

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4351

Appeal PA20-00561

Ministry of the Solicitor General

February 7, 2023

Summary: The Ministry of the Solicitor General (the ministry) received an access request for information relating to a specified Ontario Provincial Police (OPP) file number. The ministry issued a decision granting partial access to the records. During the inquiry, the appellant narrowed his request to the OPP officer's handwritten notes, which was withheld under the discretionary personal privacy exemption at section 49(b). In this order, the adjudicator partially upholds the ministry's decision and orders the ministry to disclose the non-exempt information 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) (the definition of "personal information"), 21(2)(f), 21(3)(b), and 49(b).

OVERVIEW:

[1] In March 2018, the appellant and two affected parties¹ were involved in an incident in Cuba.

[2] Subsequently, the appellant made the following access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the

¹ One of these affected parties provided his consent to having his personal information disclosed to the appellant. I will refer to this affected party as the consenting affected party. I will refer to the other affected party as the involved affected party.

Solicitor General (the ministry) for the following:

Southern Georgian Bay Ontario Provincial Police file [specified file number]. All disclosure in relation to the above noted file including but not limited to:

- 1) All electronic text pages
- 2) All police officer notes and interview transcripts
- 3) All role/entity codes used in electronic file for myself (i.e., subject of complaint, suspect, other, victim, etc.)
- 4) All emails exchanged including with RCMP Miami LO [specified officer]
- 5) Disposition of file.

[3] The ministry located responsive records and issued a decision granting partial access. The ministry withheld some information from the records under the discretionary exemptions at sections 49(a)² (discretion to refuse requester's own information) and (b) (personal privacy).

[4] The ministry also withheld some information on the basis that it is not responsive to the request.

[5] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, the appellant confirmed that he does not seek access to certain personal information of affected parties in the records, such as their biographical information, or to information withheld on the basis that it is not responsive to the request.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*.

[8] The adjudicator initially assigned to this appeal invited the ministry and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and have decided that I do not require further submissions before making my decision.

[9] In this order, I partially uphold the ministry's decision and I order the ministry to

² The ministry claimed section 49(a) read with sections 14(1)(a), 14(1)(l), 15(b), and 22(a).

disclose information that is not exempt to the appellant.

RECORDS:

[10] In his representations, the appellant confirms that he is only pursuing access to the withheld information contained in the Ontario Provincial Police (OPP) officer's handwritten notes. Accordingly, I have removed access to the remainder of the records from the scope of this appeal.

[11] As stated above, the appellant does not want the information that the ministry identified as not responsive to his request. I note that some portions of the withheld information in the OPP officer's handwritten notes was identified as not responsive to the request and I have removed it from the scope of this appeal.

[12] The record at issue is the OPP officer's handwritten notes for specified dates at pages 33 to 35, inclusive.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- 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 the IPC uphold the exercise of discretion?

DISCUSSION:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[13] In order to decide whether section 49(b) applies, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[14] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.³

³ The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

[15] Information is “about” the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual if it does not reveal something of a personal nature about them.⁴

[16] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁵

[17] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples that are relevant to this appeal are set out below:

“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,

...

(h) the individual’s name if 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.

[18] Sections 2(2.1) and (2.2) distinguish personal information from information about an individual in a business or professional capacity. Section 2(2.1) states that:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[19] To qualify as personal information, the information must be about the individual in a personal capacity. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

reveals something of a personal nature about the individual.⁶

[20] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be “personal information.”⁷

[21] It is important to know whose personal information is in the records. If the records contain the requester’s own personal information, their access rights are greater than if it does not.⁸ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.⁹

[22] The ministry submits that the records contain personal information within the meaning of the non-exhaustive definition of this term as set out in section 2(1) of the *Act*. It submits that the personal information belongs to affected parties, including their names and telephone numbers.

[23] Although the appellant provided representations, his representations did not address whether the records contain “personal information”.

[24] On my review, I find that the records contain information that qualifies as the personal information of identifiable individuals, specifically five affected parties (including the consenting affected party and the involved affected party) and the appellant, which would fall under paragraphs (a), (d), and (h) of the definition of “personal information” under section 2(1) of the *Act*.

[25] With respect to the withheld information (listed as bullet point #2) near the end of page 1 of the OPP officer’s handwritten notes for April 12, 2018, I find that it contains information that qualifies as the personal information of the appellant and the consenting affected party only. I find that the appellant’s personal information (and the consenting affected party) can be disclosed to him. As the personal privacy exemptions cannot apply to exempt the appellant’s own personal information from disclosure to himself, I will order the ministry to disclose the withheld information listed as bullet #2 on page 1 of the OPP officer’s handwritten notes to him in accordance with the highlighted records enclosed with this order.

[26] As I have found that the withheld information in the records contain the personal information of the appellant along with other identifiable individuals, I will consider the appellant’s access to the withheld information under Part III of the *Act*.

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ Order 11.

⁸ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁹ See sections 21(1) and 49(b).

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

[27] 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.

[28] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of exceptions in sections 21(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[29] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. 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).

[30] 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.¹⁰

[31] If any of sections 21(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). 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.¹¹ 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).¹²

Analysis and findings

[32] I note that the withheld personal information does not fit within the exceptions set out in section 21(1)(a) to (e) nor section 21(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 21(2) and (3) apply.

[33] The ministry relies on the presumption in section 21(3)(b) and the factor favouring non-disclosure in section 21(2)(f) to withhold the personal information under

¹⁰ Order MO-2954.

¹¹ Order P-239.

¹² Order P-99.

section 49(b).

[34] Sections 21(2)(f) and 21(3)(b) state:

(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,

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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.

[35] With respect to section 21(3)(b), the ministry submits that the records were prepared by Cuba's National Revolutionary Police (NRP) as part of its investigation arising out of a suspected crime. As such, the ministry submits that section 21(3)(b) must apply.

[36] The ministry also submits that the fact that the investigation was conducted by a police service outside of Ontario does not affect the application of section 21(3)(b). It relies on IPC Orders PO-3766 and PO-3897, which it states related to similar policing records. I have reviewed both these orders and do not find that they are relevant to the issue of section 21(3)(b). These orders dealt with the OPP investigating a property dispute or the OPP being involved due to a motor vehicle accident.

[37] The appellant submits that the section 21(3)(b) presumption cannot apply as the withheld information was not compiled and is not identified as part of an investigation into a possible violation of law. The appellant submits that the OPP reports disclosed to him show that the involved affected party and their family did not seek the assistance of the OPP relating to any possible violation of law occurring in Ontario.

[38] Based on my review of the withheld personal information and the parties' representations, I find that the presumption at section 21(3)(b) does not apply. The only records at issue in this appeal are OPP officer's handwritten notes. It is clear that the withheld personal information in the notes were compiled by the NRP as part of its investigation arising out of a suspected crime. It is also clear that the withheld information was not compiled and identifiable as part of an OPP investigation into a possible violation of law as the OPP did not investigate the crime in question. The alleged crime in question occurred in Cuba, not Ontario. According to the ministry's representations, the OPP was involved to provide assistance to the involved affected party and their family as the family had reached out to the OPP for assistance.

Accordingly, I do not find that the presumption at section 21(3)(b) applies to the withheld personal information.

[39] The ministry also submits that the factor weighing in favour of non-disclosure in section 21(2)(f) supports its position that disclosure of the withheld personal information would be an unjustified invasion of personal privacy. The ministry submits that in Order P-1618, the IPC found that the personal information of individuals who were "complainants, witnesses or suspects" as part of their contact with the OPP was "highly sensitive" pursuant to this subsection. The ministry submits that to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed. In this case, the ministry submits that some of the affected parties could be described as witnesses or as a complainant (while others may arguably be characterized as such).

[40] The appellant submits that the release of information contained in the records would be highly sensitive to himself and the consenting affected party. He submits that the disclosure of such information would be in the interests of police accountability. The appellant also submits that it is common practice for the police to provide full disclosure of their handwritten notes, especially when the court process has unfolded, and doing so would not cause distress for any involved parties.

[41] In this case, the affected parties' (excluding the consenting affected party) personal information (such as their name, date of birth, address and other information) is contained in the OPP officer's handwritten notes. I accept that within the circumstances of this appeal, disclosure of the personal information contained in the OPP officer's handwritten notes is highly sensitive. As such, I find that disclosure of the affected parties' personal information may likely cause the affected parties' significant personal distress. As a result, I give this factor some weight.

[42] I note that the appellant did not raise any of the listed factors favouring disclosure of the withheld personal information. The appellant states that he is requesting a copy of the records to determine whether further privacy breaches or other improper practice occurred by the OPP so that he may address it. To be clear, the appellant is referring to any privacy breach through the disclosure of his personal information and/or the personal information of the consenting affected party. I give this factor some weight in favour of disclosure.

[43] Having reviewed the withheld personal information and considering the factors (listed and unlisted) in section 21(2), I find that disclosure of the withheld information would be an unjustified invasion of the affected parties'¹³ personal privacy. While I also give some weight to the appellant's need to know whether his (and the consenting affected party's) privacy has been breached, I find that it is outweighed by the factor in section 21(2)(f) weighing in favour of non-disclosure. Accordingly, I find that the

¹³ This reference does not include the consenting affected party.

remaining personal information is exempt under section 49(b) subject to my finding on the ministry's exercise of discretion.

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

[44] The section 49(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[45] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[46] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ The IPC cannot, however, substitute its own discretion for that of the institution.¹⁵

[47] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:¹⁶

- 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, 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 their own personal information,

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

¹⁶ 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, and
- the historic practice of the institution with respect to similar information.

[48] The ministry submits that it had exercised its discretion appropriately to not disclose personal information collected as a result of a suspected crime involving the involved affected party. The ministry submits that it has acted in accordance with its usual practices, including by relying on past orders, and the principles enshrined in the *Victims Bill of Rights, 1995*.

[49] The appellant submits that the ministry has not acted in a reasonable manner by not disclosing the OPP officer's handwritten notes to him. He submits that the OPP was acting on presumptions and bias when conducting their file, rather than abiding by policy or privacy law. The appellant takes issue with the fact that his and the consenting affected party's personal information were disclosed to the involved affected party and their family without their consent. The appellant submits that it is reasonable that he wishes to obtain the records to determine their accuracy. He also submits that the ministry's decision not to be transparent and provide him with the records further erodes the public's trust in the police.

[50] Based on my review of the parties' representations and the nature and the content of the records at issue, I find that the ministry properly exercised its discretion to withhold the personal information pursuant to the discretionary personal privacy exemption at section 49(b) of the *Act*. I note that the ministry took into account the following relevant considerations: the relationship between the appellant and the affected parties (including the involved affected party); and the wording of the exemption and the interests it seeks to protect. I am satisfied that the ministry took into account relevant considerations, and did not act in bad faith or for an improper purpose. Accordingly, I uphold the ministry's exercise of discretion in deciding to withhold the personal information in the records, pursuant to the section 49(b) exemption.

ORDER:

1. I order the ministry to disclose the withheld personal information about the appellant and the consenting affected party at the bottom of page 2 of the OPP officer's handwritten notes to the appellant by **March 9, 2023**. I have identified the portions that the ministry must disclose by highlighting them in yellow on the copy of the records provided to the ministry with this order.
2. I otherwise uphold the ministry's access decision.
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 disclosed upon request.

Original signed by: _____
Lan An
Adjudicator

February 7, 2023 _____