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

ORDER PO-1877

Appeal PA-000234-1

Ministry of the Solicitor General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the Ministry) for access to records relating to a particular incident involving the appellant.

The Ministry located responsive records [held by the Ontario Provincial Police (the OPP)] and decided to deny access to them in full, on the basis of section 49(a) in conjunction with section 14 (law enforcement), and section 49(b) in conjunction with section 21 (personal privacy) of the *Act*.

The appellant then appealed the Ministry's decision to this office. The appellant's appeal letter contains detailed submissions on why the appellant believes the exemptions cited by the Ministry do not apply.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry to the appellant, together with the non-confidential portions of the Ministry's representations, who provided representations in response. The appellant's representations discuss a number of matters relating to his contact with the police, but do not specifically address the issues set out in the Notice of Inquiry.

RECORDS:

The records at issue at issue in this appeal consist of a one page general occurrence report (page 1), two pages of police officer's notes (pages 2-3), and two pages of computer generated incident reports (pages 4-5).

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF INFORMATION

The Ministry has claimed that portions of pages 2, 3, 4 and 5 are not responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness." That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness," I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

The Ministry submits:

> The Ministry has identified a number of parts of the responsive records as containing information that is not relevant to the appellant's request to access specific information concerning an investigation undertaken by the OPP on [specified date]. The Ministry submits that the [type] of information which is not reasonably relevant to the request includes:
>
> - Entries in OPP records which concern other police matters;
> - Times, dates and badge numbers of OPP staff printing computer generated reports (responsive records);
> - OMPPAC [Ontario Municipal Provincial Police Cooperative] computer system function keys which automatically print out on some reports.

In the circumstances, I am satisfied that portions of each page of the records are not responsive to the request, for the reasons cited by the Ministry.

PERSONAL PRIVACY

In order for section 49(b) in conjunction with section 21 to apply, the information in question must constitute "personal information." Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The Ministry submits that the records contain personal information relating both to the appellant and to other identifiable individuals.

The information in the records relates to an incident involving both the appellant and other individuals. In my view, this information clearly qualifies as personal information of both the appellant and these other individuals, as that term is defined in section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS' PRIVACY

Introduction

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.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the *Act* prohibits an institution from releasing this information.

In both these situations, 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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which 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 21(2) *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In this case, the Ministry have claimed the application of the presumption at section 21(3)(b) of the *Act*, which reads:

> 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 submit:

> . . . [T]he exempt information consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* (*PSA*) establishes the OPP and provides for its composition, authority and jurisdiction. The duties of a police officer include investigating possible law violations and apprehending criminals and others who may lawfully be taken into custody and crime prevention.
>
> The records at issue document an investigation undertaken by the OPP. In the course of their investigation, the OPP interviewed a number of identifiable individuals . . . [T]he exempt information was compiled and is identifiable as part of an investigation into a possible violation of law. The investigation focussed on whether there has been a violation of any *Criminal Code* provisions.
>
> Specifically, the OPP investigation was into a complaint regarding a series of unwanted telephone calls . . . The OPP undertook an investigation to determine whether the appellant made the calls and whether there were grounds to lay criminal charges against him . . .
>
> In this particular case, the OPP determined that no charges against the appellant would be laid. The Ministry submits that the application of section 21(3)(b) [of the *Act*] is not dependent on whether charges are actually laid (Orders P-223, P-237 and P-1225).

The personal information in these records relating to individuals other than the appellant clearly was compiled and is identifiable as part of an investigation into a possible violation of law (in particular, provisions of the *Criminal Code*) and, therefore, section 21(3)(b) applies to it. I accept the Ministry submission that, based on earlier orders of this office, section 21(3)(b) may apply, regardless of the fact that charges ultimately were not laid. As a result, disclosure of this information relating to other identifiable individuals is presumed to constitute an unjustified invasion of privacy, and it qualifies for exemption under section 49(b) of the *Act*. In addition, some information, while relating to the appellant, is so intertwined with information relating to other individuals that it cannot reasonably be disclosed without unjustifiably invading the privacy of the other individuals. This information also is exempt under section 49(b).

However, each of the five pages at issue contains some personal information which clearly relates to the appellant only, and not to any other individual. This information is not exempt under section 49(b) of the *Act*. In addition, the records contain information which is not about any individual in his or her personal capacity. Similarly, this information does not fit within the scope of section 49(b).

To conclude, the records contain some information which is exempt under section 49(b), while other information, which does not qualify as other individuals' personal information, is not exempt under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

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

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.1 or 22 would apply to the disclosure of that information.

In this case, the Ministry has relied on sections 14(1)(e), 14(1)(l) and 14(2)(a), in conjunction with section 49(a), to withhold the records at issue.

Section 14(1)(e): endangerment to life or physical safety

Section 14(1)(e) of the *Act* reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> endanger the life or physical safety of a law enforcement officer or any other person;

The words "could reasonably be expected to" appear in the preamble of section 20, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms." In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a

record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a Areasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly [section] 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment could be expected to result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated [see Orders MO-1262 and PO-1747].

The Ministry submits:

> The Ministry has applied section 14(1)(e) to all of the responsive records. It is the view of the Ministry that release of the requested information can reasonably be expected to endanger the life or physical safety of other individuals.
>
> . . . . .
>
> In support of the Ministry's position, attached is a copy of a memorandum . . . prepared by the OPP setting out the specific concerns for the safety of [specified individuals] . . . As a result of the foregoing, the Ministry submits that release of the requested records may reasonably be expected to threaten the life and physical safety of [specified individuals].

The Ministry's representations, understandably, are directed towards disclosure of all of the records in their entirety. I found above that much of the information in these records is exempt under section 49(b), and that the remaining

information either relates solely to the appellant, or is not personal information. It may be that disclosure of the records as a whole could reasonably be expected to lead to the harm described in section 14(1)(e). However, I am not persuaded that disclosure of the information remaining at issue to the appellant could reasonably be expected to threaten the safety or health of any individual. In the circumstances, the expectation of the harms described in section 14(1)(e) arising from disclosure is exaggerated.

Section 14(1)(l): facilitate the commission of a crime

The Ministry has claimed the application of section 14(1)(l) of the *Act*, which reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry describes the information withheld under this section as OPP message codes, commonly known as >ten codes' (page 3), and computer access codes from the two Ontario Municipal Provincial Police Cooperative (OMPPAC) computer generated incident reports (pages 4 and 5). I found above that the latter codes are not responsive to the request, so it is not necessary for me to make a finding on this information respecting section 14(1)(l). With respect to the "ten codes," in Order M-757, former Adjudicator Anita Fineberg stated:

> The Police have applied section 8(1)(l) of the *Act* to exempt from disclosure their operational "ten" codes . . .
> The Police have indicated that they use the "ten" codes to shorten radio transmissions, to standardize radio responses and, most importantly, to reduce the ability of those involved in criminal activity from easily tracking the activities of police officers. They submit that they applied section 8(1)(l) on the basis of this last concern.
>
> The Police have explained the meaning of the five codes which have not been disclosed. They have provided, as part of their representations, an example of a case in which those involved in criminal activities acquired a list of the police codes and how it undermined the effectiveness of the Police in their attempt to control these activities.
>
> The purpose of the exemption in section 8(1)(l) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section. I am satisfied that, in this case, the Police have provided sufficient evidence to establish that disclosure of the "ten" codes . . . could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 8(1)(l) have been met with respect to this information.

In my view, former Adjudicator Fineberg's findings are equally applicable here, and I find that section 14(1)(l) applies to the ten codes on page 3 of the records.

Section 14(2)(a): law enforcement report

The Ministry has claimed the application of this section to page 1 of the records. Section 14(2)(a) reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law [see Order 200 and Order P-324].

The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).
The Ministry submits:

> The police report at issue was prepared at the conclusion of the investigation undertaken by the OPP. The report is a formal, final report containing details of the matter investigated.
>
> The Ministry submits that the police report at issue also meets the three-part test established by former Commissioner Tom Wright for the following reasons:
>
> 1. The record at issue is a general occurrence report prepared by the OPP. The report contains information compiled during a law enforcement investigation. The report implicitly contains the findings of the investigator.
>
> 2. The report contains a summary of investigative information compiled during an investigation into an allegation of criminal activity involving the appellant. As supported by a number of previous orders, police investigations into allegations of criminal activity are law enforcement investigations; and
>
> 3. As stated earlier, the *PSA* establishes the OPP and provides for its composition, authority and jurisdiction. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario.

In my view, page 1 does not qualify as a "report" for the purpose of section 14(2)(a), because it does not consist of a formal statement or account of the results of the collation and consideration of information. Rather, it is more accurately characterized as a record containing mere observations and recordings of fact. The record does not include, for example, the author's conclusions and recommendations as a result of the investigation which, if present, might bring the record within the scope of the word "report" in section 14(2)(a) of the *Act*.

Conclusion

None of the claimed exemptions under section 14 applies to the information remaining at issue in this appeal.

EXERCISE OF DISCRETION

Section 49(b), the only exemption which I found to apply in the circumstances of this case, is a discretionary exemption. This means that despite the fact that information may be exempt In the Notice of Inquiry, I asked the Ministry to provide specific representations on the basis for exercising its discretion under section 49(b) to withhold information from the appellant, including an indication of what factors were considered, in the circumstances of this case.

The Ministry submits:

> The Ministry has applied section 49(b) to parts of the responsive records which contain personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. In such cases, the Ministry submits that it must be very sensitive to the right of privacy of individuals who have been involved in any type of law enforcement investigation.
>
> In this particular case, the Ministry carefully reviewed the information at issue and weighed the appellant's right of access to his own personal information. The Ministry determined in its exercise of discretion that release of the requested information would not be appropriate in the circumstances.

In my view, although the Ministry does refer generally to the circumstances of this case, it could and should provide more specific information about what factors it relied on in exercising its discretion. I am satisfied that the Ministry took into account the circumstances of this case and, on this basis, I will not send the matter back to the Ministry for a re-exercise of discretion. However, I would urge the Ministry to be more forthright in this regard in future cases.

ORDER:

1. I uphold the Ministry's decision to withhold certain portions of the records.

2. I order the Ministry to disclose the records to the appellant, with the exception of the information highlighted on the Ministry's copy of the records included with its copy of this order, no later than **April 9, 2001**, but no earlier than **April 2, 2001**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original signed by: March 5, 2001
David Goodis
Senior Adjudicator