



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2191

Appeal PA-020058-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General, now the Ministry of Public Safety and Security (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the transcripts of all telephone calls (the 911 calls) about an identified vehicle made on June 24, 2000 to the Ontario Provincial Police (OPP) Communications Centre in North Bay and relayed to the Burk's Falls OPP Detachment. The request, which was made late in 2001, also identified the exact times that two specific calls were made. The requester was the driver of the vehicle that was involved in an accident (the incident), and the calls were placed as a result of this incident.

The Ministry contacted the requester and advised him that copies of audiotapes of the identified telephone calls are retained for 45 days and then destroyed. The requester accepted the Ministry's explanation, and clarified that he wished to obtain a copy of the occurrence reports which resulted from the investigation of the incident.

The Ministry denied access to the responsive occurrence reports on the basis that the matter was before the Courts, and also claimed that the records qualified for a number of identified exemptions under the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry issued a revised decision granting partial access to parts of the records. The appellant advised that he was not pursuing access to certain information severed from the records; however, the appellant stated that he wished to pursue access to the information provided by a complainant, and to obtain access to the specific house number on a named road where the traffic incident took place.

As a result of mediation, the sole exemption claim remaining at issue is section 49(b) (invasion of privacy) in conjunction with section 21(3)(b), and the issue of whether that section applies to the portions of the records remaining at issue.

Also during mediation, the appellant decided that he wanted to pursue access to the transcripts of the 911 calls, as he contended that the Communications Centre enters the 911 calls onto a computer. The Ministry advised that, rather than entering communications calls onto a computer, as of April 2001, the OPP had been saving communication logger tapes to DVD. In response, the appellant advised that although the incident occurred in June of the year 2000, he believed that records of the 911 calls exist, and that he should have access to transcripts of these calls. This issue could not be resolved in mediation, and the question of whether or not additional responsive records exist remains an issue in this appeal.

The appeal was transferred to the inquiry stage of the process. A Notice of Inquiry was sent to the Ministry initially, and the Ministry provided representations to this office. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant. Although the appellant identified that he was interested in providing representations, no representations were received from the appellant.

RECORDS:

The records remaining at issue are the severed portions of:

- Page 1 – a Motor Vehicle Collision Report dated June 25, 2000
- Pages 2 and 3 – a General Occurrence Report and a Supplementary Occurrence Report dated June 25, 2000
- Page 1 – a General Occurrence Report dated July 20, 2000

The two severances at issue are 1) the specific house number on an identified street, which occurs five times in the four pages of records, and 2) certain information provided by a complainant (5 lines severed from the second page of the records).

DISCUSSION:

PERSONAL INFORMATION

The first issue for me to determine is whether the records contain personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,

...

- (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's representations

The Ministry takes the position that the records at issue contain the personal information of the appellant as well as other identifiable individuals.

Upon my review of the records and the representations, it is clear that the records contain the personal information of the appellant, who was involved in the incident. It contains his name along with other personal information relating to him.

With respect to whether the severed portions of the records contain the personal information of other identifiable individuals, the Ministry states:

... the information remaining at issue contains the types of personal information listed [in section 2(d) and (e) of the definition] with respect to potentially identifiable individuals.

Although [other] individuals are not named in the information remaining at issue, in the circumstances of the appellant's request, the Ministry submits that the information could be viewed as containing personal information about identifiable individuals.

In support of this position, the Ministry notes that in order P-230 former Commissioner Tom Wright stated:

I believe that provisions of the Act relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

The Ministry is of the view that former Commissioner Wright's comments appear to be applicable to the circumstances of the appellant's request and the information at issue. As a result of the disclosure process associated with the criminal prosecution of the appellant, the Ministry submits that the appellant may be in possession of information that will enable him to identify specific individuals in the records at issue.

The Ministry submits that personal information that is not expressly listed in subsection 2(1) may still be considered personal information about identifiable individuals.

In support of this position, the Ministry notes that in Order 11 former Commissioner Sidney B. Linden stated:

It is clear from the wording of the statute that the list of examples of personal information under subsection 2(1) is not exhaustive.

This leaves it open for me to decide whether or not information contained in the records which does not fall under subsections (a) to (h), set out above, constitutes personal information.

Later in its representations, the Ministry makes the following statement in support of its position that the street number should not be disclosed:

The house number severed from the responsive records was used as a reference point for the purposes of the police investigation. The Ministry has released the street name where the incident involving the appellant occurred. The [Ministry] has attempted to give appropriate consideration to the privacy of the individuals residing at this address as well as the access rights of the appellant.

Findings

There are two distinct portions of records remaining at issue in this appeal.

The first is the specific house number on an identified street (the address number). The street name has been disclosed to the appellant, and it is only the address number which remains at issue in this appeal.

It is clear from both the Ministry's representations and the records that the address number referred to in the records is included in the records simply as a reference point for the purpose of the investigation into the incident. The incident is an accident involving the appellant's vehicle, and the police were involved in investigating the accident. For the purpose of identifying the location of the accident, an address number was used; however, there is no indication from either the records or the representations that the address number is referable to an identifiable individual, nor is there any suggestion that any individual at that address was in any way involved in the incident.

As set out above, "personal information" is defined in the *Act* as recorded information about an identifiable individual, including,

- (d) the address ... of the individual,

In the circumstances of this appeal, the street number (address) is not referable to any individual. Whether any individual lived at that address at the time of the incident, or currently lives there, or whether it is or was used as a business address, has no relevance to this appeal. The street number is simply the reference point used by the Police in their investigation. Indeed, one of the references to the street number in the records refers to the location of the incident as "east of [the identified number]". In my view, the street number in this appeal is not recorded information about an identifiable individual, and does not constitute the personal information of an identifiable individual for the purpose of the *Act*.

The second severance remaining at issue consists of 5 lines of information severed from the second page of the records, which contain information provided by a complainant. Again, the

records do not identify this individual by name, nor is there anything in the records which could identify this person.

As identified above, the Ministry takes the position that the appellant may be in possession of information that will enable him to identify this individual. The Ministry also referred to former Commissioner Wright's comments from Order P-230 where he stated:

If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

In this case, although none of the records contain the name of the individual or other information that would readily be recognized as "identifying" an individual, I must decide whether the individual whose information is reflected in these records may nonetheless be identifiable given the information contained in the record and the surrounding circumstances (See Order MO-1472-F).

The severed portion of page 2 of the records contains a description of the incident from an individual's perspective. The Ministry identifies that, as a result of the disclosure process associated with the criminal prosecution of the appellant, the appellant may be in possession of information that will enable him to identify the specific individual. Based on my review of the information contained in this file, I accept the position of the Ministry, and find that, in the circumstances, there exists a reasonable expectation that the individual can be identified by the appellant. Therefore, the complainant's statement constitutes that individual's personal information because it reveals recorded information about the identifiable individual including the individual's involvement with the incident, as well as statements made by this individual regarding the incident.

Accordingly, I find that the severed portion of page 2 of the records contains the personal information of both the appellant and another identifiable individual. I must now decide whether it qualifies for exemption under section 49(b) of the *Act*.

INVASION OF PRIVACY

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 the requester 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 the discretion to deny the requester access to that information.

Section 49(b) of the *Act* introduces a balancing principle. 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), (3) and (4) of the *Act* provide guidance in deciding 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 whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure 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].

Operation of the presumption in section 21(3)(b)

In this appeal, the Ministry relies on the "presumed unjustified invasion of personal privacy" in section 21(3)(b) of the *Act*, which states:

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 submits:

The exempt information relates to a criminal investigation undertaken by the OPP in regard to a motor vehicle accident involving the appellant. In the course of the investigation, the OPP interviewed witnesses and other identifiable individuals. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry then refers to the specific violation of law which was being investigated.

I have reviewed the portion of the record remaining at issue. In my view, this information was compiled and is identifiable as part of a law enforcement investigation undertaken by the OPP into a possible violation of the *Criminal Code*. As such, I find that the presumption in section 21(3)(b) applies to this information.

This portion of the records is therefore exempt from disclosure under section 49(b).

EXERCISE OF DISCRETION

As noted, section 49(b) is a discretionary exemption. Once it is found that records qualify for exemption under this section, the Ministry must exercise its discretion in deciding whether or not to disclose it.

I have reviewed the representations of the Ministry with respect to the considerations it took into account when determining not to disclose the exempt information to the appellant. Based on the representations of the Ministry, I am satisfied that the Ministry properly exercised its discretion in deciding to withhold the information at issue.

REASONABLE SEARCH

As identified above, the request in this appeal included a request for the transcripts of certain 911 telephone calls made to the OPP Communications Centre in North Bay, and relayed to the Burk's Falls OPP Detachment on June 24, 2000. The Ministry advised that copies of audiotapes of the calls were retained for only 45 days and then destroyed. The appellant later contended that the Communications Centre enters the 911 calls onto a computer. In response, the Ministry advised that, as of April 2001, the OPP has been saving communication logger tapes to DVD. The appellant maintained that, although the incident occurred in June of the year 2000, he believed that records of the requested 911 calls exist.

In cases where a requester provides sufficient details about the records which he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that 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 responsive records (see order PO-1744).

The Ministry provided representations in support of its position that it conducted a reasonable search for responsive records. The Ministry states:

Following receipt of the Notice of Inquiry, the Ministry contacted the responsible OPP Sergeant at the North East Provincial Communications Centre (NEPCC) and the Detachment Commander of the Burk's Falls OPP Detachment and asked that they prepare affidavits detailing their respective records search activities and related matters in regard to the appellant's request. Attached is a copy of the affidavits [of these individuals].

The Ministry submits that it has conducted a reasonable search for records in the circumstances of the appellant's request. It remains the Ministry's position that the subject communications logger tapes no longer exist.

Attached to the Ministry's representations were two affidavits in support of the Ministry's position.

One affidavit is sworn by the Detachment Commander at the OPP Almaguin Highlands Detachment in Burk's Falls. The affidavit identifies that the affiant received a request for the transcripts of the calls in January of 2002 and that, after undertaking a search for the records, he could not locate records responsive to the request. The affiant also identifies the records retention schedule for records of this nature, and states that tapes of this nature are recycled after the retention period is passed, in circumstances where there is no law enforcement requirement to retain the tapes for a longer period. Finally, the Detachment Commander identifies that he conducted a further search at the time the Notice of Inquiry was sent, and that no responsive records were located.

The second affidavit is sworn by a Sergeant with the OPP North East Provincial Communications Centre. This affidavit identifies the process which was in place at the time of the incident for recording and storing the audio tapes responsive to the request. It identifies that the retention period at the relevant time was 45 days (as per section 5 of Regulation 460 of the *Act*). The affidavit also identifies that tapes were normally maintained for a period of 90 days and then reused (if there was no need to retain the tape for other reasons). It also identifies the nature of the searches conducted for the responsive records, and confirms that the affiant conducted a total of three separate searches for the responsive records at different times (one at the time of the request, one a few months later, and one at the time of preparing the affidavit), all of which had negative results.

Finally, the affidavit identifies that on July 7, 2000, the NEPCC converted to a DVD computer-based storage system for the storage of transmissions of the kind requested. The affidavit also identifies that records are now retained for at least two years. However, the Sergeant identifies that all logger tapes used prior to that date and no longer required were erased and sent to General Headquarters in accordance with their respective retention schedules.

Findings

It is interesting to note that the Ministry's representations, which were shared with the appellant, identify that the conversion to the DVD computer-based storage system for records of the kind requested was actually made shortly after the date of the incident. However, other than the fact that the incident preceded the conversion date, there is no suggestion that the conversion date is significant for the purpose of this appeal. The appellant did not provide representations in this appeal. Based on the information provided to me, including the affidavits and representations provided by the Ministry, I am satisfied that the searches undertaken by the Ministry were adequate and reasonable in the circumstances.

ORDER:

1. I order the Ministry to disclose the portions of the records which identify the street number to the appellant by providing him with a copy by **November 6, 2003**.
2. I uphold the Ministry's decision to deny access the severed portion of the second page of the records.

3. I find that the Ministry's search for records responsive to the appellant's request for transcripts of telephone calls was reasonable.
4. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to that Provision, upon request.

Original signed by: _____
Frank DeVries
Adjudicator

_____ October 16, 2003