



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2303

Appeal PA-030339-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for access to an occurrence report pertaining to a telephone call the appellant had received from a named Ontario Provincial Police (OPP) constable (the constable) on December 18, 2002, concerning a restraining order and warning provided by the parole officer for the appellant's former husband (the affected person).

The Ministry issued a decision letter granting partial access to a General Occurrence Report, dated November 18, 2002, obtained from the South Bruce (Kincardine) OPP (record #1), with severances made pursuant to section 49(a) (read in conjunction with section 14(2)(a)) and section 49(b) (read in conjunction with sections 21(2)(f) and 21(3)(b)) of the *Act*. In its decision letter the Ministry indicated that it did not locate a report dated December 18, 2002 pertaining to a telephone call from the constable but that it did locate record #1. The Ministry also advised that some information, such as references to computer commands, had been removed from this record as non-responsive to the request.

The appellant appealed the Ministry's decision.

During the mediation stage, the appellant explained that she had received a telephone call from the constable warning her about a letter he had received from the affected person's parole officer. She advised the mediator that she wanted the letter to be located and included in the scope of her request. The Ministry was able to locate a copy of a Memorandum, dated November 13, 2002 (record #2), and agreed to include it in the scope of the request and to issue a decision regarding access. The Ministry issued a second decision on December 10, 2003, denying access to record #2 in its entirety, pursuant to section 49(b) (read in conjunction with 21(2)(f) and 21(3)(b)), as well as section 49(e) of the *Act*.

The appellant indicated that she wished to pursue access to the information at issue, with the exception of the portions severed as non-responsive. As no further mediation was possible, the appeal was moved to the adjudication stage.

I first sought representations from the Ministry, which submitted representations in response. In its representations the Ministry indicated that some additional information from record #1 could be released to the appellant. The Ministry included with its representations a copy of a decision letter issued to the appellant regarding the release of this information. The Ministry advised that this additional information has been released to the appellant. The Ministry also indicated that it is withdrawing its reliance upon section 49(a), read in conjunction with section 14(2)(a) in respect of record #1, and section 49(e) in respect of record #2.

The Ministry agreed to share its representations in their entirety with the appellant, a copy of which was provided to the appellant. I then sought representations from appellant. The appellant chose not to submit representations.

RECORDS:

The records at issue, and the remaining exemptions claimed for them, are:

1. a one-page General Occurrence Report dated November 18, 2002, denied in part under section 49(b), read in conjunction with sections 21(2)(f) and 21(3)(b)
2. a two-page Memorandum, dated November 13, 2002, denied in whole under section 49(b), read in conjunction with 21(2)(f) and 21(3)(b)

DISCUSSION:

PERSONAL INFORMATION

The section 49(b) exemption applies only to information that qualifies as “personal information”, as defined under section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual, including information relating to the age, sex or marital status of the individual [paragraph (a)], information relating to the criminal history of the individual [paragraph (b)], the individual’s address and telephone number [paragraph (d)], the personal opinions or views of the individual except where they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] and 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 [paragraph (h)].

The Ministry’s representations are brief. The Ministry simply states that the information remaining at issue contains the types of personal information about the affected party that are set out in the above paragraphs of section 2(1).

Based on my review of the records, I am satisfied that the records contain the personal information of the appellant, including her name and information relating to her relationship with the affected person. The records also contain information about other identifiable individuals, specifically the affected person and the affected person’s parole officer. The personal information about the affected person includes his name, address, telephone number and date of birth, details pertaining to a criminal conviction and his opinions and views about matters relating to the break-up of his marriage. The information about the parole officer includes his name and his views regarding the affected person.

Having found that the records contain the personal information of the appellant and other individuals, I will consider the application of section 49(b) to these records.

DISCRETION TO REFUSE ACCESS TO APPELLANT'S INFORMATION/INVASION OF PRIVACY

Introduction

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.

Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case I have determined that the records contain the personal information of both the appellant and other individuals. As a result, I will consider whether the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester. I will review the Police's exercise of discretion under section 49(b) later in this order, after I have decided whether the exemption applies.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) 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 head to consider in making a determination as to 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(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], though it 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 14 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.

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, then disclosure would not be an unjustified invasion of privacy under section 49(b).

Unjustified invasion of another individual's personal privacy

In this case, the Ministry is relying on the presumption at section 21(3)(b) to support its decision to deny access to the information at issue. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

The Ministry submits that the personal information remaining at issue consists of "highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law." The Ministry further states that the investigation was undertaken in response to concerns expressed by the affected person's parole officer to the OPP. The Ministry submits that as part of the OPP's investigation they contacted the appellant and "discussed the nature of the concerns". The Ministry does not indicate whether or not charges were laid against the affected person as a result of this investigation. However, the Ministry points out that the application of section 21(3)(b) is not dependent upon whether charges are actually laid.

The Ministry submits that the OPP have taken "measures they deemed appropriate" in response to potential safety concerns for the appellant and, in this regard, had discussions with the appellant. The Ministry also states that the affected person's parole officer made "numerous attempts" to contact the appellant by telephone to discuss this matter and wrote a letter to the appellant explaining the conditions of the affected person's probation order. The Ministry indicates that the appellant was encouraged to contact the parole officer for additional information and the OPP if at any time she had concerns about her safety.

On my review of the Ministry's representations and the records, it is clear that the personal information was compiled as part of an investigation into a possible violation of the *Criminal Code* by the OPP.

It is not clear whether criminal proceedings were commenced in respect of this investigation. However, the Ministry is correct that whether or not a criminal proceeding was commenced does not have a bearing on this issue since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

In the circumstances of this case, I am satisfied that section 21(3)(b) applies. I acknowledge that the Ministry has also raised the application of section 21(2)(f) (the personal information is highly sensitive) as a factor weighing in favour of non-disclosure. However, having found that the section 21(3)(b) presumption applies I am not required to consider section 21(2)(f) in this case. In addition, I find that no exceptions under section 21(4) apply. The application of the "public interest override" at section 23 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

In conclusion, based on the application of section 21(3)(b), I find that disclosure of the personal information would be an unjustified invasion of personal privacy. Therefore, the information is exempt under section 49(b).

SEVERANCE

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt.

The parties did not submit representations on the severance issue.

The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

The Ministry has disclosed all of the information in the records to the appellant with the exception of the exempt information.

Therefore, I am satisfied that the Ministry has properly completed the severing exercise.

EXERCISE OF DISCRETION

The section 49(b) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The exercise of discretion under section 49(b) involves a balancing principle. The institution must weigh the appellant's right of access to his or her own personal information against the

other individual's right to the protection of their privacy. If the institution determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the appellant.

The Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Ministry states that it considers every access case on an individual, case-by-case basis. In this case, the Ministry states that it carefully considered the appellant's right of access to the withheld information that contains her personal information. The Ministry states that the appellant has indicated that she would like the information "for her lawyer". It submits that in exercising its discretion it carefully considered the "potential benefits to the appellant" should the withheld information be disclosed and felt that the level of disclosure being provided was appropriate in the circumstances due to the highly sensitive nature of the withheld information.

In the circumstances, I am satisfied that the Ministry has properly balanced the appellant's right of access against privacy considerations. Accordingly, I find that the Ministry has not erred in the exercise of its discretion to deny the appellant access to the withheld information.

ORDER:

I uphold the Ministry's decision that the withheld portions of the records are exempt under section 49(b) of the *Act*.

Original Signed By: _____
Bernard Morrow
Adjudicator

July 27, 2004 _____