



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

ORDER PO-2326

Appeal PA-030353-1

Ministry of Public Safety and Security



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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a complaint authored by a named individual sent to the Ontario Provincial Police (the OPP). The requester stated that the complaint "...makes allegations of drinking and driving amongst other things ..." at a named community in Ontario.

The requester also identified the OPP offices and the individuals she believed the complaint was either sent to or re-directed to. In addition, the requester identified that she was not interested in the identities of any of the individuals who may have been named in the complaint.

The Ministry responded to the request by issuing a decision letter which stated:

Please be advised that the existence of the requested information cannot be confirmed or denied in accordance with section 14(3) and 21(5) of the *Act*.

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

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry's representations, to the appellant. I did not receive representations in response.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD - INVASION OF PRIVACY

Introduction

Section 21(5) reads as follows:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases (Order P-339).

Definition of Personal Information

An unjustified invasion of privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information

about an identifiable individual, including 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)].

Any record responsive to the appellant's request would, by definition, contain information about the individual named by the appellant in the context of any interaction he may have had with the Ministry. Therefore, I find that any such record would be "about" the named individual in a personal sense, and would fall within the scope of the definition of "personal information".

Unjustified invasion of personal privacy and Section 21(5)

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) lists some criteria for the Ministry to consider in making this determination; and section 21(3) identifies certain types of information, the disclosure of which is presumed to 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). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

In this case, the Ministry takes the position that disclosing any responsive information, if it exists, would constitute a presumed unjustified invasion of privacy under section 21(3)(b), and that the factor found in section 21(2)(f) would be relevant. These sections read as follows:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
 - (f) the personal information is highly sensitive;
- (3) 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;

With regard to the factor in section 21(2)(f), the Ministry states:

Disclosure of the existence of non-existence of the requested OPP records would reveal whether or not the named individual has submitted a complaint to the OPP in regard to the matter of drinking and driving. The Ministry submits that such information is deemed to be highly sensitive within the meaning of section 21(2)(f) of the *Act*.

The Ministry also states as follows regarding the application of the presumption in section 21(3)(b):

The requester has asked to access OPP records which, if they exist, would identify a named complainant and allegations of drinking and driving. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act (PSA)* establishes the OPP and provides for its composition, authority and jurisdiction. The duties of a police officer include investigating possible law violations and apprehending criminals and others who may lawfully be taken into custody and crime prevention. The Ministry is of the opinion that the requested OPP records, if they exist, would consist of personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law ie: *Criminal Code* provisions relating to drinking and driving.

As identified earlier, the requester has not submitted representations in this appeal.

Based on the Ministry's representations, I find that disclosure of the record, if it exists, would be a presumed unjustified invasion of privacy pursuant to section 21(3)(b). Sections 21(4) and 23 have no application in the circumstances of this appeal, and disclosure of the record, if it exists, would therefore be an unjustified invasion of personal privacy.

In the circumstances of this appeal, particularly in light of the nature and wording of the request, I have concluded that section 21(5) applies. In my view, this is a situation in which the very nature of the request permits the Ministry to rely on the "refuse to confirm or deny" exemption. Disclosing the existence or non-existence of records responsive to this request would itself reveal personal information about a named individual, specifically whether or not the named individual has submitted a complaint to the OPP. In the absence of any factors favouring disclosure of the existence or non-existence of records, I find that disclosing the existence or non-existence of responsive records would constitute an unjustified invasion of the individual's personal privacy. In my view, this justifies the Ministry's discretionary decision to apply section 21(5).

Accordingly, I find that the Ministry properly exercised its discretion to refuse to confirm or deny the existence of responsive records, and that section 21(5) applies in this appeal.

As I have found that section 21(5) applies in this appeal, it is not necessary for me to review the possible application of section 14(3) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ September 28, 2004