



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

ORDER P-600

Appeal P-9300430

Ministry of the Attorney General



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléco: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documentation and materials related to the investigation and review of a complaint made by a named individual (the complainant) against the requester. The complainant alleged that the requester and a fellow officer assaulted him and/or used excessive force while in the course of their duties as police officers.

The Ministry identified 100 pages of materials as constituting the record responsive to the request. Access was denied to 79 pages in total pursuant to sections 14(1)(a) and 21 of the Act. The remaining 21 pages were disclosed in full to the requester. The requester appealed the decision of the Ministry.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Representations were received from both parties. In its representations, the Ministry indicated that it was exercising its discretion under sections 49(a) and (b) of the Act to deny access to the 79 pages. The Ministry also raised the application of the discretionary exemption in section 14(1)(b) of the Act. Because of the manner in which I have disposed of this appeal, it is not necessary for me to consider this section in this order.

THE RECORDS:

The appellant was involved in an altercation with the complainant as a result of which the named individual claimed he was assaulted by the appellant. The matter was investigated by the appellant's employer which concluded that the complaint was "Not Sustained". The complainant subsequently requested that this decision be reviewed by the Office of the Police Complaints Commissioner (PCC). The complainant also filed a statement of claim in a civil action against the appellant and others.

The pages at issue consist of documentation from the PCC file - the action log, case summary, witness statements, photographs, internal memoranda, a medical report, and correspondence.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether any of the information contained in the pages at issue qualifies as "personal information" as defined in section 2(1) of the Act.

- B. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.
- C. Whether the discretionary exemptions provided by sections 14(1)(a) and 49(a) of the Act apply.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the pages at issue qualifies as "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, ...

I have carefully reviewed all of the pages at issue and find that they contain the personal information of the appellant, the complainant and other identifiable individuals.

ISSUE B: If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

In Issue A, I found that the records contain the personal information of the appellant and other identifiable individuals. Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access. One such exception is found in section 49(b) of the Act which states:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individual's

personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 21(2) provides a non-exhaustive list of criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy, while section 21(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists a number of specific types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut the presumption. The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M-170).

The Ministry submits that the pages at issue fall under the presumptions in sections 21(3)(a) and/or (b) of the Act. These sections state:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (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;

As far as section 21(3)(b) is concerned, the Ministry indicates that the personal information contained in the pages at issue was compiled as part of the PCC investigation under the Police Services Act in an attempt to determine whether the appellant and another officer had violated the Code of Conduct for police officers. On this basis, I am satisfied that the presumption in section 21(3)(b) applies and that disclosure of the pages at issue would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

I have considered section 21(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 applies.

In his representations, the appellant indicates that he requires the pages at issue, and primarily the witness statements, for his defence in the civil suit filed by the complainant. On this basis, he argues that section 21(2)(d) of the Act (the personal information is relevant to a fair determination of the rights affecting the person who made the request) is a relevant consideration in determining whether the personal information should be released. Even if the information at issue fell within section 21(2)(d) of the Act, that consideration would be insufficient to dislodge the presumption.

The appellant has also argued that because one of the records disclosed to him contains the names and addresses of some of the witnesses, the Ministry has "waived" its right to subsequently deny access to the balance of the personal information relating to these individuals. In my view, disclosure by an institution of some personal information about an identifiable individual cannot be taken as precluding the institution from claiming the mandatory exemption in section 21 of the Act to deny access to other personal information about that individual. In each case, an institution must consider whether the exception in section 21(1)(f) of the Act applies, i.e. whether the disclosure of the particular personal information would constitute an **unjustified** invasion of personal privacy. In this appeal, the personal information at issue is far more extensive than that which has been disclosed to the appellant.

Accordingly, I find that disclosure of the personal information withheld from the pages at issue would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and is, therefore, properly exempt from disclosure under section 21(3)(b) of the Act. It is therefore not necessary for me to consider the application of section 21(3)(a).

I have reviewed the Ministry's representations on its exercise of discretion under section 49(b) in refusing to disclose to the appellant his own personal information. I find nothing improper in the manner in which this discretion was exercised and would not alter it on appeal.

Because of the manner in which I have dealt with Issues A and B, it is not necessary for me to consider Issue C.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 15, 1993