



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2587

Appeal PA-050306-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*) a request was made to the Ministry of Community Safety and Correctional Services (the Ministry) by a representative of two requesters for access to all police notes and records pertaining to an investigation of damage to the requesters' property, which occurred in 2001.

The Ministry identified records responsive to the request and relied on the discretionary exemptions in section 49(a) (refuse to disclose requester's own information), in conjunction with sections 14(1)(a), (b) and (l) and 14(2)(a) and 49(b) (personal privacy) with particular reference to sections 21(2)(f) and 21(3)(b) of the *Act*, to withhold access to them in full.

The requesters (now the appellants) appealed the Ministry's decision.

At mediation, the Ministry reconsidered its initial decision to deny access and issued a supplementary decision letter releasing some information to the appellants. Also at mediation the appellants advised that they were no longer seeking access to any police "ten" codes or to any non-responsive information. As a result, this information is no longer at issue in the appeal. Finally, the mediator obtained the consent of an individual to release any personal information relating to him contained in the records.

Accordingly, the Ministry issued another supplementary decision letter releasing additional information to the appellants. As a result of mediation and the Ministry's two supplementary decision letters, the application of the discretionary exemption at section 49(a) in conjunction with sections 14(1)(a), (b) and (l) and 14(2)(a) are also no longer at issue in the appeal. However, the Ministry continues to rely on the exemption at section 49(b) with particular reference to the factor at section 21(2)(f) and the presumption at section 21(3)(b) to deny access to the information that it withheld.

Mediation did not resolve the appeal and it moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry and an individual whose interests may be affected by the disclosure of the records (the affected party), initially. As the incident that was the subject of the request related to property damage, in the Notice I also invited submissions on the factors set out at sections 21(2)(d), (e), (h) and (i) of the *Act*. The Ministry filed representations in response and advised that after another review of the records remaining at issue, it had decided to release further additional information. A copy of the Ministry's last supplementary decision letter was enclosed with its representations. The affected party advised that everything he had to say was contained in a statement he made to the police about the incident, and he had nothing to add. I then sent a Notice of Inquiry along with a complete copy of the Ministry's representations to the appellant. The appellant filed representations in response to the Notice.

RECORDS

The records consist of pages from the notebooks of a Police Detective and a Police Officer. Remaining at issue are the withheld portions of pages 2, 3, 6, 8, 10, 13, 14, 15, 16, 17, 18 and 21 of the notes.

DISCUSSION:

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.

Section 2(1) of the *Act* defines “personal information”, in part, 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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (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.

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.)].

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], but 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, PO-2435].

All of the withheld information relates to an investigation into damage to the appellants’ property. The appellants assert that the content of a General Occurrence Report the Ministry disclosed in a civil action demonstrates that some of the information which appears in the records is sourced from certain named public officials and employees, who were not acting in their personal capacity when the information was provided. The appellants argue, therefore, that this information does not qualify as “personal” information. I do not agree. Although I find that portions of pages 8, 10 and 18 contain information that relates to individuals in a professional or business capacity, there is nothing in the records at issue to indicate that the balance of the information was provided, or relates to, other identified individuals only in a professional, official or business capacity. Rather, it is clear from the records that they appear as simple witnesses who provided background to the police in the course of their investigation. I also do not interpret anything in the General Occurrence Report to modify this finding. In my view, the reference to an individual’s employment in the General Occurrence Report does not transform that individual’s role from personal to professional with respect to the circumstances surrounding the provision of the information that is found in the records at issue.

The appellants also allege that by disclosing the General Occurrence Report in a civil action the Ministry waived any exemption claim under the *Act*. Order PO-2066 sets out that previous orders of this office have pointed out that the *Act* establishes a regime and process for obtaining access to records which is separate and distinct from the discovery or disclosure mechanisms related to court actions. Accordingly, the provision of information pursuant to a different, parallel disclosure regime does not preclude the possible application of the exemptions in the *Act* to that same information.

Furthermore, I am not satisfied that the appellants have established that by providing the General Occurrence Report the Ministry expressly waived the right to deny access to the information found in the records at issue in this appeal. The records at issue in this appeal are the notes of the Police Officer and Police Detective, not the General Occurrence Report that was already produced. On the facts and circumstances before me, I am not satisfied that there was any waiver of the Ministry’s right to claim an exemption under the *Act*, as alleged by the appellants.

In my view, all the pages remaining at issue, including pages 8, 10 and 18, contain information about the appellants that meets the definition of “personal information” in paragraphs (c) (address), (b) information relating to financial transactions in which they have been involved, and (h) (the appellants’ names along with other personal information relating to them). In addition, they also contain the personal information of other individuals because it includes information about their employment history, or relating to financial transactions in which they

have been involved (paragraph (b)), their telephone number (paragraph (d)) or their names along with other personal information about them (paragraph (h)).

To conclude, I find as follows:

1. With the exception of a cellular telephone number on page 10, pages 8, 10, and 18 of the records contain information relating to identified individuals in a professional or business capacity along with the personal information of the appellants, only.
2. The withheld responsive portions of pages 2, 3, 6, 13, 14, 15, 16, 17 and 21, contain the personal information of the appellants along with the personal information of other identifiable individuals.

PERSONAL PRIVACY

If a record contains the personal information of the requester along with the personal information of another individual, section 49(b) of the *Act* applies.

Section 49(b) of the *Act* reads:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Accordingly, under section 49(b) where a record contains personal information of both the appellants and another identifiable individual, and disclosure of that information would "constitute an "unjustified invasion" of that other individual's personal privacy, the Ministry may refuse to disclose that information to the appellants.

That does not end the matter however. Despite this finding, the Ministry may exercise its discretion to disclose the information to the appellants. This involves a weighing of the appellants' right of access to their own personal information against the other individual's right to protection of their privacy.

Under section 49(b), the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and 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 under section 21(3), 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 (*John Doe*)] 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 exemption. [See Order PO-1764]

As I stated above, with the exception of a cellular phone number on page 10, the information withheld from pages 8, 10, and 18 of the records does not qualify as “personal information” because it relates to the identified individuals in a professional or business capacity, or is the “personal information” of the appellants, only. Disclosing this information to the appellants, would not, therefore, constitute an unjustified invasion of another individual’s personal privacy under section 49(b). Accordingly, I will order that this information be disclosed.

I will now address the withheld portions of pages 2, 3, 6, 13, 14, 15, 16, 17 and 21 and the cellular telephone number severed from page 10.

Section 21(3)(b)

Section 21(3)(b) reads as follows:

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 disclosure is necessary to prosecute the violation or to continue the investigation.

The Ministry submits that the remaining information severed from pages 2, 3, 6, 13, 14, 15, 16, 17 and 21, and the cellular telephone number severed from page 10, was compiled and is identifiable as part of an investigation into allegations that an offence of mischief under the *Criminal Code* may have been committed.

Analysis and Findings

I find that section 21(3)(b) applies in the circumstances of this appeal. I have reviewed the portions of the records remaining at issue and in my opinion, the personal information severed from the records was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. The fact that charges were not laid does not affect the application of 21(3)(b) [Order PO-1849]. The presumed unjustified invasion of personal privacy at section 21(3)(b) therefore applies to this information. Section 21(4) does not apply to

this information and the appellants did not raise the possible application of the public interest override at section 23 of the *Act*. Accordingly, I conclude that the disclosure of the personal information relating to other identifiable individuals contained in the severances remaining at issue would constitute an unjustified invasion of personal privacy.

In conclusion, I find that because the remaining withheld portions of the records are subject to the section 21(3)(b) presumption, this information qualifies for exemption under section 49(b).

As I have found that the remaining withheld portions of the records qualifies for exemption under the section 21(3)(b) presumption, it is not necessary for me to address whether the factors in section 21(2) might also apply.

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 withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the decision of the Ministry to deny access to the withheld responsive portions of pages 2, 3, 6, 13, 14, 15, 16, 17, and 21, along with a cellular phone number that appears on page 10. For greater certainty I have highlighted the exempt or non-responsive information in yellow on the copy of the records provided to the Ministry with this Order. The highlighted information is not to be disclosed.
2. I order the Ministry to disclose to the appellants the remainder of the responsive information on pages 8, 10 and 18 of the records that I have highlighted in green on

the copy of the records I have provided to the Ministry with this Order, by providing it to the appellants, by **June 29, 2007**, but not before **July 5, 2007**.

3. In order to verify compliance with the terms of this Order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant upon request.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ May 31, 2007