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

ORDER PO-2627

Appeal PA06-352

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 videotaped statement (the video statement) provided by a named individual (the complainant) to the Ontario Provincial Police in regard to a complaint filed by the complainant against the requester.

The Ministry denied access to the video statement, applying the exemptions found in sections 49(a) (discretion to refuse requester's own information) of the *Act*, read in conjunction with the law enforcement exemptions in sections 14(1)(e) (life or physical safety) and 14(1)(l) (commission of an unlawful act or control of crime), and 49(b) of the *Act*, read in conjunction with section 21(1) (personal privacy). Regarding the section 49(b)/21(1) exemption, the Ministry indicated that it is relying on the presumption in section 21(3)(b) (information compiled as part of an investigation) and the factor in section 21(2)(f) (highly sensitive personal information).

The requester (now the appellant) appealed the Ministry's decision. No issues were resolved during the mediation stage of the appeal process and the file was transferred to adjudication for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Ministry on the application of the section 49 (a) and (b) exemptions to the contents of the video statement. The Ministry submitted representations in response and agreed to share the non-confidential portions of them with the appellant.

I then issued a second Notice of Inquiry, in which I sought representations from the appellant. I enclosed with this Notice of Inquiry a copy of the non-confidential portions of the Ministry's representations. Portions of the Ministry's representations were withheld due to confidentiality concerns. The appellant submitted representations in response.

RECORDS:

There is one record at issue, the video statement provided to the Police by the complainant.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which section 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,
>
> …
>
> (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 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].

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.)].

Analysis and findings

The parties' representations on this issue were not helpful. Therefore, I was left to review the record to determine the extent to which it contains personal information and, if so, to whom it relates.

Having carefully reviewed the video statement, I find that it primarily contains the personal information of the complainant and the appellant. The personal information regarding the complainant includes her name, sex, colour, address, her personal views and opinions and other information relating to her. With regard to the appellant, the video statement contains his name and the complainant's views and opinions about him. The record also contains minimal personal information about other identifiable individuals.

Having found that the record contains the personal information of the appellant and other individuals, I will now consider the application of section 49(b), read in conjunction with section 21(1), to it.

PERSONAL PRIVACY

Section 49(b)/21 exemption

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. The Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 49(b). 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 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.

Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 49(b) is met. If the presumptions contained in paragraphs (a) to (h) of section 21(3) apply, the disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 21(4), or the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In this case the Police have raised the application of sections 21(3)(b). This section 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;

Section 21(3)(b) may still apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Parties' representations

The Ministry submits that the video statement contains highly sensitive personal information that was "compiled and is identifiable as part of an OPP investigation into a possible violation of law." The Ministry adds that the video statement was provided by the complainant during the course of that investigation. The Ministry states that as a result of the investigation nine *Criminal Code* charges were laid against the appellant, including assault, forcible confinement, unsafe storage of firearms and possession of a prohibited weapon. The Ministry submits that the appellant was ultimately convicted of unsafe storage of firearms while the other charges were withdrawn.

The Ministry also relies on the application of section 21(2)(f) to bolster its position on the non-disclosure of the information at issue, stating that the video statement contains "highly sensitive personal information."

In addition, the Ministry submits that in relying on the section 49(b) exemption, it carefully considered the application of the absurd result principle, but that owing to the "particular and sensitive circumstances of the appellant's request", it determined that disclosure would be inconsistent with the application of the discretionary exemption in section 49(b).

The Ministry states that none of the circumstances outlined in section 21(4) would operate to rebut the application of the presumption under section 21(3)(b).

The appellant's representations do not address the application of the section 49(b) exemption or the operation of the section 21(3)(b) presumption to the record at issue. The appellant simply states that disclosing the contents of the video statement would not represent an unjustified invasion of the complainant's personal privacy. As well, he indicates that he was not convicted on the charge of unsafe storage of firearms, but rather entered a plea bargain with the court on that charge.

Findings and analysis

On my review of the parties' representations and the record at issue, it is clear that the personal information contained in the video statement was compiled as part of an investigation into possible violations of law under the *Criminal Code*. The fact that the appellant entered a guilty plea on only one of nine charges and was convicted on that charge is irrelevant. As stated above, the presumption only requires that there be an investigation into a possible violation of law. Therefore, I find that the section 21(3)(b) presumption applies to the information at issue, subject to the application of the absurd result principle.

I will now examine the application of the absurd result principle to the circumstances of this case. Senior Adjudicator John Higgins stated in Order M-444, "it is an established principle of

statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention."

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]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In Order PO-2498, I found that applying the section 21(3)(b) presumption to a video statement that was provided by the requester to the OPP during the course of a police investigation would lead to an absurd result. The basis for reaching that conclusion in that case was that the statement had been provided *by the requester* to the OPP.

The circumstances in this case are completely different. While some minor snippets of information in the video statement may be within the knowledge of the appellant, it is the complainant who, in this case, has provided the statement in question. This is, in my view, a significant distinguishing feature from the circumstances in Order PO-2498. Accordingly, I find that the absurd result principle does not apply to rebut the section 21(3)(b) presumption in this case.

Having found that the section 21(3)(b) presumption applies to the video statement, I am not at liberty to consider other factors in support of disclosure of this record, aside from the possible application of the exceptions in section 21(4) or the section 23 "public interest override".

I have considered the application of the exceptions contained in section 21(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this provision. In addition, the application of the "public interest override" at section 23 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

In conclusion, as a result of the application of section 21(3)(b), I find that the disclosure of the personal information in the video statement would result in an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information is exempt under section 49(b).

Regarding severance, in light of the nature of a videotape record and the extent to which the appellant's personal information is intermeshed with the complainant's, I find that it would be impractical to disclose to the appellant only those portions of the video statement that contain his personal information without comprising the personal privacy of other individuals or providing meaningless snippets of information about the appellant. The appellant's personal information is so intertwined with that of others that, even if it were practically feasible, severing out the

personal information of others to enable the appellant to receive his very minimal personal information would only lead to a disclosure of information without context or meaning.

Having found that the section 49(b) exemption applies in the circumstances of this appeal, I am not required to consider the application of section 49(a), read with the section 8 law enforcement exemptions claimed.

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 43(2)].

The Ministry provided representations on the exercise of discretion issue. The Ministry states that it is cognizant of the appellant's right of access to his personal information and considered releasing the video statement to him. The Ministry submits that the concerns of the complainant expressed in the video statement created a heightened level of sensitivity with regard to the contents of this record. Under the circumstances in this case, the Ministry concluded that it would not be appropriate to provide the appellant with any portion of the video statement.

The appellant did not offer representations on the exercise of discretion issue.

Having regard to the highly sensitive circumstances of this case, I am satisfied that the Ministry properly exercised its discretion in deciding to withhold the entire contents of the video statement from the appellant.

ORDER:

I uphold the Ministry's decision to withhold the record at issue from the appellant.

Original signed by: November 30, 2007
Bernard Morrow
Adjudicator