

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3618

Appeal PA15-288

Ministry of Community Safety and Correctional Services

June 2, 2016

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for Ontario Provincial Police (the OPP) reports relating to a complaint made by the requester regarding the conduct of her ex-husband. Access was granted to portions of the records, but access to some portions of the records was denied. In this order, the adjudicator finds that the personal information in the records is exempt under the discretionary personal privacy exemption in section 49(b).

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

Orders and Investigation Reports Considered: Order P-1618.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for Ontario Provincial Police (the OPP)¹ reports relating to a specific complaint made by the requester regarding the conduct of her ex-husband (the affected person).

¹ The OPP is part of the ministry.

[2] The ministry located three responsive records and issued a decision granting partial access. Access to some of the information was denied pursuant to the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), read in conjunction with section 14 (law enforcement), and section 49(b) (personal privacy). The ministry also severed some information from the records on the basis that the information was not responsive to the request.

[3] The requester (now appellant) appealed the ministry's decision.

[4] As mediation did not resolve the issues in this appeal, this matter proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the ministry seeking its representations. The ministry provided representations, which were sent to the appellant. The appellant did not provide representations in response.

[5] In this order, I find that the information at issue in the records is exempt under section 49(b).

RECORDS:

[6] At issue is the information withheld from five-pages of records, which consist of an Occurrence Summary, a General Occurrence Report, and a Domestic Violence Supplementary Report.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy 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. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[7] 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;

[8] 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.²

[9] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[10] The ministry states that the records contain personal information that belongs to an affected person and includes their name, their address, their date of birth, and other information gathered by the OPP about the affected person in connection with their investigation.

[11] The ministry submits that due to the subject matter of the records (i.e., a law enforcement investigation where the appellant and the affected person know each other), any disclosure would contain the information of an identifiable individual.

Analysis/Findings

[12] The five-pages of records consist of an Occurrence Summary, a General Occurrence Report, and a Domestic Violence Supplementary Report, all of which were generated by the OPP in the course of conducting its investigation.

[13] I find that the records contain the personal information of the appellant and the affected person in their personal capacity. This personal information includes their addresses, phone numbers, dates of birth, marital status, and views or opinions in accordance with paragraphs (a), (d), (g) and (h) of the definition of personal information in section 2(1).

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

[14] 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.

[15] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[16] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[17] If the information fits within any of paragraphs (a) to (e) of section 21(1) or within section 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In this appeal, the information does not fit within these paragraphs of section 21(1) or within section 21(4).

[18] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and

balance the interests of the parties.⁴

[19] 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).

[20] In the circumstances, the ministry relies on the presumption at section 21(3)(b). This section reads:

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

[21] The ministry submits that the records relate to a complaint made by the appellant alleging that the affected person had disobeyed a court order and that disobeying a court order is an offence created under section 127 of the *Criminal Code*. The complaint led to an OPP investigation into whether a breach of the *Criminal Code* had occurred. It states that if the evidence gathered during the investigation had pointed in a different direction, charges could have been laid by the OPP.

[22] I agree with the ministry that section 21(3)(b) applies as the personal information in the records was compiled and is identifiable as part of an investigation by the OPP into a possible violation of law as described by the ministry.

[23] 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.⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁶

[24] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁷

[25] The list of factors under section 21(2) is not exhaustive. The institution must also

⁴ Order MO-2954.

⁵ Orders P-242 and MO-2235.

⁶ Orders MO-2213, PO-1849 and PO-2608.

⁷ Order P-239.

consider any circumstances that are relevant, even if they are not listed under section 21(2).⁸

[26] The ministry relies on the factor in section 21(2)(f), which reads:

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

[27] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁹

[28] The ministry states that the factor in section 21(2)(f) applies as the records relate to a law enforcement investigation involving the affected person. The ministry relies on Order P-1618, where former Assistant Commissioner Tom Mitchinson determined that in the circumstances of that appeal, the personal information of the affected persons that relates to their contacts with the OPP as complainants, witnesses or suspects was highly sensitive for the purposes of section 21(2)(f).

[29] The affected person was a suspect in a potential violation of law involving a domestic situation with the appellant. The appellant complained to the OPP about the affected person's conduct and the OPP conducted a law enforcement investigation into this conduct. The appellant has not provided representations on the sensitivity of this information, although asked to address the application of the factor in section 21(2)(f) in the Notice of Inquiry.

[30] Based on my review of the information at issue in this appeal, I agree with the ministry that the personal information of the affected person in the records is highly sensitive. I find that the factor favouring privacy protection in section 21(2)(f) applies.

[31] Accordingly, as the presumption in section 21(3)(b) and the factor in section 21(2)(f), both favouring privacy protection, apply, and in the absence of representations from the appellant, I find that the information at issue in the records is exempt under section 49(b), subject to my review of the ministry's exercise of discretion.

[32] As section 49(b) applies to the information at issue in the records, there is no need for me to also consider whether this information is exempt under the discretionary law enforcement exemption in section 14, read in conjunction with section 49(a).

⁸ Order P-99.

⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

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

[33] 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.

[34] 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.

[35] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[36] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- 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

¹⁰ Order MO-1573.

¹¹ Section 54(2).

¹² Orders P-344 and MO-1573.

- 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
- whether disclosure will increase public confidence in the operation of the institution
- 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
- the age of the information
- the historic practice of the institution with respect to similar information.

[37] The ministry states that it exercised its discretion based on the following considerations:

(a) The public policy interest in protecting the privacy of personal information belonging to individuals that is contained in law enforcement investigation records, on the basis of its inherent sensitivity;

(b) The harm that would be caused to OPP's law enforcement mandate, based on our contention that the public would be less likely to cooperate were the OPP to increase the amount of personal information it discloses in law enforcement records.

[38] The ministry also referred to other factors it considered in exercising its discretion.

Analysis/Findings

[39] The ministry has disclosed to the appellant the personal information in the records that relates solely to her, and has withheld the personal information about the affected person.

[40] In denying access to the records, I find that the ministry exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations in its consideration of the application of the discretionary personal privacy exemption in section 49(b) to the personal information of the affected person in the records.

[41] Accordingly, I am upholding the ministry's exercise of discretion and find that the information at issue is exempt under section 49(b) of *FIPPA*.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

_____ June 2, 2016