



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2503

Appeal PA-060016-1

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 a copy of a police report dated November 21, 2005, created by the Ontario Provincial Police (the OPP) in response to an incident involving the requester and another named individual at a specified location.

The Ministry searched for and located the responsive General Occurrence Report and granted access, in part, to it. Access was denied to parts of this report pursuant to section 49(b) of the *Act*, read in conjunction with section 21 (invasion of privacy). In support of its section 49(b) claim, the Ministry cited the application of the factor in section 21(2)(f) (information is highly sensitive) and the presumption in section 21(3)(b) (investigation into a possible violation of law). Access was also denied on the basis that some portions of this report were not responsive to the request.

The requester (now the appellant) appealed the decision to deny access to the severed portions of the General Occurrence Report. He also filed an appeal because he believed that more records must exist with respect to the subject matter of his request. In his written appeal, he clarified that he wishes to obtain access to:

the *incident* and *history* details for [a specific occurrence] as well as all other reports, notes, letters or statements made by the complainant regarding the incident.

One letter known to exist was read aloud during a meeting held on 12-December-2005 at [a named] OPP Detachment and appeared not to include the names of other individuals involved.

During mediation, the Ministry contacted the responsible OPP Detachment which confirmed that the sole record responsive to the appellant's initial request was the General Occurrence Report, which consists of only one page.

The appellant then filed a new request seeking access to "all records relating to the incident". The Ministry located additional records consisting of three pages of police officer's notes. The Ministry issued a decision letter with respect to this new request granting partial access to the notes. The appellant asked that the scope of his first request be part of the appeal. Consequently, the scope of the appellant's first request is an issue in this appeal.

As further mediation was not possible, the appeal file was moved to the adjudication stage. I sought and received the representations from the Ministry. I sent a severed copy of these representations to the appellant, seeking his representations. Portions of the Ministry's representations were withheld on the basis that they contain confidential information. The appellant provided submissions in response to the Ministry's severed representations.

RECORD:

The information at issue in this appeal is the severed portions of a one-page General Occurrence Report.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORD

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section reads, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Scope of the Request

With respect to the scope of the appellant's request, the Ministry states that:

...the appellant's first request was quite clear and did not require clarification. The appellant requested access to the "police report" relating to a specific occurrence. The appellant provided the necessary information (Location, Date/Time, Parties, Date of Birth, etc.) that enabled the OPP to identify the requested police report...

As noted previously in this submission, on November 30, 2005, after the appellant was granted partial access to the requested police report, he contacted the Ministry by telephone and advised that it was his intention to submit a second more comprehensive (request) that would encompass all records (reports, notes and statements).

At the time the appellant's second request was received, his appeal relating to the first request was well in progress. As noted previously, a response to the second request was issued on May 4, 2006 and the request file is now closed.

The Ministry submits that the scope of the first request should be considered moot at this time as the appellant has since submitted a detailed, comprehensive second request encompassing all records relating to the subject occurrence.

The appellant did not submit representations on this issue. I agree with the Ministry's submission and find that the scope of the appellant's first request should be considered moot at this time. This appeal involves only the request for access to the General Occurrence Report referred to above. The appellant has, since the filing of his first request, submitted a detailed and comprehensive second request encompassing all records relating to the subject occurrence. The Ministry has responded to this latter request.

Responsiveness of Record

With respect to the responsiveness of the record to the appellant's request, the Ministry states that:

...the information severed from the top and bottom of the responsive OPP police report is not reasonably responsive to the appellant's request.

This information consists of administrative information relating to the printing of the responsive OPP police report. Such information includes the date, time and badge number of the individual printing the general occurrence report for the sole purpose of producing the record responsive to the appellant's *FIPPA* request received on November 24, 2005. The Ministry submits that similar information was found to be not responsive to a *FIPPA* request by Adjudicator Sherry Liang in Order PO-2254.

Again, the appellant did not submit representations with respect to the denial of access to the non-responsive portions of the record, namely, the information severed from the top and bottom of the record.

Most of the record at issue in this appeal, *i.e.*, the General Occurrence Report, does reasonably relate and is responsive to the appellant's request for the police report for the incident listed in his request. However, the information severed by the Ministry relates to the printing of the document in connection with the appellant's request and is not part of the record as originally prepared, and I find that those portions of the record do not reasonably relate to the subject matter of the appellant's request. I find that they are non-responsive.

PERSONAL INFORMATION

In order to determine which sections of the *Act* 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) of the *Act* as “recorded information about an identifiable individual”, followed by a non-exhaustive list of examples.

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits that the record contains personal information of the appellant and other identifiable individuals, in accordance with the following paragraphs of the definition of “personal information” in section 2(1) of the *Act*.

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if 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 appellant did not provide submissions as to whether the record contains personal information.

I find that the record contains the personal information of the appellant and one other named individual. In particular, the record contains the personal information of the named individual other than the appellant, relating to this individual’s marital or family status (paragraph (a)); address (paragraph (d)); personal opinions or views (paragraph (e)); and, his or her name where it appears with other personal information relating to this individual or where the disclosure of this individual’s name would reveal other personal information about this individual (paragraph (h)).

As noted, the record also contains the personal information of the appellant, including the views or opinions of another individual about the appellant (paragraph (g)).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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 this right.

Under section 49(b), where a record contains 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. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. I will consider the Ministry's exercise of discretion, below.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "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 relies on the presumption at section 21(3)(b). Section 21(3)(b) reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that the 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 submits that the content of the police report at issue is supportive of its position in this regard.

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. The duties of a police officer include investigating possible law violations.

The exempt information was compiled and is identifiable as relating to the law enforcement investigation arising from a landlord tenant issue. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an OPP investigation into a possible violation of law.

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

The appellant maintains that he requires the information in the record in order to pursue a case for defamation of character or malicious intent. He claims that the statements in the record should be disclosed to allow him to pursue a possible legal action against the identifiable individual in the record who made these statements. The appellant relies upon the provision in section 21(3)(b) that allows for the disclosure of information, if the disclosure is necessary to continue an investigation into a possible violation of law.

I find that the undisclosed personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law, namely an offence contrary to the *Trespass to Property Act*, R.S.O. 1990, Chapter T.21. Accordingly, disclosure of this information is presumed to constitute an unjustified invasion of personal privacy pursuant to section 21(3)(b).

I do not accept the appellant's submission that the information should be disclosed as it is necessary for him to pursue a legal action against the identifiable individual listed in the record, and that this constitutes a continuation of the investigation within the meaning of section 21(3)(b). Prior orders have provided that an appellant's own "investigation" does not constitute the continuation of the "investigation into a possible violation of law" referred to in section 21(3)(b). In Order PO-2167, Adjudicator Bernard Morrow stated:

I acknowledge the appellant's concerns that he requires this information in order to complete his own investigation. However, in my view, the drafters of the *Act* did not intend to justify the rebutting of the presumption against disclosure under section [21(3)(b)] in circumstances where a private individual or organization wished to pursue their own investigation. The phrase "continue the investigation" refers to the investigation in which the information at issue was compiled. This view has been followed in previous orders of this office (Orders MO-1356, M-718 and M-249).

Even though criminal proceedings were not commenced against the appellant, section 21(3)(b) still applies. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. The appellant's arguments about a potential lawsuit could arguably raise the factor favouring disclosure in section 21(2)(d) (fair determination of rights), but even if it applied, this provision would not overcome section 21(3)(b). As well, sections 21(4) and 16 do not apply. Accordingly, I find that disclosure of the withheld parts of the record would constitute an unjustified invasion of another individual's personal privacy, and this information is therefore exempt under section 49(b).

EXERCISE OF DISCRETION

The section 49(b) exemption is discretionary, and permits an institution 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.

In addition, 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 either 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 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In deciding whether to provide the appellant with access to the record, which contains the personal information of the appellant and an identifiable individual, the Ministry states that it:

took into consideration that the appellant's request has been submitted in his personal capacity, as well as his capacity as owner of a specific property. The Ministry considered providing the appellant with total access to the requested police report notwithstanding that a discretionary exemption applied to parts of the record. The Ministry ultimately decided to provide the appellant with partial access to the requested police report.

Given the sensitive nature of the incident that resulted in the creation of the responsive police report, the Ministry was satisfied that release of additional information from the record at issue would cause personal distress to other identifiable individuals. The Ministry was also satisfied that the information remaining at issue was compiled and is identifiable as part of an investigation into a potential violation of law.

The Ministry took into consideration that the police report relates to a matter that occurred in the relatively recent past (November 2005). The Ministry also took into consideration the possible benefits to the appellant should the withheld information be released.

It is the historic practice of the Ministry to provide individuals with access to as much information as possible from responsive police records. The Ministry carefully considered whether release of the records at issue could generally discourage parties from sharing information with the police regarding potential violations of law and undermine the ability of the OPP to provide policing services. The Ministry does not believe that release of the undisclosed parts of the police report at issue would increase public confidence in the provision of policing services by the OPP.

The appellant submits that the Ministry, in exercising its discretion, has only taken into account that personal distress may be caused to an identifiable individual other than the appellant. The appellant takes issue with the fact that no consideration was given that the appellant himself is “a victim” and that the non-disclosure of the personal information in the record is also causing him personal distress. The appellant states that:

This incident was not “isolated”. ...this incident was an “opportunity” to legitimize the objectives of the tenant.

The appellant also wishes the information to be released to ensure that an accurate public record exists concerning the accusations made against the appellant.

Findings

I have considered the confidential and non-confidential representations of the Ministry along with the representations of the appellant. I find that in denying access to the record, the Ministry exercised its discretion under section 49(b) in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

I do not accept the appellant's argument that because he is suffering from personal distress, that this would require the Ministry to exercise its discretion by granting him access to sensitive information about another individual.

I also do not accept the appellant's argument that the undisclosed information in the record, which forms part of a General Occurrence Report, is contained in a public document. The record in this case is not a public document. Furthermore, the need of the appellant to verify the accuracy of the contents of the record is not a relevant factor in this case. Even if it was relevant, after considering all the representations, I find that it does not override the necessity to protect the other identifiable individual in the record's right to privacy.

ORDER:

I uphold the Ministry's decision

Original signed by: _____
Diane Smith
Adjudicator

_____ September 20, 2006