



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

ORDER PO-2881

Appeal PA09-234

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 all information relating to a particular incident which occurred on an identified date at a stated address.

The Ministry issued a decision letter granting partial access to the responsive records. Access was denied to portions of the records pursuant to section 49(b) (invasion of privacy) as well as section 49(a) (discretion to refuse requester's own information), read in conjunction with sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement) of the *Act*. The Ministry also withheld portions of the records on the basis that these portions were not responsive to the request.

The requester, now the appellant, appealed the decision.

During mediation, the appellant identified that the portions of the records which were not disclosed on the basis of the exemption at section 14(1)(l), and the portions of the records identified as non-responsive, were no longer at issue in this appeal.

Mediation did not resolve the remaining issues, and this file was transferred to the adjudication stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the Ministry, initially, and the Ministry provided representations in response. In the Ministry's representations, it advised that it was withdrawing its claim that the exemption at section 49(a), read in conjunction with section 14(2) of the *Act*, applies to the records. As a result, these sections were removed from the scope of the appeal. A modified Notice of Inquiry, along with a complete copy of the Ministry's representations, was then sent to the appellant, and the appellant also provided representations in response.

The file was subsequently transferred to me to complete the inquiry process.

RECORDS:

The three records at issue in this appeal consist of the withheld portions of a 1-page General Occurrence Report, the withheld portions of a 1-page Occurrence Summary, and the responsive portions of one page of a police officer's notes.

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 refer to paragraphs (a), (b), (d), (e), (g) and (h) of the definition of "personal information" set out above, and state that the records at issue contain these types of personal information relating to the appellant and other identifiable individuals. The appellant does not directly address the issue of whether the records contain personal information.

Analysis and findings

I must determine whether the records at issue contain "personal information" as that term is defined in section 2(1) of the *Act* and, if so, to whom it relates.

The records at issue set out the information gathered by the Police for the purpose of investigating a complaint involving the appellant and others. The Police disclosed portions of two pages of the records, and withheld the remaining portions of the records.

I have carefully reviewed the records at issue.

To begin with, I am satisfied that the records contain the personal information of the appellant. The records relate to a complaint made involving the appellant and, using the record-by-record analysis of the records at issue (see Order M-352), these records contain the personal information of the appellant. This information falls within paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*, because they include the appellant's name, address and telephone number as well as the appellant's name along with other personal information about her.

Furthermore, I am satisfied that the withheld portions of the records contain the personal information of identifiable individuals other than the appellant. This information includes the marital or family status of some individuals (paragraph (a)), their names, addresses and telephone numbers (paragraph (d)), and their names where they appear with other personal information relating to them (paragraph (h)).

DISCRETION TO REFUSE ACCESS TO APPELLANT'S OWN PERSONAL INFORMATION/INVASION OF 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 exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the Ministry must look at the information and weigh the appellant's right of access to her own personal information against the other individuals' right to the protection of their privacy. If the Ministry determines that release of the information would constitute an unjustified invasion of the personal privacy of others, then section 49(b) gives the Ministry the discretion to deny access to the appellant's personal information.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 21(2) provides some criteria for the Ministry 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. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) and that, 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).

Representations

The Ministry relies on section 49(b) in support of its decision to deny access to the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) of the *Act*. These sections read:

49. A head may refuse to disclose to the individual to whom the information relates personal information,

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

21 (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;

With respect to the section 21(3)(b) presumption, the Ministry submits:

The records at issue document the [Ontario Provincial Police (the OPP's)] involvement with respect to a matter brought to the attention of the OPP. ... the incident in question was categorized by the OPP as a "Theft" incident

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 Ministry is of the opinion that the personal information records at issue consist of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The records contain details of the steps undertaken by the OPP to investigate the alleged theft incident. Theft is an offence under the *Criminal Code of Canada*.

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 Ministry also submits that neither section 21(4) nor the public interest override in section 23 apply in the circumstances of this appeal.

The appellant's representations are brief, and consist of little more than a recitation of the specific information she is interested in obtaining, including who made the complaint and how it was made, details about the information contained in the withheld records, and questions about the records.

Analysis and Finding

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].

With respect to the application of the presumption in section 21(3)(b) to the records at issue in this appeal, on my review of the records and the representations, I am satisfied that the information in the records was compiled by the OPP in the course of their investigation of incidents involving the appellant and others. The information at issue consists of statements made to the Police, or information contained in an occurrence report and a police officer's notebook, compiled by the Police in the process of conducting their investigation into possible criminal wrongdoing. In my view, the information in these records was compiled as part of an investigation conducted by the OPP into a possible violation of law, and fits within the presumption in section 21(3)(b). Accordingly, I find that the disclosure of the personal information contained in the records is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 21(3)(b) of the *Act* and, as a result, it is exempt from disclosure under section 49(b).

In addition, I am satisfied that the Ministry has properly severed the records. The Ministry provided the appellant with information relating exclusively to her, but severed out personal information relating to other identified individuals. Accordingly, I am satisfied that the records and portions of records remaining at issue qualify for exemption under section 49(b).

The section 49(b) exemption 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). I will, therefore, review the Ministry's exercise of discretion.

Exercise of discretion

When a discretionary exemption such as section 49(b) has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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)].

In the Ministry's representations supporting its position that it properly exercised its discretion, the Ministry states:

The Ministry is cognizant of the appellant's right of access to personal information records held by the Ministry. The Ministry took into account that the appellant is an individual rather than an organization. The Ministry also considered the relationship between the appellant and other individuals referenced in the police records at issue.

The Ministry has exercised its discretion to release key parts of the records at issue to the appellant, including the police occurrence number, the date of the incident, the nature of the incident and the involvement of the appellant in relation to the matter.

The Ministry is mindful of the fact that the responsive records in this particular instance concern a highly sensitive matter....

The Ministry considered whether release of the information remaining at issue could generally discourage members of the public from reporting potential violations of law to government agencies and undermine public confidence in the ability of the OPP to provide policing services.

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.

The appellant did not address this issue in her representations.

I have carefully reviewed the records remaining at issue in this appeal. I agree with the Ministry that it released key parts of the records including the date of the incident, the nature of the incident and the involvement of the appellant in relation to the matter. On my review of the information remaining at issue in this appeal, I find no reason to disturb the manner in which the Ministry exercised its discretion to deny the appellant access to this information. In my view, the Ministry has carefully severed the records, and provided the appellant with as much information as possible without invading the privacy of other individuals.

Based on all of the circumstances, I am satisfied that the Ministry did not err in exercising its discretion not to disclose to the appellant the information remaining at issue, and I uphold the Ministry's decision.

ORDER:

I uphold the decision of the Ministry, and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

April 15, 2010