



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1989

Appeal PA-010024-1

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a file relating to an investigation undertaken by the Ministry's Special Investigations Unit (the SIU), including all documents pertaining to the investigation. The Ministry located the responsive records and provided the requester with copies of a portion of them. Access to the majority of the records was denied by the Ministry, who claimed the application of the following exemptions contained in the *Act*:

- law enforcement – section 14(2)(a);
- invasion of privacy – section 21(1) with reference to the presumption in section 21(3)(b) (information compiled as part of an investigation into a possible violation of law).

The requester, now the appellant, appealed the Ministry's decision to deny access to the responsive records. During the mediation stage of the appeal, as a result of the filing of two Authorizations executed by the police officers who were the subject of the investigation, an additional five pages of records were disclosed to the appellant.

As no further mediation was possible, the file was moved into the Adjudication stage of the appeal process. I decided to seek the representations of the Ministry and another individual whose rights may be affected by the disclosure of the information contained in the records (the affected person), initially. I received submissions from both of these parties in response to the Notice. I decided to share the representations of the Ministry, in their entirety, with the appellant. However, the representations of the affected person were not shared with the appellant as they failed to address the issues in the appeal in any significant way other than to state his objection to the disclosure of the records. The appellant did not make any submissions in response to the Notice provided to him.

The records at issue consist of the contents of the SIU's investigation file including administrative forms, various statements taken during the course of the investigation, correspondence and notes taken by the investigator, a draft version and the final Report of the SIU Director to the Attorney General, various photographs, medical records and ten audiotapes.

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information which 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.

The Ministry submits that the records at issue contain the personal information of the individual who initiated the complaint to the SIU (the affected person), the subject police officers, other police and civilian witnesses and other identifiable individuals who were involved in the investigation and that none of the personal information relates to the appellant.

The Ministry contends that the personal information includes such things as the age and sex of identifiable individuals (section 2(1)(a)), employment and medical history of these individuals (section 2(1)(b)), identifying numbers pertaining to individuals (section 2(1)(c)), addresses and telephone numbers (section 2(1)(d)), the personal views and opinions of various individuals or about other individuals (sections 2(1)(e) and (g)), correspondence of a private or confidential nature (section 2(1)(f)) and the names of individuals along with other personal information about them (section 2(1)(h)).

I have reviewed the information contained in the records and find that it qualifies as personal information as that term is defined in section 2(1) of the *Act*. This personal information relates to the affected person and a number of other identifiable individuals, including the subject officers. The personal information does not relate to the appellants.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the present case, I am of the view that only the exception in section 21(f) may apply. This section reads:

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

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

Section 21(1)(f)

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].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption.

[See Order PO-1764]

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The Ministry has relied on the "presumed unjustified invasion of personal privacy" in 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,

- (b) 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.

In support of its contention that the presumption in section 21(3)(b) applies, the Ministry submits:

The statute which gives rise to the SIU, outlining its jurisdiction and responsibilities, is the PSA [the *Police Services Act*] (which is the sole governing statutory provision relating to the SIU).

...

the SIU is a law enforcement agency which conducts (as in the case at issue) criminal investigations surrounding the circumstances of incidents which fall within its jurisdiction in order to determine whether the officer or officers who is/are the focus of the investigation has/have committed any criminal offence in relation thereto.

...

The *personal information* herein at issue was compiled and is clearly identifiable as "part of an investigation into a possible violation of law", namely the criminal law as is contained in the *Criminal Code of Canada*.

The Ministry goes on to explain what it describes as "strong policy reasons" which militate for the protection of the personal information contained in the records. Essentially, it argues that it is important that information provided by police officers, witnesses and other members of the public be protected from disclosure in order to ensure that police officers and the public cooperate with such investigations.

The affected person simply states that he does not wish to have his personal information disclosed to anyone.

In Order PO-1849, I addressed the application of the presumption in section 21(3)(b) to similar records also maintained by the SIU. I found that:

I find that the information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. The fact that no criminal proceedings were commenced by the SIU has no bearing on this issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Orders M-198 and P-237). Therefore, I find that the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies. Because the exempt information falls within the scope of one of the section 21(3) presumptions, *John Doe, supra*, precludes me from considering the application of any of the factors weighing for or against disclosure under section 21(2), or any other unlisted considerations. . .

In that case, the SIU Director's Report to the Attorney General was not at issue. In the present appeal, I have no difficulty in finding that the information which was compiled and is identifiable as part of the investigation into a possible violation of law is subject to the presumption in section 21(3)(b). I further find that none of the exceptions in section 21(4) apply in the circumstances. The investigation records are, accordingly, exempt from disclosure under section 21(1).

The SIU Director's Report to the Attorney General, and the draft version of the same document, were not, however, compiled and identifiable as part of the investigation. The Report and its draft were prepared following the conclusion of the investigation. I will, therefore, address the application of section 14(2)(a) to these records.

LAW ENFORCEMENT REPORT

The Ministry submits that section 14(2)(a) of the *Act* applies to the SIU Director's Report and its draft. Section 14(2)(a) states:

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.

[Orders 200, P-324 and P-1244]

In Order 221, Commissioner Tom Wright made the following comments about part one of the test:

The word “report” is not defined in the *Act*. However, it is my view that in order to satisfy the first part of the test, i.e. to be 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 records of fact. [emphasis added]

I adopt this approach for the purposes of this appeal. The Ministry submits that the SIU Director’s Report and the draft version thereof “... provides an overview of the incident and a description of the events prior to, during and subsequent to the occurrence. It also analyses the information and statements accumulated, and reaches a conclusion regarding the conduct of the police.”

The SIU was established by section 113 of the *Police Services Act (the PSA)* and is charged with the investigation of “... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers” (section 113(5)). The Ministry states that when allegations about an incident involving police are raised, an independent investigation is conducted by SIU investigators with a view to determining whether any police officer may have committed a criminal offence. At the conclusion of the investigation, a brief is submitted to the Director of the SIU for review and determination. If reasonable grounds exist, the Director may cause an information to be laid against a police officer in connection with the matters investigated and refer such an information to the Crown Attorney for prosecution.

Section 113(8) of the *PSA* requires the Director to provide a report of the results of an investigation to the Attorney General. As noted above, the remaining records at issue in this case consist of the Report from the Director of the SIU to the Attorney General pursuant to section 113(8) of the *PSA* and an earlier draft of the Report.

I have carefully reviewed the information at issue in this appeal. I find that the SIU Director’s Report to the Attorney General (and its draft) were written to satisfy the Director’s reporting requirements under section 113(8) of the *PSA*. The letter reports to the Attorney General on the results of the SIU investigation based upon the Director’s review of the Final Investigative Report. Accordingly, in my view, the SIU Director’s Report and its draft comprise a formal statement of the results of the collation and consideration of information. Consequently, I find that the information contained in the records constitutes a “report” for the purposes of part one of the section 14(2)(a) test.

Previous orders of the Commissioner's office have found that investigations undertaken by the SIU under section 113 of the PSA qualify as law enforcement investigations for the purposes of the second part of the section 14(2)(a) test. [Orders P-1155, P-1337 and P-1418] I adopt this approach from these orders and similarly find that the remaining records at issue in this appeal, the draft and final versions of the SIU Director's Report to the Attorney General, were prepared in the course of a law enforcement investigation by the SIU.

In addition, I find that the SIU is an agency which has the function of enforcing and regulating compliance with a law, thereby satisfying the third part of the section 14(2)(a) test. As all three parts of the test described above have been met, I find that the SIU Director's Report to the Attorney General and the draft version of the same document qualify for exemption under section 14(2)(a) of the *Act*.

ORDER:

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

Donald Hale
Adjudicator

January 25, 2002