



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2736

Appeal PA-050301-2

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 the Ontario Provincial Police (OPP) interview reports of three named individuals. The interviews resulted from a complaint filed by the appellant relating to the construction of his home.

Initially, the Ministry issued a decision refusing to confirm or deny the existence of the requested records under sections 14(3) and 21(5) of the *Act*. The requester (now the appellant) appealed that decision. During the mediation stage of this appeal, the Ministry provided the appellant with an “in the alternative” position on the records, should they exist. The Ministry identified sections 14(1)(d) (law enforcement) and 21(1) (invasion of privacy), with reference to the presumption in section 21(3)(b) as the exemptions it would rely upon as the basis for denying access to the records, should they exist. The three named individuals were contacted by this office as affected parties under section 28 of the *Act*. Affected party B did not wish to participate in this inquiry and asked not to be contacted further. As the parties could not resolve any other matters, the appeal was moved to the adjudication stage.

Subsequently, the Ministry issued a revised decision letter which confirmed the existence of the three OPP interview records requested by the appellant. The ministry denied access to them pursuant to section 49(b), with reference to the consideration in section 21(2)(f) and the presumption in section 21(3)(b) of *the Act*.

The appellant indicated that he wished to proceed with his appeal.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Ministry and affected parties A and C. I received representations from the Ministry, which agreed to share its representations with the appellant. The two affected parties did not respond to the Notice. I then issued a second Notice of Inquiry, in which I sought representations from the appellant. The appellant submitted very detailed representations in response. The appellant’s representations contained articles from newspapers, letters and a detailed explanation of the history surrounding the construction of his home.

RECORDS:

The records at issue are as follows:

1. the OPP witness statement of affected party A
2. the OPP interview report of affected party B
3. the OPP video statement of affected party C.

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.)].

I have carefully examined the three statements. I find that Record 2, which is the OPP interview report of affected party B, contains personal information about affected party B and two other individuals. This includes the personal opinion and views of affected party B as well as details of transactions that the individuals mentioned in the record were involved in. Record 2 does not contain any personal information of the appellant.

Record 3, the video statement of affected party C, contains the personal information of several people including affected party C, the appellant and others. Again, this record contains the personal opinions and views of affected party C, as well as details of the transactions that the individuals mentioned in the record were involved in.

Record 1 is the OPP witness statement of affected party A, who at the time of making the statement held an official position with the local township. Having reviewed the record, I am satisfied that affected party A was acting in an official, professional capacity when giving his statement to the police. During the interview that forms the basis of record 1, affected party A describes his professional duties and functions and his professional activities relating to the complaint filed by the appellant. As such, I am satisfied that record 1 does not contain his personal information. However, the record does contain the personal information of two individuals, including the appellant, such as the details of transactions that these individuals were involved in.

I therefore conclude that the three records contain information that qualifies as personal information under paragraphs (b) and (e) of the definition of that term in section 2(1).

Having found that each of the records contains personal information, I will now consider whether a disclosure of this personal information would constitute an unjustified invasion of personal privacy.

INVASION OF PRIVACY

Section 49(b)/21 exemptions

Because Record 2 does not contain any personal information relating to the appellant, I will only consider the application of the mandatory exemption in section 21 of the *Act* to it. Records 1 and 3 however, contain both information about the appellant and other individuals and must be considered under the discretionary exemption in section 49(b) of the *Act*.

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 Ministry takes the position that the records 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.

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 Ministry relies on the factor favouring privacy protection at section 21(2)(f)(highly sensitive personal information), and the presumption of an unjustified invasion found in section 21(3)(b) (information compiled as part of an investigation into a possible violation of law).

Sections 21(2)(f) and 21(3)(b) read:

(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,

(f) the personal information is highly sensitive;

(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;

Parties’ representations

With respect to the factor in section 21(2)(f), the Ministry submits:

The Ministry is of the view that the exempt information relating to various individuals about whom the appellant has made allegations may be viewed as highly sensitive personal information within the meaning of section 21(2)(f) of FIPPA. The Ministry is of the opinion that release of this information would cause these identifiable individuals excessive personal distress.

In support of its argument that the presumption in section 21(3)(b) applies to the three records at issue, the Ministry submits that:

The exempt OPP interview statements were compiled and are identifiable as relating to the investigation undertaken by the OPP as a result of the appellant's allegations that other individuals have engaged in unlawful activities. In the course of the investigation, the OPP interviewed witnesses. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. Specifically, it should be noted that the appellant's allegations included Criminal breach of trust, an offence under section 236 of the *Criminal Code (of Canada)*.

The appellant on the other hand submits that he himself has suffered personal distress and that the release of this personal information would assist others who are in a similar position to the one he finds himself. The appellant feels that he has been victimized and that the release of the records might provide some assistance to him.

Based on my careful examination of the records, I find that all three records are statements which were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, the presumption in section 21(3)(b) applies to certain personal information contained in all three records. I will deal with each record separately.

I have already concluded that record 1 does not contain the personal information of affected party A, who provided a statement to the police during the course of his official duties. However, it does contain the appellant's personal information as well as the personal information of another individual. I find that the disclosure of the personal information of the other individual would constitute an unjustified invasion of that individual's personal privacy and is exempt from disclosure pursuant to section 21(3)(b). As no other exemptions have been claimed for record 1, I will order that record 1 be disclosed to the appellant, subject to the severance of the other individual's personal information from the record.

I have found that record 3 contains the personal information of affected party C who provided the information, as well as other individuals, including the appellant. I conclude that disclosure of the record would constitute an unjustified invasion of affected party C's personal privacy pursuant to section 21(3)(b), subject to the discussion regarding the exercise of discretion that follows.

I have found that record 2 contains the personal information of affected party B and other individuals, but does not contain any of the appellant's personal information. I am therefore satisfied that disclosure of the record would constitute an unjustified invasion of personal privacy under section 21(3)(b) of the *Act*.

In addition, I am satisfied that none of the considerations listed in section 21(4) apply to the personal information in the records.

As a result, I find that the disclosure of the severed portions of record 1 and the entirety of record 3 would constitute an unjustified invasion of personal privacy pursuant to section 39(b), in conjunction with section 21(3)(b) of the *Act*, and I uphold the Ministry's decision not to disclose those records. Further, I find that the disclosure of record 2 would constitute an unjustified invasion of affected party B's privacy and similarly uphold the Ministry decision not to disclose.

PUBLIC INTEREST OVERRIDE

In his representations, the appellant raises the possible application of the "public interest override" provision in section 23, stating:

There is a compelling and tremendous public interest in how these rogue builders and building inspectors who grant building permits to these rogue builders (in effect) explain their actions, especially to the police: especially if the police are provided misinformation either willingly or unwittingly which lead to the wrong conclusions.

Section 23 provides that:

An exemption from disclosure of a record under sections 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the section 21 exemption. In support of his position, the appellant submitted several newspaper articles about home building issues in this province.

Based on my review of the contents of the records, and the parties' submissions, while I agree that a public interest may exist, I cannot find that the public interest in the disclosure of the personal information in the records is sufficiently compelling to outweigh the application of the section 21 and 49(b) exemptions. I note that the appellant's complaints about the construction of his home have been addressed by another tribunal under the Ontario New Home Warranties Plan *Act*. In my view, the publicly disseminated decision of that body would satisfy any public interest which may exist in the personal information at issue in this appeal. As a result, I find that section 23 has no application in the present appeal.

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 appellant has made several requests to the Ministry for information arising from problems he encountered in the building of his home. The Ministry states that it has made several other records available to the appellant which fell outside of his request but relate to the construction problems he encountered. In support of its exercise of discretion in dealing with the records at issue the Ministry's representations state:

In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant should the information at issue be disclosed. However, the Ministry was mindful that the records were created as a result of the allegations the appellant has brought forward concerning other individuals. Given the sensitive nature of the responsive records, the Ministry was satisfied that release of the requested witness statements would cause personal distress to these other individuals. The potential harm to these individuals should the exempt information be released was a factor that the Ministry considered in its exercise of discretion.

The appellant argues again that the public would benefit from the release of the records and that their release would assist other victims. He further questions the motives behind the Ministry's exercise of discretion not to disclose records 1 and 3 to him.

Following my review of the records and all of the circumstances surrounding this appeal and the Ministry's representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the records under section 49(b).

ORDER:

1. I order the Ministry to disclose those portions of record 1 that I found not exempt under the *Act* by **December 31, 2008**. For the sake of clarity, I have highlighted the portions of the record that should **not** be disclosed in the copy of the record enclosed with this Order.

2. I uphold the Ministry's decision to deny access to the remaining records at issue.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original signed by: _____
Brian Beamish
Assistant Commissioner

November 26, 2008