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

ORDER PO-2340

Appeal PA-030356-1

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 the following:

> … information made in a call to the Renfrew detachment of the OPP on July 22, 2002 at about 1pm.

By way of background, the circumstances of the call concern an alleged domestic dispute between the appellant and his spouse (the affected person).

The Ministry granted partial access to the responsive records. The Ministry denied access to portions of the records pursuant to 49(a), read in conjunction with section 14(1)(l) (law enforcement: unlawful act or control of crime) and/or 49(b), read in conjunction with section 21 (personal privacy). In support of its section 49(b)/21 claim, the Ministry cited the application of sections 21(2)(f) and 21(3)(b). The Ministry also denied access to a portion of the records on the basis that it was non-responsive to the request.

The appellant appealed the Ministry's decision.

During the mediation stage the appellant indicated that he is not pursuing access to information relating to other law enforcement matters, marked non-responsive by the Ministry. Accordingly, this information is no longer at issue. The appellant also confirmed that he is not pursuing access to the police codes. Therefore, access to these codes is also no longer at issue.

On my review of the records, it appears that the Ministry had claimed the application of section 14(1)(l) only with respect to the police codes. However, during mediation, the Ministry clarified that it was also relying upon section 49(a), read in conjunction with section 14(1)(l), to deny access to all of the withheld information in the records. Accordingly, I have decided seek representations from the parties on both the section 49(a)/14(1)(l) and 49(b)/21 exemptions.

I began my inquiry by sending a Notice of Inquiry to the Ministry. The Ministry submitted representations, which it agreed to share in their entirety with the appellant. The Ministry states in its representations that during the course of reviewing the records in the preparation of its submissions, it determined that additional information (a portion of a police officer's notes) could be released to the appellant. Accordingly, the Ministry issued a new decision letter in which it confirmed the release of this information to the appellant.

I then sought representations from the appellant and included a copy of the Ministry's representations with my Notice of Inquiry. The appellant submitted representations in response.

RECORDS:

The following three records are at issue:

- Record 1: portions of an "Arrest Report"
- Record 2: portions of one police officer's notes
- Record 3: portions of a second police officer's notes

DISCUSSION:

As indicated above, the Ministry has claimed the application of both the section 49(a)/14(1)(l) and 49(b)/21 exemptions to the information at issue. I will first deal with the application of the section 49(b)/21 exemption.

PERSONAL INFORMATION

General principles

In order to determine whether the section 49(b)/21 exemption may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> …
>
> (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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual (Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225).

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual (Orders P-1409, R-980015, PO-2225).

Representations

The Ministry submits that the records contain the types of personal information listed above with respect to the appellant and the affected person. The Ministry also states that the records contain the personal information of another identifiable individual. The Ministry suggests that while this individual has provided information in her professional capacity, the "circumstances of the appellant's request and the content of the records at issue" make this information personal rather than professional in nature.

The appellant's representations do not directly address this issue. They focus on his reasons for wanting the information. However, this discussion is relevant to a determination of this issue. The appellant states that his "intentions in this case have always been clear". He intends to have an identifiable individual "charged by police for making [a] false statement to police." He also states that he hopes to "force an inquiry" into this person's actions to ensure that this does not happen to another person. He submits that the identifiable individual knows the appellant's motives and that is the reason she does not want him to have the information at issue. He suggests that having this information would either confirm this individual's innocence regarding his allegations or prove her guilt.

Analysis

Based on my review of the records, I am satisfied that they contain the personal information of the appellant, including his name, information relating to his relationship with the affected person and other named individuals, and the views of other individuals about the appellant. I also find that that the records contain information about other identifiable individuals, including the affected person and the affected person's counsellor. I note that the affected person has a therapeutic relationship with the counsellor. The records comprise an OPP investigation into a complaint reported by the counsellor regarding allegations of harassment and threats by the affected person against the appellant. In the circumstances of this appeal, the counsellor's conduct has been called into question by the appellant, and I therefore find her information to be personal in nature. This conclusion is consistent with this office's past approach in addressing this issue (see my decision in Order PO-1563).

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,
>
> > where 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 Ministry'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) and the criteria in section 21(2)(f) to support its decision to deny access to the information at issue. I will first consider the application of section 21(3)(b). This section reads:

> 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;

Representations

The Ministry submits that the personal information at issue consists of "highly sensitive" personal information that was "compiled and is identifiable as part of an investigation into a possible violation of law." The Ministry states that the appellant was previously arrested and charged with assaulting the affected person. The appellant was released from custody after entering into an undertaking. The conditions of the appellant's undertaking included

requirements that he stay away from the affected person's residence and abstain from the consumption of alcohol. The Ministry submits that that the records at issue were compiled and are identifiable as part of an OPP investigation into whether the appellant had breached the conditions of the undertaking he had entered into upon his release from custody. The Ministry states that the appellant was ultimately charged by the OPP with two counts of Failure to Comply with Conditions of Undertaking, an offence under section 145(5.1) of the *Criminal Code*. The Ministry also submits that none of the circumstances outlined in section 21(4) of the *Act* operate to rebut the presumption under section 21(3)(b).

The appellant submits that I have been provided with inaccurate information. He states that he has never threatened the affected person and was "never charged with this at any time". He states that it is his understanding from conversations with the affected person and an OPP officer that the counsellor "manipulated and harassed" the affected person into "giving permission" to call police. He states that the counsellor gave "an untruthful statement to police in order to get [him] arrested." He states that his "eventual guilty plea" in this case was made on the advice of his lawyer upon learning of the appellant's plans to get back together with the affected person. The appellant states that his lawyer advised him to plead guilty in order to spare the affected person the discomfort of cross-examination. He states that in exchange for his plea he was "promised in writing that there would be no trial, no conviction and that [he] would receive no criminal record." In addition, as stated above, the appellant is interested in the information at issue in order to pursue legal action against the counsellor and, possibly, a named health facility.

Analysis

I acknowledge the appellant's views about this matter. However, the records themselves establish that they were compiled by the OPP and are identifiable as part of its investigation into a possible violation of law under section 145(5.1) of the *Criminal Code*. The appellant was charged as a result of this investigation. It is also clear, based on a long line of orders issued by this office, that the fact that an investigation has been completed, charges laid and disposed of does not negate the application of the section 21(3)(b) presumption, so long as it has been established that the records themselves were compiled during the course of the investigation (Orders P-223, P-237, P-1225, MO-1181, MO-1386, MO-1443, MO-1817).

In the circumstances of this case, I am satisfied that section 21(3)(b) applies, with one notable exception.

One of the withheld portions of Record 1 consists of information relating to the "incident location" that is the subject of the appellant's request. This withheld information contains the personal information of the appellant and the affected person, specifically their names and home address. This office has applied the absurd result principle in situations where the basis for a finding that information qualifies for exemption under section 21(1) would be absurd and inconsistent with the purpose of the exemption (see Orders M-444, MO-1323). It has been applied in situations where the information is clearly within the appellant's knowledge (MO-1196, PO-1679, MO-1755). Applied to this case, the names of the appellant and affected person and their home address are clearly within the appellant's knowledge. In addition, I note that it

was disclosed to the appellant in another record. On an application of the "absurd result" principle, I find that section 21(3)(b) does not apply to this portion of Record 1.

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. In addition, I note that the appellant's representations raise the possible application of sections 21(2)(a) (public scrutiny) and 21(2)(d) (fair determination of rights). I have found that the section 21(3)(b) presumption applies to this information, with one notable exception. Therefore, I am precluded from considering the factors in section 21(2), other than to that portion of the information to which I have found section 21(3)(b) does not apply by operation of the absurd result principle. However, having found that the absurd result principle applies to the appellant's and affected person's names and their address, in my view, it would be equally as absurd to find that its disclosure would be an unjustified invasion of privacy on the basis of section 21(2). This information is therefore not exempt under section 49(b).

With respect to the remaining information, 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, I find that the remaining withheld portions of Record 1 and the severed portions of Records 2 and 3 qualify for exemption under section 49(b), based on the application of the section 21(3)(b) presumption.

I also note that the Ministry has raised the application of section 49(a), read in conjunction with section 14(1)(l). In my view, disclosure of the information I have found not to be exempt under section 49(b) because of the "absurd result" principle would not facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the section 49(a)/14(1)(l) exemption does not apply to the appellant's and affected person's names and their address, and I will order disclosure of this information.

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 49(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 each and every access request on an individual, case-by-case basis". In this case, the Ministry states that it carefully weighed the appellant's right of access to records that contain his personal information against the other individuals' right to privacy protection. The Ministry states that after considering the possibility of providing the appellant with total access to the records, it ultimately decided to exercise its discretion to provide the appellant with partial access. After further review, it revised its decision and agreed to provide additional information contained in the records to the appellant. The Ministry submits that given the "highly sensitive nature of the domestic incident in question", it was satisfied that the release of additional information "would cause personal distress to other identifiable individuals." The Ministry states that it is aware that the appellant's request for access to information is "in connection with a possible civil action." The Ministry indicates that it took this factor into consideration in its exercise of discretion, since its practice in these circumstances is to release as much information as possible.

The appellant does not offer any representations on this issue.

In the circumstances of this case, 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 discretion to deny the appellant access to the withheld information.

ORDER:

1. I uphold the Ministry's decision that the withheld portions of Records 2 and 3 and a severed portion of Record 1 qualify for exemption under the Act.

2. I order the Ministry to disclose a portion of Record 1 no later than **December 6, 2004** but not before **November 29, 2004**, in accordance with the highlighted version of this record included with the Ministry's copy of this order. To be clear, the Ministry should not disclose the highlighted portions of this record.

3. In order to verify compliance with provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records they disclose to the appellant.

Original Signed by: October 29, 2004
Bernard Morrow
Adjudicator