

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4448

Appeals PA21-00325 and PA21-00326

Ministry of the Solicitor General

October 12, 2023

Summary: The appellant filed two requests under the *Act* with the ministry for records relating to two incidents that took place on his property. The ministry granted the appellant partial access to them. Relevant to this order, the ministry withheld portions of the records under the discretionary personal privacy exemption in section 49(b). The adjudicator upholds the ministry's decision, in part. The adjudicator orders the ministry to disclose to the appellant one portion of the records that relates solely to him, but finds the remainder of the information at issue is exempt under the personal privacy exemption and upholds the ministry's exercise of discretion.

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 privacy), 21(1), 21(2)(f), 21(3)(b), and 49(b).

OVERVIEW:

[1] The appellant filed two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the Ministry of the Solicitor General (the ministry) for records relating to incidents that took place on two specified dates.

[2] The ministry located responsive records and issued an access decision to the appellant, granting him partial access to them. The ministry withheld portions of the records under the discretionary exemptions in sections 49(a), read with section 14(1)(l) (facilitate the commission of an unlawful act) and 49(b) (personal privacy). The ministry

also withheld some information as not responsive to the appellant's request.

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

[4] During mediation, the appellant confirmed he does not pursue access to the information withheld as not responsive or under section 49(a), read with section 14(1)(l). The appellant also confirmed he does not pursue access to video statements or dispatch calls. Accordingly, this information was removed from the scope of both appeals.

[5] However, the appellant confirmed his interest in the information subject to the ministry's privacy exemption claim. The ministry maintained its position regarding this information.

[6] No further mediation was possible and the files were transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeals decided to join the appeals and conduct a single inquiry due to the overlap in parties and issues. The adjudicator began the inquiry by inviting the ministry to submit representations in response to a Notice of Inquiry, which summarized the facts and issues under appeal. The ministry submitted representations. The adjudicator then sought and received representations from the appellant in response to the Notice of Inquiry and the ministry's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*.

[7] The appeals were then transferred to me to complete the inquiry. I reviewed the records and the parties' representations and decided I did not need to hear further from the parties before making my decision.

[8] In the discussion that follows, I uphold the ministry's decision in part. I find the majority of the information at issue is exempt under section 49(b) and uphold the ministry's exercise of discretion to withhold it from disclosure. However, I order the ministry to disclose a portion of a General Report that relates solely to the appellant to him.

RECORDS:

[9] The records at issue in Appeal PA21-00325 are:

- Record 1: Occurrence Summary (page 1)
- Record 2: General Report (pages 2 and 3)
- Record 3: letter (pages 4 and 5)

- Record 4: three officers' notes (pages 10 to 20)

[10] The records at issue in Appeal PA21-00326 are:

- Record 5: Occurrence Summary (page 1)
- Record 6: General Report (page 2)
- Record 7: Supplementary Occurrence Report (page 3)
- Record 8: letter (page 4)
- Record 9: two officers' notes (pages 11-15)
- Record 10: a 911 audio recording

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 ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

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

[11] In order to decide which sections of the *Act* may apply, the IPC must first decide whether the records contain *personal information* and, if so, to whom it relates. It is important to know whose personal information is in the records. If the records contain the requester's personal information, their access rights are greater than if they do not.¹ Also, if the records contain the personal information of other identifiable individuals, one of the personal privacy exemptions might apply.² The term *personal information* is defined in section 2(1) as "recorded information about an identifiable individual."

¹ 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.

² Section 21(1) below.

[12] To qualify as *personal information*, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.³ Therefore, the information relating to Ontario Provincial Police (OPP) officers or provided by the officers in their professional capacities (such as their opinions in relation to their investigations) is not their personal information.

[13] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴ I find the information relating to the police officers in the records before me do not reveal anything of a personal nature about them.

[14] To qualify as personal information, it must be reasonable to expect an individual will be identified if the information is disclosed.

[15] The ministry submits the records at issue contain "extensive amounts" of personal information within the meaning of section 2(1) of the *Act* relating to identifiable individuals, including potential witnesses, complainants and victims. The ministry submits the records contain these individuals' names, dates of birth, telephone numbers, home addresses, and their statements which could reasonably be expected to reveal their identities, their opinions and actions, collected as part of the law enforcement investigations.

[16] The ministry submits it cannot reasonably sever identifying information to remove the personal information from the records.

[17] The ministry states it withheld the Workplace Identification Numbers (WINs) belonging to Computer Assisted Dispatch Operators in the records. The ministry refers to Orders PO-3742 and PO-4336, which found that a WIN qualifies as an employee's personal information because it is an assigned number that would reveal something of a personal nature about the employee if it is disclosed.

[18] The appellant does not address whether the records contain personal information within the meaning of section 2(1) in his representations.

[19] I reviewed the records and listened to the audio recording. I find all of the records contain the personal information of the appellant. Specifically, I find the records contains recorded information about him (considered to be *personal information* under the introductory wording of the definition of that term in section 2(1)), his criminal or employment history (paragraph (b)), his address and telephone number (paragraph (d)), the views or opinions of other individuals about him (paragraph (g)), and his name

³ See sections 2(3) and (4) of the Act and Orders P-257, P-427, P-1621, R-98005, MO-1550-F and PO2225.

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

where it appears with other personal information relating to him (paragraph (h)).

[20] I note a portion of Record 6, a General Report, contains information relating solely to the appellant. Specifically, the paragraph under the heading *HISTORY* relates solely to the appellant and does not contain information relating to any other identifiable individual. Given these circumstances, the personal privacy exemption in section 49(b) cannot apply to this information. As no other exemptions were claimed for this information and no mandatory exemptions apply to it, I will order the ministry to disclose this portion of the General Report to the appellant.

[21] In addition, I find the records contain personal information relating to other identifiable individuals (the affected parties). I find the records contain recorded information about these affected parties (the introductory wording in section 2(1)), their dates of birth (paragraph (b)), their addresses and telephone numbers (paragraph (d)), their personal views or opinions (paragraph (e)), the views or opinions of other individuals about them (paragraph (g)), and their names where they appear with other personal information relating to them (paragraph (h)).

[22] I also find the WINs of Computer Assisted Dispatch Operators in the records to be personal information within the meaning of the *Act*. I find support for this finding in Order PO-3742, which found that the WIN provides a link to other personal information of the employee, such as human resources information. As such, the WIN qualifies as the individual's personal information within the meaning of paragraph (c) of the definition of *personal information* in section 2(1).

[23] In conclusion, I find the records contain personal information belonging to the appellant and other identifiable individuals. As the records contain personal information belonging to the appellant, I will consider whether he is entitled to access to the records under Part III of the *Act*.

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

[24] Under section 49(b), where a record contains the personal information of both the requester (here, the appellant) and another individual and disclosure of the record would be an unjustified invasion of another individual's personal privacy, that information may be exempt from disclosure. Section 49(b) states,

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure could constitute an unjustified invasion of another individual's personal privacy.

Even if the personal information falls within the scope of section 49(b), an institution may exercise its discretion to disclose the information to the requester after weighing

the appellant's right of access to their own personal information against the other individuals' right to protection of their privacy.⁵

[25] Therefore, I must determine whether disclosing information relating to individuals who are not the appellant would constitute an unjustified invasion of their personal privacy under section 49(b).

[26] Section 21 provides guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). If the information fits within any of the paragraphs of sections 21(1) or 21(4), disclosure is not an invasion of personal privacy and the information is not exempt under section 49(b). None of the parties claim that any of the exceptions in sections 21(1) or (4) apply and I am satisfied none do.

[27] In determining whether the disclosure of the personal information relating to the affected parties would be an unjustified invasion of personal privacy under section 49(b), I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁶

Sections 21(2) and (3)

[28] The ministry claims the application of the presumption in section 21(3)(b). This section states,

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[.]

[29] The ministry submits the presumption in section 21(3)(b) applies to all of the personal information at issue. The ministry submits the records were created pursuant to law enforcement investigations conducted by the OPP. The ministry refers to the Notice of Inquiry which states, "even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply."⁷ The ministry refers to Orders PO-3273 and PO-3301, which held that the presumption applied to records from an OPP law enforcement investigation. The ministry submits the reasoning in these orders should be applied in this case. The ministry submits the personal information in the records was compiled by the OPP and is identifiable as part of its investigations of potential violations of the law.

⁵ See Issue C, below.

⁶ Order MO-2954.

⁷ Orders P-242 and MO-2235.

[30] The appellant submits the ministry provided insufficient evidence to support its claim that section 21(3)(b) applies to the records.

[31] I reviewed the records and find the presumption in section 21(3)(b) applies to the personal information at issue. The contents of the records demonstrate there was an OPP investigation into incidents involving the appellant, in the case of the records responsive to Appeal PA21-00326, and his property, in the case of the records responsive to Appeal PA21-00325. I am satisfied the personal information relating to the affected parties and the WIN was compiled and is identifiable as part of investigations into possible violations of law.

[32] The ministry also claims the factor favouring non-disclosure in section 21(2)(f) applies to the personal information remaining at issue. Section 21(2)(f) states,

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.

[33] The ministry submits the records contain the names of affected parties who are identified as complainants or witnesses. Given the investigations that were conducted, the ministry submits the disclosure of the information could be expected to cause these affected parties significant distress. The ministry refers to Order PO-3301 to support this claim.

[34] With regard to the audio recording of the 911 call, the ministry refers to Order MO-3649, and submits it is reasonable to expect that significant distress would result if the personal information of the individual who made the call is ordered to be disclosed.

[35] Finally, with regard to the WINs, the ministry submits the disclosure of these identifiers would be expected to be distressing because it would reveal something of a personal nature about the employees, given that the employee names have also been released. The ministry relies on Orders PO-3742 and PO-4336 to support its position.

[36] The appellant submits the ministry did not provide sufficient evidence to support its position that section 21(2)(f) applies to the personal information at issue. The appellant states he seeks complete access to the original handwritten notes of the officers who attended the incidents on the dates identified in the appellant's request. The appellant states he would like to understand the process in which the OPP gathered evidence during its investigation.

[37] I reviewed the records and considered the circumstances surrounding the creation of the records. Upon this review, I find the factor in section 21(2)(f) applies in favour of non-disclosure of the personal information at issue. Given the nature of the relationships between the affected parties in the records and the appellant, I find the

disclosure of the personal information at issue could reasonable be expected to result in significant personal distress to the affected parties if their personal information as disclosed to the appellant. Accordingly, I find the factor at section 21(2)(f) is a relevant factor weighing in favour of the non-disclosure of the personal information at issue.

[38] The appellant did not submit representations in support of the application of any of the factors in section 21(2). I acknowledge the appellant's interest in understanding the process in which the OPP conducted its investigations into the incidents that took place on two specified dates. However, this is not a relevant consideration that weigh in favour or against disclosure of another person's personal information.

[39] In my review, I have considered the appellant's interest in access his own personal information in my review the records and the application of section 49(b) to the personal information that remains at issue. I have balanced the appellant's interests with those of the other individuals identified in the records. I have also considered and weighed the factor in section 21(2)(f) and the presumption in section 21(3)(b), both of which weigh against disclosure of the other individuals' personal information at issue. In light of these considerations, I find that disclosure of the other individuals' personal information in the records would be an unjustified invasion of personal privacy under section 49(b).

Absurd Result

[40] The records involve individuals who rent space on the appellant's equestrian facility. Given this context, the appellant submits, as the property owner, he "inherently possesses all information, personal and otherwise, with respect to the individuals and their horses occupying stall space on the property." There is no mention of a property owner's right of ownership or possession of the personal information of their tenants in the *Act*. However, I will consider whether the *absurd result* principle applies to the information at issue. The *absurd result* principle has been applied by the IPC when the requester sought access to their own witness statement,⁸ the requester was present when the information was provided to the institution,⁹ and the information was or is clearly within the requester's knowledge.¹⁰ However, if disclosure is inconsistent with the purpose of the exemption, the absurd result may not apply.¹¹

[41] The ministry submits it is not clear how much knowledge the appellant has of the contents of the records. Regardless, the ministry submits the absurd result principle does not apply because disclosure would be inconsistent with the purpose of the privacy exemption.

[42] Upon review of the circumstances and the parties' representations, I find the

⁸ Orders M-444 and M-451.

⁹ Orders M-444 and P-1414.

¹⁰ Orders MO-1196, PO-1679 and MO-1755.

¹¹ Orders M-757, MO-1323 and MO-1378.

absurd result principle does not apply to the withheld information. While the appellant claims he is entitled to the records given his ownership of equestrian facility, he does not provide any evidence to demonstrate that any of the information was or is clearly within his knowledge or that he was present at the time the information was provided to the police. The personal information at issue consists of identifying personal information or the opinions and view of affected parties that is highly sensitive. There is no clear evidence before me that this information is within the appellant's knowledge. Given these circumstances, I find the absurd result principle has no application to the personal information at issue.

[43] Therefore, I find the personal information remaining at issue is exempt from disclosure under the personal privacy exemption in section 49(b) of the *Act*. I have considered whether some of the personal information of the appellant, such as the opinions of the affected parties about him, may be severed from the records and disclosed to him. However, I find the appellant's personal information is inextricably intertwined with the affected parties' and cannot be severed without identifying the affected parties or resulting in an unjustified invasion of their personal privacy.

[44] In conclusion, I uphold the ministry's application of section 49(b) to withhold the personal information that remains at issue, subject to my review of its exercise of discretion below.

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

[45] The exemption in section 49(b) is discretionary and permits an institution to disclose the information subject to it despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. The IPC may find the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it considers irrelevant considerations or fails to consider relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² However, the IPC may not substitute its own discretion for that of the institution.¹³

[46] The ministry submits it exercised its discretion properly in not releasing the records at issue. The ministry states it considered the public's expectation that their personal information will be protected when it forms part of a law enforcement investigation, particularly where the affected individuals are not aware that their personal information is subject to disclosure due to this appeal. The ministry submits it is also concerned that disclosure of the records may subject affected third party individuals who are victims, complainants or witnesses to harm.

¹² Order MO-1573.

¹³ Section 43(2) of the *Act*.

[47] The appellant did not make any submissions on the ministry's exercise of discretion.

[48] I reviewed the parties' representations and the personal information at issue. Based on this review, I am satisfied the ministry considered relevant factors in exercising its discretion and did not consider irrelevant factors.

[49] Specifically, I am satisfied that in exercising its discretion under section 49(b), the ministry considered the sensitivity of the personal information at issue, the circumstances surrounding the creation of the records, and balanced the appellant's right of access to his personal information with the privacy interests of the other individuals, whose personal information is contained in the records. There is no evidence before me to suggest the ministry considered irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose.

[50] Accordingly, I am satisfied the ministry did not err in exercising its discretion to withhold information exempt under section 49(b) and I will not interfere with it on appeal.

ORDER:

1. I order the ministry to disclose the paragraph below *HISTORY* in Record 6, which is a General Report and found on page 2 of the records package for Appeal PA21-00326 by **November 12, 2023**.
2. I uphold the ministry's application of section 49(b) to withhold the remainder of the information at issue.

Original signed by: _____

Justine Wai
Adjudicator

October 12, 2023 _____