



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

ORDER PO-2321

Appeal PA-040011-1

Ministry of Community Safety and Correctional Services



Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7538
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Privacy Act (the Act)* for the following information:

A full and complete copy of the investigative materials, file materials, police reports, witness statements, photographs, and any other material which was generated as a result of the investigation and prosecution of [a named individual] in regard to [a particular incident].

The Ministry located records responsive to the request and granted partial access to them. Access to the remaining records, and parts of records, was denied on the basis that this information was either not responsive to the request or was exempt from disclosure under sections 14(1)(l) and 14(2)(a) (law enforcement) and section 49(b) [with reference to the consideration in section 21(2)(f) and the presumption in section 21(3)(b)] of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During the mediation stage of the appeal, the appellant agreed not to pursue access to those portions of the records described as "not responsive" and the information to which the Ministry had applied section 14(1)(l). As a result, this information is no longer at issue. Further mediation was not possible and the appeal was moved into the adjudication stage of the process. I initially sought and received the representations of the Ministry. In its submissions, the Ministry indicates that it is no longer claiming the application of section 14(2)(a) to Records 4 and 5. As these were the only records for which section 14(2)(a) was claimed, that exemption is no longer at issue.

I shared the Ministry's representations, in their entirety, with the appellant along with a Notice of Inquiry but did not receive any response.

RECORDS:

The undisclosed portions of Records 1 and 2 (police officer notebook entries), Record 3 (an occurrence summary), Records 4, 5 and 7 (occurrence reports) and Records 8 to 10 and 11 to 12 (witness statements) remain at issue in this appeal.

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 age or gender [paragraph (a)], address or telephone number [paragraph (d)], the personal opinions or views of that individual except where they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (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 [paragraph (h)].

The Ministry submits that the information remaining at issue contains the types of personal information set out in paragraphs (a), (d), (e), (g) and (h).

In my view, because the records at issue consist of information relating to the incident involving the appellant, they contain the personal information of the appellant. I also find that the undisclosed information from the police officer's notes on pages 1 and 2, the occurrence reports at pages 3, 4, 5, 6 and 7 and the witness statements that comprise pages 8 to 10 and 11 to 12 also contain the personal information of other identifiable individuals within the definition of that term in sections 2(1)(a), (d) and (h). I note that pages 11 to 12 consist of a witness statement provided by the appellant to the investigating officer and that portions of it relating to individuals other than the appellant have been withheld by the Ministry.

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 which contain the personal information of the appellant and other identifiable individuals, consisting of certain undisclosed portions of the police officer's notes on pages 1 and 2, the undisclosed information in the occurrence reports at pages 3, 4, 5 and 7 and the witness statements at pages 8 to 10 and 11 to 12. More specifically, the Ministry relies on the factor favouring privacy protection at section 21(2)(f) and the presumption of an unjustified invasion found in section 21(3)(b).

Sections 21(2)(f) and 21(3)(b) read:

- (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 respect to the factor in section 21(2)(f), the Ministry submits:

The Ministry is of the view that the undisclosed personal information may be viewed as highly sensitive.... The Ministry is of the opinion that the release of the undisclosed information would cause other identifiable individuals excessive personal distress.

In support of its argument that the presumption in section 21(3)(b) applies to the information in the records, the Ministry submits that:

. . . the personal information remaining at issue consists of personal information that was compiled and is identifiable as part of an 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 exempt information documents the law enforcement investigation undertaken by the OPP in response to an incident involving the appellant and another identifiable individual. . . . The Ministry refers to the contents of the requested records in support of its position in this regard. The records document the law enforcement investigation arising from an allegation that the appellant's client had been assaulted by another individual. Assault is an offence under the *Criminal Code*.

I find that the remaining portions of the records for which the section 49(b) claim is made contain the personal information of identifiable individuals other than the appellant which can be considered “highly sensitive” for the purpose of section 21(2)(f). I am also satisfied, based on the Ministry’s representations, that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law. The presumption in section 21(3)(b) applies to this information, therefore. As a result, I conclude that disclosing the remaining portions of pages 1, 2, 3, 4, 5, 7, 8 to 10 and 11 to 12 would constitute an unjustified invasion of personal privacy under section 49(b). None of the considerations listed in section 21(4) apply and the appellant has not raised the possible application of the “public interest override” provision in section 23. Accordingly, I find that all of the undisclosed information qualifies for exemption under section 49(b).

Absurd result

As noted above, pages 11 to 12 of the records consist of a statement provided by the appellant to the investigating officer. The majority of the statement was disclosed to her but portions were severed from it. Where the requester originally supplied the information, it may be found not exempt under section 49(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester’s knowledge [Orders MO-1196, PO-1679, MO-1755]

In my view, the principle is applicable in the present case with respect only to the undisclosed information from pages 11 to 12. The appellant herself provided this information to the investigating officer and to deny access to it would lead to a result that is absurd and inconsistent with the purpose of the exemption. I will, accordingly, order that the appellant be provided with access to a complete, unsevered version of pages 11 to 12.

Exercise of Discretion

The section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry’s decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

The Ministry made lengthy submissions in support of its decision to exercise discretion not to disclose that information which is exempt under section 49(b) to the appellant. It indicates,

among other things, that it “carefully weighed the appellant’s client’s right of access to records that contain her personal information against the rights to privacy protection of other individuals.”

Following my review of all of the circumstances surrounding this appeal and the Ministry’s representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the records under section 49(b).

ORDER:

1. I order the Ministry to disclose pages 11 to 12 of the records by providing her with a copy by **October 20, 2004** but not before **October 15, 2004**.
2. I uphold the Ministry’s decision to deny access to the remaining records.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: _____
Donald Hale
Adjudicator

_____ September 14, 2004