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

ORDER PO-2622

Appeal PA07-42

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*) which read as follows:

> I have reason to believe that a complaint (one or more) was filed against me to [either of two named Ontario Provincial Police (OPP) Detachments] approximately one year ago in October and possibly again in November.
>
> Also, if there are any other complaints/allegations on file involving myself, I wish to be fully informed.

The Ministry initially responded to the request by advising the requester that, following a search for records at the requested OPP detachments, no responsive records were located. In response to this decision, the requester sent a letter to the Ministry providing further information and explaining why he believed that records should exist in response to his request. The Ministry then issued a subsequent decision, in which it stated that partial access was granted to the requested records, and that access was denied to the remaining records or portions of records on the basis of the exemptions in sections 49(a) (discretion to refuse requester's own information), 14(1)(c) and 14(2)(a) (law enforcement), 14(1)(l) (facilitate commission of an unlawful act) and 49(b) and 21(1) (invasion of privacy), with reference to the presumptions in 21(3)(b) and (d) and the factor in 21(2)(f). The Ministry also advised that portions of the records were denied as they were not responsive to the request.

The requester (now the appellant) appealed the Ministry's decision.

During mediation the Ministry provided an Index of Records, which was shared with the appellant.

Also during mediation a number of issues were resolved, including whether certain records were responsive to the request, and the application of section 14(1)(l) to portions of the records. Those issues are no longer in dispute in this appeal.

In addition, during mediation, the appellant confirmed that he believed that additional responsive records exist. In particular, he believed that communications existed at a particular level of Command for an identified Region of the OPP, or at the Commissioner's Office. He also advised that an audio interview ought to exist. The Ministry subsequently located an additional responsive record (an audio interview). It also stated that it had conducted an additional search, and that no additional records existed, as no other records were created pertaining to this occurrence. The Ministry advised that any records relating to the occurrence had restricted access and were "locked down" in the OPP database, and that only certain persons had access to such restricted access records. The appellant maintained that further records ought to exist.

Mediation did not resolve all of the issues in this appeal, and it was transferred to the inquiry stage of the process. I initially sent a Notice of Inquiry to the Ministry, identifying the issues and asking the Ministry to provide representations on them.

Following the issuance of the Notice of Inquiry, the Ministry and this office were provided with a copy of letter from one of the individuals whose information is included in the records (an affected party). In that letter, the affected party identified that she consented to the release to the appellant of any information contained in the records relating to her.

As a result of the receipt of the consent from the affected party, the Ministry sent a further decision letter to the appellant, in which it confirmed that it was releasing additional information to the appellant. It stated that portions of 10 pages of responsive records were now being disclosed, and provided those additional portions of records to the appellant.

The Ministry also provided this office with representations in response to the issues set out in the Notice of Inquiry, but identified that additional inquiries were being made with regard to the issue of whether the Ministry's search for responsive records was reasonable. It stated that further searches were being conducted, and that representations on that issue would subsequently be provided. The Ministry subsequently provided supplementary representations.

In its initial representations, the Ministry also confirmed that it was no longer relying on the exemptions in sections 14(1)(c), 14(2)(a) or 49(a). Accordingly, those exemptions are no longer at issue in this appeal.

I then sent the appellant a modified Notice of Inquiry (with the exemptions that are no longer at issue removed from it), along with a complete copy of both the Ministry's initial representations and its supplementary representations. The appellant also provided representations on the issues.

RECORDS:

There are 42 pages of responsive records in this appeal, as well as one audiotape. Eleven pages of records are no longer at issue. The hardcopy paper records remaining at issue consist of the portions of those pages which were not disclosed to the appellant on the basis that they qualify for exemption under the *Act*. These records include an occurrence summary and general occurrence reports (portions of pages 1-6, 8, 9 and 11-14), police officers' notebook entries (portions of pages 19-29, 31, 32, 34, 36, 37, 39, 40 and 42), and the audiotape.

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, sex, marital or family status [section 2(1)(a)], medical, psychiatric, psychological, criminal, or employment history [section 2(1)(b)], address or telephone number [section 2(1)(d)], the personal opinions or views of that individual except where they relate to another individual [section 2(1)(e)], the views or opinions of another individual about the individual [section 2(1)(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 [section 2(1)(h)].

The Ministry submits that the information remaining at issue contains the types of personal information set out in the sections of the *Act* referred to above, and that it relates to the appellant and other identifiable individuals. The appellant does not directly address this issue; however, his representations suggest that the records contain his personal information.

Based on my review of the contents of the records, I find that all of the records remaining at issue contain the personal information of the appellant and other identifiable individuals within the meaning of that term in section 2(1).

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), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellant's right of access to their own personal information against other individuals' right to the protection of their privacy.

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.

Representations

The Ministry relies on section 49(b) in conjunction with the "presumed unjustified invasion of personal privacy" at section 21(3)(b), and the factor favouring privacy protection at section 21(2)(f), to deny access to the records at issue.

The appellant does not specifically refer to a particular section of the *Act*; instead, his representations focus on his concerns regarding the allegations made against him. They include his position that:

- the allegations were unsubstantiated,
- the process used was inappropriate,
- he ought to have access to these records to ensure their accuracy (or to enable him to challenge their accuracy),
- he wants to ensure that inaccurate information is not available to others, as this may result in prejudice to him in the future,
- information relating to the individual who consented to disclosure has not been fully released,
- he requires access to the records to clarify for him what actions he can or cannot take,
- had the allegations resulted in charges against him, he would have had the opportunity to review the information in the context of disclosure during a trial, and could have taken various actions in response.

By referring to these circumstances, he appears to be raising the factors in sections 21(2)(a), (d) and (g) of the *Act*.

The referenced sections read:

> 49 A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

> 21 (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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
> >
> > (g) the personal information is unlikely to be accurate or reliable;
>
> (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 section 21(3)(b) presumption, the Ministry submits:

> … the personal information records at issue consist 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 responsive records, both disclosed and undisclosed parts, 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* (the *PSA*) provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.
>
> The records at issue document the OPP's law enforcement investigation into [an identified complaint] involving the appellant. [The identified complaint] is an offence under [an identified section] of the *Criminal Code*.
>
> The Ministry submits that the application of section 21(3)(b) of [the *Act*] is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The appellant does not address the application of the presumption in section 21(3)(b).

Findings

As identified above, the records remaining at issue consist of the withheld portions of an occurrence summary and general occurrence reports, officers' notebook entries, and the entire audiotape of the complainant's interview. Portions of the occurrence summary, general occurrence reports, and officers' notebook entries have been disclosed to the appellant. The specific portions of the hardcopy records remaining at issue consist of the portions of the officers' notes and the occurrence reports which directly record the statements made by the complainants and/or the contacts the police had with the complainants, or the names, addresses and identifiers of the complainants and other individuals.

I find that the records and portions of records remaining at issue were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the records is presumed to constitute an unjustified invasion of the privacy of the identifiable individuals under section 21(3)(b) of the *Act*. As set out above, the Divisional Court has stated that a presumption cannot be rebutted by either one or a combination of the factors set out in section 21(2). I therefore find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b), subject to my review of the absurd result principle and the Ministry's exercise of discretion, discussed below.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b) and/or 21, 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]

Previous orders have also stated that, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

With respect to whether or not the absurd disclosure is consistent with the purpose of the section 21(3)(b) exemption, Senior Adjudicator Goodis reviewed this issue in Order PO-2285. In that order, in which the records at issue were described by Adjudicator Goodis as "particularly sensitive", he stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester.

I adopt the approach taken to the absurd result principle set out above, as well as the approach taken by the Senior Adjudicator in Order MO-2285.

In its representations the Ministry states:

> The Ministry has carefully considered the application of the absurd result principle with respect to the non-disclosure of the personal information at issue. The Ministry submits that in the particular circumstances of the highly sensitive incident that has given rise to the appellant's request for access to information, disclosure of the responsive information would be inconsistent with the application of the discretionary exemption from disclosure contained in section 49(b).

I have carefully reviewed the circumstances of this appeal, including the specific portions of the records remaining at issue, the background to the creation of the records, and the nature of the investigation undertaken by the OPP. The appellant has been provided with access to the portions of the records which he provided to the OPP, the notes of the statements he made to the OPP in the course of the investigation (with minor severances), and the information relating to the results of the investigation, which addresses a highly sensitive matter. I find that, in these circumstances, there is particular sensitivity inherent in the records remaining at issue in this appeal, and that disclosure of the remaining information would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis (namely, the protection of privacy of individuals). Accordingly, the absurd result principle does not apply in this appeal to the information remaining at issue.

Ministry's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act*'s discretionary exemptions. 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 record.

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. The Ministry states:

> The Ministry is cognizant of the appellant's right of access to personal information records held by the Ministry. The Ministry took into account that the appellant is an individual rather than an organization. The Ministry also considered the relationship between the appellant and other individuals referenced in the records.

The Ministry then states that it considered releasing the exempt records to the appellant, but chose not to, particularly in light of the nature of the offence reflected in the investigation. It states that "this circumstance adds a heightened level of sensitivity to the requested law enforcement records", and the Ministry then identifies the specific reasons why it exercised its discretion to withhold the remaining portions of hardcopy records, and the audiotape.

The Ministry's representations were shared with the appellant. Although the appellant does not directly address the issue of whether the Ministry properly exercised its discretion, the appellant identifies a number of reasons why he believes he ought to have access to the records, as set out above.

Finding

I have carefully considered the positions of the parties and the records remaining at issue. As identified above, the specific portions of the hardcopy records remaining at issue consist of the portions of the officers' notes and occurrence reports which directly record the statements made by the complainants and/or the contacts the police had with the complainants, or the names, addresses and identifiers of the complainants and other individuals. Any information the appellant provided to the OPP, the notes of the statements he made to the OPP (with minor severances), and the information relating to the results of the investigation, have been disclosed to the appellant. Much of this information was disclosed by the Ministry in its initial decision, and the Ministry disclosed additional information when it released additional portions of records to the appellant during the inquiry stage. It is clear that the appellant knows much about the allegations made against him.

On my review of the records remaining at issue, the Ministry's representations, and the circumstances of this appeal, I am satisfied that the Ministry properly exercised its discretion in refusing to disclose the remaining records under section 49(b). Accordingly, I uphold the Ministry's decision to deny access to the records remaining at issue on the basis of the exemption in section 49(b) of the *Act*.

Additional matters

The appellant raises three items in his representations which I will briefly address.

At one point in his representations the appellant refers to concerns he has regarding information not disclosed to him from an officer's notebook on page 39. He suggests that certain information about the allegations is withheld on that page, without reference to an identified exemption.

However, on my review of this page, it is only the names of individuals other than the appellant that have been severed from this page.

The appellant also argues that certain individuals ought to be notified by this office regarding whether they consent to the release of their personal information. In the circumstances of this appeal, taking into account the nature of the allegations referred to in the records, the relationships between the parties, and the nature of the information remaining at issue, I decided under section 50(3) of the *Act* not to notify additional individuals in the course of conducting this inquiry.

Lastly, the appellant identifies his concerns about the accuracy of the information, and who may view it. However, in its representations, the Ministry has stated that there is restricted access to any records relating to the occurrence. Regarding the appellant's concerns that he ought to have access to the records to allow him to ensure its accuracy, previous orders have clearly stated that the right of correction of personal information under section 36(2)(a) of the *Act* does not apply to information that simply reflects the views of the individuals whose impressions are being set out, regardless of whether or not these views are true (See Order MO-1840).

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

In response to the Notice of Inquiry, the Ministry provided supplementary representations in support of its position that the search conducted by it for responsive records was reasonable.

The Ministry begins by reviewing its earlier searches for responsive records. It confirms that, after clarification with the appellant, it located responsive records, and subsequently located the audiotape interview. It then states:

> The appellant remained of the view that additional responsive records of communications at [an identified OPP Region Command] or the OPP Commissioner's Office should exist. As a result, the reasonableness of the OPP's records search activities was included as an issue in the Notice of Inquiry.
>
> The Ministry subsequently asked the OPP to conduct further records searches for records of communications at the OPP Commissioner's Office and the [identified Region Command]. The Ministry also asked the OPP to consult with several staff named in the responsive records to ascertain if any additional records exist. The additional record searches have now been completed and are described below.

The Ministry then proceeds to describe the searches it conducted. It specifically lists the four areas where searches were conducted: OPP Commissioner's Office, the identified OPP Region Command, the Detachment, and the search conducted by the Central Region Superintendent. The Ministry describes in detail the searches that were conducted in those four areas, and that the results of those searches did not result in the identification of any additional responsive records. The detailed description of the searches includes the nature of the searches conducted, who conducted the searches, and the names of individuals who were specifically asked whether they had responsive records or took additional notes which would be responsive to the request.

The appellant's representations deal predominantly with the issues regarding access to the withheld records; however, a portion of his representations address the reasonable search issue. The appellant identifies his concern that the Ministry initially failed to locate any responsive records, and that they later failed to locate the audiotape of the complainant's interview. Lastly, the appellant states that a transcript of the audiotape ought to have been created. He states that this would allow the tape to be subject to the inspection under the *Act*, and also that it would allow a "perusal of the general content or accuracy of the information."

Findings

I have carefully examined the information provided by the parties in this appeal.

As identified above, in reasonable search appeals, the *Act* does not require the institution to prove with absolute certainty that further records do not exist; however, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Based on the representations provided by the Ministry, and in particular the supplementary representations provided by it in which the Ministry reviews in detail the nature of the searches conducted for responsive records, I am satisfied that the searches conducted by the Ministry were reasonable.

In this appeal both parties acknowledge that the Ministry's initial search did not result in the identification of any records responsive to the request, and that it was only after additional clarification was provided by the appellant that responsive records were located. Although I appreciate the appellant's concern that the Ministry initially failed to locate responsive records, I accept that one of the reasons why this occurred is because of the nature of the records requested, and the restricted access to those records. Once the appellant clarified where responsive records may exist, responsive records were located.

Although the Ministry does not provide a reason why the audiotape of the interview was not initially located, the Ministry conducted further searches in the course of this inquiry, and has provided detailed information regarding the nature, extent and results of those searches. I find that the appellant has not provided a reasonable basis for concluding that additional records responsive to his request exist. Accordingly, I am satisfied that reasonable efforts have been made by the Ministry to locate records responsive to the request.

As a final matter, in his representations the appellant seems to suggest that, because no transcript of the audiotape interview was created, the full scope of the *Act* may not apply to that record. However, section 2(1) of the *Act* defines a record as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, *a sound recording*, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, …
> > [emphasis added]

Accordingly, I do not accept the appellant's position that the fact that no transcript of the audiotape was created in any way affects the rights of the appellant under the *Act*.

ORDER:

I uphold the Ministry's decision.

Original Signed by: November 15, 2007
Frank DeVries
Adjudicator