

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3093

Appeal PA10-244

Ministry of Community Safety and Correctional Services

June 19, 2012

Summary: The appellant filed a request for records relating to an incident involving himself. The ministry denied the appellant access to the responsive records claiming that disclosure would constitute an unjustified invasion of personal privacy under section 49(b). The ministry also claims that the records are exempt under section 49(a), in conjunction with 14(1)(e) and/or 14(1)(l) (law enforcement). This order finds that the records are exempt under section 49(b) and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s.2(1) definition of "personal information", 21(1), 21(2)(f), 21(3)(b) and 49(b).

OVERVIEW:

[1] The appellant filed 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:

All of the information and transcripts and documentation pertaining to [a specified incident number] through the Nipigon Detachment of the ... Ontario Provincial Police... including the following:

1. Transcripts of the 911 call made from a [named individual employed at a municipal office] to the OPP made [during a specified time and date]; and
2. Results of toxicology report (Breathalyzer) taken [by myself] on or about [specified date]; and
3. Any and all officer's notes, occurrence report and synopsis and any witness statements taken with any [town] staff as well as [mine own].

[2] The ministry issued a decision granting partial access to the responsive police officers' notes and reports, but denied access to the 911 call (on a CD) in its entirety. The ministry claims that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b)(refusal to disclose one's own personal information), in conjunction with the presumption at section 21(3)(b) and factor weighing against disclosure at section 21(2)(f).

[3] The ministry also claims that the withheld information qualifies for exemption under section 49(a)(refusal to disclose one's own personal information) in conjunction with sections 14(1)(l)(hamper the control of crime) and 14(2)(a) (law enforcement report) in the *Act*. Finally, the ministry advises that some of the information in the records is not responsive and that no records relating to an alcohol screening test exist.

[4] The appellant appealed the ministry's decision to this office and a mediator explored settlement with the parties. During mediation, the appellant questioned the reasonableness of the ministry's search for records related to the alcohol screening test administered by a police officer on the day of the incident in question.

[5] The ministry, in turn, consulted with the police officer in question who agreed to prepare a report that would provide the results of this test. The ministry then issued a subsequent decision to the appellant granting him partial access to this report, claiming that the withheld information qualifies for exemption under the *Act*. In addition, the ministry raised the possible application of an additional discretionary exemption to the 911 call record (section 49(a)/14(1)(e)(endanger life or physical safety of a person).

[6] At the end of mediation, the appellant removed the following from the scope of appeal:

- police code information withheld under the law enforcement provisions under the *Act*;
- the notes of one of the involved police officers;
- withheld information contained in the report about the alcohol screening test;
- information removed as not responsive in the occurrence reports;
- the affected party's personal information, such as his home address, date of birth

- or personal phone number contained in any of the records; and
- adequacy of the ministry's search for responsive records.

[7] The appellant confirmed that he continues to seek access to the remaining information at issue, including all communications recorded on the CD which the ministry claim is not responsive. The appellant also objects to the late raising of the discretionary exemption at section 14(1)(e).

[8] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. A Notice of Inquiry outlining the facts and issues in the appeal was sent to the parties seeking their representations. The ministry issued a third decision letter after its receipt of the Notice of Inquiry. The third decision letter indicates that the ministry is prepared to disclose additional information from one of the occurrence reports. In addition, the ministry reconsidered its position that only the initial portion of the 911 audio recording was responsive to the request. The ministry now claims that but for one specific call, the entire recording is responsive. Finally, the ministry withdrew its claim that section 49(a), in conjunction with section 14(2)(a) applies to the withheld information contained in pages 1 and 8.

[9] However, in its representations, the ministry indicates that it now takes the position that all of the information remaining at issue qualifies for exemption under section 49(a), in conjunction with section 14(1)(e).

[10] The appellant submitted representations in response to the ministry's representations. The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[11] In this order, I find that disclosure of the records to the appellant would constitute an unjustified invasion of personal privacy under section 49(b). As a result of my finding, it was not necessary to also make a finding as to whether the ministry should be permitted to raise the discretionary exemption under section 14(1)(e) to the records and whether that exemption applies in the circumstances of this appeal.

[12] With respect to the small portion of the 911 call to the ministry submits is not responsive, I have carefully reviewed the entire recording and agree that this portion is not responsive to the appellant's request.

RECORDS:

Description of Records	Page No.	Exemption Claimed	Released?
General Occurrence Report	Page 1	49(b)/21(3)(b) and/or 21(2)(f)	Partial

		49(a)/14(1)(e)	
Officer's note book entries	Pages 6 and 7	49(b)/21(3)(b) and/or 21(2)(f)	Partial
		49(a)/14(1)(e)	
Supplementary Occurrence Report	Page 8	49(b)/21(3)(b) and/or 21(2)(f)	Partial
		49(a)/14(1)(e)	
911 calls on CD	n/a	49(a)/14(1)(e) and (l)	Withheld
		49(b)/21(3)(b) and 21(2)(f)	

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 49(b)?
- C. Did the ministry properly exercise its discretion in applying the discretionary exemptions at section 49(b)?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[13] 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. The ministry submits that the records contain the personal information of the individual who called 911 (affected party) and the appellant. The representations of the appellant do not specifically address this issue. However, he advises that the records relate to a 911 call made by the affected party after he attended a meeting at the affected party's office. The remainder of the appellant's representations do not address the issues identified in the Notice of Inquiry sent to him.

[14] The confidential portions of the ministry's representations acknowledge that the 911 call was placed by an individual who was acting in his professional capacity.

[15] 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 and PO-2225]. However, information which relates to an individual in a professional, official or business

capacity, 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 and MO-2344]. Following the analysis set forth in Order PO-2225, the first question I must ask is: "*In what context does the name of the individual 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 this individual?*"

[16] With respect to the first question, I am satisfied that the information contained in the records which relates to the affected party appears in a professional, official or business context. The affected party is a municipal employee who called 911 from his office.

[17] As a result of this finding, the next question I must ask is whether there is anything about the information at issue which, if disclosed, would reveal something of a personal nature about the affected party. I have carefully reviewed the records and am satisfied that disclosure of the information which relates to the affected party would reveal something of a personal nature about him. In particular, I find that portions of the records contain the personal opinions or views of the affected party [paragraph (e) of the definition of personal information in section 2(1)] in addition to his name where it appears with other personal information relating to him [paragraph (h)].

[18] I also find that the records contain the affected party's view or opinions of the appellant [paragraph (g)]. Accordingly, the records also contain the appellant's personal information. I will now go on to determine whether disclosure of the records would constitute an unjustified invasion of personal privacy under section 49(b), if disclosed to the appellant.

B. Would disclosure of the records constitute an unjustified invasion of personal privacy under section 49(b)?

[19] 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. 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. Earlier in this order, I found that the records contain the personal information of the appellant and the individual who called 911. As a result, the ministry must look at the withheld information and weigh the appellant's right of access to his own personal information against the affected party's right to the protection of his privacy. If the ministry determines that the release of the withheld information constitutes an unjustified invasion of an identifiable individual's personal privacy, then section 49(b) gives the ministry the discretion to withhold access to the appellant's personal information.

[20] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person'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 parties have not claimed that any of the exclusions in section 21(4) apply and I am satisfied that none apply.

[21] 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.

[22] The ministry claims that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) taking into account the presumption at section 21(3)(b) and factor weighing against disclosure at section 21(2)(f).

[23] The appellant's representations did not specifically address whether any of the presumptions or factors weighing in favour or against disclosure apply in the circumstance of this appeal. However, in his representations, the appellant states that he was present when the affected party called 911.

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

[24] 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

[25] 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]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

[26] The ministry's representations state:

The OPP has the function of enforcing the laws of Canada and the Province of Ontario. The duties of a police officer include investigating possible law violations. The Ministry is of the opinion that the personal information remaining at issue consists of highly sensitive personal information that was compiled and is identifiable as part of a police investigation into a possible violation of law, including the *Trespass to Property Act*.

[27] The withheld information at issue mostly comprises of the complainant's statements to police and the audio recording of his conversation with a 911 operator. The remaining withheld information comprises of the 911 operators related calls to police and dispatch and information severed from the occurrence reports and notebook entries. I have carefully reviewed this information along with the representations of the parties and find that the presumption at section 21(3)(b) applies to the withheld information. I am satisfied that the personal information at issue in the records was compiled by the police and police dispatch during their response and investigation of a matter involving the appellant. Accordingly, I find that the personal information was compiled and is identifiable as part of the police's investigation into a possible violation of law.

21(2)(f): highly sensitive

[28] Section 21(2)(f) states:

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 the personal information is highly sensitive

[29] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

[30] The ministry takes the position that disclosure of the withheld information "would cause identifiable individuals excessive personal distress". In support of its position, the ministry attached a confidential letter from the affected party to its representations. The appellant's representations do not specifically address the issue as to whether the personal information at issue is highly sensitive.

[31] I have carefully reviewed the records along with the confidential and non-confidential representations of the parties and am satisfied that there is a reasonable expectation that the affected party would experience significant personal distress if his

statements to the police and the 911 operator are disclosed to the appellant. In making my decision, I took into consideration that the affected party is a complainant in a matter that was investigated by the police. Having regard to the above, I am satisfied that the factor at section 21(2)(f) applies in the circumstances of this appeal.

Absurd Result

[32] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and MO-1323].

[33] The absurd result principle has been applied where the requester was present when the information was provided to the institution [Orders M-444 and P-1414] or the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and MO-1755].

[34] 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 within the requester's knowledge [Orders M-757, MO-1323 and MO-1378].

[35] As stated above, in his representations, the appellant advises that he was present when the affected party called 911. The appellant submits that he overheard the affected party's conversation to the 911 operator. The appellant also advises that he took notes of this conversation.

[36] The ministry takes the position that the absurd result principle does not apply in the circumstances of this appeal. The ministry also takes the position that disclosure of the information at issue is inconsistent with the purpose of the personal privacy provisions under the *Act*.

[37] I have carefully reviewed the representations of the parties and find that the absurd result principle does not apply in the circumstances of this appeal. Though I accept the appellant's evidence that he was present when the affected party telephoned 911, I am not satisfied that the information at issue is clearly within the requester's knowledge. I also carefully reviewed the 911 recordings and note that the affected party and the 911 operator were aware the appellant could hear their one-sided conversation. As a result, the 911 operator asked questions which the affected party was asked to affirm or deny which enabled him to communicate with the 911 operator without discussing his concerns in detail in front of the appellant. Based on the information contained in the recording, it also appears that the appellant left the premise before the affected party finished his initial conversation with the 911 operator. In addition, there was a subsequent conversation for which the appellant was not

present. Finally, the appellant was not present when the affected party spoke to the attending police officers.

[38] Having regard to the above, I find that the absurd result principle has no application in the circumstances of this appeal.

Decision

[39] As I have found that no factors weighing in favour of disclosure apply to the withheld information and that the absurd result principle does not apply, I find that disclosure of the personal information at issue to the appellant would constitute an unjustified invasion of personal privacy under section 49(b), subject to my finding as to whether the ministry properly exercised its discretion.

C. Did the ministry properly exercise its discretion in applying the discretionary exemptions at section 49 (b)?

[40] 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.

[41] 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.

[42] 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)].

[43] The appellant did not make representations specifically addressing this issue. The ministry submits that it properly exercised its discretion to withhold the personal information at issue. In support of its position, the ministry states it:

- considered the appellant's right to access his own personal information;

- balanced the appellant's right of access to his own information against personal privacy concerns of the affected party and decided to grant the appellant with partial access to the records;
- considered the highly sensitive nature of the withheld information;
- considered whether it would be possible to further sever the records, including the 911 recording and found that the remaining information at issue could not be reasonably severed.

[44] In my view, the ministry's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information. I am satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into account irrelevant considerations.

[45] In making my decision, I note that the ministry considered that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue and the sensitivity of it outweigh this principle, taking into consideration the information in the occurrence reports that has been disclosed to the appellant. In addition, I am satisfied that the personal information at issue could not be reasonably severed from the appellant's information contained in the 911 recording.

[46] Having regard to the above, I conclude that the ministry properly exercised its discretion to withhold the information I found exempt under section 49(b).

ORDER:

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

Original Signed By: _____

Jennifer James
Adjudicator

June 19, 2012