

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3123

Appeal PA12-176

Ministry of Community Safety and Correctional Services

October 25, 2012

**Summary:** The appellant sought access to an occurrence summary about an incident in which he was involved. The ministry granted partial access to the record and relied on section 49(a) in conjunction with 14(1)(l), and section 49(b) to withhold portions of the record. The decision of the ministry is upheld, in part, and the ministry is ordered to disclose certain withheld portions to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1)(a), 10(2), 49(b).

### OVERVIEW:

[1] 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 records relating to a particular complaint about him which were created by the Ontario Provincial Police (OPP).

[2] The ministry identified one responsive record, an occurrence summary, and issued a decision to the appellant granting partial access. The ministry denied access to certain portions of the record pursuant to section 49(a), taken in conjunction with section 14(1)(l) (law enforcement), and section 49(b) (personal privacy) of the *Act*. In addition, the ministry denied access to other portions of the record on the basis that they were not responsive to the request.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the appellant advised that he was not pursuing access to the portions of the record which the ministry claimed were not responsive to the request. Accordingly, this information is no longer at issue in the appeal. The appellant also advised that he was not pursuing access to the information the ministry denied access to under section 14(1)(l) and section 49(a). Accordingly, this information and these exemptions are also no longer at issue.

[5] The appellant confirmed that he wanted to pursue access to the remaining severed portions of the record, and the appeal was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[6] I sought and received representations from the ministry, the appellant, and another individual whose rights may be affected by disclosure of the record (the affected party). I shared these representations in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*.

[7] This order upholds, in part, the decision of the ministry to withhold the personal information of the affected party from the appellant. It also directs the ministry to disclose to the appellant two withheld portions of the occurrence summary.

[8] The only record at issue in this appeal is a one page occurrence summary.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[9] 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) in part 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,  
...
- (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,  
...
- (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;

[10] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that the individual may be identified if the information is disclosed.<sup>1</sup>

[11] In its representations, the ministry states that the record contains the name, address and opinions of the affected party, all of which qualify as the affected party’s personal information. The ministry submits that the personal information is about the affected party in a personal capacity, and as the appellant and the affected party know one another, the affected party will be identified if his personal information is disclosed. The ministry further submits that it has disclosed to the appellant the portions of the record that contain his personal information alone.

[12] In his representations, the appellant stresses his desire to know what the affected party said about him, as he believes that the information provided to the OPP by the affected party was fabricated.

### ***Analysis and findings***

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[13] Based on my review of the occurrence summary, I find that the record contains the personal information of both the appellant and the affected party.

[14] In particular, the record contains the name, age, sex and address of the appellant and the affected party, all of which qualify as personal information under paragraphs (a) and (d) of the definition of that term in section 2(1).

[15] The record also contains the affected party's personal views or opinions, which qualify as personal information of the affected party under paragraph (e) of the definition in section 2(1). Finally, the affected party's name along with the other personal information in the record qualify as personal information under paragraph (h) of the definition in section 2(1), as disclosure of the name would reveal other personal information about the affected party, namely, that the affected party complained to the police about the appellant.

[16] I further find that some of the appellant's personal information contained in the withheld information under the "Summary" section of the record, can be severed in accordance with section 10(2) of the *Act*, without disclosing the personal information of the affected party. The appellant's personal information that can be severed consists of his name, date of birth and address, and I order below that it be disclosed.

**B. Does the discretionary exemption at section 49(b) apply to the information at issue?**

***General principles***

[17] 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.

[18] 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.

[19] 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 own personal information against the other individual's right to privacy protection.

[20] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[21] 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). In *Grant v. Copley*,<sup>2</sup> the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) in determining, under s. 49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[22] 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.<sup>3</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>4</sup>

[23] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.<sup>5</sup>

### ***Absurd result***

[24] 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.<sup>6</sup>

[25] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement<sup>7</sup>
- the requester was present when the information was provided to the institution<sup>8</sup>
- the information is clearly within the requester's knowledge<sup>9</sup>

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<sup>2</sup> [2001] O.J. 749.

<sup>3</sup> Orders P-242 and MO-2235.

<sup>4</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>5</sup> Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

<sup>6</sup> Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

<sup>7</sup> Orders M-444 and M-451.

<sup>8</sup> Orders M-444, P-1414 and MO-2266.

<sup>9</sup> Orders MO-1196, PO-1679, MO-1755 and MO-2257-I.

[26] 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.<sup>10</sup>

### ***Representations***

[27] In its representations, the ministry states that disclosure of the personal information of the affected party in the record is presumed to constitute an unjustified invasion of personal privacy in accordance with sections 21(1) and 21(3)(b). The ministry submits that the record was created by the OPP as part of OPP involvement in an occurrence where officers were attempting to prevent a breach of the peace. The ministry further submits that since the record is an occurrence summary, it was compiled and is identifiable as part of an investigation into a possible violation of law, namely, section 31 of the *Criminal Code*. In addition, the ministry submits that the withheld personal information is highly sensitive and the consideration in section 21(2)(f) applies. It also argues that the information was supplied by the affected party in confidence, as contemplated by the consideration in section 21(2)(h). Finally, the ministry denies that the absurd result principle applies as the withheld information does not apply to the appellant and there is no suggestion that the appellant is aware of the information.

[28] The appellant submits that sections 49(b) and 21(3)(b) do not apply as there was no investigation or any breach of law; rather, the incident involved an order by the affected party to the OPP. The appellant also submits that section 21(2)(f) does not apply as the affected party was the one that called the OPP.

### ***Analysis and findings***

[29] If I find that the presumption in section 21(3)(b) applies to the personal information, as the ministry submits it does, then disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). This presumption may be overcome if the personal information at issue falls under section 21(4), or if there exists a public interest in the disclosure of the record under section 23, neither of which is the case in this appeal.

[30] As noted above, the record in this appeal is an occurrence summary. It relates to an incident involving the appellant and was prepared by the OPP after it received a complaint about the appellant. It is clear that the undisclosed portions of the record, which contain the personal information of the affected party in addition to that of the appellant, were compiled by the OPP and are identifiable as part of an investigation of a

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<sup>10</sup> Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

possible violation of the law. Accordingly, I find that this personal information falls within the ambit of the presumption in section 21(3)(b).

[31] While the appellant challenges the legitimacy of the complaint that initiated the OPP's involvement and creation of the record and asks me to consider this in my adjudication of the appeal, I have no jurisdiction to review the actions of the OPP or the legitimacy of the complaint that instigated the OPP's actions. My jurisdiction is limited to determinations respecting access to information under the *Act*.

[32] Regarding the consideration in section 21(2)(f), which both the appellant and the ministry have identified as being relevant, I accept the representations of the ministry that the highly sensitive nature of the withheld personal information of the affected party does not support disclosure. Similarly, I accept the ministry's submission that the information was supplied by the affected party in confidence to the OPP, and therefore the consideration in section 21(2)(h) favours the protection of the affected party's privacy.

[33] Accordingly, I find that the presumption in section 21(3)(b) applies and disclosure of the record would be presumed to be an unjustified invasion of personal privacy under section 49(b).

[34] However, there is one withheld portion of the record which I find should not be exempt under section 49(b). The "Involved Address(es)" section of the record includes the "Dispatch address: Occurrence address." This is the address that the OPP attended following the complaint they received from the affected party. The appellant was at this address when he was visited by the OPP and therefore, this information is clearly within his knowledge. As it would be absurd to withhold this information from the appellant, I order that the ministry disclose this portion of the record to him.

**C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?**

[35] 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>12</sup>

[38] In its representations, the ministry states that it had regard to the following considerations in exercising its discretion to withhold portions of the record:

1. The affected party has not consented to the disclosure of his personal information.
2. The personal information of the affected party is highly sensitive, given that it originated from a police occurrence record.
3. The ministry has severed the responsive record, and it has exercised its discretion in accordance with standard practices.
4. The ministry believes that the public has expectations that third party personal information contained in police records will be strictly protected. The ministry is concerned that disclosure of the affected party's personal information in this instance would harm public confidence in the OPP, and other law enforcement organizations.

[39] The appellant did not provide any representations on this issue.

[40] I accept the ministry's representations that it took into account relevant considerations in exercising its discretion. I also note that I am upholding the ministry's decision to withhold the portions of the record that contain the personal information of the affected party in accordance with section 49(b). The withheld personal information is subject to a presumption against disclosure, and there is a significant basis for this. Having regard to the above, I find that the ministry's exercise of discretion was appropriate, and I uphold it in this appeal.

## **ORDER:**

1. I order the ministry to disclose the personal information of the appellant that can be severed under the "Summary" section of the record, as well as, the "Dispatch address: Occurrence address" by **November 30, 2012**, but not before, **November 22, 2012**. For greater certainty, I have highlighted the portions of the record to be disclosed by the ministry on the copy of the record that I have sent to the ministry along with this order.
2. I uphold the decision of the ministry to withhold the remaining severed portions of the record in accordance with section 49(b).

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<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 54(2) of the *Act*.



3. To verify compliance with provision 1 of this order, I reserve the right to require a copy of the record disclosed to the appellant to be provided to me.

Original Signed by: \_\_\_\_\_

October 25, 2012 \_\_\_\_\_

Stella Ball  
Adjudicator