the specific steps taken to search for responsive records, the nature and location of the search, or the types of files searched. I have not been provided with any information regarding the identities of the employee who conducted the actual search, the experience of the employee or his/her familiarity with the subject matter of the request. No direct evidence from the person who conducted the search was provided to me.

In my view, the Ministry has not provided me with sufficient evidence to enable me to conclude that it has discharged its statutory responsibility to conduct a reasonable search for records responsive to the request, in the circumstances of this appeal.

Accordingly, I require the Ministry to conduct a further search for responsive records and to provide me with a detailed affidavit sworn by an official of the Ministry who has knowledge of and understands the subject matter of the request. The contents of this affidavit are outlined in the provisions of my order.

In the case before me, I am also not satisfied that the Ministry has conducted a reasonable search for records responsive to the request. As in the above cases, I find that I have not been provided with sufficient evidence as to the details of the search, such as the identities of the employee(s) who conducted the actual search, the experience of the employee(s), and their familiarity with the subject matter of the request. Further, although the Ministry states that it contacted the individual who is named in part 1 of the request, it does not appear that this individual was asked to or did conduct a search for responsive records. It is also not apparent whether this individual was asked about notes *or* reports, as specified in the request. In any event, there is no direct evidence from this individual.

In the circumstances, I find it appropriate to order the Ministry to conduct a further search for responsive records. The Ministry must also provide me with a detailed affidavit sworn by the employee(s) who conducted the search, the contents of which are outlined in the provisions of my order. The Ministry will also be ordered to provide an affidavit from the person named in part 1 of the request, detailing her search for responsive records.

Although it may seem onerous for the Ministry to meet these requirements, it must be remembered that an appellant is rarely in a position to challenge or substantiate the information given by an institution about its search process. An institution is usually the only source of information on this issue, and significant reliance is accordingly placed on its information. The more detailed the information provided by an institution, and the more direct the evidence, the greater is the likelihood that this office will be satisfied that a reasonable search was conducted.

It should also not go unrecognized that the confidence appellants have in an institution's response to requests for access to information under the *Act*, and the findings of this office on this issue, is enhanced where a high level of detail is provided about the steps taken to respond to a request.

### **ORDER:**

1. I uphold the Ministry's decision to withhold portions of pages 11 and 12 of the OCCOPS records (pages 7 and 8 of the PSD records).
2. I order the Ministry to disclose the severed portions of page 10 of the OCCOPS records (page 6 of the PSD records).
3. I order the Ministry to conduct a further search for responsive records and to provide me with a detailed affidavit(s) sworn by the employee(s) of the Ministry and/or the OCCOPS who have specific knowledge of and understand the subject matter of the request, within thirty (30) days of the date of this Interim Order. This further search is to include a search by the individual named in part 1 of the request, and an affidavit is to be provided by this individual about the search. If for any reason it is not possible or practicable to have this individual conduct a search or provide an affidavit, the Ministry is to provide me with information detailing why not.
4. At a minimum, the affidavit(s) must contain the following:
  - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
  - (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
  - (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted by the person, if any;
  - (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search.
5. If, as a result of the further search, the Ministry identifies any records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in

accordance with sections 26, 28 and 29 of the *Act*, considering the date of this order as the date of the request and without recourse to a time extension.

6. The affidavit(s) referred to in Provisions 3 and 4 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_

Sherry Liang  
Adjudicator

\_\_\_\_\_ January 19, 2001