



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

ORDER P-1375

Appeal P_9700007

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>

NATURE OF THE APPEAL:

The appellant requested a copy of an identified occurrence report and a copy of the 911 tape relating to the occurrence. The request was made to the Ministry of the Solicitor General and Correctional Services (the Ministry) pursuant to the Freedom of Information and Protection of Privacy Act (the Act).

The Ministry provided the appellant with partial access to the occurrence report and denied access to the tape in its entirety. The tape and portions of the occurrence report were withheld on the basis of the following exemptions in the Act:

- law enforcement report - section 14(2)(a)
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse access to requester's own information - section 49(a)

The appellant filed an appeal of the Ministry's decision. During mediation the appellant indicated that he was only seeking access to the 911 tape.

The 911 telephone call to the Ontario Provincial Police (the OPP) was made by the appellant's son at the appellant's request. The tape contains the voices of his son, the appellant and the appellant's former wife.

A Notice of Inquiry was sent to the Ministry, the appellant and the appellant's former wife on her own behalf, as well as her 12 year old son who is in her custody. The appellant indicated that his identity as the requester could be disclosed to his former wife.

Representations were received from the Ministry, the appellant and the appellant's former wife on her own behalf and on behalf of her son. In its representations, the Ministry withdrew its reliance on the exemptions in sections 14(2)(a) and 49(a) of the Act.

DISCUSSION:

INVASION OF PRIVACY

"Personal information" is defined in section 2(1) of the Act, in part, as recorded information about an identifiable individual. I have listened to the 911 tape and find that it contains the personal information of the appellant, his former wife and his son.

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another

individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 21(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The Ministry submits that the personal information at issue is subject to the presumption in section 21(3)(b) of the Act which states:

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

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;

There are several previous orders of this office which have considered whether information that an appellant was previously aware of, or which was provided to or received from an appellant by an institution should be subject to a presumption against non-disclosure (Orders M-384, M-444, M-613, M-847 and P-1263). All of these orders deal with fact situations analogous to the present case in that the information at issue was the personal information of both the appellant and other individuals.

In Orders M-713 and M-793, the records at issue were tapes of 911 calls that an appellant had made to the police. Order M-851 involved a videotape of the appellant taking a polygraph test. Order M-857 did not involve information or records provided by the appellant to the institution, but information within the knowledge of the appellant by virtue of his involvement in the situation which lead to the creation of the records.

These orders found that non-disclosure of personal information which was originally provided to the institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

The circumstances of this case are somewhat different in that the appellant did not actually make the 911 call to the OPP. His son did. However, in my view, it is clear that the call was being made by the son on the appellant's behalf. The appellant was physically unable to place the call because of the situation at that time with his former wife. It is clear that the appellant was

present when the call was being made, heard the conversation between his son and the dispatcher and, in many instances, directed his son how to respond to the dispatcher's questions. It is almost as if the son were the appellant's "proxy" with respect to the call.

In these circumstances, I am of the view that to apply the presumption in section 21(3)(b) to the tape of the 911 call would lead to an absurd result. Accordingly, I find that this presumption does not apply.

The parties have all provided submissions on the other circumstances of this case which, in the case of the Ministry and the appellant's former wife, favour privacy and which, in the appellant's view support disclosure.

The Ministry submits that the personal information is highly sensitive in that disclosure would cause stress to the appellant's former wife and son. Thus, the Ministry has raised the application of the circumstances outlined in section 21(2)(f) of the Act.

The former wife states, that in her opinion, it would be in the best interests of all concerned to put this incident behind them and that mention of the existence of the tape would upset her son.

The appellant points out that initially both he and his former wife informally sought a copy of the tape from the OPP. To this end, they both consented to the disclosure of the tape to each other. The Ministry indicates that when it contacted the appellant's former wife in response to the appellant's request under the Act, she withdrew her consent. About ten days later, the Ministry received a call from counsel for the former wife indicating that her client now consented to the disclosure and that she would send the Ministry written confirmation. The Ministry states that it did not receive such confirmation and, in her submissions, the former wife states that she no longer gives her consent.

The appellant also indicates that he requires access to the tape as it is relevant to a fair determination of his rights under section 21(2)(d) of the Act. He states that the tape provides evidence of the respective actions of the parties should any allegations against him be made in the future as to his role in the occurrence. In addition, he notes that his son will not have to testify to these events if he is given access to the tape.

Furthermore, the appellant states that all the parties involved have discussed the incident. As I have indicated, the appellant was present, heard the 911 call and is aware of what was said. The appellant was provided with partial access to the occurrence report describing the incident with only minor severances referring to his son and former wife.

Having listened to the tape, considered the representations of the parties and all the circumstances of this case, I make the following findings:

- (1) I accept the submissions of the Ministry that the information on the tape is highly sensitive and the desire of the appellant's former wife to put this incident behind her and her family. Therefore, I find that section 21(2)(f) of the Act is a relevant consideration favouring privacy.

- (2) I also give weight to the appellant's concerns about requiring the tape for a fair determination of his rights. Although it is likely that the tape would be disclosed to him in any future criminal proceedings, the same may not be said of any civil proceedings between the appellant and his former wife. This consideration favours disclosure.
- (3) While the appellant did not directly provide the information on the tape to the Ministry, I find that he was, in essence, the "directing mind" behind the call. In my view, this factor weighs in favour of disclosure of the tape.
- (4) Given that the appellant was present when the call was made, the information on the tape is within his knowledge by virtue of his involvement in the situation which lead to the creation of the record. In the circumstances of this case, the fact that the appellant is aware of the information at issue weighs in favour of disclosure.
- (5) Based on all of the foregoing, I find that disclosure of the tape to the appellant would not constitute an unjustified invasion of the personal privacy of his son or former wife.

ORDER:

1. I order the Ministry to disclose a copy of the 911 tape to the appellant by sending him a copy by **May 14, 1997** and not before **May 9, 1997**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the tape which is provided to the appellant pursuant to Provision 1.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 9, 1997