



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2731**

**Appeal PA-060109-1**

**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 following:

Noise complaint calls, emails or other correspondence or contact from [a named, identified individual]

Specifically...regarding noise complaints regarding myself ... I am seeking the information regarding any calls, emails and other correspondence for the years 2004, 2005 and 2006 to date from [the named individual] to the [the Ontario Provincial Police (the OPP)] concerning these noise complaints. ... I am also seeking the times and dates of the calls, the times and dates of the officers responding, all notes of communications with [the named individual] and the officers and also all communications to myself and/or received by the attending officers. The action taken or recommended and the parties involved....

Any and all communications of any type from [the named individual] regarding the handling of noise complaints to do with myself, and any responses to him. Any complaints against officers for their handling of complaints in a manner not satisfactory to [the named individual] or to their commanding officers.

Any other calls of complaints from any other residents [of a named street] complaining of noise from my residence. Time, date and name if possible and action taken.

The Ministry responded to the request by denying access to responsive records on the basis of the exemption found in section 49(b) (invasion of privacy) and section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(a), (b), (l) and 14(2)(a) (law enforcement), and section 19 (solicitor-client privilege).

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

Mediation did not resolve the issues, and this file was transferred to the inquiry stage of the appeal process. After this file was transferred to the inquiry stage of the process, the Ministry advised the appellant that, pursuant to the notification requirements in section 28 of the *Act*, it was notifying one or more affected parties, and giving them an opportunity to make representations concerning the disclosure of the requested information. The Ministry subsequently advised the appellant that the Ministry's initial access decision remained unchanged.

A Notice of Inquiry was sent to the Ministry and one of the affected parties, initially. The affected party responded to the Notice and consented to the disclosure of that party's personal information. The Ministry also provided representations in response to the Notice. In its representations, the Ministry identified that it was no longer relying on the exemptions in sections 14(1)(b), 14(2)(a) and 19 of the *Act*; however, the Ministry identified that it was now taking the position that the exemption in section 14(1)(e) (endanger life or safety) of the *Act* applied to the records.

After addressing issues regarding the sharing of the Ministry's representations, the previous adjudicator sent a revised Notice of Inquiry, along with a copy of the non-confidential portions of the Ministry's representations, to the appellant. The revised Notice of Inquiry no longer referred to the exemptions which were no longer at issue in this appeal, and also asked the appellant to address the issue of the possible application of the exemption in section 14(1)(e), as well as whether the Ministry ought to be able to raise that exemption at this stage in the process.

The appellant provided representations in response to the revised Notice of Inquiry. The appellant's representations were then shared with the Ministry, and the Ministry was invited to provide reply representations, which it did. The Ministry's reply representations were then provided to the appellant, who did not provide any further representations to this office.

This file was then transferred to me to complete the adjudication process.

## **NOTE**

Before the adjudicator previously assigned to this appeal commenced the Inquiry process, the appellant made a subsequent request to the Ministry under the *Act* for additional records. The second request sought access to records relating to an identified investigation conducted by five Ontario Provincial Police (OPP) officers on certain dates. The request also made reference to specific questions relating to the investigation.

The Ministry denied access to the responsive records in the second request. The appellant appealed the Ministry's decision and it became the subject of appeal PA06-296. Mediation did not resolve the issues in appeal PA06-296 and it was transferred to the Adjudication stage of the process. Appeal PA06-296 was assigned to the adjudicator previously assigned to the current appeal.

After sending the parties Notices of Inquiry, and receiving representations in that file, the previous adjudicator decided to combine the two appeals. However, after reviewing the issues and records in both files, I have decided to address the issues in separate orders. As a result, this order will only address the issues in Appeal PA-060109-1. I will address the issues in Appeal PA06-296 in a separate order.

## **Preliminary matters**

### ***Scope of the request and responsive records***

As a preliminary matter, after reviewing the records in detail, I note that some of the records that have been identified as responsive to the appellant's request do not pertain to the appellant. I find the request to be unclear. One reading of it may lead to a finding that any and all records pertaining to complaints and/or communications by the named individual or anyone else are to be included. Another reading of it, however, appears to narrow the records requested to only those that pertain to complaints made against the appellant by the named individual or anyone

else in the identified area. In the absence of clarification the Ministry has given the request a broad interpretation. It has become apparent, on a reading of the representations submitted by the parties, that the appellant is clearly seeking only those records that pertain to him. Nevertheless, as other records have been identified and addressed throughout the appeals process, I will deal with them all in this order.

## **RECORDS:**

There are 215 pages of records at issue in this appeal, consisting of general and supplementary occurrence reports, occurrence summaries, various officer's handwritten notes, e-mail messages, correspondence, meeting notes and agendas. I note that there is a large amount of duplicate information contained in the 215 pages, primarily as a result of multiple copies of e-mail chains being included.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

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) 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 where 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]. However, 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].

In addition, 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.)].

The Ministry's representations simply state that the records at issue contain the types of personal information set out in the definition section (above) "with respect to the appellant and other identifiable individuals." The appellant's representations focus on the reasons why he believes he ought to have access to the records, and these reasons suggest that he is of the view that the records contain his personal information.

I have carefully reviewed the records at issue in this appeal, as well as the specific wording of the request (set out above), to determine whose information is contained in the records.

As I noted above, some of the records do not pertain to the appellant, but were included as responsive records nevertheless. On my review of the records at issue, I find that Records 67-83, 100, 148, 197 and 215 do not contain the appellant's personal information.

I am satisfied that the remaining records contain the personal information of the appellant, as they relate to complaints about him or refer to him in some way. Furthermore, on my review of

the records, I find that all of the records at issue contain the personal information of other identifiable individuals, including their names, complaints made by them or about them, statements made to the Police, and correspondence. I find further that the appellant's personal information is so intertwined with that of the other individuals identified in the records that it is not severable.

## **INVASION OF PRIVACY**

As I indicated above, I find that some of the records contain only the personal information of individuals other than the appellant. For these records, I will determine whether the mandatory exemption at section 21(1) applies to exempt them from disclosure. For the remaining records that do contain the appellant's personal information, my assessment of this issue will be conducted under the discretionary exemption at 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 disclosure that limit this general right. In particular, section 49(b) states:

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;

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

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

Where, however, a requester seeks personal information of another individual only, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether the personal information is exempt under section 21(1), or whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b).

Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 21(1) or 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the “compelling public interest” override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The Ministry relies on the “presumed unjustified invasion of personal privacy” at section 21(3)(b) of the *Act* to withhold the records at issue from disclosure. This section 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;

The Ministry submits:

... the personal information records at issue consist of highly sensitive personal information that was compiled and is identifiable as part of OPP investigations 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 *Police Services Act* 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 involvement with respect to a longstanding and escalating neighbour dispute primarily involving the appellant

and [one] affected party. The records contain detailed information in relation to the OPP investigation of alleged unlawful activities primarily involving the appellant. The records contain information relating to the alleged contravention of [municipal] noise by-law. As noted previously, by-law charge was dismissed at court ....

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 addresses the possible application of section 21(3)(b) by asking that this office review the content of the records that the Ministry claims fall within the exemption. The appellant then states that, to his knowledge, all investigations are closed, and that one trial took place and another will be occurring. The appellant proceeds to argue that the disclosure is necessary to prosecute the violation, and that “the results of the investigation are required for a fair trial and a proper defence.” The appellant goes on to identify that the records are necessary to assist with his defence, and would have been of assistance in the previous trial.

Both the Ministry and the appellant also refer to a number of the factors under section 21(2) to support their respective positions regarding the disclosure of the records.

### **Finding**

The records at issue all pertain to the involvement of the OPP in various matters involving the appellant and other individuals as a result of complaints made under the municipal by-law. Previous orders of this office have established that personal information relating to investigations of alleged violations of municipal by-laws fall within the scope of the presumption provided by section 14(3)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent to section 21(3)(b) of the *Act* (see, for example: Orders M-382 and MO-1598). Based on the representations of the Ministry and my review of the records, I am satisfied that the records at issue were compiled and are identifiable as part of various investigations conducted by the OPP into possible violations of law. Moreover, previous orders have established that, even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

Accordingly, disclosing the records is presumed to constitute an unjustified invasion of the privacy of the identifiable individuals referred to in those records under section 21(3)(b). As set out above, a presumption cannot be rebutted by the factors in section 21(2), and in my view they are not rebutted by either the exceptions in section 21(4) or the “compelling public interest” override at section 23, which was not raised in this case.



Therefore, I find that disclosing the information in Records 67-83, 100, 148, 197 and 215 would constitute an unjustified invasion of personal privacy, and that these records are exempt under section 21(1) of the *Act*.

Similarly, I find that the remaining information qualifies for exemption under section 49(b). I will consider whether the absurd result principle applies to the information that qualifies for exemption under section 49(b). I will also examine the exercise of discretion by the Ministry, in deciding to withhold this information.

### **Absurd result**

In this appeal, many of the records relate to incidents in which the appellant, or the affected party who consented to disclosure of personal information, was present or involved in some way. Previous orders have determined that, where a requester originally supplied the information, or a requester is otherwise aware of it, the information may be found not exempt under section 49(b) and/or 21, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO- 1755]

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

With respect to whether or not disclosure is consistent with the purpose of the section 21(3)(b) exemption, former Senior Adjudicator Goodis reviewed this issue in Order PO-2285. He stated:

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

Senior Adjudicator Goodis went on to refer to the following excerpt from Order MO-1378:

The appellant claims that [certain identified photographs] should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.

In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:

Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.

In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

I adopt the approach taken to the absurd result principle set out above, as well as the approach taken by the Senior Adjudicator in Orders MO-1378 and PO-2285.

In this appeal, the Ministry takes the position that the absurd result principle ought not to apply, due to the “particular and sensitive circumstances of the appellant’s request.”

I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, the nature of the relationship between the appellant and one of the affected parties, information relating to concerns expressed in support of other exemptions by Police, the amount of information clearly within the knowledge of the appellant, and the nature of the allegations brought against the appellant.

I find that, in these circumstances, there is a particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act*, as identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

## **EXERCISE OF DISCRETION**

The exemption in section 49(b) is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry’s decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

The Ministry made submissions in support of its decision to exercise its discretion not to disclose to the appellant the information which is exempt under section 49(b). The Ministry's representations were shared with the appellant, who did not respond to them.

In considering all of the circumstances surrounding this appeal, as well as the representations of the Ministry, I am satisfied that the Ministry has taken the appropriate factors into consideration in exercising its discretion, and has not erred in deciding not to disclose the records under sections 49(b) of the *Act*.

Having found that the records qualify for exemption under section 49(b) of the *Act*, it is not necessary for me to also consider the possible application of sections 49(a) and 14(1) to them.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_  
October 31, 2008