



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2570**

**Appeal PA-060141-1**

**Ministry of Community Safety and Correctional Services**



Tribunal Services 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: 416-325-7539  
<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 Protection of Privacy Act* (the Act) for access to information related to an OPP matter involving the requester. The request was for the following information:

1. Memo book notes from both officers regarding the [date] Hearing Room incident and from the subsequent meeting that took place in the PSB (Police Services Board) reception area.
2. Any memo book notes made by [named detective] regarding the [date] meeting with the Hearings Officer and two lawyers.
3. Any memo book notes made as a result of our meeting in the cafeteria on [date].
4. Memo book notes made by [named detective] regarding our meeting in the PSB office on [date].
5. Any reports of correspondence sent or received by either of the two officers involving the aforementioned matters.
6. Any e-mail correspondence sent or received regarding the aforementioned matters.

In response to the request the Ministry located responsive records and denied access to them, claiming the application of the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 14(1)(c), (d), (e), (i) and (l), and the solicitor-client exemption in section 19. The Ministry also denied access to the responsive records on the basis that they are exempt under section 49(b) (invasion of privacy of another individual), in conjunction with the factors in section 21(2)(f) and (h) and the presumptions in section 21(3)(b) and (d).

The requester, now the appellant, appealed that decision.

As mediation was not successful in resolving the appeal, the file was referred to me to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues to the Ministry initially, seeking its representations. The Ministry provided representations in response which were shared, along with a Notice of Inquiry and copy of the Ministry's representations, with the appellant. Portions of the Ministry's representations were not disclosed due to my concerns about confidentiality. I received representations from the appellant in response to the Notice of Inquiry. Portions of the appellant's representations were also provided to me in confidence by the appellant.

**RECORDS:**

The records consist of officer notes and email correspondence, more particularly described in the following index:

**Index of Records**

<b>Record</b>	<b>Ministry Page(s)</b>	<b>Type of Document</b>	<b>Exemptions</b>
1	1 to 2	Officer's Notes	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
2	3 to 6	Officer's Notes	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
3	7	Officer's Notes	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 19, 49(b)
4	8 to 12	Officer's Notes	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
5	13 to 23	E-mail correspondence	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
6	24	E-mail correspondence	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 19, 49(b)
7	25 to 37	E-mail correspondence	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
8	38 to 41	E-mail correspondence	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 19, 49(b)
9	42 to 53	E-mail correspondence	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “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, the information must be about the individual in a personal capacity. 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, R-980015, MO-1550-F, PO-2225].

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].

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.)].

### **Representations of the Parties**

The Ministry submits that:

...the records at issue contain the types of personal information listed above with respect to the appellant and other identifiable individuals, including a named OPP detective and other named OPP officers.

As noted previously, the appellant filed a public complaint under the *Police Services Act (PSA)* in relation to the conduct of the detective named in the appellant’s statement of request. The focus of the public complaint is directly related to the content of the records requested by the appellant. The Ministry submits that many of the responsive records reflect the named detective’s involvement with respect to issues concerning the appellant arising from incidents that occurred on [dates].

In view of the nature and focus of the appellant’s *PSA* complaint, the Ministry submits that the responsive records should be considered the named detective’s personal information. The Ministry submits that the exempt information is supportive of its position in this regard.

In further support of the Ministry’s position, the Ministry notes that in Order P-721 former Assistant Commissioner Irwin Glasberg commented as follows:

...Previous orders have held that information about an employee does not constitute that individual’s personal information where the information relates to the individual’s employment responsibilities or position. Where, however, the information involves an evaluation of the employee’s performance or an

investigation into his or her conduct, these references are considered to be the individual's personal information.

The Ministry further submits that other parts of the responsive records contain information in relation to OPP officers that is inherently personal in nature.

The appellant submits disagrees with the Ministry's submissions that the responsive records be deemed the personal property of the named detective. He states that:

[T]hroughout the entire incident spanning the three dates, the named investigator was acting in an official capacity. As such, the records should not be deemed "personal in nature".

The Ministry's position suggests that they want to have it both ways. Their argument is prefaced on the fact that given the named officer was the subject of a *PSA* complaint, it is proper to deem the responsive records the detective's personal property.

However, the complaint was not acted upon given s. 59(4) and 59(3) of the *Police Services Act*. Therefore, to now use the complaint as the rationale to deny disclosure of the responsive records would be wrong.

The Ministry is also suggesting that the complaint was tantamount to an evaluation of the detective's performance and therefore, should be deemed his personal property. The appellant would suggest that what is being referred to in Order P-721 are performance appraisals that are done from time to time by the organization to assess a workers' performance. A complaint certainly would not equate to an evaluation of the officer's performance.

### **Analysis/Findings**

On my review of the records, I find that they contain the personal information of the appellant, including:

- the views and opinions of other individuals about the appellant;
- his educational and employment history; and,
- his own personal views and opinions.

Accordingly, I am satisfied that the records at issue contain the personal information of the appellant, pursuant to the definition of personal information in section 2(1).

I also find that these records contain the personal information of identifiable individuals (the OPP officers) other than the appellant, including:

- their names where the disclosure of their names would reveal other personal information about the individual;
- the appellant's views and opinions about these other individuals; and,
- their own personal views and opinions.

Accordingly, I am satisfied that the records at issue contain the personal information of individuals other than the appellant, pursuant to of the definition of personal information in section 2(1).

In assessing whether this type of information qualifies as "personal information," the following cases are of assistance. An examination of an individual's job performance has been found to be "personal information". In Order P-1180, former Inquiry Officer Anita Fineberg stated:

Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

Statements provided to investigators by potential witnesses has also been found to be "personal information". In Order PO-2271, Senior Adjudicator David Goodis stated:

When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of these individuals doing their job in no way undermines this conclusion.

Although the personal information in the records is about the individuals other than the appellant in their professional capacity, this information relates to an investigation into or assessment of the performance or alleged improper conduct of these individuals. As such, I find that the characterization of this information changed and is more appropriately described as personal information about these individuals.

#### **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.

I have found that the records contain both the personal information of the appellant and other individuals. Under section 49(b), 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 has the discretion to refuse to disclose that information to the requester. I will therefore consider whether disclosure of the personal information in the records would result in an unjustified invasion of the personal privacy of other individuals and are, therefore, exempt from disclosure under section 49(b).

In this case, the Ministry relies on section 49(b) in conjunction with section 21(1), for all of the records. Section 21(1) requires that I determine whether disclosure of the personal information of the individuals would result in an unjustified invasion of these individuals’ personal privacy. Sections 21(2), (3) and (4) provide guidance in determining whether “unjustified invasion of 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).

The Ministry has claimed that disclosure constitutes an unjustified invasion of personal privacy by reason of the application of section 21(3)(b), for all of the records, which 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 disclosure is necessary to prosecute the violation or to continue the investigation.

### **Representations of the Ministry**

With respect to the claimed section 21(3)(b) presumption, the Ministry states that:

[it] is of the opinion that the personal information in the records 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 records 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 *PSA* provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.



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).

### **Representations of Appellant**

The appellant is requesting records that stem from his attendance as an observer at a PSB hearing where he was accused of reading defense counsel's notes during a break. He provides the following information in his representations as to the circumstances surrounding his access request:

The appellant was queried as to who he was, accused of reading defense counsel's notes, and a demand made as to why he had not signed in. The appellant answered their questions, trying to allay their fears that he had done anything wrong. The meeting ended with him being threatened with removal from the building should he do anything else wrong.

Barring more evidence, the appellant drew the conclusion that the investigators' discomfort stemmed from their awareness that the case was flawed and that they felt uncomfortable that an unknown person was present to witness the hearing.

The next day, during a break, the same investigator approached the appellant and again was directed to follow him. This time he was led into an office where the hearing officer and both lawyers were present. He was again queried about the incident in the hearing room. He again explained. At the end of the meeting, they seemed satisfied that nothing untoward had occurred. He left the room...

On [date] the appellant filed a complaint about the officer's conduct. The appellant realized that his complaint was beyond the six month limitation period. He ....was aware of the process. Without the supporting evidence ..., the complaint would have gone nowhere. Given s. 59(4) [of the PSA] is a discretionary authority, the appellant thought that, given the nature of the complaint, it would have been acted upon.

However, in a letter dated ..., the PSB Bureau Commander advised that he was exercising his discretion not to investigate the matter given the six-month limitation period identified in s. 59(4) of the PSA. In addition, his letter referred to s. 59(3) which provides police services authority not investigate complaints that are deemed "frivolous, vexatious, or made in bad faith." The letter does not elaborate more specifically on which of the three criteria were met....

The appellant believes the only charge that the OPP could consider would be "public mischief", a charge that would have stemmed from the filing of his complaint.

“Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

(c) reporting that an offence has been committed when it has not been committed.”

Once again, no police officer was willing to swear to a criminal information charging the appellant with this offence. The reason is simple. They didn't have the prerequisite grounds.

### **Analysis/Findings**

I am satisfied the personal information in all of the records was compiled and is identifiable as part of an investigation into a possible violation of law. The appellant concedes that the information was compiled during the course of an investigation into the allegations against him and that possibly could have resulted in his being charged with public mischief, an offence under section 140 of the *Criminal Code*. There is, therefore, a presumed unjustified invasion of personal privacy in connection with the disclosure of these records. 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, v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. 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*, cited above]. Section 23 has not been raised by the appellant and section 21(4) is inapplicable in this appeal.

Section 21(3)(b) still applies despite the fact that no criminal proceedings were commenced against any of the other individuals. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law [Order P-242].

I have also considered the appellant's representations concerning the exception contained in the final clause of section 21(3)(b) and the need to disclose the information to continue an investigation. The appellant's wishes to continue his investigation into the questionable treatment that certain OPP members had received from the Police Services Board and the flaws in the conduct of their investigation. However, the factor in section 21(2)(d) (fair determination of rights) cannot operate to override the presumption in section 21(3)(b) [*John Doe*, cited above]. In my view, the situation is similar to that in Order MO-1410. In that case, the appellant argued that the *Act* (in that case the *Municipal Freedom of Information and Protection of Privacy Act*) did not specify who is to “continue the investigation”. The appellant claimed that she was “entitled to continue the investigation into her spouse's death by retaining legal counsel and an accident reconstruction expert”.

In Order MO-1410, Adjudicator Dora Nipp held:

Previous orders of this office have established that the exception contained in the phrase “continue the investigation” refers to the investigation for which the personal information was compiled, i.e. the investigation “into a possible violation of law”. Therefore, even though another party, in this situation the appellant, is continuing the investigation, this presumption applies (Orders M-249, M-718).

The situation is also similar to that in Order MO-1449, in which Adjudicator Laurel Cropley stated:

In the circumstances of this appeal, the investigation conducted by the Police was concluded. Therefore, the disclosure of the personal information in the records is not necessary to continue that investigation. The appellant is essentially interested in commencing a new investigation into, not only the circumstances of her brother’s death, but, apparently, into the actions of the Police with respect to the manner in which they conducted their investigation. ...I find that the exception to section 14(3)(b) (section 21(3)(b) in the *Freedom of Information and Protection of Privacy Act*) does not apply.

I agree with and adopt the analysis and conclusion in Orders MO-1410 and MO-1499 and I disagree with the appellant’s argument that section 21(3)(b) does not apply. I find that the presumption in section 21(3)(b) applies to the undisclosed personal information in the records. Disclosure of this personal information is presumed to constitute an unjustified invasion of personal privacy of the individuals under section 21(3)(b) as the personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

Subject to my discussion of the Ministry’s exercise of discretion below, disclosure of the personal information in the records, would, therefore, constitute an unjustified invasion of personal privacy and is 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

## **Representations of the Parties**

The Ministry submits that:

[it] is mindful of the major purposes and objects of the [Act]. The Ministry considers each request for access to information on an individual, case-by-case basis.

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 considered releasing the exempt records at issue to the appellant notwithstanding that discretionary exemptions from disclosure applied to the records at issue in their entirety. The Ministry has exercised its discretion to deny the appellant access to personal information records only after very careful consideration of all relevant factors.

The historic practice of the Ministry when responding to personal information requests for police records is to release as much information as possible in the circumstances. The Ministry was mindful of the fact that the responsive records in this particular instance, however, reflect health and safety concerns. This circumstance added a heightened level of sensitivity to the requested law enforcement records. In the circumstances of the appellant's request, the Ministry is of the view that release of any of the records at issue is not appropriate.

Given the highly sensitive nature of the matters reflected in the records, the Ministry was satisfied that release of the requested records would cause personal distress to identifiable individuals. The Ministry was also satisfied that the information at issue was compiled and identifiable as part of an investigation into a possible violation of law.

The Ministry was mindful of the fact that earlier this year the appellant filed a *PSA* complaint in regard to the conduct of a named detective and that the current ...request is significantly focused in regard to relevant records involving the named detective.

The Ministry in its exercise of discretion took into consideration the fact that confidentiality of information in some instances is necessary for public safety and protection.

The Ministry carefully considered whether it would be possible to release any nonexempt information from the records at issue. However, the Ministry concluded that severing was not feasible in this instance.

The Ministry ultimately came to the conclusion in its exercise of discretion that the release of records in the circumstances of the appellant's request was not

appropriate. It should be noted, however, that the Ministry has provided the appellant with partial access to the records responsive to his related appeal, [#].

The appellant submits that:

The Ministry advocates ...that the historic practice of the Ministry when responding to personal information for police records is to release as much information as possible in the circumstances. The appellant's experience to date is that the precise opposite is true. To date, the appellant has only received ...memo book notes and occurrence report... but that occurred during the mediation stage of his complaint after he had appealed the Ministry's decision to withhold all information.

### **Analysis/Findings**

I find that the Ministry properly exercised its discretion under section 49(b) with respect to the records that contain the personal information of identifiable individuals other than the appellant. I find that the Ministry considered relevant factors and did not consider irrelevant ones with respect to these records. I agree with the Ministry that due to the highly sensitive nature of the matters reflected in the records, that release of the records at issue would cause personal distress to identifiable individuals.

As I have found all of the records to be exempt from disclosure, there is no need for me to consider in this order as to whether the exemptions in sections 14(1) (law enforcement) and 19 (solicitor-client privilege) of the *Act* apply to the records.

### **ORDER:**

I uphold the Ministry's decision.

Original Signed By: \_\_\_\_\_

Diane Smith  
Adjudicator

\_\_\_\_\_  
April 30, 2007