



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2327

Appeal PA-040082-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

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 copies of an identified police officer's notes for a particular incident.

The Ministry responded to the request by granting access to portions of the responsive notes, and denying access to the remaining portions of the notes on the basis of the exemption found in section 49(b) of the *Act* (invasion of privacy) with reference to the factor found in section 21(2)(f) and the presumption found in section 21(3)(b).

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

During mediation, the appellant confirmed that he was interested in obtaining all information relating to the police officer's notes for the incident. The mediator attempted to contact an individual whose personal information may be contained in the records (an affected party), but did not receive a response.

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 the Ministry provided representations in response. The Notice of Inquiry, along with a copy of the Ministry's representations, was then sent to the appellant, who also provided representations.

RECORDS:

The records remaining at issue consist of the severed portions of four pages of the police officer's notes for the identified incident.

DISCUSSION:

PERSONAL INFORMATION

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 individual's address or telephone number (section 2(1)(d)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)), the views or opinions of another individual about the individual (section 2(1)(g)), or 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 (section 2(1)(h)).

The Ministry submits that the information remaining at issue contains the types of personal information set out in the sections of the *Act* referred to above, and that it relates to the appellant and other identifiable individuals. The appellant does not directly address this issue; however, his representations confirm that he is seeking the information severed from the records, and questions why this personal information should not be disclosed.

I find that the records at issue in this appeal contain information relating to the appellant, and therefore contain the personal information of the appellant within the meaning of that term in section 2(1). I also find that they contain the personal information of other identifiable individuals as defined in paragraphs (d) and (h).

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 exemptions from disclosure that limit this general right.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester 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 requester. 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 Ministry's exercise of discretion under section 49(b) later in this order, after I have decided whether the exemption applies.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 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).

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

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) and the factor favouring privacy protection at section 21(2)(f). The appellant disputes the Ministry's position that those sections of the *Act* have relevance in this appeal, and also refers to his interest in obtaining access to the records to assist

in other court proceedings, thereby raising the factor in section 21(2)(d) of the *Act*. He also refers to the failure of the affected party to respond to the mediator in this appeal as a factor that should be considered in favour of disclosure.

The sections of the *Act* referred to by the parties read as follows:

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

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

21 (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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(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;

Section 21(3)(b)

With respect to the section 21(3)(b) presumption, the Ministry submits:

... the personal information remaining at issue consists of personal information that was compiled and is identifiable as part of an Ontario Provincial Police (OPP) investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition, authority and jurisdiction of the OPP. Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.

The exempt information documents the law enforcement investigation undertaken by the OPP in response to the incident involving the appellant and another

individual. 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 focus of the OPP investigation was to determine whether any laws had been violated in respect to the property dispute involving the appellant and another identifiable individual. The OPP officer ultimately determined that no charges would be laid in respect to this incident.

The Ministry submits that the application of section 21(3)(b) is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The appellant disputes the Ministry's position that the presumption in section 21(3)(b) applies. He states:

The appellant disagrees with the Ministry's use of this presumption. The information is needed to continue the investigation that the Ministry did not ensure was completed. The information is required to prosecute the offender The information is required to investigate and prosecute the offending party or parties which is an exception to the presumption.

As identified above, the records remaining at issue consist of the severed portions of four pages of officer's notes, which contain the personal information of both the appellant and other individuals. I am satisfied that the records remaining at issue were collected by the police officer in the course of investigating a complaint, and that they are identifiable as part of an investigation into a possible violation of law.

The appellant claims that the information is required to investigate and prosecute the offending party, and argues that therefore section 21(3)(b) does not apply. The appellant seems to suggest that he requires this information to conduct his own investigation of the matter and to review the Ministry's actions. In my view, this part of section 21(3)(b) of the *Act* was not intended to apply in circumstances where a private individual or organization wishes to pursue their own investigation. The phrase "continue the investigation" refers to the investigation in which the information at issue was compiled. (See orders MO-1356, M-718 and M-249).

In Order MO-2167, Adjudicator Morrow considered the meaning of the phrase "continue the investigation" found in section 21(3)(b). He stated:

In this case, the investigation was conducted by the OPP and the information contained in the record was gathered as a result of that investigation. It is clear on the evidence that their investigation has been completed. The fact that the appellant now wishes to acquire that information to complete his own investigation is not relevant to a determination of section 21(3)(b).

I agree with the approach taken to the interpretation of section 21(3)(b) in previous orders, and I find that disclosing the records is presumed to constitute an unjustified invasion of the privacy of

the identifiable individuals under section 21(3)(b) of the *Act*. As set out above, a section 21(3) presumption cannot be rebutted by the factors in section 21(2), and in my view section 21(4) has no application in this case. I therefore find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b).

Ministry's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the record.

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. These include the Ministry's reference to the portions of the records which were disclosed, the fact that property incidents sometimes lead to civil litigation, and the nature of the confidentiality of information provided in a law enforcement context.

I am satisfied, based on the Ministry's representations and the circumstances of this appeal, that the Ministry properly exercised its discretion in refusing to disclose the remaining records under section 49(b).

COMPELLING PUBLIC INTEREST

In his representations, the appellant takes the position that there is a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the section 21 exemption. He is therefore raising the possible application of section 23 of the *Act*, which 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 order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

The appellant argues that the public would have an interest in the position taken by the Ministry that the names of individuals making complaints to the Police are not provided to requesters, thereby denying requesters the ability to take proper legal action. The appellant also states:

The appellant submits that there is overwhelming public interest in releasing this information and scrutinizing the public institutions that are trying to prevent this release even though the information relates to a person who does not see fit to respond in his own interests.

The appellant proceeds to argue that the public would be very interested in the circumstances of this appeal. The incident referred to in the records resulted from an apparent dispute about the nature of the rights of various parties over a piece of property. The appellant states:

The public would be shocked to learn that the Ministry would argue to keep this information from the rightful owner of the property. If the appellant was to notify the public through the press of the Ministry's refusal to share this information, the Ministry would soon learn that this situation is indeed a compelling public interest.

I do not agree that section 23 applies in these circumstances to override the application of the exemption. In my view, the interest identified by the appellant is a private interest in the information at issue, involving a property dispute. Although the public has an interest in "property rights" generally, I do not find that the public has an interest in the disclosure of the record at issue, and the interest cannot be characterized as a "public interest" within the meaning of section 23.

Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision

Original signed by: _____
Frank DeVries
Adjudicator

September 29, 2004