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

# ORDER PO-2983

## Appeal PA10-147

## Ministry of Community Safety and Correctional Services

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## NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for access to the video statements of his daughter and son taken by the Kawartha Lakes OPP on a specified date.

The ministry denied access to the records based on the discretionary exemption at section 49(b) (personal privacy), with reference to the consideration at section 21(2)(f) and the presumption in section 21(3)(b) of the *Act*.

During mediation, the appellant advised the mediator that he is the custodial parent of his son and daughter and that he would provide written documentation confirming this status. As a result, section 66(c) of the *Act* which enables custodial parents to exercise certain access rights on behalf of their minor children, has been raised. The appellant also advised the mediator that he brought his son and daughter to the police station to be interviewed and was in the room when his son, while his son was being interviewed.

During the inquiry into this appeal, I sought representations from the ministry and the appellant. The ministry's representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* number 7.

## RECORDS:

The records at issue are the video statements provided by the appellant's children and are contained on a single DVD.

## DISCUSSION:

### PERSON LESS THAN SIXTEEN YEARS OF AGE

Section 66(c) states:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

Under this section, a requester can exercise another individual's right of access under the *Act* if he/she can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

If the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the individual as the individual would have. The request for access to the personal information of the individual will be treated as though the request came from the individual him or herself [Order MO-1535].

The ministry concedes that the children are less than sixteen years of age but contests whether the appellant has lawful custody of the children, as the appellant has not provided evidence of this. The appellant did not provide representations and efforts by this office to contact him were unsuccessful. Based on the fact that the appellant has not provided evidence to conclusively establish that he is the custodial parent of his son and daughter, I am unable to find that section 66(c) applies. Accordingly, the appellant cannot exercise his children's access rights under the *Act*.

**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 if 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, 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 submits that the record contains the personal information of the appellant, his children and other identifiable individuals within the meaning of paragraphs (a) through (c), as well as paragraphs (g) and (h) of the definition of that term in section 2(1) of the *Act*.

The ministry notes that the video statements were provided by the children in relation to an alleged incident that occurred between their parents. The alleged incident resulted in a charge being laid, which was subsequently withdrawn.

I have reviewed the statements of the two children and find that they both contain recorded information about the appellant, each of his two children and other identifiable individuals within the meaning of the definition of personal information set out in section 2(1).

The information relating to the appellant consists of statements made about him by his children and therefore qualifies as his personal information within the meaning of paragraph (g) of the definition of that term in section 2(1).

As the records contain the personal information of the appellant, I will determine whether the personal privacy exemption in section 49(b) of the *Act* applies to this personal information.

**PERSONAL 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 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.

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. See below for a more detailed discussion of and questions regarding the exercise of discretion issue.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If the 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 from disclosure under section 49(b). I find that none of these paragraphs apply in the circumstances of this appeal.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. 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 49(b).

The ministry submits that the factor in section 21(2)(f) and the presumption in 21(3)(b) applies to the personal information in the children's video statements. These sections of the *Act* state:

> (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;

The ministry submits that the statements consist of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. It states:

> 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 also cites Order PO-2868 as particularly relevant to the current appeal, as both appeals deal with requests for the video-taped statements of children by a parent. In that decision, Adjudicator Colin Battacharjee found that:

> … Even if the information in the video statements was compiled because the appellant asked that his two children be interviewed, the OPP clearly conducted these interviews as part of a law enforcement investigation. The personal information in the video statements was compiled by the OPP and is identifiable as part of its investigation into possible violations of the *Criminal Code*.
>
> It does not appear that any criminal charges were laid as a result of the OPP's investigation. However, 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 [Orders P-242 and MO-2235]. I find, therefore, that the section 21(3)(b) presumption applies to the personal information in the children's video statements.

I agree with the ministry's submission that the reasoning in Order PO-2868 is relevant in this appeal.

The appellant in the current appeal also brought his children to an OPP detachment to be interviewed with respect to an allegation of criminal wrongdoing. Interviews were conducted and a charge was laid. Based on my review of the record, I find that it contains personal information which was compiled and is identifiable as part of an investigation into a possible violation of the law, namely the *Criminal Code*. Accordingly, I find that the presumption in section 21(3)(b) applies to the personal information in the records.

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 21(3), it 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]. I have considered the exceptions in section 21(4) of the *Act* and find that the personal information in the children's video statements does not fall within the ambit of this section. Moreover, the appellant has not claimed the public interest override in section 23.

I find that disclosure of the personal information in the children's video statements is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b). Once established, the section 21(3)(b) presumption cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. As a result, it is not necessary to consider the ministry's submission that the factor in section 21(2)(f) weighs in favour of withholding the video statements.

As noted above, 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 49(b).

Consequently, I find that the personal information in the children's video statements qualifies for exemption under section 49(b) of the *Act*, subject to my review of the manner in which the ministry exercised its discretion in applying this exemption.

**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.

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 exercising its discretion the ministry considered the appellant's right of access to his own personal information in the records held by it. Further, the ministry took into account the following:

- The appellant is an individual and the records contain his personal information and that of other individuals.
- The relationship between the appellant, his children and the other individuals mentioned during the interview.
- The law enforcement investigation arose out of a sensitive family situation.

The ministry also considered whether it would be possible to either release the whole record or sever the record in order to provide disclosure to the appellant. However, the ministry determined in this instance that it would exercise its discretion to not disclose the record.

I have carefully reviewed the records and the ministry's representations. I am particularly mindful of the ministry's concern about the unusual circumstances surrounding the interviews. Nevertheless, I also find it particularly relevant that the appellant was present in the room for his son's interview. However, the ministry submits that it considered this fact when it examined the possible application of the absurd result principle. Based on its submissions and all of the circumstances present in this appeal, I find that the ministry exercised its discretion based on proper considerations. I am not persuaded that it failed to take relevant factors into account or

that it considered irrelevant factors in withholding the personal information in the children's video statements under the discretionary exemption in section 49(b). I find, therefore, that its exercise of discretion was proper.

## ORDER:

I uphold the ministry's decision to withhold the records.

Original signed by: July 20, 2011
Stephanie Haly
Adjudicator