



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

ORDER PO-1912

Appeal PA-000128-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received the following request for access to certain information under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

The records to which access is requested includes all records relating to the involvement of the Ontario Provincial Police in [the appellant's] pursuit and apprehension on or about January 13, 2000. Without limiting the generality of the foregoing, we require [1] the log of communication between and amongst officers and dispatch in connection with the pursuit and apprehension, [2] any use of force, suspect injury or other reports, [3] the notebook excerpts in respect of all officers connected with the pursuit and apprehension, [4] any occurrence reports or [5] statement made by or to [the appellant], [6] any complaints made by [the appellant] in respect of his treatment and [7] any videotapes and photographs taken for the purpose of identification or the documentation of injuries. It is also requested that we be provided with [8] the full names of all persons otherwise identified by badge numbers on the documents disclosed pursuant to this request.

The Ministry denied access to all responsive records on the basis that they "concern a matter that is currently under investigation and/or before the courts". The requester, now the appellant, appealed the Ministry's decision.

The investigation referred to by the Ministry was subsequently completed, after which the Ministry issued a revised decision letter to the appellant, disclosing a number of responsive records, and including an index identifying the records and exemptions claimed for each of them. The Ministry's index contains 27 pages of responsive records, as well as one dispatcher log tape. The 27 pages consisted of the following:

- pages 1-13 - police officers' notebook entries
- pages 14-21 - police officers' statements
- page 22 - Occurrence Report
- pages 23-24 - Motor Vehicle Accident Report
- pages 25-27 - Use of Force Reports

The Ministry granted full access to pages 1, 2, 4, 9, 11, 12, 14, 15, 16, 17, 18 and 21, and partial access to pages 3, 5, 6, 7, 8, 10, 13, 19, 20, 22, 23 and 24. The Ministry denied access to the remaining portions of these pages and to pages 25, 26 and 27 and the dispatcher log tape in their entirety on the basis of one or more of the following exemption claims:

- section 49(a), with reference to sections 14(1)(c), (e) and (l) and section 14(2)(a)
- section 49(b), with reference to sections 21(2)(f) and 21(3)(a), (b) and (d).

The Ministry also withheld certain police officers' notebook entries and portions of the Occurrence Report on the basis that they relate to other policing activities and were not responsive to the request.

In its supplementary decision, the Ministry also stated that the appellant had not provided statements to the Ontario Provincial Police (the OPP), nor did he make any complaints regarding his treatment. The Ministry also advised the appellant that no videotapes or photographs were taken for the purpose of identifying or documenting injuries suffered by OPP officers.

During mediation, a number of events occurred:

- the appellant withdrew his appeal regarding items 4 - 8 of his request, thereby removing the undisclosed portions of pages 23 and 24 from the scope of the appeal;
- the appellant agreed not to pursue access to the so-called “ten codes” used by the police officers which are included on certain pages of the records and on the dispatch log tape;
- the appellant agreed not to pursue access to the information identified by the Ministry as non-responsive, thereby removing pages 10, 13 and 22 from the scope of the appeal.

A Notice of Inquiry was sent initially to the Ministry, which submitted representations in response. A modified Notice was then sent to the appellant along with a complete copy of the Ministry’s representations. The appellant chose not to provide any representations. I decided to provide the Notice of Inquiry to eight police officers who were involved in the incident and whose interests might be affected by the outcome of the appeal (the affected persons). I received representations from a lawyer representing three of the affected persons, stating that they did not consent to the disclosure of information relating to them.

In its representations, the Ministry withdrew its reliance on sections 14(1)(c), 14(1)(e) and 14(2)(a) of the *Act*. Accordingly, these exemptions are no longer at issue in this appeal.

RECORDS:

The following records or partial records, along with the relevant exemption claims, remain at issue in this appeal:

- the undisclosed portions of pages 3, 5, 6, 7 and 8 (police officers’ notebook entries), and pages 19 and 20 (police officers’ statements) - section 49(b) (with reference to sections 21(2)(f) and 21(3)(b));
- pages 25 - 27 (Use of Force Reports) - section 49(b) (with reference to sections 21(2)(e), (f) and (h) and 21(3)(b) and (d)); and

- the dispatcher log tape - section 49(a) (with reference to section 14(1)(l)), and section 49(b) (with reference to sections 21(2)(f) and 21(3)(b)).

DISCUSSION:

PERSONAL INFORMATION

The Ministry provides the following representations regarding section 2(1).

Personal information is further defined in section 2(1) to include:

- (a) information relating to the ... sex ... of the individual,
- (c) any identifying number, symbol or other particular,
- (d) the address, telephone number ... of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

The Ministry submits that parts of the information remaining at issue contain the types of personal information listed above with respect to the appellant, the registered owner of the vehicle stolen/driven by the appellant during the police pursuit and the named witness. The Ministry further submits that parts of the information remaining at issue also consist of personal information about identifiable police officers.

All of the records stem from an incident in which the appellant was pursued and apprehended by the OPP and the York Regional Police. I find that all of the records contain references to the appellant's actions and as such constitute his personal information.

I also find that the name and telephone number of a witness to the incident which appears on page 7 constitutes the personal information of that individual. There are several references in the

records and on the dispatcher log tape to the licence plate number of the stolen vehicle driven by the appellant during the incident. The owner's name, address and vehicle insurance coverage details also appear on page 6. I find that this information and the licence plate number constitute the personal information of the vehicle owner (Order MO-1314).

The Ministry provides the following representations in support of its claim that pages 5, 6, 7, 25, 26 and 27 also contain personal information relating to the police officers involved in the incident.

The Ministry is of the view that the Use of Force Reports contain personal information about three identifiable OPP officers. These officers' handwritten notes and signed statements were previously released to the appellant. As a result, although the officers' names do not appear on the Use of Force Reports, these records can be related to specific OPP officers whose identities would be evident to the appellant's legal representative through a comparison of the handwriting in the Use of Force Reports and the previously released officers' handwritten notes and signed statements. It should be noted that the appellant has filed a civil action against the Ministry and the York Regional Police Service as a result of his January 13, 2000, apprehension and arrest. A copy of the Statement of Claim is attached for reference.

Further to discussion with the York Regional Police Service, the Ministry also submits that exempt information about identifiable York Regional Police Service Officers consists of their personal information in the circumstances of the appellant's request. In this regard, it should be noted that there were allegations of excessive use of force by York Regional Police Service officers during the apprehension and arrest of the appellant on January 13, 2000. As per the attached newsclipping, the allegations were investigated by the York Regional Police Services Professional Standards branch and also subject to review by a Crown Attorney who concluded that no criminal charges can be laid. In addition, as noted earlier, the appellant has also filed a civil action against the York Regional Police Services as a result of the events of January 13, 2000.

The Ministry also refers to Order P-721, where former Assistant Commissioner Irwin Glasberg found:

... information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

Previous decisions of this Office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position (see Reconsideration Order R-980015 and Order PO-1663). However, where information about the

individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's personal information (see Orders P-721, P-939, P-1318 and PO-1772). Based on the particular facts of this case, I accept the Ministry's position that the names and other undisclosed information pertaining to the OPP and York Regional Police Officers which appears on pages 5, 6, 7, 25, 26 and 27 constitutes their personal information. The appellant alleged misconduct on the part of the various police officers involved in the incident, and has commenced a civil action against the OPP and the York Regional Police Service based on the role played by their officers in the incident. Because the conduct of the officers has been called into question by the appellant's law suit, the notes and Use of Force Reports that were originally created in these officers' professional duties is now properly considered their personal information.

INVASION OF PRIVACY/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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.

Section 49(b) introduces a balancing principle in circumstances where a record contains the personal information of both the requester and other individuals. 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 determining whether the exemption in section 49(b) applies, 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. Section 21(2) provides some criteria for the institution to consider in making this determination, and section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 21(3) 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].

Section 21(3)(b)

The Ministry submits that section 21(3)(b) of the *Act* applies. This section reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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 states:

The Ministry is of the opinion that the exempt personal information in the responsive documents and the Dispatcher Logger Tape relating to the registered vehicle owner and the named witness consists of highly sensitive personal information that was compiled and is identifiable as part of a police investigation into a violation of law. The OPP and the York Regional Police Service are agencies that have the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* (the *PSA*) establishes police services and provides for their composition, authority and jurisdiction. The duties of a police officer include investigating possible law violations, 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 and the York Regional Police Service. The Ministry submits that the exempt information was compiled and is identifiable as part of an investigation into a violation of law. As noted earlier, the events of January 13, 2000, resulted in a number of criminal charges being laid against the appellant.

I accept the Ministry's representations as they related to pages 3, 5, 6, 7, 8, 19 and 20, as well as the dispatcher log tape. These records contain descriptions of the appellant, the licence number of the stolen vehicle, the incident in which the appellant was involved, identifying information concerning a witness to the incident, and the pursuit and apprehension of the appellant by the OPP and York Regional Police. I find that all of this information was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the investigation that led to charges laid against the appellant under the *Criminal Code*, and disclosure of this information would constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the *Act*. None of the exceptions in section 21(4) are present with respect to this information, and the public interest provision in section 23 has not been raised by the appellant. Accordingly, I find that the requirements for exemption under section 21 of the *Act* have been established for the dispatch log tape and the undisclosed portions of pages 3, 5, 6, 7, 8, 19 and 20.

As far as pages 25, 26 and 27 are concerned, these Use of Force Reports were prepared pursuant to the mandatory requirements of section 14.5 of Regulation 926 under the *PSA*, which provides, in part:

A member of a police force shall submit a report to the chief of police or Commissioner [of the OPP] whenever the member,

- (a) draws a handgun in the presence of a member of the public, excluding a member of the police force while on duty, or discharges a firearm;
- (b) uses a weapon other than a firearm on another person; or

- (c) uses physical force on another person that results in an injury requiring medical attention.

- (2) The report shall be in Form I.
...

- (3.1) The chief of Police or Commissioner shall ensure that Part B of the report is destroyed not later than thirty days after the report is submitted.
...

- (3.4) A report submitted under subsection (1) shall not be admitted in evidence at any hearing under Part V or VI of [the *PSA*], other than a hearing to determine whether a police officer has contravened this section.

In my view, pages 25, 26 and 27 do not fall within the scope of section 21(3)(b). These Use of Force Reports were not compiled as part of the police investigation concerning the incident involving the appellant. Rather, they were created in response to the statutory responsibilities outlined in the *PSA*, and are used by senior officials within the police force to ensure that incidents involving the use of force are managed in a manner consistent with established standards and procedures.

The Ministry also claims that the one entry on pages 25, 26 and 27 that identifies the length of service of each author of the Use of Force Reports relates to their “employment history”, thereby falling within the scope of the section 21(3)(d) presumption. I concur. Consistent with past orders of this Office dealing with similar information, I find that disclosure of the length of service which appears in one entry on each of pages 25, 26 and 27 would constitute a presumed unjustified invasion of the privacy of the three individual police officers who authored the Reports (see Orders M-451 and P-1128).

Section 21(2)

The Ministry submits that the factors in sections 21(2)(e), (f) and (h) of the *Act* are relevant factors favouring privacy protection of the personal information of the police officers contained in the Use of Force Reports. These sections read:

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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

As far as section 21(2)(e) is concerned, the Ministry simply states that disclosure of the Use of Force Reports could unfairly expose the OPP officers to pecuniary or other harm. I do not accept this position. The civil law suit commenced by the appellant names the York Regional Police Service and the Crown (the legal entity responsible for the actions of the OPP) as defendants. No police officer is named individually, and I am not persuaded that the existence of this law suit in and of itself mean that disclosure of these records would expose any of the police officers to pecuniary or other harm. Even if it does, any determination of personal liability would be based on a finding to that effect by a court and, in my view, this could not accurately be described as being “unfair”. Therefore, I find that section 21(2)(e) is not a relevant factor in the circumstances of this appeal.

The Ministry’s submission on section 21(2)(f) state:

The Use of Force Reports at issue contain information supplied by three OPP officers with respect to their personal observations and assessment of the circumstances relating to the use of force incident involving the appellant on January 13, 2000. This information is contained in Part A of Form I under the *PSA*.

It should be noted that the responsive Use of Force Reports do not contain Part B of Form I. Part B normally contains the name, rank and badge numbers of the officer preparing the Use of Force Report. Part B also contains sections for the officer to list the date of his or her last use of force refresher training, to request an interview with training staff and for training staff to make recommendations for use of force training for the subject officer. The retention period for Part B of completed Use of Force Reports is prescribed in subsections (3.1) to (3.3) of section 14.5 of Regulation 926 under the *PSA*. The inherent sensitivity of Use of Force Reports identifiable to a named officer is evidenced by the restricted retention period for Part B of such documents.

In order for information to be considered highly sensitive under section 21(2)(f), its disclosure must reasonably be expected to cause excessive personal distress (Orders M-1053, P-1681 and PO-1736).

The three Use of Force Reports were prepared by the OPP officers involved in the pursuit and apprehension of the appellant. The Reports themselves include a number of details concerning the time and location of the incident, as well as the type of force used. Each Report also includes a brief narrative section at the bottom with handwritten notes of the officer who completed the Report. Having reviewed the records and considered the representations provided by the Ministry and the three affected persons, I am not persuaded that disclosure of the Use of Force Reports could reasonably be expected to cause excessive personal distress to any of the OPP or York Regional Police officers involved in the incident. The majority of the information in the

reports consists of factual details concerning the incident which are already known to the appellant. The information contained in the narrative section is general in nature and, in my view, is essentially the same as information already provided to the appellant by the Ministry through the disclosure of other responsive records. As the Ministry points out, Part B of these three Reports, which apparently would have included more detailed information about the officers in question, is not at issue in this appeal, presumably because it has been destroyed in accordance with the requirements of Regulation 926. Different considerations might apply to Part B but, in my view, Part A of these forms, which are the only records before me in this appeal, do not contain information that is highly sensitive in nature, and I find that section 21(2)(f) is not a relevant consideration with respect to pages 25, 26 and 27.

As far as section 21(2)(h) is concerned, the Ministry also relies on the destruction requirements of Regulation 926 as the basis for concluding that the Reports themselves were supplied by the individual police officer in confidence. The Ministry points out that records of this type are “consistently handled in a confidential manner”. Again, I do not accept the Ministry’s position on the relevance of this factor. Use of Force Reports are prepared by police officers under a statutory scheme established by the *PSA*. As the Ministry points out in its representations:

Use of Force Reports are primarily used to assess use of force incidents with a view to ensuring that use of force incidents are being managed in a manner consistent with established standards and procedures and to identify any use of force training needs relating to either the specific individual completing the report or a specific police service.

In my view, given this stated purpose, it is not reasonable for police officers to expect when submitting the Use of Force Reports that the information contained in them would be treated in a confidential manner, and I find that section 21(2)(h) is not a relevant consideration with respect to pages 25, 26 and 27.

In summary, I find that there are no factors favouring the protection of the privacy of any of the police officers whose personal information is contained on the three Use of Force Reports.

The appellant provided no representations on this issue. However, because I have determined that there are no factors present which favour privacy protection, I find that disclosure of the Use of Force Reports would not constitute an unjustified invasion of any police officer’s privacy, and pages 25, 26 and 27 do not qualify for exemption under section 49(b) of the *Act*. This finding recognizes the higher right of access provided under Part III of the *Act* when requesting one’s own personal information. If I had been dealing with a request for access to records under Part II that contained personal information of other individuals but no personal information of an appellant, it would be up to that appellant to establish why disclosure of personal information would not constitute an unjustified invasion of the other individual’s privacy; otherwise the mandatory section 21 exemption would apply. However, because the records in this appeal all contain the appellant’s personal information, if the Ministry and/or affected persons have not established that disclosure would constitute an unjustified invasion of the affected persons’ privacy, then the rights of the appellant prevail.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed portions of pages 3, 5, 6, 7, 8, 19 and 20 and the dispatcher log tape.
2. I order the Ministry to disclose pages 25, 26 and 27, subject to the severance of the one line on each record which identifies the length of employment service for each of the three police officers who authored the Use of Force Reports. This disclosure shall be made by **July 24, 2001** but not before **July 19, 2001**.
3. I reserve the right to require the Ministry to provide me with a copy of the pages disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 19, 2001