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

ORDER PO-2038

Appeal PA-000021-1

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of records relating to a named Ontario Provincial Police (OPP) officer (the affected person).

The Ministry responded by advising the appellant that "access to an [OPP] Criminal Investigation Bureau Threat Assessment and responsive records that name [you] in an investigation is denied as the records concern a matter that is currently under investigation and/or before the courts". The Ministry relied on section 49(a) in conjunction with sections 14 (law enforcement) and 19 (solicitor-client privilege), and section 49(b) in conjunction with section 21 (personal privacy) of the *Act*.

The appellant appealed the Ministry's decision.

During the mediation stage of the appeal, the Ministry issued a supplementary decision in which it advised the appellant that it located additional records responsive to her request. The Ministry explained that these records relate to an investigation by the OPP Professional Standards Bureau. The Ministry denied access to these records in their entirety on the basis of sections 65(6) of the *Act*, which excludes certain employment related records from the scope of the *Act*.

Also during mediation, the appellant advised that with respect to the OPP Professional Standards Bureau records, she is only seeking access to information that directly or indirectly refers to her. The appellant also advised that she is not seeking access to the OPP Criminal Investigation Branch records, with the exception of any Threat Assessments found in those records. Also at mediation, the Ministry disclosed one responsive record to the appellant, a handwritten telephone message.

As a result of the above, sections 49(a) in conjunction with sections 14 and 19 are no longer at issue.

Prior to the issuance of a Notice of Inquiry, the Ministry issued another decision to the appellant advising that it has located an additional record (a Threat Assessment relating to the OPP Professional Standards Bureau investigation) responsive to the appellant's request. The Ministry denied access to this record in its entirety under section 65(6). Accordingly, this record has been included as a record at issue in this appeal.

This office sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry. The Ministry submitted representations in response. In these representations, the Ministry raised for the first time the application of section 49(a) in conjunction with section 14(1)(e) to the Criminal Investigation Bureau record.

After reviewing the Ministry's submissions, this office sent a Supplementary Notice of Inquiry to the Ministry seeking addition information on the application of section 65(6). The Ministry submitted additional representations in response. This office then sent the non-confidential portions of the Ministry's representations to the appellant, who provided her own representations in response.

This office then sent a copy of the appellant's representations to the Ministry, which provided reply representations.

Because of a recent judgment of the Court of Appeal for Ontario with respect to section 65(6), I sought and received additional representations from the appellant on the application of that section.

RECORDS:

The records at issue in this appeal fall into two broad categories. The Professional Standards Bureau records consist of e-mails, witness lists and memoranda containing witness lists; a Summons to Witness; witness statements; an Interview Report; portions of Investigation/Investigative Findings documents with reference to the appellant; police officers' notes; and two Threat Assessments. The Ministry denied access to these records in full on the basis of section 65(6). In its representations, the Ministry refers to these records as "Record 1".

The only Criminal Investigation Bureau record remaining at issue in this appeal is a Threat Assessment. The Ministry denied access to this record pursuant to section 49(b) in conjunction with section 21. In its representations, the Ministry refers to this record as "Record 2".

DISCUSSION:

APPLICATION OF THE ACT

Introduction

As indicated above, the Ministry relies on section 65(6) to deny access to Record 1. Section 65(6) is record-specific and fact-specific. If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, then the records are outside the scope of the *Act*.

The Ministry claims that paragraphs 1 and 3 of section 65(6) apply to the records. I will first consider the application of section 65(6)1.

Section 65(6)1

Introduction

Sections 65(6)1 and 65(7) read:

> (6) Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

In order for a record to fall within the scope of section 65(6)1, the Ministry must establish that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Requirements 1 and 2

The Ministry submits:

> The records at issue in this appeal were either collected, prepared, maintained or used by [the OPP's Professional Standards Bureau] for the purposes of investigating complaints relating to a former member of the force. It is this office,

which has been established to investigate internal as well as public complaints against members. During the course of investigating these complaints, information and records are created and gathered or compiled in order to thoroughly investigate allegations and arrive at proper conclusions. Such investigations normally include taking reports from the subject officer of the complaint, the complainant and witnesses. The investigating officer then communicates the findings of his/her investigation to the [OPP] Commissioner by way of formal reports. The Commissioner then makes a decision as to the disposition of the complaint under section 64 of the [*Police Services Act* (*PSA*)].

The Ministry wishes to refer the IPC to Order M-835, which dealt with the issue of disciplinary hearings under section 60 of Part V of the *PSA*. On page 6 of that Order, the Assistant Commissioner made the following findings:

> A disciplinary hearing conducted under section 60 of the *PSA* is a dispute or complaint resolution process conducted by a court, tribunal or other entity which has, by law, the power to decide disciplinary matters. As such, these hearings are properly characterized as "proceedings" for the purpose of section 52(3)1.
>
> The Chief of Police or delegate has the authority to conduct "proceedings", and the power, by law, to determine matters affecting legal rights and obligations, and is properly characterized as an "other entity" for the purposes of section 52(3)1.

The Ministry suggests that Part V of the *PSA* . . . would also apply to issue of disciplinary hearings.

In Order P-1223, Assistant Commissioner Mitchinson stated:

> . . . if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

The [IPC] has ruled in previous Orders [M-1347, MO-1280, M-1186, M-835] that the Police have . . . statutory responsibility under the *PSA* to investigate and conduct hearings in order to deal with complaints involving police officers before another entity and that the Commissioner or a delegate would satisfy the requirements.

In Order MO-1347, Assistant Commissioner Mitchinson stated:

> . . . The Police have a statutory responsibility under the *PSA* to investigate and conduct hearings in order to deal with complaints

> involving police officers. Meetings, discussions and communications take place in this context, and any records responsive to the appellant's request would fall within this category.

With respect to the records at issue, the Ministry submits that the records were directly related to the investigation of the complaints and the requirements for 1 and 2 have been met.

The appellant submits:

> . . . [I]nformation which was gathered as part of a criminal investigation was not originally attained for labour relations or negotiations. The police received complaints against a person who just happened to be employed by them. The police would still be obligated to investigate as that is one of their basic functions. It was coincidental that the crimes [the affected person] perpetrated just happened to be in OPP jurisdiction. This means that the OPP investigated which I believe was a conflict of interest. Sudbury Regional or North Bay City Police Services should have investigated the Crimes and then there would be no employee/employer conflict of interest. It was only a result of [the affected person] pleading guilty to the crimes he committed when the labour relation/employment issue was raised. It would have been at that point where the OPP was forced to terminate [the affected person's] employment.
>
> I am asking for the threat assessment. This document does not relate to labour relations, rather it is an investigative tool the police utilize to assist in their investigation.

Based on the Ministry's submissions, and on the face of the records themselves, I am satisfied that the records were collected, maintained or used in relation to anticipated disciplinary proceedings under Part V of the *PSA* against the affected person. Based on the orders cited above by the Ministry, I find that these anticipated proceedings satisfy the second requirement under section 65(6)1. The fact that the OPP later investigated criminal allegations against the affected person does not negate the application of section 65(6) to the *PSA* disciplinary records.

Requirement 3

The Ministry submits:

> Having established that disciplinary hearings, a board of inquiry and criminal court matters meet the criteria of "proceedings or anticipated proceedings", it is our position that these various proceedings or anticipated proceedings "relate to ... the employment of a person by the institution."

> It is incumbent upon the institution's management to ensure that all members adhere to the rules, regulations, and procedures of the OPP, which includes the *PSA* as well as the Criminal Code of Canada. When an officer is deemed not to have fulfilled his employment duties/responsibilities by failing to comply with the above-noted regulations, it therefore follows that any ensuring public complaints investigation clearly relates to the employment by the institution of the police officer that is the subject of the investigation. As such, these records no longer fall within the auspices of the 'Act'.
>
> In support of our position that disciplinary proceedings under Part V of the *PSA* are characterized as "employment related actions", [Assistant] Commissioner Tom Mitchinson found at Order M-835 that:
>
> > Despite what I acknowledge to be a general public interest in policing matters, I find that these Part V proceedings do in fact "relate to the employment of a person by the institution". The penalties outlined in section 61(1), which may be imposed after a finding of misconduct, involve dismissal, demotion, suspension, and the forfeiting of pay and time. In my view, these can only reasonably be characterized as employment-related actions, despite the fact that they are contained in a statute and applied to police officers.
>
> The Ministry submits that the discipline process as described in Part V of *PSA* does constitute a proceeding and that disciplinary action, which were undertaken in this circumstance, under the *PSA*, do relate to the employment of a person by the Police.

The appellant submits that section 65(6)1 cannot apply because "there are no proceedings relating to labour relations or the employment of [the affected person.] He is no longer employed by the OPP."

In my view, following Order M-835, it is clear that the anticipated proceedings in question, under Part V of the *PSA*, relate to the employment of a person by the Ministry. In addition, requirement 3 applies, despite the fact that the proceedings are no longer continuing or anticipated. The judgment of the Court of Appeal for Ontario in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (leave to appeal refused [2001] S.C.C.A. No. 509) makes it clear that section 65(6) can apply, despite the passage of time or change of circumstances, as long as the requirements of the section are met at the time the records were collected or prepared.

Based on the above, I find that all three requirements of section 65(6) are met. In addition, I find that none of the section 65(7) exceptions applies. Therefore, the *Act* does not apply to Record 1. Accordingly, it is not necessary for me to make a finding on the application of section 65(6)3.

PERSONAL INFORMATION

The Ministry has claimed that section 21 applies to Record 2. The section 21 personal privacy exemption can apply only if the record contains "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 this record, a threat assessment, contains highly detailed information about the affected person and other identifiable individuals who were victims of the affected person. As such, the Ministry argues that all of the information in the record constitutes personal information of the affected person and other individuals. The Ministry submits that the record contains no personal information of the appellant.

The appellant submits:

> . . . I am only seeking my personal information to confirm my name on the threat assessment and the level of threat to which I am exposed. As personal information relating to the individual, I have stated previously, the information relating to other officers can be blacked out to maintain their privacy.

Based on my review of the record, I find that it contains highly detailed personal information, primarily about the affected person, but also about other individuals and their interactions with the affected person. In addition, I agree with the Ministry's submission that the record contains no personal information relating to the appellant.

INVASION OF PRIVACY

Introduction

Where a requester seeks personal information of other individuals, 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. The only exception that could apply here is section 21(1)(f), which reads:

> 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 personal privacy. 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).

Section 21(3)(b) presumption

The Ministry relies on the presumption at section 21(3)(b) which states:

> 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:

> . . . [A]ll personal information in [Record 2] was compiled and is identifiable as part of an OPP investigation into a possible violation of law, in accordance with section 21(3)(b) of the *Act*.
>
> . . . . .
>
> A member of the Criminal Investigation Unit requested the record to be compiled as part of the law enforcement investigation into Criminal allegations against [the affected person]. The OPP conducted a criminal investigation to determine the person who committed this criminal offence, which is contrary to the *Criminal Code*, a federal statute. As a result of this investigation personal information was gathered in order to identify the person who committed the offence.
>
> . . . . .
>
> The OPP in an agency, which has the function of enforcing, and regulating compliance with a law.
>
> The Ministry submits that this clearly was a law enforcement investigation in which the records were compiled to determine if there were any violations of the *Criminal Code*.

The appellant submits:

> . . . The information contained in the threat assessment pertains to my personal safety. To permit me access to it would certainly not be unjustified . . .
>
> In regards to sec. 21(2)F of the *Act*, the information contained within the threat assessment would not be considered highly sensitive or cause [the affected person] excessive personal distress if released. Firstly, it causes me a great deal

> of excessive personal distress to be denied access to my information contained within the threat assessment. This assessment was not completed in the presence of [the affected person]. It is not a psychiatric assessment within a patient/doctor relationship. If this were the case I could understand the privilege, the right of confidentiality and the highly sensitive nature of the information. Rather, the document was compiled by a psychologist employed by the police, without [the affected person's] presence, to provide a profile of predicted behaviour. This is used as an investigative tool for police as well as a means to persuade the courts of the danger [the affected person] poses in the community while they seek to keep [the affected person] in custody. Since the matter has been dealt with in the courts, the expectation of any privacy would be defunct.
>
> In conclusion, the police have the obligation to protect the public, and keep victims informed. The OPP is denying me the right to access my personal information that relates to my personal safety. Parallels can be made to *Jane Doe v. Metro Toronto Police Service . . .*

Although the appellant cites various factors that may weigh in favour of disclosure, it is clear that the presumption of an unjustified invasion of privacy under section 21(3)(b) applies, a presumption which cannot be overcome by any factors, listed or unlisted, under section 21(2). As the appellant herself indicates, records of this nature are used "as an investigative tool for police". The information in this record was clearly compiled and is identifiable as part of an investigation into a possible violation of law, namely various sections of the *Criminal Code*. As well, it appears that many of the appellant's submissions are based on her erroneous assumption that the record contains her personal information. In addition, the fact that certain matters relating to the investigation of the affected person were made public through the courts does not negate the application of the section 21 exemption and, in any event, I have no evidence before me to indicate that Record 2 formed part of the public court file in this matter or was otherwise disclosed to the public. In the circumstances, I am satisfied that disclosure of the record, or any portion, would constitute an unjustified invasion of the affected person's privacy under section 21 of the *Act*.

PUBLIC INTEREST OVERRIDE

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In the circumstances of this appeal, section 23 can apply only to Record 2, since the *Act* does not apply to Record 1.

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must

clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The appellant submits:

> . . . [The affected person] is a convicted violent offender. The information contained in the threat assessment pertains to my personal safety. To permit me access to [Record 2] would certainly not be unjustified. Public safety must be paramount. Since [the affected person] has already used violence to victimize members of society, there is real concern for public safety. This is emphasized in sec 23 of the *Act* which refers to where there is a compelling public interest that exists in the disclosure of the information which would clearly outweigh the purpose of the section 21 exemption.

Given the level of knowledge the appellant already has about the behaviour of the affected person, I am not satisfied that disclosure of this particular record, which does not contain her personal information, could reasonably be expected to enhance her personal safety in any significant way. Further, I am not convinced that disclosure of this record would enhance overall public safety. There is nothing before me, either in the record itself or otherwise, to indicate that this record would lead to any member of the public altering their behaviour with a view to enhancing their safety or security.

To conclude, I find that there is no compelling public interest in the disclosure of this record, and that, therefore, section 23 of the *Act* cannot apply.

ORDER:

1. I uphold the decision of the Police that the *Act* does not apply to Record 1.

2. I uphold the decision of the Police to withhold Record 2 pursuant to the exemption at section 21 of the *Act*.

Original Signed By: September 5, 2002
David Goodis
Senior Adjudicator