



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

ORDER P-1500

Appeal P-9700235

Ministry of the Attorney General



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NATURE OF THE APPEAL:

In August 1994, the appellant was the victim of a serious assault. Four individuals were charged under the Criminal Code with aggravated assault as a result of this incident. One of these individuals was convicted and sentenced while the other three have fled the jurisdiction. The appellant has initiated a civil action against each of these individuals in the Ontario Court (General Division) for compensation for the injuries caused by the assault.

The appellant 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 "the entire prosecution file" relating to the criminal proceedings against those individuals who were charged with assaulting the appellant. The Ministry located a large number of responsive records and initially denied access to them, claiming the application of the solicitor-client privilege exemption contained in section 19 of the Act.

The appellant appealed the Ministry's decision. In his letter of appeal, the appellant submits that the Ministry's decision letter is inadequate as it did not include reasons for the denial of access and was provided to him after the 30-day period mandated by sections 26 and 29 of the Act, respectively. During the mediation stage of the appeal, the Ministry provided the appellant with a second decision letter in which it claimed the application of the following additional exemptions:

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

This office provided a Notice of Inquiry to the appellant, the Ministry and to 20 other individuals (the affected persons), whose rights may be affected by the disclosure of the information contained in the responsive records. Because the records also appeared to contain the personal information of the appellant, the parties were asked to address the possible application of sections 49(a) and (b) of the Act. Representations were received from the Ministry and the appellant only. Four of the Notices of Inquiry were returned to this office as undeliverable.

The records at issue in this appeal consist of 741 pages of notes, witness statements, transcripts, court documents and medical records. The Ministry advises that it is now prepared to disclose Records 17-24, 31-33, 38-39, 47-56, 61, 69-70, 92-93, 198-207, 221 and 461-462 to the appellant. Because no mandatory exemptions apply to these documents, I order that they be disclosed.

PRELIMINARY ISSUES:

ADEQUACY OF THE DECISION LETTER

The appellant objects to the content of the initial decision letter provided to him by the Ministry. He argues that it does not comply with section 29 as it does not describe in sufficient detail the reasons why the exemptions claimed apply to the records at issue. In addition, the appellant submits that because the Ministry responded to his request after the 30 day period required by

section 26 of the Act, it ought to be precluded from claiming the application of any discretionary exemptions to the records.

I disagree with these assertions. The decision letter clearly states that access to the responsive records is denied pursuant to the section 19 exemption because they were prepared by Crown counsel for use in litigation. In my view, to say more would tend to reveal the contents of the records and thereby defeat the purpose of the exemption provisions in the Act.

I agree that the Ministry was late in responding to the appellant's request, however I am not satisfied that the appellant was in any significant way prejudiced by this delay. The Ministry provided the appellant with a decision and any order I might make with respect to this issue at this point in time will be of no effect. Moreover, I cannot agree with the position taken by the appellant that the Ministry should be precluded from claiming the application of any of the discretionary exemptions in the Act because of its tardiness in responding to the request.

LATE RAISING OF DISCRETIONARY EXEMPTIONS

In the Confirmation of Appeal notification sent by this office to the Ministry when the appeal was received, the Ministry was advised that it would be able to raise the possible application of discretionary exemptions beyond the section 19 claim only until September 23, 1997. In a letter to the appellant dated October 10, 1997, the Ministry claimed for the first time that the records were also exempt under sections 14(1)(a) and (f) and section 21(1).

The Ministry acknowledges that it was 17 days late in applying these exemptions due to personnel changes in its Freedom of Information and Protection of Privacy office. It argues that it ought to be entitled to claim the additional exemptions because of the serious nature of the information in the records and the possible risk of harm to a fair trial of the accused persons. Again, the Ministry also argues that the appellant was not significantly prejudiced by its delay.

The appellant objects to the Ministry being able to claim additional discretionary exemptions, particularly in light of the lateness of its original decision letter to him.

In my view, because of the manner in which I have addressed the application of sections 21(1) and 49(b) below, it is not necessary for me to determine whether to consider the application of sections 14(1)(a) and (f). Section 21(1) is a mandatory exemption which I am required to apply regardless of whether the Ministry has claimed it. Similarly, section 49(b) addresses the issue of privacy protection where disclosure may have serious consequences, particularly as the records involve an investigation into criminal activity. Accordingly, I will consider the application of each of the invasion of privacy exemptions to the records.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and the submissions of the parties and find that the majority of the records contain the personal information of the appellant and other identifiable individuals, as they relate to the assault against the appellant, the

subsequent police investigation and the criminal proceedings against the accused persons. In addition, a number of the records only contain the personal information of other identifiable individuals, who were witnesses or suspects in the police investigation of the assault and the subsequent criminal proceedings before the Courts.

Under section 49(b) of the Act, where a record contains the personal information of **both the appellant and other individuals**, and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. For these records, I will consider whether disclosure would be an unjustified invasion of the personal privacy of other individuals under section 49(b).

Where, however, a record **only contains the personal information of other individuals**, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits the Ministry from releasing this information. For these records, I will consider whether disclosure would be an unjustified invasion of personal privacy under section 21(1).

Under both sections 21(1) and 49(b), 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 found 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) or 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 Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry submits that because the records were compiled as part of an investigation of a criminal offence, their release would result in a presumed unjustified invasion of personal privacy under section 21(3)(b), which states that:

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;

The appellant does not specifically refer to the application of any of the factors enumerated in section 21(2) supporting disclosure. However, his representations appear to refer to section 21(2)(d) (fair determination of rights). The appellant submits that the disclosure of the records is necessary to enable him to determine whether he wishes to personally swear an information in order to prosecute the violation or continue the investigation.

I find that the personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the personal information in these pages is subject to the presumption in section 21(3)(b) of the Act. Although I am sympathetic to the appellant's position, as I have previously indicated, a factor or combination of factors under section 21(2) cannot rebut a presumption under section 21(3).

I have also considered the application of section 21(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. The appellant has claimed that section 23 of the Act applies in this case. He argues that there exists a compelling public interest in enabling victims of violence to pursue civil remedies against their aggressors and that this public interest clearly outweighs the purpose of the sections 21(1) and 49(b) exemptions. I cannot agree with this submission. In my view, the appellant's ability to pursue whatever civil remedies he may wish are not so compelling as to override the fundamental public interest in privacy protection, particularly with regard to investigations and prosecutions of criminal activity, which is recognized in sections 21(1) and 49(b).

Accordingly, I find that the disclosure of the records would constitute an unjustified invasion of the personal privacy of other identifiable individuals. Therefore, those records which contain only the personal information of individuals other than the appellant are exempt under section 21(1) of the Act. Those records which contain the personal information of the appellant and other identifiable individuals are exempt under section 49(b) of the Act.

Because of the manner in which I have resolved the issues in this appeal, it is not necessary for me to consider the application of sections 14(1)(a) and (f), 19 and 49(a).

ORDER:

1. I order the Ministry to disclose to the appellant copies of Records 17-24, 31-33, 38-39, 47-56, 61, 69-70, 92-93, 198-207, 221 and 461-462 by **January 14, 1998** but not before **January 9, 1998**.
2. I uphold the Ministry's decision to deny access to the remaining records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

Donald Hale
Inquiry Officer

December 10, 1997