



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2539

Appeal PA06-188

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The requester, on behalf of herself and her husband, submitted a request to the Ministry of Community Safety and Correctional Services (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of the notes made by a police officer who responded to a complaint filed against them by a neighbour.

The Ministry located responsive records and issued a decision providing partial access to the officer's notes and to the occurrence summary/general occurrence report relating to the incident, citing sections 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), 21(2)(f), 21(3)(b) (invasion of privacy), 49(a) and (b) (discretion to refuse requester's own information) to withhold the remaining information. The Ministry also noted that some non-responsive information was severed from the record.

The requester and her husband, now the appellants, appealed this decision.

During mediation, the appellants confirmed that they were interested in obtaining both the occurrence summary/general occurrence report and the officer's notes. They also agreed not to pursue the non-responsive information and the police codes that were included in the records. Accordingly, the portions of the records marked non-responsive are not at issue and section 14(1)(l) is no longer at issue as it was claimed for the police codes only.

Further mediation could not be effected and the file was forwarded to the adjudication stage of the process. I decided to seek representations from the Ministry, initially. The Ministry submitted representations in response and consented to sharing them with the appellants, in their entirety.

In its submissions, the Ministry indicated that after reviewing the records at issue again, it decided to withdraw its reliance on the discretionary exemption at section 14(2)(a). Because of this decision, section 49(a) is no longer an issue. The Ministry also indicated that it has issued a supplementary decision to the appellants in which it disclosed additional information from page 2 of the records at issue.

I subsequently sought submissions from the appellants regarding the possible application of sections 21(1) and 49(b) only, and provided them with a copy of the Ministry's submissions and an amended Notice of Inquiry. The appellants also submitted representations.

RECORDS:

The records at issue consist of the withheld portions of a three-page Occurrence summary/General Occurrence Report and two pages of one police officer's 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. 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,
- (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 if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (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].

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 records contain the types of personal information listed above with respect to identifiable individuals and that their identities are evident from the content of the records.

Findings

After reviewing the records, I agree with the Ministry and find that the records contain information about the two appellants, as well as two other identified individuals, including their names and addresses along with other personal information about them (paragraph (h) of the definition of that term in section 2(1)), such as information pertaining to their actions in the dispute that has arisen between them. I note that portions of the records containing the personal information of the appellants only have been disclosed. I find that the remaining personal information of the appellants is so intertwined with that of the other individuals identified in the records that it is not severable.

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 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,

if 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 the appellants and other individuals.

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. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

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 21 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, disclosure would not be an unjustified invasion of privacy under section 49(b).

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.

In this case, the Ministry has decided to deny access to the remaining portions of the records on the basis that they are exempt under section 49(b), in conjunction with the presumption at section 21(3)(b), which states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

Representations of the Parties

The Ministry stated in its representations:

...The OPP [Ontario Provincial Police] is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. 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 into the circumstances of an incident of alleged damage that occurred on the property of the appellants' neighbour. 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 alleged property damage. Incidents of wilful damage to property can lead to Mischief charges pursuant to section 430 of the *Criminal Code*.

The Ministry noted that no charges were laid as a result of the investigation.

The appellants outlined the details of the dispute between the two neighbours from their perspective and provided some documents to support their position, including Court documents relating to a deeded right of way over the neighbours' property that was being used by the appellants. In their representations, the appellants submitted that their situation should create an exception to the application of the presumption at section 21(3)(b) since they feel that they have been victimized by the neighbours. The appellants conclude:

We are sure that the intent of the privacy act is not to protect vindictive people so they can not be held accountable for the malicious mischief they perpetrate on others.

I ask that you review the original appeal, through the light that there was no criminal act to be investigated, before April 18/06 the 'malicious mischief' acts of the [neighbours].

Findings

The records at issue pertain to the complaint made by the neighbour of a possible criminal act by the appellants and the subsequent response of the OPP on April 18, 2006. The records reflect the nature and extent of the investigation that the police officer undertook at that time. I find that the personal information at issue in the records was compiled and is identifiable as part of an investigation into a possible violation of law pursuant to the *Criminal Code*. The fact that no criminal charges were laid has no bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

As a result of my finding that the presumption in section 21(3)(b) applies to the personal information at issue, I conclude that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records. Therefore, subject to my discussion below of the Exercise of Discretion, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellants and that this information qualifies for exemption under section 49(b).

EXERCISE OF DISCRETION

Section 49(b) states:

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.

The section 49 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)].

Ministry's Representations

The Ministry submitted that it treats each access request before it on a case-by-case basis. In this case, it considered and weighed the potential benefits of disclosure to the appellants against the potential harm to the other identifiable individuals and concluded that due to the sensitive nature of the information remaining at issue and the application of a presumption to it, disclosure of the remaining information would cause personal distress to the other identifiable individuals.

The Ministry indicated further that it was cognizant of the appellant's reasons for wanting the information and took into consideration that the property-related matters have been dealt with by the Court.

The Ministry also indicated that it has severed as much information as possible and disclosed the non-exempt portions to the appellants in accordance with section 10(2).

Findings

I have found above that the records contain the personal information of both parties to a neighbour dispute. Documentation relating to a court action, provided by the appellants with their submissions, indicates that the dispute pertains to a deeded right-of-way across the property of the neighbours. The information in the records reflects the escalation of that dispute. In their request to the Ministry, the appellants stated that they were advised to obtain the records in order to protect themselves against further complaints by the neighbours. I note that the appellants have received sufficient information, as a result of the disclosure already made by the Ministry, to provide them with a record of the incident to use for whatever purposes they wish.

In denying access to the remaining portions of those records, I find that the Ministry exercised its discretion under section 49 in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

Consequently, I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals identified in them, other than the appellants, and they are properly exempt under section 49(b) of the *Act*.

ORDER:

I uphold the Ministry's decision to withhold access to the records at issue.

Original signed by: _____

Laurel Cropley
Adjudicator

January 10, 2007 _____