



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

ORDER P-391

Appeal P-9200403

Ministry of the Solicitor General



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ORDER

BACKGROUND:

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 record identified as the "Level III Inspection Report 1992 - Belleville Police Force."

The Ministry granted access to 101 pages of the report in full and denied access to parts of the remaining 15 pages, pursuant to sections 14(1)(b) and (e) and 21 of the Act.

The requester appealed the Ministry's decision and raised the possible application of section 23 of the Act, the "public interest override".

Attempts to mediate the appeal were not successful and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, three individuals (the affected persons) and another party (the affected party) whose interests might be affected by disclosure of the record. Written representations were received from the Ministry, the appellant, two of the affected persons and the affected party. For the purposes of this order, the affected persons will be referred to by number 1, 2 and 3.

In its representations, the affected party claims that sections 21(1), 14(1)(a) and (f), 14(2)(a) and 18(1)(f) of the Act apply to the record. The affected party also claims that section 14(1)(b) applies to the entire record.

In Order P-257, Assistant Commissioner Tom Mitchinson considered the issue of whether or not a party other than an institution can rely on a discretionary exemption when an institution has not done so. At pages 5 and 6 of that order, he stated as follows:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. ... In my view, however, it is only in this limited context that

an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

Sections 14(1)(a) and (f), 14(2)(a) and 18(1)(f) are discretionary exemptions which were not claimed by the Ministry. In my view, in the circumstances, this appeal is not one of those "rare occasions" when an exemption, other than a mandatory exemption, not raised by the Ministry should be considered. Similarly, in my opinion, consideration of the application of a discretionary exemption actually claimed by the Ministry, should not be extended to exempt more of the record than was originally claimed by the Ministry.

ISSUES:

The issues in this appeal are as follows:

- A. Whether any of the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the information qualifies for exemption under section 21 of the Act.
- C. Whether the discretionary exemption provided by section 14(1)(b) of the Act applies to the record.
- D. Whether the discretionary exemption provided by section 14(1)(e) of the Act applies to the record.
- E. If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the personal information.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act reads, in part, as follows:

"personal information" means recorded information about an identifiable individual ...

The Ministry claims that the severances on pages FI0009, FI0032, FI0059, FI0077, FI0100, FI0101, FI0102, FI0103, FI0104, FI0106 and FI0108 contain personal information.

I have examined this information and, in my view, pages FI0009, FI0059, FI0077, FI0100, FI0102, FI0103, FI0106 and FI0108 contain the personal information of affected person 1 only; page FI0101 contains the personal information of affected persons 1 and 2 and FI0104 contains the personal information of affected person 3 only.

The severance on page FI0032 contains case numbers which, if disclosed, could not identify a particular individual and, therefore, do not satisfy the requirements of the definition of personal information. Since no other exemptions have been claimed for this severance, I order that it be disclosed to the appellant.

ISSUE B: If the answer to Issue A is yes, whether the information qualifies for exemption under section 21 of the Act.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information, except in certain circumstances, to anyone other than the individual to whom the information relates. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Although the Ministry claimed section 21, it specifically declined to make representations in support of this exemption. Affected persons 1 and 2 and the affected party provided representations on this issue; affected person 3 did not.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Both the Ministry and the affected party claim that section 21(3)(g) applies to the severances on pages FI0009, FI0100, FI0102, FI0103 and FI0106. Section 21(3)(g) reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Although, in a broad sense, it could be argued that some of the severances contain the "evaluations" of the author of the report, in my opinion, because of the nature of the report, they have no "personal" or "personnel" component, as required by section 21(3)(g). Therefore, this subsection does not apply.

Turning to section 21(2), the affected party and affected persons 1 and 2 submit that section 21(2)(f) applies to the information contained in the severances made to pages FI0009, FI0059, FI0077, FI0100, FI0101, FI0102, FI0103, FI0104, FI0106 and FI0108 of the record. The representations submitted by affected person 1 also suggest the application of sections 21(2)(g),(h) and (i) and the affected party also claims the application of section 21(2)(g) and (i).

Sections 21(2)(f), (g), (h) and (i) read as follows:

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;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The affected party submits that section 21(2)(f) applies because the record at issue in this appeal forms part of the subject matter of an "Inquiry" ordered by the Ministry under section 25 of the Police Services Act, into the conduct and performance of the Belleville Police Force and the Belleville Police Services Board.

Under these circumstances, the information at issue can be considered to be highly sensitive and section 21(2)(f) applies to all of the personal information which has been severed from the record. Since none of the factors listed in section 21(2) which favour disclosure are present, in my view, the disclosure of the information severed from pages FI0009, FI0059, FI0077, FI0100, FI0101, FI0102, FI0103, FI0104, FI0106 and FI0108 would constitute an unjustified invasion of the affected persons' personal privacy and the severances qualify for exemption under section 21(1).

ISSUE C: Whether the discretionary exemption provided by section 14(1)(b) of the Act applies to the record.

The Ministry claims that section 14(1)(b) applies to the information severed from page FI0038.

Section 14(1)(b) of the Act reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The words "law enforcement" are defined in section 2(1) of the Act as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

In its representations, the Ministry states that the information severed from page FI0038 relates to an investigation currently being conducted by the Belleville Police Force which could lead to charges under the Criminal Code of Canada and, therefore, qualifies as "policing". I agree. However, I must also decide whether the disclosure of this information could reasonably be expected to result in the harm specified in section 14(1)(b).

The Ministry submits that the investigation is currently ongoing and, therefore, premature disclosure of this information could reasonably be expected to interfere with the efforts of the investigating officer in identifying and interviewing witnesses and suspects. The investigation has nothing to do with the conduct of any member of the Belleville Police Force but is an investigation being conducted **by** one of its members. It is referred to in the record as an example of the way the Belleville Police Force carries out its responsibilities.

In my view, the Ministry has provided sufficient evidence to satisfy the requirements of section 14(1)(b) with respect to the severance on page FI0038. I have reviewed the Ministry's reasons for exercising discretion in favour of claiming this exemption, and I find nothing improper in the circumstances.

ISSUE D: Whether the discretionary exemption provided by section 14(1)(e) of the Act applies to the record.

The Ministry claims section 14(1)(e) as the basis for severing information from pages FI0063, FI0070 and FI0081.

Section 14(1)(e) reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (e) endanger the life or physical safety of a law enforcement officer or any other person;

The Ministry provides detailed representations in support of the position that release of this information could reasonably be expected to endanger the lives and/or physical safety of the law enforcement personnel employed by the Belleville Police Force.

I have carefully reviewed the Ministry's representations and I am satisfied that it has provided sufficient evidence to establish that disclosure of the information severed from pages FI0070 and FI0081 of the record could reasonably be expected to result in the type of harm identified in section 14(1)(e). Therefore, I find that these severances qualify for exemption under this section.

However, I am not convinced that the information severed from page FI0063 qualifies for exemption under this section. This information relates to the types of firearms, and training in their use, provided to the members of the Belleville Police Force. In my view, disclosure of this information would not reveal any information that has not already been discussed publicly in relation to police forces across the province. Therefore, I am not satisfied that disclosure of this information could result in the type of harm specified by section 14(1)(e) of the Act and, accordingly, the information severed from page FI0063 does not qualify for exemption.

I have reviewed the head's reasons for exercising discretion in favour of claiming the section 14(1)(e) exemption for pages FI0070 and FI0081, and I find nothing improper.

ISSUE E: If the answer to Issue B is yes, whether there is a compelling public interest in the disclosure of the personal information.

Section 23 of the Act provides that:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

Section 23 does not apply to information which has been found to be exempt under section 14 of the Act, so my discussion of section 23 is restricted to the severances on pages FI0009, FI0059, FI0077, FI0100, FI0101, FI0102, FI0103, FI0104, FI0106 and FI0108 which I have found to be exempt under section 21 of the Act.

In Order 24, former Commissioner Sidney B. Linden outlined the two requirements which must be satisfied in order to invoke the application of section 23. He stated:

The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The appellant submits that there is a compelling public interest in the disclosure of the entire record in order to restore public confidence in the Belleville Police Force.

As stated earlier, the Ministry has ordered an "Inquiry" into the conduct of the Belleville Police Force and the Belleville Police Services Board. The appellant has received access to virtually the entire record, which record, including the small portion which has not been disclosed, will form part of the subject matter of the "Inquiry" the Ministry has ordered.

Accordingly, in my opinion, the degree of disclosure which has taken place, together with the fact that an "Inquiry" is presently underway, leads me to conclude that section 23 of the Act does not apply.

ORDER:

1. I uphold the Ministry's decision not to disclose the severed information, except pages FI0032 and FI0063 of the record.
2. I order the Ministry to disclose the information severed from pages FI0032 and FI0063 within 15 days from the date of this order.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the information which is disclosed to the appellant pursuant to Provision 2, upon my request **only**.

Original signed by:
Tom Wright
Commissioner

December 23, 1992