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

ORDER P-1228

Appeal P-9500329
[Reconsideration]

Ministry of the Solicitor General and Correctional Services

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This order sets out my decision on the reconsideration of Order P-1044 (which I issued on November 8, 1995).

BACKGROUND:

In Order P-1044, I addressed a number of issues concerning a request made under the Freedom of Information and Protection of Privacy Act (the Act), for records relating to a motor vehicle accident which was investigated by the Ontario Provincial Police (the OPP). As a result of this investigation, charges were brought against one of the drivers under the Highway Traffic Act (the HTA).

In the decision which lead to that order, the Ministry of the Solicitor General and Correctional Services (the Ministry) denied access to the records responsive to this request in their entirety pursuant to the following exemptions in the Act:

- law enforcement - sections 14(1)(a) and (b)
- right to fair trial - section 14(1)(f)
- invasion of privacy - section 21(1).

The requester (now the appellant) appealed this decision. In the Notice of Inquiry which was sent to the parties by this office, the Appeals Officer raised the possible application of sections 49(a) (discretion to refuse requester's own information) and (b) (invasion of privacy) to the records.

In Order P-1044, I made the following findings with respect to the issues in the appeal:

1. A number of pages of the records contained the personal information of the appellant and/or other individuals (pages 1 - 5, 18 - 19, 34 - 42, 44 - 50, 53 - 56, 57 - 60 and 62 - 69). This information was analysed under section 49(b).

2. Some of the pages contained only the personal information of individuals other than the appellant (pages 6 - 17, 20 - 22, 31 and 76). This information was analysed under section 21(1).

3. Some of the personal information (which is found on pages 4 and 5, and parts of pages 41, 53 - 56, 62 and 63) had been provided to the OPP by the appellant. In the circumstances of this appeal, disclosure of this information would not constitute an unjustified invasion of privacy.

4. The remaining personal information was properly exempt under sections 21 and 49(b), and the Ministry's decision with respect to these portions of the records was upheld.

5. The Ministry failed to meet the burden of proof with respect to section 14 regarding the records and parts of records which did not contain personal information, and those records which were not exempt under section 49(b), and these records were ordered disclosed.

6. Because of the findings I made regarding the nature of the information contained in the records, I did not need to consider the possible application of the exemption in section 49(a).

THE REQUEST FOR RECONSIDERATION:

After it received Order P-1044, the Ministry submitted a request for reconsideration of the order on the grounds that the findings I reached were unreasonable on the basis of the evidence adduced during the inquiry. In particular, the Ministry submits that:

- my finding that the records at issue were not prepared for the purpose of prosecution was unreasonable;

- my finding that the Ministry had produced "no evidence" to support its claim that the records at issue were prepared for prosecution or that disclosure of the records would lead to the harms envisioned by sections 14(1)(a), (b) or (f) was unreasonable.

In addition, the Ministry claims that my interpretation of section 14(1)(a) is neither consistent with earlier related orders nor with the records at issue.

The Office of the Information and Privacy Commissioner/Ontario has developed a policy statement which summarizes the grounds upon which a decision-maker may reconsider an order. In brief, the policy statement provides that orders should be reconsidered only where there is a fundamental defect in the adjudication process or some other jurisdictional defect in the order, or where there is a typographical or other clerical error in the order which has a bearing on the decision or which does not express the manifest intention of the Decision Maker. An order should not be reconsidered simply on the basis that new evidence is provided.

On December 22, 1995, I wrote to the Ministry and the appellant regarding this reconsideration request, and invited both parties to submit representations on my authority to re-open and reconsider Order P-1044.

In the interests of expediency, these letters also set out the issues raised by the reconsideration request. After acknowledging that the Ministry had already submitted representations on these issues, I invited the appellant to make representations on them.

The appellant's counsel contacted this office on January 15, 1996 and advised that he was not aware of any errors in the decision. Moreover, he indicated that he believed that the HTA matter had proceeded to trial and that a decision had been rendered in December, 1995.

The Ministry submitted further representations regarding my authority to re-open and reconsider Order P-1044. In addition to the submissions referred to above, the Ministry submits that even if the grounds for this application do not fall within the reconsideration policy, reconsideration should nonetheless be granted on the basis of the discretionary exemptions in sections 14(2)(a) and 19 of the Act.

I note that the Ministry did not claim the possible application of either section 14(2)(a) or 19 in its decision letter. Neither did it raise these issues in its original representations. The Ministry acknowledges this, but submits that I should nevertheless reconsider my decision in light of recent case law which, it argues, has established that reconsideration need not be strictly applied. Moreover, the Ministry submits that sections 14(2)(a) and 19 would appear to be determinative of the issue. However, because of the decision I have made regarding the Ministry's reconsideration request, it is not necessary for me to deal with this issue.

Following a review of the original representations submitted by the Ministry, the representations submitted on reconsideration, the records and my decision in Order P-1044, I have decided to proceed with the reconsideration. My reasons for reconsidering Order P-1044 are set out below in my discussion of the exemption in sections 14(1)(a) and 49(a).

As I noted above, the Ministry has raised a number of issues in this reconsideration. However, I have restricted my discussion to the findings in Order P-1044 regarding sections 14(1)(a) and 49(a). Because I am only proceeding to reconsider this portion of my decision in Order P-1044, this reconsideration order supersedes only the discussion under Law Enforcement/Right to Fair Trial on pages 4 and 5 of Order P-1044, and Order Provisions 3 and 4 as set out on page 6 of that order. The balance of the discussion and order provisions in Order P-1044 remain unchanged.

THE RECORDS AT ISSUE IN THIS RECONSIDERATION:

As I indicated above, in Order P-1044 I determined that, although much of the personal information in the records was exempt under section 21 or 49(b), pages 4 and 5, and parts of pages 41, 53 - 56, 62 and 63 were not exempt under either of these sections. Further, only portions of a number of the pages which contained personal information were exempt under section 21 or 49(b). The remaining portions of these pages did not attract this exemption.

The Ministry claimed that the exemption in section 14 applied to all of the records at issue in this appeal. Accordingly, in Order P-1044, I considered these pages and parts of pages along with the remaining information at issue in this appeal, in the discussion under section 14. The Ministry has notified this office that it has disclosed pages 4 and 5, and the portions of pages 41, 53 -56, 62 and 63 which I referred to above, to the appellant, and these portions of the records are not at issue in this reconsideration.

Therefore, the records at issue in the following discussion consist of pages 22 - 29, 30, 32, 33, 43, 58 - 61, 64 - 68 and 77 - 79, the non-highlighted portions of the records (comprising pages 18, 19, 21, 34 - 40, 42, 44, 48 - 51, 57, 69 - 72, 75, 76 and 80) which were attached to Order P-1044, and the remaining portions of pages 41, 53 - 56, 62 and 63.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

In Order P-1044, I found that the following pages contain the appellant's personal information: pages 18, 19, 34 - 42, 43, 44, 48 - 50, 53 - 60 and 62 - 69. This finding is not in dispute.

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 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 14, would otherwise apply to that information.

As I noted above, because of the findings I made with respect to the exemption claim under section 14 in Order P-1044, it was not necessary for me to consider the exemption in section 49(a). However, having decided to reconsider my decision regarding section 14, I must also turn my mind to the possible application of section 49(a) to those records which contain the appellant's personal information.

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering whether these records qualify for exemption under section 14(1)(a) of the Act.

LAW ENFORCEMENT

Section 14(1)(a) provides:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > interfere with a law enforcement matter.

In Order P-1044 I found that the Ministry had failed to provide sufficient information and reasoning to support a conclusion that disclosure of the remaining information in the records could reasonably be expected to result in any interference with a law enforcement matter.

I noted at the beginning of my discussion of the Ministry's claims under section 14, that in this case:

> The Ministry's arguments under sections 14(1)(a), (b) and (f) all relate to concerns about the ability of an individual charged under the HTA to have a fair and impartial trial. Because the Ministry's submissions are simultaneously directed at all three of these sections, I will consider whether its representations have collectively established their application.

In my view, I incorrectly considered the collective effect of the representations on the exemptions claimed. Rather, a collective reading of the representations should have been considered in determining whether each subsection of section 14 applied, independent of the other subsections. I find that failure to consider each subsection on its own merits amounts to a jurisdictional defect.

In Order P-1044, I noted the Ministry's arguments as follows:

> The Ministry submits that the investigation and prosecution of the charges are law enforcement matters. Further, disclosure of evidence in court proceedings could potentially prejudice the ability to conduct a fair and impartial trial. In this regard, the Ministry submits that "[t]he disclosure of these records could result in a publication of the anticipated evidence of subpoenaed witnesses to be used in a trial, which would interfere with the law enforcement proceedings."

Following consideration of these arguments, I concluded that:

> ... The Ministry has provided no evidence to support this argument, however, and I am not persuaded that the mere disclosure of any information gathered as part of a police investigation, during a trial, would necessarily prejudice an individual's right to a fair trial.

In my view, in rejecting the arguments as they related to section 14(1)(f) (right to a fair trial), I neglected to consider the broader application of the exemption in section 14(1)(a). Therefore, the crux of the issue in this reconsideration is whether disclosure of the records would "interfere" with a law enforcement matter under section 14(1)(a) of the Act.

Previous orders of the Commissioner's office have found that the use of the word "interfere" in section 14(1)(a) contemplates a situation where the particular investigation or law enforcement matter is still ongoing (Orders P-285, P-316 and P-403).

In Order P-567, which also concerned records relating to a motor vehicle accident, former Assistant Commissioner Irwin Glasberg accepted the Ministry's arguments that disclosure of information about the police investigation prior to the hearing could reasonably be expected to interfere with the investigation and eventual prosecution of the individual charged. In that case, the trial pertaining to the charges had not yet been scheduled, although an active warrant for non-appearance had been issued for one of the individuals involved in the accident.

When I issued my decision in Order P-1044, the proceedings under the HTA were imminent. Having now considered section 14(1)(a) separately from 14(1)(b) and (f) in the context of the Ministry's original arguments and previous interpretations of section 14(1)(a), I am satisfied that the Ministry has met the burden placed upon it by section 53 of the Act and has provided sufficient evidence to establish a reasonable expectation of the harm as contemplated in section 14(1)(a). Accordingly, I find that this exemption applies and the information is exempt from disclosure. Further, I find that the portions of pages 18, 19, 34 - 42, 43, 44, 48 - 50, 53 - 60 and 62 - 69 which are at issue in this reconsideration are also exempt under section 49(a).

As I indicated above, this reconsideration order supersedes only the discussion under Law Enforcement/Right to Fair Trial on pages 4 and 5 of Order P-1044, and Order Provisions 3 and 4 as set out on page 6 of that order. The balance of the discussion and order provisions in Order P-1044 remain unchanged. However, for greater clarity, I have set out the order provisions in Order P-1044 along with the amendments made to Order Provision 3 in accordance with this

reconsideration. These order provisions replace the order provisions in Order P-1044 in their entirety, and those in Order P-1044 should be disregarded.

ORDER:

1. I uphold the Ministry's decision to withhold the information contained in pages 1 - 3, 6 - 17, 20, 31, 45 - 47 and 52, and the portions of the records comprising pages 18 - 19, 21, 36 - 42, 44, 48, 49, 57, 63 and 76 which are highlighted in yellow on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry **not** to disclose the portions of information which is found on pages 52, 73 and 74 and portions of pages 34, 35, 39, 40, 42, 44, 50, 51, 53, 56, 62, 69 - 72, 75 and 80 which are highlighted in pink on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

3. I uphold the Ministry's decision to withhold the information in pages 22 - 29, 30, 32, 33, 43, 58 - 61, 64 - 68 and 77 - 79, the non-highlighted portions of the records (comprising pages 18, 19, 21, 34 - 40, 42, 44, 48 - 51, 57, 69 - 72, 75, 76 and 80) which were attached to Order P-1044, and the remaining portions of pages 41, 53 - 56, 62 and 63.

Original signed by: July 16, 1996
Laurel Cropley
Inquiry Officer

POSTSCRIPT:

In his response to this office, counsel for the appellant indicated that the HTA matter had already proceeded to trial and a decision had been rendered in December, 1995. Neither counsel nor the Ministry has indicated whether an appeal of this decision has been made. In my view, however, the fact that the matter may now be concluded is not relevant to the decision which has been made in this reconsideration.

My decision to reconsider Order P-1044 was based on my determination that I had made an error at the time of issuing that Order. Accordingly, my decision in this reconsideration must reflect the circumstances as they were at that time.

I do note, however, that the Ministry's primary concern throughout this appeal was the premature disclosure of information prior to the trial. In light of this, in the event the HTA matter has finally concluded, the Ministry may now wish to reconsider its decision with respect to the information it has withheld under section 14 on its own initiative or in response to a new access request.