



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

ORDER PO-2922

Appeal PA10-78

Ministry of Community Safety and Correctional Services



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7538
<http://www.ipc.on.ca>

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 all reports in the custody and control of the Centre for Forensic Sciences that were generated by an identified doctor in relation to a specific criminal trial in which the requester was an accused person.

The ministry identified responsive records and granted partial access to them. The ministry relied on the discretionary exemption at section 49(b) (personal privacy) with particular reference to the factor at section 21(2)(f) (highly sensitive) and the presumption at section 21(3)(b) (investigation into a possible violation of law) of the *Act*, to deny access to the portion it withheld.

The requester (now the appellant) appealed the decision.

At mediation the appellant raised the possible application of the factor at section 21(2)(d) (relevant to a fair determination of rights) of the *Act*.

Mediation did not resolve the matter and it was moved to the adjudication phase of the appeals process where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. The ministry provided representations in response. I then sent a Notice of Inquiry, along with the complete representations of the ministry, to the appellant, inviting his representations in response. The appellant also provided representations.

RECORDS:

At issue in this appeal are the withheld portions of a Report of the Centre of Forensic Sciences and a Supplemental Report of the Centre of Forensic Sciences.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain “personal information” in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines “personal information”, 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 content 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.

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 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].

The ministry submits that withheld information in the records qualifies as the personal information of an individual other than the appellant under paragraphs 2(1)(b), (d) and (h) of the *Act*.

I find that the withheld portions of the records at issue contain information that qualifies as the personal information of an individual other than the appellant within the meaning of section 2(1) of the *Act*. The records also contain the personal information of the appellant.

PERSONAL PRIVACY

If a record contains the personal information of the requester along with the personal information of another individual, section 49(b) of the *Act* applies.

Section 49(b) of the *Act* reads:

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.

Despite a finding that information falls within the scope of section 49(b) the ministry may exercise its discretion to disclose the information. This involves a weighing of the appellant's rights of access to his own personal information against the other individual's right to protection of their privacy.

Sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. If the personal information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). Section 21(2) also 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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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 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].

The ministry's representations address the presumption at section 21(3)(b) and the factor at section 21(2)(f). The appellant's representations focus on the application of the factor at section 21(2)(d).

Section 21(3)(b)

Section 21(3)(b) reads as follows:

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 continue the investigation.

The ministry submits that the withheld information was compiled and is identifiable as part of an investigation into whether an offence under the *Criminal Code* was committed.

The appellant acknowledges that the records were generated as a result of an investigation into whether an offence under the *Criminal Code* was committed. He also states that an evidentiary rule at the time of his criminal trial “barred [the identified doctor] from disclosing this evidence”. He submits that the records are necessary for a contemplated proceeding.

Analysis and Findings

I find that section 21(3)(b) applies in the circumstances of this appeal. I have reviewed the portions of the records remaining at issue and in my opinion, the personal information severed from the records was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. The presumed unjustified invasion of personal privacy at section 21(3)(b) therefore applies to this information. Section 21(4) does not apply to this information. The appellant did not expressly raise the possible application of the public interest override at section 23 of the *Act*, nor in my view did the appellant raise sufficient grounds to merit its application. Accordingly, I conclude that the disclosure of the personal information relating to another identifiable individual contained in the severances remaining at issue would constitute an unjustified invasion of personal privacy.

In conclusion, I find that because the withheld portions of the records are subject to the section 21(3)(b) presumption, this information qualifies for exemption under section 49(b).

As I have found that the section 21(3)(b) presumptions applies, it is not necessary for me to address whether the factors at section 21(2)(d) and (f) might apply [see the discussion on *John Doe*, above].

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(b) is a discretionary exemption, I must also review the ministry’s exercise of discretion in deciding to deny access to the withheld information. 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.

I may find that the ministry erred in exercising their discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

In these cases, I may send the matter back to the ministry for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the ministry to withhold the severed information was appropriate, given the circumstances and nature of the information.

SEVERANCES

The appellant suggests that, for the reasons set out in his representations, the withheld information can be separated between that of the appellant and that of another identifiable individual.

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information, including the information of individuals who consented to disclosure, that what is disclosed is substantially unintelligible. The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)]. In my view there is no way to separate the information along the lines suggested by the appellant as the information is intermingled to such an extent that it cannot be disclosed without disclosing the information that I have found to be exempt.

ORDER:

I uphold the decision of the ministry to withhold the severed portions of the records at issue in this appeal and dismiss the appeal.

Original Signed By: _____
Steven Faughnan
Adjudicator

October 19, 2010