



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

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# INVESTIGATION REPORT

INVESTIGATION I92-066P

Ministry of Solicitor General and Correctional Services

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**June 11, 1993**



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# INTRODUCTION

## Background of the Complaint

This investigation was initiated as a result of a complaint brought to our attention by the legal counsel of a union, on behalf of one of its members (the complainant). The complaint involved the Ministry of the Solicitor General, now the Ministry of the Solicitor General and Correctional Services (the Ministry).

On December 17, 1991, at 7:30 a.m., the complainant was driving his car on a public highway when two Ontario Provincial Police (OPP) officers stopped him. The complainant was found in possession of narcotics and was taken into police custody. He was released at about 12:00 noon after he had signed a document promising to appear in court on January 27, 1992. On the same day the complainant was taken into custody, one of the arresting officers advised the complainant's supervisor of his arrest and the pending charges. An information was subsequently laid on January 9, 1992 -- 23 days after the complainant's arrest. On February 26, 1992, the complainant's employment was terminated for conduct incompatible with his employment.

The complainant was of the view that his rights under the Freedom of Information and Protection of Privacy Act (the Act) had been violated and that the OPP officer's disclosure of his arrest and the pending charges was not in accordance with the Act.

## Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information in question "personal information" as defined in section 2(1) of the Act? If yes,
- (B) Was section 37 of the Act applicable?
- (C) Was the OPP officer's disclosure to the complainant's employer in accordance with section 42 of the Act?

## RESULTS OF THE INVESTIGATION

**Issue A: Was the information in question "personal information" as defined in section 2(1) of the Act?**

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

- (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;

We have determined that the information in question was the complainant's name together with the circumstances of his arrest i.e. that the complainant had been found in possession of narcotics and that charges were going to be laid against him. It is our view that this information met the requirements of paragraph (h) of the definition of personal information in section 2(1) of the Act.

**Conclusion:** The information in question was "personal information" as defined in section 2(1) of the Act.

**Issue B: Was section 37 of the Act applicable?**

The Ministry acknowledged that on the day the complainant was arrested, one of the arresting OPP officers informed an engineering supervisor of the details of the complainant's arrest and of the pending charges. This took place prior to the complainant signing the documents compelling a court attendance, and the laying of an information in court.

The Ministry, however, was of the view that section 37 of the Act was applicable to the disclosure of the complainant's personal information. Section 37 states:

This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

The Ministry submitted that:

... information relating to accused persons and their charges is available to the public. The personal information provided by PC [name of the police constable] could be found in a public record, e.g., a criminal court file.

The Ministry stated:

The OPP as a matter of general practice does not release information about accused persons prior to the laying of an information. While the Ministry acknowledges that the personal information was released in this instance before the information was laid, the Ministry submits that the information was soon to be available publicly.

The Ministry further submitted that the disclosure accorded with the "Guidelines for the Peremptory Disclosure of Personal Information Held by Law Enforcement Agencies", issued by the Management Board of Cabinet initially in December 1990, then revised and redistributed in August 1992. The revised guidelines state in part that where an information is laid or will be laid in a courthouse, the personal information contained in the information, such as the name, date of birth and address of the accused, may be disclosed.

Under Section 37 of the Act, personal information that is maintained by an institution may be excluded from the application of Part III of the Act only if the personal information is maintained for the purpose of creating a record which is available to the general public.

In this case, at the time of the disclosure of the complainant's personal information by the OPP officer to the complainant's employer, charges had not been laid; documents compelling a court appearance had not been signed; and an information had not been laid in court.

It is thus our view that at the time of its disclosure, it could not be said that the information about the complainant's arrest and the pending charges was being maintained by the OPP for the purpose of creating a record which was available to the general public. Therefore, section 37 of the Act would not apply and the privacy provisions of Part III would not be excluded.

With respect to the guidelines issued by Management Board, we wish to take a narrower interpretation than the view expressed in the guidelines that law enforcement agencies may disclose personal information about an accused **before** an information is laid, on the basis that the information **will be** available to the general public.

**Conclusion:** Section 37 of the Act did not apply to the personal information disclosed by the OPP officer to the complainant's employer.

**Issue C: Did the OPP officer disclose personal information to the complainant's employer, in accordance with section 42 of the Act?**

Under the Act, an institution may not disclose personal information in its custody or under its control except in the specific circumstances outlined in section 42.

The Ministry submitted that the OPP officer's disclosure of the complainant's arrest and the pending charges was in accordance with section 42(a) which states:

An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

As further support of this view, the Ministry cited a passage from the **Freedom of Information and Protection of Privacy Manual** produced by Management Board Secretariat which states:

Subsection 42(a) permits an institution to disclose personal information in circumstances where such a disclosure would be permitted under section 21 of the Act, even though the institution has not received an access request. This subsection should be read in conjunction with subsection 63(1) which permits a head to disclose information even though an access request has not been received.

In past compliance investigations, we have held the view that the section 42(a) exception to the section 42 prohibition against disclosure of personal information only applies in the context of a request by an individual, made under Part II of the Act, for personal information relating to another individual. Given that section 63(1) of the Act does not refer specifically to "personal information", and bearing in mind that one of the purposes of the Act as set out in section 1(b) is

to protect the privacy of individuals with respect to personal information, it is our view that section 63(1) should be interpreted narrowly.

Nonetheless, we have examined section 63(1) in the circumstances of this case. In our view, even assuming that section 63(1) permits a head to disclose information where an access request has not been received, the disclosure in this specific case would not have been in accordance with section 42(a) of the Act.

The Ministry submitted that because the disclosure was not an unjustified invasion of personal privacy since the information was soon to be made public and because there were also health and safety concerns, the disclosure was in accordance with sections 21(1)(c), 21(1)(f) and 21(2)(b) of Part II of the Act.

It is our view that the sections cited by the Ministry in support of its position would not have applied. However, Section 21(3) of the Act would have been relevant to the disclosure of the complainant's arrest and of the pending charges.

Section 21(3) of the Act states that:

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
  - (a) was compiled and is identifiable as part of an investigation into a possible violation of law....

Section 28(1) of the Act provides that:

- (1) Before a head grants a request for access to a record,
  - (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

In this case, no notice as required under section 28(1)(b) was given to the complainant. Therefore, the disclosure of the complainant's arrest and the pending charges would not have been in accordance with Part II of the Act, and consequently, would not have been in accordance with section 42(a).

We have also examined the other provisions of section 42 of the Act and have determined that none of the provisions applied to the circumstances of this case.

**Conclusion:** The disclosure by the OPP officer of the complainant's arrest and the pending charges to his employer was not in accordance with section 42 of the Act.

## SUMMARY OF CONCLUSIONS

- The information in question was "personal information" as defined in section 2(1) of the Act.
- Section 37 of the Act did not apply to the personal information disclosed by the OPP officer to the complainant's employer.
- The disclosure by the OPP officer of the complainant's arrest and pending charges to his employer was not in accordance with section 42 of the Act.

## **RECOMMENDATION**

We recommend that the Ministry take steps to ensure that in future, disclosures of personal information by the OPP are in accordance with the provisions of the Act as interpreted in this investigation.

Within six months of receiving this report, the Ministry should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation.

Original signed by: \_\_\_\_\_  
Ann Cavoukian, Ph.D  
Assistant Commissioner

June 11, 1993 \_\_\_\_\_  
Date