



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2777

Appeal PA07-466

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 access to information relating to a specific incident identified by a police report number in addition to any information relating to the incident.

The request indicated that the requester was fired from his employment and was subsequently accused by his former employer of making threats of physical violence. The request was filed by the requester's lawyer who states "I am specifically requesting confirmation or denial that any allegation was made against my client, ...and the precise nature of any such allegation against my client, if any such allegation was made."

The requester's lawyer also wrote to the requester's former employer seeking their consent to the release of any information they provided to the police. The requester's former employer did not consent to the release of any information.

Upon its receipt of the request, the Ministry located responsive records and granted the requester partial access. The Ministry denied the requester access to the remaining information under sections 49(a) and/or 14(1)(l) and 14(2)(a) of the *Act* [law enforcement]. The Ministry also claimed that disclosure of the remaining portions of the records would constitute an unjustified invasion of privacy under sections 49(b) and/or 21(1) of the *Act* [personal privacy]. Sections 49(a) and (b) recognize the special nature of requests for one's own personal information and the desire of the legislature to give institutions the discretion to grant requesters access to their own personal information. The Ministry also identified some portions of the records it claimed was non-responsive to the request.

In response, the requester wrote to the Ministry and asked it to review its decision. The Ministry's decision remained unchanged and the requester (now the appellant) subsequently appealed the Ministry's decision to this office. The law firm representing the appellant set out the appellant's position in a letter of appeal and provided a copy of its letter to the Ministry asking it to review its decision. The appellant's lawyer also provided this office with a copy of the requester's former employer's letter advising that they were not prepared to provide their consent.

During mediation, the appellant's lawyer advised that the appellant was not pursuing access to the non-responsive portions of the records or the police codes withheld under section 14(1)(l) of the *Act*. The remaining issues were not settled and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*.

I decided to commence my inquiry by seeking the representations of the Ministry and an individual (affected party) not already contacted by the appellant. I did not seek the representations of the appellant's former employer. The Ministry and the affected party submitted representations in response. The non-confidential portions of the Ministry's representations were provided to the appellant. The Ministry's representations indicate that the Ministry no longer relies on sections 49(a) and/or 14(2)(a) to deny the appellant access to the records at issue. Accordingly, these issues were removed from the scope of this appeal.

Due to confidentiality concerns, the affected party's representations were not shared with the appellant. However, the appellant was advised that the affected party's representations support the Ministry's position that disclosure of the information at issue would constitute an unjustified invasion of privacy.

The appellant was given an opportunity to provide representations in response to the Ministry's and affected party's position. In response, the appellant's lawyer wrote to this office and asked that the correspondence he previously sent to this office be considered as the appellant's submission.

RECORDS:

The records at issue comprise of the following documents:

Record	General Description of Record	Access	Exemptions Claimed
1	Occurrence summary	Partial disclosure	Sections 21(1) and/or 49(b)
2	General occurrence report	Withheld	Sections 21(1) and/or 49(b)
3	Occurrence summary	Partial disclosure	Sections 21(1) and/or 49(b)
4	General Occurrence report	Withheld	Sections 21(1) and/or 49(b)

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether sections 21(1) and/or 49(b) of the *Act* apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

The Ministry submits that the records contain the "personal information" of the appellant and other identifiable individuals as described in the definition of that term in section 2(1) of the *Act*. The appellant does not dispute that the records contain the "personal information" of other identifiable individuals. However, the appellant submits that the information at issue relates to information his employer provided the police which raises the issue as to whether the information at issue relates to the employer in a professional or personal capacity.

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. The request relating to this appeal was filed after April 1, 2007. Section 2(3) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”.

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.)].

Do the records contain the personal information relating to other identifiable individuals?

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]. Following the analysis set forth in Order PO-2225 the first question I must ask is: “*in what context do the names of the individuals appear*”? The second question I must ask is: “*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*”?

With respect to the first question, I am not satisfied that the information contained in the records relate in a professional or business context only. In my view, the information contained in the records relate primarily to the police’s investigation of complaints received by identifiable individuals about the appellant. Having regard to the above, I am not satisfied that the information at issue relates in a professional or business context only. Even if I was, I would find that disclosure of the information at issue would reveal something that is inherently personal in nature about the other individuals identified in the records thus answering the second question in the negative.

In making my decision, I carefully reviewed the records and find that they contain the personal information relating to the age and sex of other identifiable individuals as defined in paragraph (a) of the definition of that term in section 2(1). Also identified in the records is information relating to the employment history of other identifiable individuals within the meaning of paragraph (b) of the definition of that term in section 2(1) along with their residential address and telephone numbers as defined in paragraph (d) of the definition of that term in section 2(1). Finally, the records contain these individual’s views or opinions about the appellant along with their names which appears with other personal information relating to them as defined in paragraphs (g) and (h) of the definition of that term in section 2(1).

Do the records contain the personal information of the appellant?

I am also satisfied that the records contain the personal information of the appellant. In particular, the records contain information relating to his race, national or ethnic origin or sex as defined in paragraph (a) of the definition of that term in section 2(1). The records also contain

information relating to his employment history along with his name as defined in paragraphs (g) and (h) of the definition of that term in section 2(1).

Summary of Findings

I find that the withheld information constitutes the “personal information of the appellant and other identifiable individuals. Accordingly, I will review whether disclosure of this information qualifies for exemption under section 49(b).

PERSONAL PRIVACY

General Principles

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.

Under section 49(b), where a record contains 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. Section 49(b) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352]. 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 is met.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). The Ministry submits that the presumption at section 21(3)(b) applies in the circumstances of this appeal. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The appellant has not claimed that any of the exclusions in paragraph 21(4) apply or that the public interest override at section 23 applies in the circumstances of this appeal. In my view, sections 21(4) and 23 have no application to this appeal. I have also carefully reviewed the

appellant's submission and find that there is no evidence that the appellant originally supplied the information at issue or is otherwise aware of it. As a result, the principle of absurd result does not apply in the circumstances of this appeal as I am not satisfied that the information at issue is clearly within the appellant's knowledge [Order MO-1323].

Accordingly, if I find that the presumption at section 21(3)(b) applies to the circumstances of this appeal, the information at issue qualifies for exemption under section 49(b), subject to the Ministry's proper exercise of discretion.

21(3)(b): investigation into violation of law

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]. Section 21(3)(b) states:

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's representations state:

The records at issue document the OPP's involvement with respect to incidents involving the appellant, the affected party and another individual. The nature of the incidents have been categorized by the OPP in the records at issue as "Threats" and "prevent breach of peace". The records contain information in relation to the OPP investigation of alleged unlawful activities. The focus of the OPP investigation was to determine whether sufficient evidence existed to lay charges against any individual.

One incident was ultimately determined by the OPP to be "unfounded". The second incident was ultimately determined by the OPP to be "non-criminal".

The appellant does not dispute that the records relate to and formed part of an investigation into a possible violation of law. Rather, the appeal letter states:

[The appellant] denies the allegation of making threats. To the extent that a report to police was made naming [the appellant] as making a threatening phone call, [the appellant] states that the report is false. It was and is our suspicion that the filing of such a report was malicious, and possibly even pre-meditated.

In order to confirm, deny or otherwise modify the above noted suspicion, a request was made for the release of the information contained in the police reports.

Having regard to the representations of the parties and the records at issue, I find that the records were compiled and are identifiable as part of a police investigation into a possible violation of law and that the presumption at section 21(3)(b) applies to all of the personal information contained in the records. As a result, disclosure of this information is presumed to be an unjustified invasion of personal privacy under section 49(b), subject the Ministry's proper exercise of discretion.

EXERCISE OF DISCRETION

General principles

The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In support of its position that it properly exercised its discretion, the Ministry advises it took into account that:

- the appellant is seeking his own personal information relating to his termination from a former workplace;
- the appellant is an individual as opposed to an organization;
- the information at issue relates to an allegation reported to law enforcement authorities;
- the Ministry's historic practice when responding to personal information requests for police records is to release as much information as possible under the circumstances; and

- the Ministry's position is that the release of further information would cause personal distress to identifiable individuals and discourage members of the public from reporting potential violations of law to the police.

The Ministry also indicated that it considered the purposes of the *Act*, including the principles that

- information should be available to the public
- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected

The appellant's submission did not specifically address whether the Ministry properly exercised its discretion. However, throughout his representations, the appellant takes the position that he has a right to know what was said about him in the records and that if the information is false, he has a right to correct the records.

I have carefully reviewed the representations of the parties and am satisfied that the Ministry has properly taken into account only relevant factors, and not irrelevant ones, in exercising its discretion to withhold the records I found exempt under section 49(b). In particular, it appears that the Ministry took into consideration that the records contain the personal information of identifiable individuals other than the appellant and that one of the purposes of the *Act* is that the privacy of individuals should be protected. I also took into consideration that the affected parties did not provide their consent to the release of their personal information and that the information at issue was provided to law enforcement authorities in the course of an investigation into a potential violation of law. Finally, I considered that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. However, in my view, the personal nature of the information and the sensitivity of it outweigh this principle taking into consideration the circumstances of this appeal, including the Ministry's advice that the police determined that the incidents were "unfounded" or "non-criminal".

Having regard to the above, I conclude that the Ministry properly exercised its discretion in deciding to withhold the personal information at issue from the appellant.

ORDER:

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

Original signed by: _____
Jennifer James
Adjudicator

_____ April 21, 2009