

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3234

Appeal PA12-416-2

Ministry of Community Safety and Correctional Services

July 31, 2013

Summary: The appellant sought access to records relating to an incident he reported to the Ontario Provincial Police. The ministry granted partial access to the responsive records and relied on the discretionary exemption in section 49(b) (invasion of privacy) to withhold portions of them. The appellant appealed the ministry's decision. This order upholds the ministry's decision to withhold information in an occurrence summary and a supplementary occurrence summary that is exempt from disclosure under section 49(b), but orders the ministry to disclose the remaining withheld information in the records which is not exempt due to the application of the absurd result principle.

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

Orders and Investigation Reports Considered: Orders MO-2035 and MO-2325-I.

OVERVIEW:

[1] 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 reports, statements and officer notes relating to a specified incident involving the requester, that was investigated by a specified Ontario Provincial Police (OPP) officer.

[2] In accordance with section 27 of the *Act*, the ministry advised the requester that due to the large number of records it was required to review, it needed an extension of 30 days to process the request.

[3] The ministry subsequently issued a decision granting partial access to the responsive records. The ministry relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement); and the discretionary exemption in section 49(b) (invasion of privacy), with reference to the presumption in section 21(3)(b) (investigation into possible violation of law) and the factor in section 21(2)(f) (highly sensitive). The ministry also advised that some information in the records was withheld because it was not responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision to this office.

[5] During mediation, the appellant confirmed that he is not interested in pursuing access to the police codes and related information that was withheld pursuant to the discretionary exemption in section 49(a), in conjunction with section 14(1)(l). Accordingly, this exemption and the information withheld under it, are no longer at issue in this appeal.

[6] Also during mediation, the appellant confirmed that he is not interested in information that was withheld by the ministry on the basis that it was not responsive to his request. Accordingly, the information withheld as not responsive to the request is no longer at issue.

[7] A mediated resolution of the appeal was not possible, and it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[8] I sought representations from the ministry, the appellant, and an individual whose interests may be affected by disclosure of the withheld information (the affected party) on the issues set out below. The ministry provided representations which were shared, in their entirety, with the appellant. In its representations, the ministry withdrew its section 49(a) and 14(2)(a) claim in relation to the withheld information in pages 2, 3 and 4. Accordingly, these exemptions and the information withheld under them are no longer at issue in this appeal.

[9] The affected party did not provide representations, but he did confirm, in correspondence, that he objected to disclosure of any of his information in this appeal.

[10] The appellant did not submit representations.

[11] In this order, I uphold the ministry's decision to withhold information in two records, and I order it to disclose the remaining withheld information.

RECORDS:

[12] The records at issue are the withheld portions of the following:

- OPP General Occurrence Summary (page 1)
- OPP General Occurrence Report (page 2)
- OPP Supplementary Occurrence Reports (pages 3 and 4)
- OPP Officer's handwritten notes (pages 8 and 9).

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 institution 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?

[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. 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,
- (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,

...

- (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,
- ...
- (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.

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

[15] In its representations, the ministry submits that the records contain the types of personal information listed above with respect to the appellant and other identifiable individuals.

[16] Having reviewed all of the records at issue, I find that they all contain the personal information of the appellant and the affected party as that term is defined in the various paragraphs of the definition in section 2(1) of the *Act* listed above. I also find that some of the records contain the personal information of other identifiable individuals.

[17] Accordingly, the *Act* requires that I balance the appellant's right to access the information in the records, against the right to privacy of the affected party and the other identifiable individuals, in my consideration of section 49(b) below.

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

[18] Section 49 provides a number of exemptions from the general right section 47(1) of the *Act* gives individuals to access their own personal information held by an institution.

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

[19] Under section 49(b), where a record contains personal information of both the requester and other individuals, and disclosure of the information would constitute an “unjustified invasion” of the other individuals’ personal privacy, the institution may refuse to disclose that information to the requester.

[20] 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 individuals’ right to protection of their privacy.

[21] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

[22] 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 under section 49(b).

[23] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[24] 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*,² 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.

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

[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.³

Absurd result

[26] 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),

² [2001] O.J. 749.

³ Orders P-242 and MO-2235.

because to find otherwise would be absurd and inconsistent with the purpose of the exemption.⁴

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

- the requester sought access to his or her own witness statement⁵
- the requester was present when the information was provided to the institution⁶
- the information is clearly within the requester's knowledge.⁷

[28] 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.⁸

Representations

[29] In this appeal, the ministry submits that the presumption at paragraph 21(3)(b) applies as disclosure of the withheld personal information in the records would constitute an unjustified invasion of the privacy of the identifiable individuals. The ministry explains that the personal information at issue was compiled and is identifiable as part of an OPP investigation into a possible violation of law, namely, the uttering of threats as contemplated by section 264(1) of the *Criminal Code*. The ministry asserts that the application of section 21(3)(b) of the *Act* is not dependent upon whether charges are actually laid in relation to a given incident, and it relies on Orders P-223, P-237 and P-1225 in this regard.

[30] The ministry further submits that the information at issue is highly sensitive as its disclosure would cause the identifiable individuals excessive personal distress, and therefore, the factor in section 21(2)(f) applies and weighs in favour of non-disclosure. Finally, the ministry asserts that the absurd result principle does not apply "in the particular and sensitive circumstances of the appellant's request." The ministry states that disclosure of the exempt information would be inconsistent with the section 49(b) privacy exemption it has applied.

Analysis and findings

[31] Based on my review of the records, which all relate to an investigation into a possible violation of law reported to the OPP by the appellant, I am satisfied that the personal information contained therein was compiled and is identifiable as part of the

⁴ Orders M-444 and MO-1323.

⁵ Orders M-444 and M-451.

⁶ Orders M-444 and P-1414.

⁷ Orders MO-1196, PO-1679 and MO-1755.

⁸ Orders M-757, MO-1323 and MO-1378.

OPP's investigation. I agree with the ministry's position that the presumption in section 21(3)(b) applies to the records, however, I disagree with the ministry's position that the absurd result principle does not apply in this appeal.

[32] Having carefully reviewed the records, I find that the absurd result principle applies to pages 2, 4, 8 and 9. The withheld information in these pages consists of the names of individuals, including the affected party, that were provided by the appellant to the OPP when he reported the alleged threat to the OPP. Accordingly, these names are clearly within the appellant's knowledge. Moreover, in some instances, the familial relationship of these individuals to the appellant immediately precedes or follows the withheld name, and has been disclosed to the appellant. Accordingly, I conclude that disclosure of the withheld information in pages 2, 4, 8 and 9 of the records would not constitute an unjustified invasion of the personal privacy of those individuals. Previous orders of this office have held that personal information that is either supplied by an appellant or clearly within the appellant's knowledge should not be withheld as exempt under section 49(b), even when the presumption in section 21(3)(b) applies, because to do so would lead to an absurd result that is inconsistent with the purpose of the exemption.⁹ I adopt this approach and find that disclosure of the withheld information in pages 2, 4, 8 and 9 of the records, that consists of the names of individuals, including the affected party, that were provided by the appellant to the OPP, would not constitute an unjustified invasion of the personal privacy of those individuals. Therefore, I find that this information is not exempt under section 49(b) and I will order the ministry to disclose it.

[33] As for the remaining two records at pages 1 and 3, I accept the position of the ministry that the absurd result principle does not apply to them as the appellant did not supply the withheld information therein, nor is he clearly aware of it. Having found above that the presumption in section 21(3)(b) applies to the records, I find that pages 1 and 3 of the records are exempt from disclosure under section 49(b) subject to my review of the ministry's exercise of discretion below.

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

[34] 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.

[35] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

⁹ Orders MO-2035 and MO-2325-I.

- 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.

[36] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

[37] The ministry states that it carefully considered the appellant's right to access his personal information in the records and tried to appropriately balance this right against the privacy rights of others by providing the appellant with partial access to much of the requested information. The ministry points out that it has provided the appellant with a substantial amount of information about how the reported threat was handled by the OPP. The ministry states that it carefully considered whether it was possible to sever

¹⁰ Orders P-344 and MO-1573.

any additional non-exempt information from the records and concluded it was not. The ministry asserts that because the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law, and is highly sensitive, it was not appropriate to disclose the withheld information.

[38] I am satisfied that in exercising its discretion under section 49(b) to withhold information in pages 1 and 3 of the records, the ministry took into account only relevant factors. I am further satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose, as it considered the appellant's right of access and disclosed his personal information contained in the records. I find that the ministry's exercise of discretion to withhold the information in pages 1 and 3 that I have found above to be exempt under section 49(b), was appropriate.

ORDER:

1. I uphold the ministry's decision to withhold information in pages 1 and 3 of the records under section 49(b).
2. I order the ministry to disclose the information in records 2, 4, 8 and 9 that the ministry withheld under section 49(b), by **September 4, 2013**, but not before, **August 30, 2013**.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records it discloses to the appellant pursuant to order provision 2.

Original Signed by: _____

Stella Ball
Adjudicator

July 31, 2013