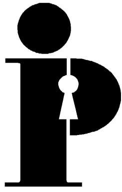

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2747

Appeal PA07-361

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received an eight-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an Ontario Provincial Police [OPP] Investigation into correspondence sent to the Ministry of Education. The requester was questioned by the investigating officers in relation to the matter.

The Ministry located records responsive to the request and granted partial access to them. Access was denied to portions of the records pursuant to the discretionary exemption at section 49(a) (discretion to refuse a requester's own information) of the *Act*, in conjunction with sections 14(1)(c) (law enforcement), 14(1)(i) (security), 14(1)(l)(facilitate commission of an unlawful act), 14(2)(a) (law enforcement), 14(2)(d) (correctional record) and 15(b) (relations with other governments). Access was also denied to portions of the records pursuant to the discretionary exemption at section 49(b) (invasion of privacy) of the *Act*, with reliance on the factor at section 21(2)(f) (highly sensitive), and the presumptions at sections 21(3)(b) (investigation into violation of law) and 21(3)(d)(employment history). The Ministry also applied the exclusionary provision in section 65(6)3 to portions of the records, and further informed the requester that some portions of the records identified are non-responsive to the request.

The requester, now the appellant, appealed the Ministry's decision to this office.

No issues were resolved during mediation. The appellant advised the mediator that he seeks access to all of the information that has been withheld.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry. The Ministry provided representations in response. In its representations, the Ministry advised that it was of the view that the Ministry of Education had an interest in the disclosure of some of the information at issue and that it should be provided with an opportunity to participate in this appeal. Specifically, the Ministry requested that the Ministry of Education be given the opportunity to comment on the application of section 65(6)3 to pages 32 to 54 of the responsive records, which consist of letters sent to the Ministry of Education by the appellant. The Ministry takes the position that, as the appellant's employer at the time the letters were received, the Ministry of Education is in the best position to speak to records relating to the appellant's employment.

As a result, I sent a copy of the Notice of Inquiry to the Ministry of Education, together with the non-confidential portions of the Ministry's representations on the possible application of section 65(6)3 to pages 32 to 54 of the records. The Ministry of Education responded with representations.

I then sent a copy of the Notice of Inquiry to the appellant, together with the non-confidential portions of the Ministry's representations, as well as the representations submitted by the Ministry of Education, in their entirety. The appellant also provided representations in response.

RECORDS:

The records at issue consist of 57 pages which include:

- an Occurrence Summary,
- Supplementary Occurrence Reports,
- a Canada Police Information Centre (CPIC) printout,
- letters from the appellant to the Chief Informing Officer, Community Services Cluster, I & IT, of the Ministry of Education,
- a letter from the appellant to the Assistant Deputy Minister Corporate Management and Services Division of the Ministry of Education,
- officer's notes,
- a report from the OPP Forensic Identification Support Services Unit, and
- correspondence from the RCMP.

DISCUSSION:

APPLICATION OF THE ACT

The Ministry submits that the exclusionary provision in section 65(6)3 applies to pages 32 to 54 at issue, and as such, that the records that comprise those pages, letters written by the appellant, fall outside the scope of the *Act*. As noted above, the Ministry explains that because the appellant was an employee of the Ministry of Education at the time the letters were received, it was of the view that the Ministry of Education has a greater interest in the disclosure of these pages. As result, the Ministry of Education was provided with an opportunity to make submissions on the application of section 65(6)3 to pages 32 to 54 and did so. My determination of whether 65(6)(3) applies in the circumstances of this appeal will be based on both the representations of the Ministry and the Ministry of Education.

Section 65(6) is record-specific and fact-specific. If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records fall outside the scope of the *Act*.

Section 65(6)3

In order to fall within the scope of paragraph 3 of section 65(6), the institution must establish that:

1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

The Ministry submits that Ministry of Education staff collected, prepared, maintained and/or used pages 32 to 54 in relation to meetings, consultations, discussions and communications in respect to the employment of the appellant. The Ministry submits:

> The Ministry of Education is an institution subject to the [*Act*]. The Ministry submits that the subject records would fall within the scope of section 65(6)3 should the appellant's request have been directed to the Ministry of Education.
>
> The application of section 65(6)3 in this instance is also contingent upon whether the Ministry of Education has an interest in the employment-related matters that resulted in the collection, maintenance and use of pages 32 to 54. The Ministry submits that the Ministry of Education, as an employer, has an inherent interest in the records relating to its workforce. The Ministry further submits that the content of the responsive records in their entirety is supportive of the Ministry's position in this regard.

The Ministry also refers to *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, where the Court of Appeal considered the meaning of the phrase "has an interest" for the purposes of section 65(6)3 and stated:

> [T]he words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters."

The Ministry concludes its representations on this issue by stating:

> The Ministry is of the view that pages 32 to 54 of the records at issue were collected, maintained and/or used for meetings, consultations, discussions and communications relating to labour relations and employment-related matters in which the Ministry of Education has an interest. The Ministry submits that all three requirements of section 65(6)3 have been satisfied and that the records at issue fall within the scope of this section.

The Ministry of Education explains that the appellant was employed by the Ministry of Education and the records at issue contain information that reflects this circumstance. It submits:

[S]ection 65(6) applies to these records, and as such, fall outside the scope of the [*Act*]. The employee was employed by the Ministry of Education and the records are inherently employment related.

When an institution received a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The Ministry of Education agrees with the position of the Ministry of Community Safety and Correctional Services that the records in question fall within the parameters of section 65(6), in that they were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions and communications in respect to the employment and labour relations issues which affected the appellant, and therefore are excluded from the scope of the *Act*. Indeed, we believe that all three requirements of section 65(6)3 have been satisfied.

It is important to note, however, that there may be other means for production of the same documents as is recognized in section 64 of the *Act*. Information that may be excluded from the *Act* may be available through other avenues.

Although the records in question were collected, prepared and maintained for employment related matters, this does not impinge on the ability of a part to litigation, in this case, the appellant, to obtain relevant information through disclosure which would enable him to prepare a defence.

Section 64 of the *Act* recognizes that the information may be otherwise available.

This provision states that:

> (1) This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation
> (2) This *Act* does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

As a result of these provisions, exclusions under the *Act* does not prevent information, including personal information, from being available in litigation when it otherwise would not be. In this case, the appellant obtained copies of the records in question through another process outside of the *Act*. The records at issue were disclosed to the appellant through his legal counsel. As indicated in section 64, although access may be denied under the *Act*, the appellant's rights are expressly preserved, as information properly available on discovery or by subpoena may still be obtained by those methods, and in this case, were.

> As such, which the Ministry of Education agrees that the records in question are excluded under section 65(6) of the *Act*, other mechanisms permitted the appellant to obtain the information required and were disclosed to the appellant's counsel in the context of litigation, approximately five months ago.
>
> The Ministry of Education respectfully submits that the decision to withhold the records under section 65(6)3 of the [*Act*] ought to be upheld.

The appellant does not make any specific representations on the possible application of section 65(6)3 to pages 32 to 54 of the records.

Analysis and findings

I agree with the representations submitted by both the Ministry and the Ministry of Education and find that pages 32 to 54 were collected and/or used by the Ministry of Education in relation to meetings, consultations, discussions or communications about employment-related matters in which the Ministry of Education has an interest.

Specifically, I accept that the letters were collected by the Ministry of Education, an institution under the *Act*, and their content gave rise to meetings, consultations or discussions by the Ministry of Education regarding the appellant, a Ministry of Education employee, whose name appeared as signatory to those letters. In my view, discussions about the activities of an employee are clearly about an employment-related matter in which the employer, in this case the Ministry of Education, has an interest.

As all of the requirements of section 65(6)3 of the *Act* have been established and none of the exceptions contained in section 65(7) are present in the circumstances of this appeal, I find that pages 32 to 54 fall within the parameters of this section, and therefore are excluded from the scope of the *Act*.

I must now go on to determine whether any of the remainder of the information at issue is subject to the exemptions claimed by the Ministry.

RESPONSIVENESS

The Ministry takes the position that parts of the records are not responsive to the appellant request. Responsiveness was included in the mediator's report as an issue to be decided in this appeal.

The Ministry submits that the portions of the records that it has identified as non-responsive contain "information concerning other law enforcement matters and administrative information that is not reasonably responsive to the appellant's request." The Ministry submits that the content of these portions of the records support its position.

The Ministry also submits that given that the information was printed for the purpose of responding to the appellant's access request, some of the information that it has severed as non-responsive to the appellant's request includes printing information, such as when the reports were printed and by whom. The Ministry relies on Order PO-2254 to support its position with respect to this type of information:

> The Ministry notes that in Order PO-2254, Adjudicator Sherry Liang accepted the Ministry's position regarding the non-responsiveness of administrative information relating to the printing of responsive reports. Adjudicator Liang commented:
>
> > To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. In this appeal, the Ministry states that some of the information in the record is "administrative information relating to the printing of the reports" and is accordingly not responsive to the request. I have reviewed the information at issue, and I agree with the Ministry's submission. The information in these portions of the record reflect when the record was printed and by whom, and was created after the appellant's request. I am satisfied that this information is not covered by the scope of the appellant's request, and I uphold the Ministry's decision to withhold this information.
>
> The Ministry submits that the identified non-responsive information neither concerns nor relates to the matters involving the appellant.

In his representations, the appellant does not specifically address the issue of the responsiveness of the records.

Previous orders have established that to be responsive, a record must be "reasonably related" to the request. As former Adjudicator Anita Fineberg stated in Order P-880:

> I am of the view that, in the context of freedom of information legislation "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I have reviewed all of the information at issue in this appeal, with careful attention to those portions identified by the Ministry as non-responsive to the appellant's request. I confirm that this information either is administrative in nature or relates to matters unrelated to the investigation involving the appellant. In my view, information relating to the printing of the records responsive to the request and information gathered by the Ministry, and/or OPP officers on unrelated policing matters that happened to take place on the same day as the activities

concerning the investigation involving the appellant, are not reasonably related to the request and therefore not "responsive" in these circumstances.

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [see Order M-352]. Where records contain the requester's own information, access to the records is addressed under Part III of the *Act* and the exemptions at section 49 may apply. Where the records contain personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act* and the exemptions found at sections 12 to 22 may apply.

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) of the *Act* and certain subsections that might be relevant to this appeal are the following:

> "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,
>
> (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

The Ministry submits that all of the records at issue contain the personal information of the appellant and other identifiable individuals. The Ministry further submits:

> [I]n the circumstances of the appellant's request, the responsive records contain personal information that is in relation to Ontario Government employees in their personal capacity. The Ministry submits that the content of the records at issue is reflective of this circumstance.

The appellant submits that the record does not contain any personal information as defined in section 2(1) of the *Act*.

Analysis and finding

Having reviewed the records at issue in this appeal, I agree with the Ministry and find that all of them contain information that qualifies as the personal information of the appellant, including his home address and telephone number (paragraph (d)), his age (paragraph (a)), and medical information (paragraph (b)), as well as his name and other personal information relating to him (paragraph (h)). These records also contain the personal information of other identifiable individuals including their home addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)), including statements made to the OPP.

As I have found that all of the records contain the personal information of the appellant, together with that of other identifiable individuals, I must now determine whether the exemption at section 49(b) applies to exempt the information that remains at issue from disclosure.

PERSONAL 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 that right.

Section 49(b) provides:

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

The personal privacy exemptions under the *Act* are *mandatory* at section 21(1) under Part II and *discretionary* at section 49(b) under Part III. Put another way, where a record contains the personal information of both the appellant and another individual, section 49(b) in part II of the *Act* permits an institutions to disclose information that it could not disclose if the exemption at section 21(1) in Part II was applied [Order MO-1757].

Section 49(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in section 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. In this case, the Ministry relies on the presumptions at sections 21(3)(b) and 21(3)(d), and also on the factor at section 21(2)(f).

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 section 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]

Section 21(3)(b): identifiable as part of an investigation into a possible violation of law

The Ministry submits that the presumption of section 21(3)(b) applies to all of the information at issue in this appeal. Section 21(3)(b) provides:

> 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

The Ministry submits that the personal information in the records at issue consist of "highly sensitive personal information that was compiled and is identifiable as part of an OPP [Ontario Provincial Police] 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 Ministry further submits:

> 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 that was initiated subsequent to the receipt of certain correspondence by the Ministry of Education. As can be noted from the responsive records, the OPP categorized the nature of the occurrence in question as "threats". The Ministry notes that uttering threats is an offence under section 264.1(1) 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 made no specific representations on the possible application of the exemption at section 49(b), or the presumption at section 21(3)(b). However, in his representations he claims that he was interrogated and fingerprinted by an OPP detective because "a few forged letters" were received by an employee at the Ministry of Education. The appellant submits that he has no knowledge of the letters and explains that he wishes to obtain access to the details of the

investigation and investigation report, as well as copies of the "forged" letters received by the Ministry of Education.

Analysis and findings

As I have found that the actual letters received by an employee at the Ministry of Education fall outside of the scope of the *Act* pursuant to section 65(6)3, my analysis is restricted to the other information that remains at issue. Based on a careful review of that information, I find that the nature and content of the records demonstrate that they were compiled and are identifiable as part of an OPP investigation into a series of threatening letters received by an employee of the Ministry of Education. As a result, I find that the records were compiled by the Ministry and are identifiable as part of that investigation, the purpose of which was to determine whether there had been a possible violation of law under the *Criminal Code*. Accordingly, I find that the presumption at section 21(3)(b) applies to the personal information at issue in this appeal.

As I have found that section 21(3)(b) applies, it is not necessary for me to determine whether the presumption at section 21(3)(d) applies. As noted above, given that a presumption under section 21(3) cannot be rebutted by factors in section 21(2), it is also not necessary for me to consider the Ministry's submissions on whether the factor at section 21(2)(f) weighs in favour of withholding the information at issue. I have reviewed the exceptions in section 21(4) and find that they do not apply. I have also considered the public interest override at section 23 of the *Act* and find that it is not relevant in the circumstances of this appeal because the appellant has a private, rather than public interest, in seeking access to the records at issue.

As previously stated, if any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to amount to an unjustified invasion of personal privacy under section 49(b). Accordingly, I find that, subject to the possible application of the absurd result principle, the discretionary exemption at section 49(b), read in conjunction with the presumption at section 21(3)(b), applies to exempt the personal information at issue from disclosure.

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), 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]

- 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]

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 within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Neither the Ministry nor the appellant made any representations on the application of the absurd result principle despite being requested to do so in the Notice of Inquiry. As a result, the appellant has not provided me with any evidence to demonstrate that the information which remains at issue in this appeal is clearly within his knowledge. Additionally, in my view, it is not evident from the severed portions of the records that any of that information is clearly within the appellant's knowledge. In such circumstances, I find that the absurd result principle does not apply to the personal information at issue in these records.

As I have found that the absurd result principle does not apply and that the information remaining at issue is exempt from disclosure under section 49(b), it is not necessary for me to determine whether section 49(a), in conjunction with sections 14 or 15, applies in the circumstances of this appeal.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. 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.

Because section 49(b) is a discretionary exemption and I have found that the Ministry has properly applied it to exempt the portions of the record that remain at issue, I must review the Ministry's exercise of discretion in deciding to deny access to portions of those records.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant consideration
- it fails to take into account relevant consideration

In either case this office may send the matter back to the Ministry for an exercise of discretion based on proper consideration [Order MO-1573].

The Ministry submits:

> The Ministry 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 maintains that it has properly exercised its discretion

> at all times. The Ministry has given careful consideration to the appellant's right of access to personal information records held by the Ministry. The Ministry is aware that the appellant is an individual rather than an organization.
>
> …
>
> It should be noted that the appellant has been provided with access to a significant number of the responsive records relating to the OPP investigation in relation to certain correspondence received by the Ministry of Education. 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.
>
> Given the highly sensitive nature of the matters reflected in the records, the Ministry was satisfied that release of the records at issue would cause personal distress to identifiable individuals. The Ministry was also satisfied that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law.
>
> The Ministry in its exercise of discretion took into consideration the fact that confidentiality of law enforcement information in some instances is necessary for public safety and protection. Likewise, for similar reasons information about confidential consultations undertaken as part of a law enforcement investigation must at times be withheld. This circumstance adds a heightened level of sensitivity to the exempt information.
>
> …
>
> The Ministry carefully considered whether it would be possible to sever any additional non-exempt information from the records at issue. However, the Ministry concluded that additional severing was not feasible in this instance.
>
> The Ministry ultimately came to the conclusion in its exercise of discretion that the release of the information remaining at issue in the circumstances of the appellant's request was not appropriate.

In the circumstances of this appeal and given the nature and sensitivity of the information, I am satisfied that the Ministry has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold the information at issue. In particular, based on its representations and the severances made to the records, it appears that the Ministry properly considered the sensitive nature of the information at issue and balanced the appellant's right to access the information against the other individuals' right to their personal privacy.

Accordingly, I conclude that the Ministry's exercise of discretion was reasonable.

ORDER:

I uphold the Ministry's decision to deny access to the information at issue.

Original Signed by:
Catherine Corban
Adjudicator

December 16, 2008