Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4009

Appeal PA19-00152

Ministry of the Solicitor General

November 25, 2019

Summary: The Ministry of the Solicitor General (the ministry) received a request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a particular Ontario Provincial Police (OPP) report. It located a responsive record, and granted the appellant partial access to it. The ministry denied access to portions of the record under section 49(a) (discretion to refuse appellant's own information) in conjunction with two law enforcement exemptions, and the personal privacy exemption at section 49(b) of the *Act*. The ministry also denied the appellant access to some information it deemed non-responsive to the request. In this order, the adjudicator upholds the ministry's access decision.

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"), 21(2), 21(3)(b), 49(b), and 64.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a particular Ontario Provincial Police (OPP) report.

[2] The ministry located a responsive record.

[3] It then issued an access decision granting the requester partial access to the record. The ministry denied access to portions of the report under section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemptions at sections 14(1)(a) (law enforcement matter) and 14(1)(l)

(facilitate commission of an unlawful act), and the personal privacy exemption at section 49(b) of the *Act*. The ministry also denied the requester access to some information it deemed non-responsive to the request.

[4] The requester (now appellant) appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (this office, or the IPC).

[5] At the IPC, mediation resulted in a narrowing of issues: non-responsive information, and information withheld under sections 14(1)(a) and 14(1)(l) in conjunction with 49(a) were removed from the scope of the appeal. The mediator was not able to obtain consent to disclose from two of the affected parties, and the appellant confirmed he was not interested in the information relating to one of the affected parties. Accordingly, the information redacted by the ministry relating to that affected party is no longer at issue in the appeal. According to the Mediator's Report, only the three redacted paragraphs on page 2 of the record are at issue.

[6] The appellant informed the mediator he wished to proceed to adjudication on the remaining issues. As a result, this file was moved to adjudication, where a written inquiry is conducted by an adjudicator.

[7] I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal to the ministry. The ministry submitted representations that were shared with the appellant, on consent. I also sought and received from the appellant.

[8] For the reasons that follow, I uphold the ministry's decision and dismiss this appeal.

RECORD:

[9] The information at issue is the three redacted paragraphs on page 2 of an OPP general report regarding a specified occurrence number.

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:

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

[10] The ministry withheld information on the basis of the discretionary personal privacy exemption at section 49(b), so I must first decide whether the record contains "personal information" as defined in section 2(1) of the *Act*, and to whom it relates. For the reasons that follow, I find that the record contain the appellant's personal information as defined in section 2(1) of the *Act*, as well as that of other identifiable individuals.

[11] The term "personal information" in section 2(1) of the *Act* is defined, 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,
> >
> > (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[.]

[12] 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.[1]

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

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[1] Order 11.
[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[14] The ministry submits, and I find, that the record contains the personal information of the appellant and a number of other identifiable individuals. Based on my review of the record, I find that it contains the appellant's personal information, including his name, the views and opinions of others about him, and the fact that his name appears in a police report. This information qualifies as his "personal information" under the introductory wording of the definition of that term and paragraph (e) of section 2(1) of the *Act*. The information in the record also includes personal information of other identifiable individuals (affected parties), within the meaning of paragraphs (a), (g), and (h) of the definition of "personal information", and the introductory wording of that definition.

[15] Since the record contains both the personal information of the appellant and other identifiable individuals, I must assess any right of access under Part III of the *Act*, specifically under the discretionary personal privacy exemption at section 49(b).

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

[16] 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.

[17] 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.[3]

[18] Here, the information at issue contains the personal information of the appellant and a number of identifiable individuals.

Would disclosure be "an unjustified invasion of personal privacy" under section 49(b)?

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

[20] 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). The parties do not argue that any of these exceptions

[3] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

apply, and on my review of the evidence before me, I find that they do not.

[21] Section 21(4) lists situations that would not be an unjustified invasion of personal privacy. The parties have not argued that any of these situations apply, and on my review of the evidence before me, I find that they do not.

[22] In determining whether the disclosure of the personal information in the record 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]

Section 21(3)(b) applies

[23] If any of paragraphs (a) to (h) of section 21(3) apply, that is a factor that weighs towards a finding that disclosure of the information is an unjustified invasion of personal privacy under section 49(b).

[24] The ministry submits that section 21(3)(b) (possible violation of law) applies.

[25] Section 21(3)(b) says:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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 [.]

[26] Section 21(3)(b) only requires that there was an investigation into a possible violation of law.[5] Even if no criminal proceedings were commenced against any individuals, as is the case here, section 21(3)(b) may still apply.

[27] The ministry submits, and I find, that section 21(3)(b) applies because the personal information at issue was compiled and is identifiable as part of law enforcement investigation into a possible violation of law by the Ontario Provincial Police (the OPP). The ministry describes the three paragraphs being withheld as relating to a complaint made by one of the affected parties named in the record against the appellant. In addition, given the nature of the complaint, the ministry submits, and I find, that an investigation ensued and could have led to charges being laid. As mentioned, the fact that no charges were laid does not affect whether section 21(3)(b) applies.

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[4] Order MO-2954.
[5] Orders P-242 and MO-2235.

[28] No other paragraphs under section 21(3) were claimed, and based on my review of the evidence, no others apply.

No factors favouring disclosure apply

[29] 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.[6] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[7]

[30] The appellant did not specifically cite factors listed under section 21(2), but having reviewed his representations, I find that he raises the factors at sections 21(2)(b) and 21(2)(d), and the unlisted factor of inherent fairness.

[31] The appellant submits that the affected parties named in his representations slandered him and defamed his character. He argues that the complaint made to the police was done out of maliciousness by two named individuals looking to hurt his family, and to sabotage his marriage. He states that his wife provided refuting evidence to the child protection agency involved (which was consulted by the OPP in the course of their investigation), but the child protection agency stated that once information is entered into their system, it cannot be removed. He repeatedly refers to ways he believes his rights were violated, and the legal proceedings he intends to pursue to clear his name, throughout his representations.

[32] The considerations in sections 21(2)(b) and (d) are typically factors that favour disclosure. These sections say:

> 21 (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,
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> > (b) access to the personal information may promote public health and safety;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[33] In addition, I note that in previous orders, considerations which have also been found relevant in determining whether the disclosure would be an unjustified invasion

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[6] Order P-239.
[7] Order P-99.

of personal privacy include inherent fairness issues.[8]

[34] I will consider each factor, below.

Section 21(2)(b) – public health and safety

[35] In this case, the appellant raises concerns about particular individuals for specific reasons mentioned in his representations, which I will not repeat in this public order. As his concerns do not relate to promoting broader issues of health or safety in any real and demonstrable way, as contemplated by section 21(2)(b), I find that section 21(2)(b) does not apply to the information at issue.

Section 21(2)(d) – fair determination of rights

[36] The appellant argues that section 21(2)(d) applies, and for the reasons set out below, I accept that it does.

[37] In the Notice of Inquiry sent to the appellant, he was advised that for section 21(2)(d) to apply, he must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[9]

[38] All four parts of this test must be met in order to accept that section 21(2)(d) is relevant to a record at issue.

[39] On the basis of the appellant's representations, I accept that he has established parts 1, 2, and 3 of the test, above, for section 21(2)(d). He alleges that his legal rights were violated, in the alleged commission of libel and slander against him (satisfying part 1), and repeatedly asserts his intention to pursue his legal action against certain

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[8] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.
[9] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

affected parties in order to clear his name (satisfying the requirement that there be a contemplated proceeding under part 2). Given these findings and the record itself, I accept that the personal information he is seeking access to may have some bearing on the determination of the legal rights he may have (satisfying part 3 of the test).

[40] However, it is not clear, considering the evidence before me, that part 4 of the test is met. Specifically, it is not clear whether the appellant would be unable to prepare for a legal proceeding without the personal information withheld or that this information would be needed to ensure an impartial hearing since he could pursue this information through the civil litigation system. The *Rules of Civil Procedure* that govern a lawsuit over which a court presides are not affected by the *Act* that governs this appeal. That is clear from the wording of section 64 of the *Act*:

1. This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

2. This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[41] Nevertheless, the availability of other means of receiving the information does not take away from rights of access under the *Act*. Therefore, I am prepared to accept that part 4 is met and that the factor at section 21(2)(d) applies.

Unlisted factor: inherent fairness

[42] The appellant states that his character has been unfairly tarnished due to allegations made in bad faith and ensuing circumstances. He argues that individuals should not be able to confidentially make false allegations. While I can appreciate the appellant's concerns, it is not the function of this office to comment on the substantive basis, or lack of basis, for any complaints made against the appellant, or any related circumstances (such as the involvement of the OPP). What I may properly consider is whether the unlisted factor of inherent fairness, which may favour disclosure, applies in this case,[10] and if so, what weight to give it (although the appellant did not specifically cite this factor in his representations).

[43] Specifically, what I must consider under inherent fairness is whether withholding the three paragraphs on page 2 of the record would be inherently unfair to the appellant. The record at issue is a short police report that was generated due to an investigation made by the OPP on the basis of information that the OPP received. Another document, which the appellant provided a copy of with his representations, provides further context for the appellant's position in this appeal. Based on my review

[10] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

of the record at issue and the representations of the parties, I find that it would not be inherently unfair to the appellant to withhold the information at issue. The evidence he provided with his representations demonstrates that he is aware of the allegation that was made against him. He was also not charged with any offence in relation to this, as acknowledged by the ministry, and it is open to him to pursue justice for any false allegations in court. In these circumstances, I am satisfied that the unlisted factor of inherent fairness is not applicable.

[44] The appellant has not established that any other factors favouring disclosure apply, and based on my review of the evidence before me, I find that no such factors exist in the circumstances of this case.

Weighing the presumption and factors

[45] Since the record contains the personal information of the appellant and other identifiable individuals, the factors and presumptions at sections 21(2) and 21(3) must be considered and weighed. The purpose of that exercise is to determine whether disclosing the information withheld would be an unjustified invasion of the personal privacy of the identifiable individuals (other than the appellant) to whom the record relates. I have found that section 21(3)(b) applies (weighing against disclosure of the withheld personal information), and that the only factor favouring disclosure that applies is section 21(2)(d). However, I assign the factor at section 21(2)(d) minimal weight because the appellant has an alternate means of obtaining information withheld through the civil litigation process. There is certainly no evidence before me that this is not the case. Taking these facts into consideration, and weighing the interests of the appellant and the affected parties, I find that the personal information at issue is exempt under section 49(b). That is, disclosing the three withheld paragraphs on page 2 of the record would be an unjustified invasion of the personal privacy a number of identifiable individuals. Given my findings, it is not necessary for me to consider the ministry's position regarding the application of the factor favouring the protection of privacy at section 21(2)(f) (highly sensitive).

Absurd result principle

[46] The appellant asserts that specified individuals complained against him. This submission raises the possible application of the absurd result principle. If a requester is aware of the personal information at issue, the information may not be exempt under section 49(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.[11] The absurd result principle has been applied where, for

[11] Orders M-444 and MO-1323.

example, the information is clearly within the requester's knowledge.[12]

[47] Without confirming or denying the accuracy of his representations on the identities of any affected parties involved, I find insufficient evidence to accept that the information withheld is clearly within the appellant's knowledge. Therefore, the absurd result principle does not apply.

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

[48] 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.

[49] 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.

[50] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution.[14]

Relevant considerations

[51] In denying access to the record, the ministry submits that it exercised its discretion under section 49(b) properly by considering:

> the public policy interest in protecting the privacy of personal information belonging to third party individuals that is contained in law enforcement investigation records, based on its inherent sensitivity.[15]

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[12] Orders MO-1196, PO-1679 and MO-1755.
[13] Order MO-1573.
[14] Section 43(2).
[15] It also states that affected parties are unaware of this appeal, and would not have been provided with an opportunity to be heard in accordance with the principles of fairness. However, this office notified most affected parties of the appeal at the mediation stage; it was unnecessary to do so at adjudication, due to the findings made under Issue B.

[52] I find that this position involves the consideration of many factors that the IPC has found to be relevant, including:

- the purposes of the *Act*, including the principles that exemptions from the right of access should be limited and specific, and 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 own personal information;
- 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; and
- the historic practice of the institution with respect to similar information.

[53] I find that these are relevant factors for the ministry to have considered in exercising its discretion. In addition, I find that the ministry has not failed to take into consideration other relevant factors.

[54] Although the appellant references concerns about certain affected parties in his representations, this is not evidence that the ministry exercised its discretion inappropriately.

[55] There is also no evidence before me that the ministry exercised its discretion in bad faith or for an improper purpose.

[56] For these reasons, I uphold the ministry's exercise of discretion under section 49(b).

ORDER:

I uphold the ministry's access decision, and dismiss this appeal.

Original signed by
Marian Sami
Adjudicator

November 25, 2019