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

ORDER P-1091

Appeal P-9500312

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information related to the convictions entered against two named police officers on a specified date. The Ministry denied access to the records and the requester, represented by counsel, appealed to this office.

The requester is a former chief of police who is involved in a civil action against his former employer.

The records at issue in this appeal consist of transcripts of conversations between a police dispatcher and the appellant, the appellant and the two police officers, the dispatcher and the two police officers, Notices of Hearing and personnel forms relating to interviews or hearings.

The Ministry relies on the following sections of the Act to deny access to the above records:

- law enforcement - section 14(2)(a)
- invasion of privacy - section 21(1)

A Notice of Inquiry was provided to the appellant, the Ministry and the two named police officers (the affected parties). Because the records appear to contain references to the appellant, the possible application of sections 49(a) and (b) of the Act was included in the Notice of Inquiry. Representations were received from all parties.

In its representations, the Ministry stated that it was no longer relying on the discretionary exemption provided by section 14(2)(a). Therefore, I need not address the application of sections 14(2)(a) and 49(a).

In addition, both the appellant and the Ministry have made representations on the application of section 23 to this case. I will, therefore, include the application of the so-called public interest override in my discussion below.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

In its representations, the Ministry submits that the information in the records appears in the context of the appellant's professional duties as a former employee and does not qualify as his personal information.

Previous orders of the Commissioner's office have determined, however, that where the employee's performance or conduct is in question, then this information is considered to be the personal information of that individual. In addition, the definition of "personal information" in section 2(1) of the Act includes the views and opinions of another individual about the individual.

I have reviewed the information in the records and in my view, it relates to the appellant, the affected parties and other identifiable individuals and constitutes the personal information of these individuals.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49(b) provides an exception to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) of where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 14(2) of the Act as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the Ministry submits that the presumptions contained in section 21(3)(b) and 21(3)(d) of the Act applies to all the personal information in the records. These provisions state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (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;
>
> (d) relates to employment or educational history;

The Ministry has provided evidence that the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law (section 59(1) of the Police Services Act (the PSA)). The Ministry submits that the records contain personal information relating to the employment history of the affected parties. The Ministry states that the records document an

investigation that led to the affected parties being disciplined, and that pursuant to section 59(2) of the PSA, the records are retained in their personnel files for the required period.

In reviewing the information in the record, I note that two pages of the records (F100024 and F100025) contain a transcription of a conversation between the appellant and a dispatcher, together with a transcription of a conversation between the appellant and the affected parties. A number of previous orders have held that the disclosure of personal information which the requester has originally supplied to the government organization, would not result in an unjustified invasion of personal privacy (Order M-384). Further, applying a presumption to deny access to information which the appellant provided to the institution is Aa manifestly absurd result" and an improper implementation of the intent of the legislature (Order M-444). I agree with the approaches and the reasons articulated in those orders and adopt both for the purposes of this appeal.

In my view, the disclosure of the parts of the transcript which record the conversation of the appellant does not constitute an unjustified invasion of personal privacy and the presumptions raised by the Ministry do not apply to this information. I have highlighted the relevant portions of the transcript on the copy of the record provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.

I will now consider the application of sections 21(3)(b) and (d) to the remaining records.

The appellant acknowledges that disclosure of records compiled as part of an investigation into a violation of the PSA would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b). The appellant submits, however, that records of conviction are the final determination as opposed to being part of the investigation. Along those same lines, the appellant argues that the personal information relating to employment history should be disclosed on the premise that police hearings are open to the public and therefore, the resulting documentation should also be available to the public.

As I have indicated previously, the records at issue consist of notices of hearing which set out the relevant section of the PSA allegedly contravened and particulars of the allegations, and secondly, the personnel documentation which include the results of the interview or hearing and the course of action taken and thirdly, transcripts of recorded conversations. I note that while disciplinary hearings under the PSA may be opened up upon request, as a general rule, they are not public hearings. In addition, there is no evidence before me to indicate that the hearings in this particular case were open to the public.

I have carefully considered the representations of the appellant, the affected parties and the Ministry. I find that the information in the notices of hearing and the transcript was compiled as part of an investigation into a possible violation of law (the PSA) and that the information in the personnel documentation relates to employment history. Therefore, the presumed unjustified invasion of privacy under sections 21(3)(b) and (d) applies to the personal information in the records.
The appellant has also raised the possible application of section 21(2)(d) (fair determination of rights) in the circumstances of this case. As I have indicated previously, where one of the presumptions in section

21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information. Therefore, section 21(2)(d) cannot rebut the presumptions that I have found to apply to the personal information in the records.

In my view, section 21(4) does not apply. The appellant has raised the possible application of section 23 of the Act. This section provides:

> 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)

In order for section 23 to apply, there must be a **compelling** public interest in disclosure and this compelling public interest must **clearly** outweigh the **purpose** of the exemption. The appellant submits that the information requested is necessary for use as evidence in the civil suit. The appellant states that the outcome of the civil proceedings against a public body will serve as precedent in future cases involving public bodies.

The Ministry states that a public interest does not exist to justify the disclosure of the personal information in the records.

I have reviewed the evidence before me and I am not satisfied that there is a compelling public interest in the disclosure of the personal information which clearly outweighs the purpose of the exemption. In my view, the appellant's interest in disclosure of the personal information is a personal interest and therefore, section 23 is not applicable.

I have found that the presumptions found in sections 21(3)(b) and (d) apply to the records (except the transcript of the appellant's conversation with the dispatcher) and therefore, disclosure of this personal information would constitute an unjustified invasion of personal privacy. Accordingly, this information is exempt under section 49(b) of the Act.

ORDER:

1. I uphold the Ministry's decision to deny access to the records **except** for the highlighted portions of pages FI00024 and FI00025, as shown on the copy provided to the Freedom of Information and Privacy Co-ordinator with this order.

2. I order the Ministry to disclose to the appellant the highlighted portions of pages FI00024 and FI00025 within fifteen (15) days of the date of this order. The **non-highlighted** portions of these pages must **not** be disclosed to the appellant.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the pages of the records disclosed to the

appellant pursuant to Provision 2.

Original signed by: December 28, 1995
Mumtaz Jiwan
Inquiry Officer