



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

# ORDER P-1337

Appeal P\_9600293

Ministry of the Attorney General



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## **NATURE OF THE APPEAL:**

The appellant, represented by the Office of the Public Guardian and Trustee, made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry). The request was for access to information relating to an investigation of a police shooting. The investigation was conducted in the fall of 1995 by the Ministry's Special Investigations Unit (the SIU). The appellant was the victim of the shooting, and was severely injured as a result of a bullet wound to his head. The appellant's injuries have left him mentally incapable of managing his property and financial affairs, and the Office of the Public Guardian and Trustee is his statutory guardian of property. In this order, references to actions taken by the appellant are to be understood to be actions taken by the Office of the Public Guardian and Trustee on the appellant's behalf.

Specifically, the appellant sought access to:

- the findings and conclusions of the investigation
- statements of witnesses (including police officers)
- toxicology reports
- ballistic reports
- accident reconstruction reports
- forensic identification reports
- photographs.

The Ministry granted partial access to the information requested. Access to the remaining information was denied under the following exemptions:

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

The appellant appealed the Ministry's decision. During mediation of the appeal, the appellant withdrew his request for the following records:

- the report by the Director of the SIU
- the witness statements provided by police officers
- the bloodstain analysis and ballistics report
- the technical collision report
- the toxicology and chemistry report
- the case submission list and exhibit list.

The appellant also indicated that although he was not interested in pursuing access to the Final Investigative Report, he was interested in obtaining some of the documents listed in the appendix of the report. The Ministry issued a separate decision letter in respect of these items, and this decision is the subject of a second appeal by the appellant and will not be considered in this order.

A Notice of Inquiry was sent to the Ministry, the appellant, independent witnesses, ambulance attendants, and civilian employees of the police. The application of sections 49(a) and (b) were included as issues in the Notice of Inquiry, as the records appeared to contain the personal information of the appellant. Representations were received from the Ministry, the appellant, and a representative of the witnesses who are employed by the police.

## **RECORDS:**

The records remaining at issue in this appeal consist of:

- witness statements provided by individuals other than police officers
- list of photographs
- photographs

Partial access was granted to both the list of photographs and the actual photographs. Access to the witness statements, however, has been denied in full.

## **DISCUSSION:**

### **DISCRETION TO REFUSE THE REQUESTER'S OWN INFORMATION**

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual." Having reviewed the records, I am satisfied that they all contain the personal information of the appellant.

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.

### **LAW ENFORCEMENT**

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 would otherwise apply to that information. Section 49(a) states as follows:

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

where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information. [Emphasis added]

The Ministry submits that section 14(2)(a) applies to parts of Record 29, which is the SIU Investigation "Photographic Book" and is comprised of the list of photographs and the photographs themselves. Section 14(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In order for a record to qualify for exemption under section 14(2)(a) of the Act, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

The Ministry submits that Record 29 was prepared by the Technical Identification Section of the Ontario Provincial Police at the request of the SIU. This record is an appendix to and forms an integral part of the SIU's Final Investigative Report. The Final Investigative Report describes the events occurring before and after the shooting, sets out the details of the investigation, outlines the investigator's comments and outlines the conclusion he reached regarding the conduct of the police. In my view, the Final Investigative Report, including the appendices, consist of a formal account of the results of the consideration of the information related to the incident. On this basis, I find that the Final Investigative Report, with appendices, constitutes a "report" for the purposes of section 14(2)(a) of the Act, and part one of the test has been met.

Turning to part two of the test, the SIU is established by section 113 of the Police Services Act and is charged with the investigation of "... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (section 113(5)). The Ministry states that, in the event of such an incident, an independent investigation is conducted by the SIU investigators with a view to determining whether any police officer may have committed a criminal offence in the circumstances. At the conclusion of the investigation, a brief is submitted to the Director of the SIU for review and determination. If reasonable grounds exist, the Director may cause an information to be laid against a police officer in connection with the matters investigated and refer such an information to the Crown Attorney for prosecution. The Director is required to provide a report of the results of the investigation to the Attorney General (section 113(8)).

On the basis of the above, I find that the Final Investigative Report was prepared in the course of a law enforcement investigation by the SIU, an agency which has the function of enforcing and regulating compliance with a law. Thus parts two and three of the test have been met and the Final Investigative Report would qualify for exemption under section 14(2)(a) of the Act.

Section 14(2)(a) enables the Ministry to refuse to disclose the entire "**report**". Thus, unlike other exempting provisions in the statute, there is no obligation to sever portions of the documents which do not contain sensitive material and disclose them to the requester. Although

the Ministry has chosen to do so by disclosing parts of Record 29 and by not claiming this exemption with respect to the witness statements which were also part of the appendix to the report, the parts of Record 29 that it has refused to disclose qualify for exemption under section 14(2)(a) of the Act. Accordingly, I find that these parts of Record 29 are, therefore, exempt under section 49(a) of the Act.

## **INVASION OF PRIVACY**

As stated above, I have found that all of the records contain the personal information of the appellant. The remaining records at issue consist of witness statements provided by independent witnesses, ambulance attendants, and civilian employees of the police. Having reviewed these records, I find that each of these statements also contains the personal information of the police officer whose conduct was the subject of the SIU investigation, other police officers involved in the incident and/or the witness or other individuals present at the scene.

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.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Of these, only sections 21(1)(a) and (f) could apply in this appeal. Section 21(1)(a) permits disclosure "upon prior written request or consent of the individual." Section 21(1)(f) permits disclosure if it "does not 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.

One of the witnesses consented to the disclosure of his personal information (although a second witness consented in writing to the disclosure of his personal information with his name and other identifying information removed, this consent was verbally withdrawn during the inquiry). The Ministry argues that despite the consent provided by this witness, the Ministry acted within the discretion afforded by the Act in determining that disclosure of his statement would constitute an unjustified invasion of personal privacy. In this regard, the Ministry submits that his statement should not be disclosed in whole or in part.

In Order M-8, Commissioner Tom Wright considered a similar argument from an institution. In that Order, Commissioner Wright stated:

In my view, the purpose of section 14 [the equivalent of section 21 of the Act] is to protect the personal information of individuals which is contained in records maintained by the institution. Section 14 is not intended to protect the interests of the institution. Where consent is given by an individual to disclose his\her personal information to which he\she is entitled to have access, and in the absence of any other exemption applying to the information, in my opinion, there is no residual discretion that can be exercised by the head to refuse disclosure of the personal information of this person. Simply stated, if the exception contained in section 14(1)(a) applies, the mandatory exemption from disclosure does not.

I agree with Commissioner Wright. However, in these circumstances, the witness statement contains the personal information of the appellant, the witness **and** the police officer whose conduct was under investigation. The personal information of these three individuals is intertwined in the statement, and cannot reasonably be severed. As the police officer has not provided his consent, section 21(1)(a) does not apply.

The Ministry states that the personal information which has been withheld was compiled as part of the SIU investigation into a possible violation of law (i.e. the potential commission of criminal offences by the police officer who was involved in the incident). Accordingly, the Ministry argues that the presumption in section 21(3)(b) applies to exempt this information from disclosure. This section provides:

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;

Based on the submissions of the Ministry and my review of the records, I find that the personal information which I have identified above was compiled and is identifiable as part of an investigation into a possible violation of law, that is the Criminal Code. The information does not fall within the types of information listed in section 21(4).

Based on the application of section 21(3)(b), I find that the disclosure of the information to which this presumption applies would be an unjustified invasion of the personal privacy of individuals other than the appellant. For this reason, the information in the witness statements is exempt under section 49(b).

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant's submissions on the public interest in the disclosure of the records relate to the issue of subjecting the police to public scrutiny.

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public

interest must **clearly** outweigh the **purpose** of the exemption. In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemption under section 21, which is essentially the protection of personal privacy. It is my view that section 23 of the Act does not apply in the circumstances of this appeal.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ February 3, 1997