



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2017

Appeal PA-010178-2

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

An individual was convicted of murder in the 1950s. The circumstances of his arrest and trial were the subject of an investigation undertaken by the Ontario Provincial Police (the OPP) in the mid-1960s. The Ministry of the Solicitor General (now the Ministry of Public Safety and Security) (the Ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media, for access to records relating to the OPP investigation.

The first request was for records concerning a meeting that took place on April 4, 1966. The requester provided a copy of a memo describing this meeting and identifying various attendees, and asked for access to the following records:

1. I would like to obtain a photocopy of any correspondence, reports, memos which were exchanged by the people who attended this meeting on the [named person's] Case, the subject of the meeting.
2. If there were Minutes of the Meeting, I'd like to obtain a photocopy of them.
3. You'll notice the final paragraph states that [attendee #1] will discuss the results of the above mentioned conference with [named individual #1]. As part of my request, I would also like to obtain a photocopy of any documents provided to [named individual #1] in this meeting and created by [named individual #1] as a result of the discussion with [attendee #1].

The second request covered the years 1966 and 1967, and dealt with the following records:

I would like to obtain a photocopy of all correspondence between [named individual #2] and [attendee #2].

Also all correspondence between [named individual #2] and [named individual #3] during the same time period.

Also all correspondence between [attendee #2] and [named individual #3] in the same time period.

The Ministry responded to each request separately. It provided the requester with partial access to a number of responsive records, and denied access to other records, in whole or in part, on the basis that they qualified for exemption under section 21 of the *Act* (invasion of privacy).

The requester, now the appellant, appealed the Ministry's decisions. She also stated in her letter of appeal that further responsive records should exist.

This office opened one file to deal with both appeals.

During mediation, the Ministry conducted further searches for responsive records, but none were located.

Mediation was not successful in resolving this appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry initially, outlining the facts and issues in the appeal and requesting written representations. The Ministry provided representations, which were then shared with the appellant, along with a copy of the Notice. The appellant advised this office that she would not be submitting representations.

RECORDS:

There are 18 records at issue in this appeal. They consist of letters and memoranda, all dated in 1966 or 1967, and all relate to the OPP investigation of the murder case.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

The section 21 personal privacy exemption applies only to information that qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual, including an 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 [paragraph (h)].

The Ministry submits that most of the records contain the personal information of witnesses who provided information to the OPP during the course of the investigation. The Ministry also submits:

Although, in some cases, persons in their professional capacity completed the records they were compiled as a result of quotes from person(s) or exact descriptions derived from police records or other source records providing evidence related to the investigation of the offence. Clearly the contents of those records to which exemptions have been applied, describe in detail information related to the offence.

As such, the record although compiled from other sources does contain the personal information of affected identifiable individuals.

Having reviewed the records, I find they all deal with information gathering activities undertaken by the OPP as part of its investigation. With the exception of Records 1, 5 and 14, the records contain the names of individuals who were interviewed or otherwise provided information to the OPP, together with the information provided by these individuals. In some instances the information appears to have been originally gathered in previous investigations and referred to by the OPP in the context of its investigation. In one instance (Record 4), certain individuals named in the record are journalists, but the information relating to them deals with information they provided to the OPP in the context of the investigation, and also includes information about certain other individuals purportedly involved in the investigation.

In the case of Records 1 and 14, the records have been fully disclosed, with the exception of a name. The information severed from Record 5 identifies an individual who had a professional involvement with the subject matter of the OPP investigation.

I find that the undisclosed portions of Records 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18 contain the personal information of identifiable individuals, specifically their names together with information they provided to the OPP in the context of the subject investigation. This information falls within the scope of the definition of “personal information” in section 2(1) of the *Act*.

Previous decisions of this office have drawn a distinction between an individual’s personal and professional capacity. In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner’s approach to this issue and the rationale for drawing this distinction. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385. In applying the principles that he described in that order, Adjudicator Hale came to the following conclusion:

I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their “personal information” within the meaning of the opening words of the definition.

I adopt this analysis for the purposes of this appeal, and apply it to Records 1, 5 and 14.

As far as Record 14 is concerned, the portions already disclosed to the appellant identify that there was a problem with the quality of a document sent by a pathologist during the course of the investigation, and that this fact was drawn to the attention of the pathologist by a named individual. Neither the Ministry’s representations nor the record identify this individual’s position, but it would appear clear from the context of Record 14 that he was a professional colleague of the pathologist.

Based on the contents of the disclosed portions of Records 1 and 5, it is clear that the individual whose name has been withheld is the author of a book on the murder case. In my view, the portions of these two records disclosed to the appellant have already established her identity.

Section 50(3) of the *Act* requires that this office notify any “affected person” upon receipt of an appeal. In practice, a decision to order disclosure of information that has been identified by an

institution as qualifying as “personal information” is normally not made unless the individual has been notified and provided with an opportunity to participate as a party in the appeal. However, the records at issue in this appeal are 35 years old and, in my view, notification of the two individuals named in Records 1, 5 and 14 is not practical in the circumstances. It is also clear from the context of these records that the information about the two named individuals has no personal component, and relates exclusively to activities undertaken by them in a professional capacity. For these reasons, I find that this is an appropriate case to depart from the general practice and to make my finding without prior notification.

Accordingly, I find that disclosing the names of the individuals in Records 1 and 14, and the name and related information in Record 5, would not reveal any personal information about either of these two individuals, and does not qualify as their “personal information”, as defined in section 2(1) of the *Act*. The section 21 privacy exemption can only apply to “personal information” and, because no other exemptions have been claimed for Records 1, 5, and 14, the remaining portions should be disclosed to the appellant.

The other 15 records, which do contain “personal information”, qualify for consideration under the personal privacy exemption claim. Section 21 of the *Act* creates a mandatory exemption for records containing the personal information of individuals other than the appellant. This section reflects one of the purposes outlined in section 1(b) of the *Act*, specifically:

to protect the privacy of individuals with respect to personal information about themselves held by institutions ...

The section 21 exemption prohibits the disclosure of personal information unless one of the exceptions listed in section 21(1) is applicable. The only exception with possible application in the circumstances of this appeal is section 21(1)(f) which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of 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 the disclosure of which is presumed to constitute an unjustified invasion of privacy.

The Ministry argues in its representations that a number of factors and presumptions are relevant to the personal information at issue in this appeal. These arguments were provided to the appellant, together with an outline of the statutory provisions and references to previous orders interpreting the various components of section 21(1), but the appellant chose not to provide any representations on this or any other issues raised in her appeal.

In the absence of representations from the appellant, or other evidence supporting a finding that disclosure of the personal information of witnesses who provided information to the OPP in the context of its investigation of this high profile and sensitive criminal matter would not constitute an unjustified invasion of their privacy, I am unable to find that the section 21(1)(f) exception applies. Accordingly, the personal information contained in the undisclosed portions of Records 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18 qualifies for exemption under the mandatory requirements of section 21 of the *Act*.

ADEQUACY OF SEARCH

In her letter of appeal, the appellant states her belief that additional responsive records relating to the April 4, 1966 meeting should exist. She points out that she did not receive any records authored by attendee #2, correspondence between named individual #2 and attendee #2, or records relating to other individuals who were in attendance at this meeting.

In appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for records, as required by section 24 of the *Act*. If I am satisfied that the searches carried out were reasonable, I will uphold the Ministry's decision; if not, then further searches may be ordered. The *Act* does not require the Ministry to prove with absolute certainty that additional 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 all responsive records.

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

By way of background, the Ministry explains that all records from the original police investigation and subsequent murder trial were either returned to the owners or destroyed in the early 1960s. The OPP's Criminal Investigation Bureau (CIB) file was transferred to the Ontario Archives several years ago. In explaining its original searches after receiving the appellant's requests, the Ministry states:

Administrative files and photographs along with negatives were still located in the CIB storage room. In addition, a search was conducted in the old number six district for Detachment and Identification records in relation to this case. In May and June 2000 members assigned this task attended at the Ontario Archives and reviewed the material stored on the premises only making copies of specific material to assist in the current endeavours.

The remaining records, any new information and subsequent follow-up investigation records are currently stored at Sebringville Detachment. This consists of a total of 8 banker boxes, under the control of D/Constable Tom Nahrgang.

The Ministry explains in its representations that the records relating to the OPP investigation were gathered between 1997 and May 2000 from a number of sources, including statements, correspondence and news articles relating to the original investigation and trial, records concerning a book on the topic, and relevant records identified at the Archives. The Ministry points out that the only archived records retrieved by the Ministry were those of interest to the OPP, and that these records were searched in the context of the appellant's request.

The Ministry states:

The two requests under the Act from the appellant were received by the OPP and [D/Constable Nahrgang] conducted the searches. The searches consisted of a review of 335 documents and 156 statements that were contained in eight banker boxes at the officer's location.

...

In addition, one banker box containing records in relation to this matter stored at the CIB office at OPP General Headquarters in Orillia was searched by a Detective Staff Sergeant and no responsive records were located.

[D/Constable Nahrgang] conducted three searches for records. They included an original search upon receipt of the requests, a second search during mediation and a third search in responding to the Notice of Inquiry by the [Commissioner's Office].

The Ministry also provided a "Will State" report from Detective Constable Nahrgang that elaborates on the specific search activities and records located.

I provided the Ministry's representations and the "Will State" report to the appellant, but she declined to provide a response.

The only evidence provided by the appellant regarding the existence of additional records was the statements in her letter of appeal. Having reviewed the various search activities undertaken by the Ministry, and given the age of the records and the possibility that some may have been previously destroyed, I find that the Ministry's searches for records were reasonable in the circumstances, and I dismiss this part of the appeal.

ORDER:

1. I order the Ministry to disclose the remaining portions of Records 1, 5 and 14 to the appellant by **June 18, 2002**.
2. I uphold the Ministry's decision to deny access to the undisclosed portions of Records 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18.

3. In order to verify compliance with Provision 1 of the order, I reserve the right to require the Ministry to provide me with a copy of the records sent to the appellant, upon request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 28, 2002 _____