



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

# **ORDER P-663**

**Appeals P-9300180 and P-9300254**

**Ministry of the Solicitor General and Correctional Services**



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/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to a number of documents related to various incidents at the Moosonee detachment of the Ontario Provincial Police (the OPP detachment) involving the requester.

The Ministry identified a one-page covering letter, an Impact Assessment Report and five pages from a police officer's notebook as being responsive to the first request and three briefing notes, a letter and 18 Impact Statements as being responsive to the second. Partial access was granted to this documentation by the Ministry. The requester appealed the decisions of the Ministry.

Appeal Number P-9300180 was opened by the Commissioner's office to consider the first group of records and Appeal Number P-9300254 to address the second.

During mediation of these appeals, the Ministry disclosed additional information to the appellant on the basis of a consent received from an individual whose interests might be affected by the disclosure of the information contained in the records. The Ministry also withdrew its reliance on some of the exemptions previously claimed to deny access to those records which remain at issue.

Further mediation was not successful and notice that an inquiry was being conducted to review the decisions of the Ministry was sent to the Ministry, the appellant and 16 persons whose interests might be affected by the disclosure of the information contained in the records (the affected persons).

Representations were received from the Ministry, the appellant and seven affected persons in Appeal Number P-9300180. Three of the affected persons consented to the release of their personal information with specific reference to the Impact Assessment Report. The other four objected to the release of their personal information.

In response to the Notice of Inquiry in Appeal Number P-9300254, the Ministry, appellant and four affected persons submitted representations. All four affected persons objected to the release of their personal information. One of the four affected persons who responded on this occasion had also objected to the release of his personal information with respect to the records in Appeal Number P-9300180.

Because the records, issues and parties involved in Appeal Numbers P-9300180 and P-9300254 are the same, this order will dispose of both appeals.

The five records remaining in issue in both appeals may be described as follows:

1. Impact Assessment Report: 13 pages withheld in part;

2. Police officer's notebook: five pages withheld in part;
3. Three "Briefing Notes:" four pages withheld in part;
4. A three-page covering letter: one page withheld in part; and
5. Eighteen "Impact Statements" from various officers: 29 pages withheld in part.

## **DISCUSSION:**

The sole issue to be determined in these appeals is whether the records contain personal information as defined in section 2(1) of the Act, and if so, whether the discretionary exemption provided by section 49(b) applies.

### **Personal Information**

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual, ...".

Following a careful review of the records I find that they all contain the personal information of the appellant and that of one or more of the affected persons. The information remaining at issue does not contain the personal information of those three affected persons who consented to the disclosure of their personal information in response to the notification in Appeal Number P-9300180.

### **Invasion of Privacy**

Section 47(1) of the Act gives individuals a general right of access to 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 reads:

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 the rights of other individuals to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' 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 the 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 privacy.

Sections 21(2), (3), and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. I find that none of the personal information at issue falls within the ambit of section 21(3) or (4) of the Act.

The Ministry submits that sections 21(2)(f) and (h) apply to the personal information contained in the records. Some of the affected persons support this position and, in addition, claim that section 21(2)(i) is a relevant consideration weighing in favour of non-disclosure.

The appellant maintains that the considerations outlined in sections 21(2)(a), (d) and (g) of the Act collectively support release of the personal information found in the records.

Section 21(2) of the Act reads, in part:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- ...
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- ...
- (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.

I will first explore the factors outlined in section 21(2) of the Act, and any other relevant circumstances, which weigh in favour of non-disclosure of the personal information contained in the records. In interpreting section 21(2), all the relevant circumstances of the case must be considered, not only the factors enumerated in the section.

### **Highly Sensitive Information - Section 21(2)(f)**

In order for personal information to be considered "highly sensitive", the parties relying on this proposition must establish that disclosure of the information would cause excessive personal distress to the affected persons (Order P-434).

The Ministry submits that the severed personal information should be considered highly sensitive because it relates to an internal investigation into a "morale" problem and such investigations are extremely sensitive in nature. Following a careful review of the records and the representations of all parties, I agree with the Ministry.

Information gathered in an internal investigation as to the morale in a police detachment is necessarily highly sensitive, touching as it does on questions of competence, safety, relations between officers and within the community generally. This information is also necessarily, very candid and in my view, it is essential that such candid disclosure be protected and encouraged in investigations of this type. I also note that the appellant has been provided with substantially all of the comments made by the affected persons about him during the course of the impact assessment.

Therefore I find that the nature of the information which the records contain is "highly sensitive" as it pertains to the affected persons. On this basis, I find that section 21(2)(f) of the Act is a circumstance which weighs in favour of protecting the privacy interests of the affected persons.

### **Expectation of Confidentiality - Section 21(2)(h)**

The Ministry submits that the severed personal information was provided in confidence. Having read the records in detail, I agree that the severed information was provided with the expectation of confidentiality. This sentiment is echoed in the objections to disclosure received from four of the affected persons in this matter.

Section 14(2)(h) of the Municipal Freedom of Information and Protection of Privacy Act corresponds to section 21(2)(h) of the provincial Act. In Order M-82, Inquiry Officer Holly Big Canoe stated as follows:

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated.

Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint.

While the present appeal relates to records concerning an investigation into the morale situation at a specific OPP detachment, I believe that this situation is in some ways analogous to that of an investigation into an allegation of harassment. Therefore, I am of the view that section 21(2)(h) of the Act is a relevant factor in this appeal.

However, on a careful examination of the record and of information released to the appellant, I am of the view that the appellant has received substantially all information about him that was gathered and used in the investigation which will enable him to address the validity of any allegations and to satisfy himself with respect to the extent to which allegations were investigated.

Having found that disclosure to the appellant has been adequate in the context of the investigation that was carried out and having found that there is a reasonable expectation of confidentiality on the part of other individuals whose personal information has not been disclosed to the appellant, I find that section 21(2)(h) is a circumstance which weighs in favour of protecting the privacy interests of the affected persons.

**Unfair Damage to Reputation - Section 21(2)(i)**

One of the affected persons claims that his reputation will be unfairly damaged should his personal information be disclosed to the appellant. The appellant submits that he and another named individual are the only persons whose reputations are likely to be damaged if the information to which he seeks access is disclosed to him.

Having carefully reviewed the records, I am not satisfied that the reputation of the appellant or the other named individual would be damaged by the release of the information to the appellant. I therefore find that section 21(2)(i) of the Act is not a relevant consideration in these appeals.

In summary, I find that the considerations in sections 21(2)(f) and (h) of the Act are relevant in the circumstances of these appeals and weigh in favour of privacy protection.

I will next consider the factors the appellant claims support disclosure of the personal information of the affected persons.

**Public Scrutiny - Section 21(2)(a)**

In my view, there are two elements which must be satisfied for section 21(2)(a) of the Act to be considered a relevant factor: (1) the activities of the institution must have been publicly called into question, **and** (2) the disclosure of the personal information of the affected persons is desirable in order to subject the activities of the institution to public scrutiny.

In Order P-634, Assistant Commissioner Irwin Glasberg indicated that the first element will be satisfied where there is some evidence that a public interest has been expressed about the circumstances which led to the creation of the record. I adopt this approach for the purposes of this appeal.

To support his position that section 21(2)(a) is a relevant consideration, the appellant has provided some correspondence from Moosonee residents indicating concerns with respect to the appellant and the policing situation in Moosonee. While I am not entirely convinced that such evidence has called into question the activities of the institution - it may be that this simply illustrates that certain individuals may have specific concerns with the policing situation in Moosonee - I am prepared to consider that the first element has been met.

However, in my view, the second element has not been satisfied.

As I have previously indicated, the appellant has been given access to a considerable amount of information relating to the investigation into morale at the OPP detachment. A great deal of the information in the records was disclosed to him, including the investigator's comments and conclusions in the Impact Assessment Report and the majority of what was said by witnesses. In my view, the extent of disclosure in the circumstances of this appeal was adequate, with respect to this particular investigation process, to subject the activities of the institution to public scrutiny. The disclosure of the personal information of the affected persons, in my view, is not necessary in order to achieve the purposes of section 21(2)(a).

Therefore, I find that section 21(2)(a) is not a relevant consideration in this appeal.

### **Fair Determination of the Appellant's Rights - Section 21(2)(d)**

The appellant submits that, as a result of the information contained in the records, he was transferred out of the Moosonee OPP Detachment. He is currently appealing that transfer order and submits that he requires access to the records in their entirety in order to properly prepare his case for the appeal.

In order for section 21(2)(d) of the Act to apply to the facts of this case, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question; **and**

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

I have carefully considered the appellant's representations. I find that his appeal of the transfer order is a legal right relating to an existing procedure, thereby satisfying the first two criteria for the application of section 21(2)(d). However, I have not been provided with sufficient evidence to conclude that the personal information at issue is required to prepare for or to ensure an impartial hearing of the transfer order.

Nor do the appellant's very general characterizations of the Impact Assessment Report as containing "unwarranted conclusions, bald statements unsubstantiated by fact and general erroneous material" permit any analysis as to how the information would be useful to his appeal.

In my view, the appellant has not identified with sufficient particularity how the withheld information contained in the records would have some bearing on the legal right which he describes.

I therefore find that section 21(2)(d) is not a relevant consideration in this appeal.

#### **Unlikelihood Information is Accurate/Reliable - Section 21(2)(g)**

The appellant also argues that the information is unlikely to be accurate or reliable and states:

... [i]ndeed, that part of the Report that has been received, for the most part, has been so. Accordingly, it is only appropriate that I be apprised of the entire Report in order to meet those other inaccuracies.

The appellant has not indicated in what specific ways the information received is inaccurate and has not submitted any evidence to show how the information not disclosed is unlikely to be accurate or reliable. Therefore, it is impossible to determine whether the information at issue is unlikely to be accurate or reliable. It is likewise impossible to assess what effect such inaccuracy or unreliability might have if it exists.

Accordingly, in my view, section 21(2)(g) of the Act is not a relevant consideration in this appeal.

To summarize, I have found no factors in section 21(2) which weigh in favour of disclosure and two factors, sections 21(f) and (h), which favour privacy protection. In addition, I have considered all of the circumstances arising in this appeal and find that, on balance, the disclosure of the personal information withheld from disclosure would constitute an unjustified invasion of the personal privacy of the affected persons.



Section 49(b) is a discretionary exemption. The Ministry has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of this appeal. I have reviewed these representations and find nothing improper in the Ministry's exercise of discretion, and would not alter it on appeal.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ April 25, 1994