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

ORDER PO-1955

Appeal PA-000070-2

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to documents relating to an internal review of an Ontario Provincial Police (OPP) investigation into the death of the requester's son. The Ministry denied access to the records on the basis that the records fall within the scope of section 65(6) and are therefore outside the jurisdiction of the *Act*.

The requester (now the appellant) appealed the Ministry's decision. This appeal was subsequently resolved by Order PO-1797. In Order PO-1797, I determined that section 65(6) did not apply and ordered the Ministry to issue a decision on access. The Ministry applied to the court for a judicial review of Order PO-1797. At the same time, the Ministry issued a decision letter to the appellant in compliance with the provisions of Order PO-1797.

In the decision letter, the Ministry denied access to the records on the basis of the following exemptions:

- section 49(a) (discretion to refuse requester's own information), as it relates to sections 14(1)(l) and 14(2)(a) of the *Act*, and
- section 49(b) (invasion of privacy), with reference to sections 21(2)(f) and (h), and sections 21(3)(a), (b) and (d) of the *Act*.

The Ministry stated that its decision was without prejudice to its position that the records were excluded from the *Act* under section 65(6).

The Ministry also stated that access to OPP computer codes, unrelated OPP matters and records covered by previous requests was being denied on the basis that these records were not responsive to the request.

Finally, the Ministry also indicated that while no exemptions were claimed for certain records, they were being withheld pending the court's decision on the judicial review application. These records are described as correspondence to or from the requester, references in records to statements or comments by the requester, and general investigative information such as weather records.

The requester (now the appellant) appealed the decision to deny access.

Despite the efforts of the Mediator during the Mediation stage of the appeal, the Ministry declined to identify which records were not responsive, which were not subject to any exemption claims, and which exemptions applied to the other responsive records.

The appellant advised the Mediator that he was not interested in pursuing access to records that did not relate to his request, but because the Ministry had not identified the records it considered non-responsive, this issue could not be resolved during mediation.

Mediation was unsuccessful in resolving any issues, and the appeal moved to the Adjudication stage. I sent a Notice of Inquiry to the Ministry initially. The Notice asked the Ministry to identify which exemptions applied to each specific record. The Ministry provided representations in response to the Notice, and attached an index of records that identified the exemptions claimed for the various records and those records it considered to be non-responsive. The Ministry also withdrew the section 49(a) exemption claim.

I then sent a modified Notice of Inquiry to the appellant, along with a copy of the Ministry's representations and the index of records. The appellant provided me with his representations in response to the Notice.

RECORDS:

A total of 122 records are listed in the Ministry's index. They consist of correspondence, witness statements, handwritten notes, a synopsis, a general occurrence report, a supplementary report and a review report, as well as correspondence to or from the appellant.

In its representations, the Ministry states that records 86 and 109 have already been disclosed to the appellant during the course of the previous related inquiry. Therefore, these two records are not at issue in this appeal. The Ministry also identifies records 1-5, 7, 9, 42-45, 93-95, 97-108, and 110-112 as the ones for which no exemptions are claimed.

PRELIMINARY MATTER:

RESPONSIVENESS OF RECORDS

In the decision letter, the Ministry states that access to OPP computer codes, information about unrelated OPP matters, and records covered by previous requests were denied on the basis that records containing this information were not responsive to the appellant's request. During mediation, the appellant agreed not to pursue access to any information or records not related to his request, but productive settlement discussions could not take place because the Ministry was not prepared to identify which records fit this characterization.

Once the appeal had moved to the Adjudication stage, the Ministry identified the records that it considers non-responsive. It states:

> The Ministry has identified a number of parts of the responsive records as containing information that is not relevant to the appellant's request. This information is highlighted in pink in the responsive records provided to the IPC. Examples of the types of information that the Ministry believes is not reasonably relevant to the request include:

- entries in OPP records which concern the scheduling of an officer's off duty times and days off [part of record 55];
- times, dates and badge numbers of OPP staff printing computer generated reports (responsive records) [part of records 80, 82 and 83];
- OMPPAC (Ontario Municipal Provincial Police Automated Cooperative) computer system codes [part of records 80, 82 and 83]; and
- records that have already been fully released to the appellant through previous requests or considered in connection with an earlier appeal [records 71, 72, 74, 75, 78, 79, and 85].

Former Adjudicator Anita Fineberg canvassed the issue of responsiveness of records in detail in Order P-880. In applying the direction provided by the Divisional Court in *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3rd) 197, she concluded:

> 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 the request. It is an integral part of any decision by a head. The request 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.

I agree with these conclusions and adopt them for the purposes of this appeal.

Having considered the Ministry's position, and reviewed the records in detail, I find that some of the portions of records identified by the Ministry are not responsive to the request. Specifically, the entries in OPP records about the scheduling of an officer's off duty times and days off [the identified portion of record 55] are not responsive. As well, the times, dates and badge numbers of OPP staff who printed computer generated responsive records, and the computer system codes for these records [the identified portion of records 80, 82 and 83] are not reasonably related to the appellant's request.

However, I do not accept the Ministry's position that records that have been fully released to the appellant through previous requests or considered in connection with an earlier appeal are not responsive records [records 71, 72, 74, 75, 78, 79 and 85]. These records are contained in the investigation file requested by the appellant, and the fact that the appellant may or may not have obtained these records in the past has no bearing on whether they are responsive records. Had the Ministry taken a different approach to mediation it is possible that issues relating to these records could have been resolved prior to this inquiry, but that did not occur, and I find that this category of records remains within the scope of my inquiry.

DISCUSSION:

PERSONAL INFORMATION

Sections 21 or 49(b) of the *Act* are applicable only to "personal information". This term is defined in section 2(1) of the *Act* to mean, in part, recorded information about an identifiable individual.

The Ministry submits that the records contain the personal information of the appellant, the appellant's deceased son, witnesses and other identifiable individuals.

The Ministry also points out that certain police officers were the subject of complaints made by the appellant to the OPP Professional Standards Bureau and the Ontario Civilian Commission on Policing. The Ministry refers to Order P-721 in support of its position that records containing identifiable information about these officers in this context constitute their personal information.

The relevant portion of Order P-721 reads as follows:

> Previous orders have held that 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.

On my review of the records, I find that they contain the personal information of a number of identifiable individuals, including the appellant's son, witnesses, and other identifiable individuals. I also accept that, consistent with Order P-721, information related to the police officers whose conduct was being investigated constitutes their personal information.

I also find that some, but not all, of the records contain the appellant's personal information. Many records relate to the investigation originally conducted into the death of the appellant's son. Most of these records contain the personal information of the son and other individuals, but only two of them (records 28 and 34) contain any information relating to the appellant. The records that do not contain the appellant's personal information are records 11-27, 29-33, 35-41, 46-54, 56-70, 73, 77, 81, 84 and the responsive portions of records 55, 80, 82 and 83.

As far as the other remaining records are concerned, (records 6, 8, 10, 28, 34, 76, 87-92, 96, and 113- 122), I find that they contain the personal information of the appellant, as well as other identifiable individuals.

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

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body.

However, 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 an 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 discretion to deny the appellant access to that information.

Where, however, a record contains only the personal information of individuals other than an appellant, 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.

Given my findings regarding "personal information", records 11-27, 29-33, 35-41, 46-54, 56-70, 73, 77, 81, 84 and the responsive portions of records 55, 80, 82 and 83, which do not contain the appellant's personal information, will be considered under the section 21(1) mandatory exemption claim; and records 6, 8, 10, 28, 34, 76, 87-92, 96, and 113-122, which contain the personal information of the appellant and other individuals, including the appellant's son, will be considered under the section 49(b) discretionary exemption claim.

In considering both of these exemptions, 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; and 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).

One section relied on by the Ministry in this case is 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 submits:

> … all of the records at issue were compiled and are identifiable as relating to the investigation of a complaint into possible violations of the *Police Services Act* (the *PSA*). The information at issue consists of records compiled and/or prepared as a result of the investigation of complaints filed by the appellant pursuant to Part V of the *PSA*.

The Ministry points out that previous orders of this Office have determined that investigations under the *PSA* qualify as investigations into possible violations of law, as required by section 21(3)(b). The Ministry goes on to identify and summarize the various complaints registered by the appellant against the conduct of identifiable police officers.

The Ministry then submits:

> In addition, the Ministry is of the view that the exempt information contains highly sensitive personal information that was originally compiled and is identifiable as part of the OPP investigation into the circumstances of the appellant's son's death.

After summarizing the possible violations of law and types of charges that may be laid in the circumstances, the Ministry states:

> The Ministry submits that the personal information contained in the records at issue was collected as part of an investigation into possible violations of the *PSA*, the *Criminal Code* and the *Highway Traffic Act*. As indicated in a number of previous IPC orders …. section 21(3)(b) applies to investigations into possible violations of law, therefore, there is no need for criminal charges to be laid or for proceedings to have been commenced for the presumptions to apply.

I accept this submission. It is clear from the face of the records and the circumstances of their creation that the personal information contained in all of them was compiled and is identifiable as part of investigations into possible violations of the *PSA*, the *Criminal Code* and/or the *Highway Traffic Act*. Therefore, I find that the presumption of an unjustified invasion of personal privacy found in section 21(3)(b) applies.

In his representations, the appellant identifies a number of reasons why he is interested in obtaining the information. One of the factors he refers to suggests that disclosure of the information contained in the records is desirable for the purpose of subjecting the

activities of the Ministry to public scrutiny. This is one of the factors found in section 21(2) of the *Act* (paragraph (a)), however, applying the *John Doe* case set out above, a factor or combination of factors in section 21(2) cannot rebut an established presumption under section 21(3).

Because disclosure of records that do not contain the appellant's personal information would constitute a presumed unjustified invasion the privacy of other individuals under section 21(3)(b), I find that these records qualify for exemption under section 21 of the *Act*. This finding applies to records 11-27, 29-33, 35-41, 46-54, 56-70, 73, 77, 81, 84 and the undisclosed responsive portions of records 55, 80, 82 and 83.

Where a record contains the personal information of both an appellant and other individuals, and the institution determines that disclosing these records would constitute an unjustified invasion of another individual's personal privacy, the institution has discretion under section 49(b) to either disclose the information to the appellant or to deny the appellant access. In the circumstances of this appeal, the Ministry refers to the factors it considered in deciding not to disclose the personal information, and submits:

> 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 exempt information would not be appropriate in the circumstances. The Ministry was mindful of the fact that the appellant's public complaints under the *PSA* were determined to be unsubstantiated. The Ministry believes this circumstance affords the subject OPP officers a high degree of privacy protection.
>
> With respect to the information about the circumstances of the appellant's son's death that was provided by witnesses and other identifiable individuals, the Ministry is aware that the appellant has already been provided with access to many relevant documents as a result of his earlier *Freedom of Information and Protection of Privacy Act* requests.

In his representations, the appellant takes issue with the Ministry's position that his complaints about professional misconduct were not substantiated. However, as I noted in reference to this issue in Order PO-1797, a determination has been made that there was no misconduct on the part of OPP officials in relation to the investigation of the appellant's son's death or the handling of the appellant's complaints.

I am satisfied that the Ministry properly exercised discretion in deciding to deny access to records containing both the appellant's and other individuals' personal information, and I uphold the Ministry's decision to deny access to these records under section 49(b) of the *Act*. This finding applies to records 6, 8, 10, 28, 34, 76, 87-92, 96, and 113-122.

Earlier in this order I determined that records 71, 72, 74, 75, 78, 79 and 85, which were previously disclosed by the Ministry to the appellant, remain within the scope of this appeal. The Ministry indicates in its index that each of these records has previously been released to the appellant. I will include a provision in this order requiring the Ministry to again disclose these records, unless the appellant indicates that copies are not required.

ORDER:

1. I order the Ministry to disclose records 1-5, 7, 9, 42-45, 71, 72, 74, 75, 78, 79, 85, 93-95, 97-108 and 110-112, for which no exemptions were claimed, to the appellant

2. I uphold the Ministry's decision to deny access to the remaining records.

3. My order for disclosure of records under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Order PO-1797.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant pursuant to Provision 1.

Original signed by:
Tom Mitchinson
Assistant Commissioner

October 4, 2001
Date: