



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1795

Appeal PA-990413-1

Ministry of the Solicitor General



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BACKGROUND:

The appellant, together with two other individuals, was the subject of a "Joint Forces" investigation undertaken by the Windsor detachment of the Royal Canadian Mounted Police (the RCMP) and the Windsor Police which resulted in charges being laid against all three individuals. The appellant and the other two individuals were acquitted of the charges. The appellant and one of the other individuals subsequently made a complaint about the conduct of the police officers who conducted the investigation. The complaint alleged that the conduct of the investigating officers constituted grounds for the laying of "obstructing justice" charges under the Criminal Code. The RCMP asked the Ontario Provincial Police (the OPP) to investigate the complaint.

NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Solicitor General (the Ministry) for access to the OPP Criminal Investigation Bureau (CIB) report regarding the criminal investigation into the conduct of the members of the Windsor detachment of the RCMP and the Windsor Police.

The Ministry located a 12-page report and denied access to it in its entirety on the basis of the exemptions in section 49(a) (discretion to refuse to disclose requester's own information) in conjunction with sections 14(1)(c) (investigative techniques) and 14(2)(a) (law enforcement report), and section 49(b) with reference to sections 21(2)(f) and 21(3)(b) (invasion of privacy).

The appellant appealed the Ministry's decision.

During mediation, the Ministry issued a revised decision in which it disclosed parts of pages 1, 3 and 6 and page 12 in its entirety. The portions of the record which were disclosed pertain directly to the appellant. The Ministry indicated that it continued to rely on the exemptions in sections 49(a) and (b) for the remainder of the record.

The appellant was not satisfied with the level of disclosure given by the Ministry. As no further mediation was possible, this appeal was moved on to inquiry.

I sent a Notice of Inquiry to the Ministry, initially. The Ministry provided representations to this office and consented to their disclosure in full to the appellant. In its representations, the Ministry indicated that it no longer relies on the discretionary exemption in section 14(1)(c) as a basis for denying access to the withheld information. Accordingly, this exemption is no longer at issue in this appeal.

In addition, the Ministry attached a copy of a revised decision letter, dated May 11, 2000, which was sent to the appellant. In this letter, the Ministry indicates that it has decided to grant further access to the record.

In particular, the Ministry granted partial access to pages 1, 2, 5, 6, 7, 8 and 10. As a result, the records at issue consist of the withheld portions of pages 1, 2, 3, 5, 6, 7, 8 and 10 and Records 4, 9 and 11 in full.

I decided to move this inquiry into stage two and sought representations from the appellant on the issues raised in this appeal. I attached the Ministry's representations in full to the Notice of Inquiry which I sent to the appellant and requested that the appellant review and refer to them in responding to this Notice. The appellant submitted representations in response to the Notice. The appellant also sent me a letter prior to receiving the Notice of Inquiry. I have considered the contents of this letter as part of the appellant's representations in this matter.

RECORD:

The record at issue consists of the withheld portions of a 12-page report prepared by the OPP officer assigned to the investigation, in particular, the withheld portions of pages 1, 2, 3, 5, 6, 7, 8 and 10 and Records 4, 9 and 11 in full.

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, 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.

The record details the OPP's investigation into the complaint made by the appellant and one of the two other individuals who was charged as a result of the investigation conducted by the RCMP and the Windsor Police. The record contains information about the original "Joint Forces" investigation and makes reference to the appellant and the two other individuals who were charged. I find that the record contains the personal information of these three individuals. In addition, the record contains details of the OPP investigator's interviews with named witnesses and other identifiable individuals. I find that this information qualifies as the personal information of these individuals.

The Ministry submits that because the appellant complained about the conduct of the officers from the RCMP and the Windsor Police, the information about these individuals contained in the record constitutes their personal information. Generally, previous orders of this office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position (see Reconsideration Order R-980015 and Order PO-1663). However, where the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information (Order P-721).

The appellant does not believe that "criminal offences committed by the RCMP" can be considered personal information.

The OPP investigation was complaint driven and focussed on the conduct of the subject officers. In these circumstances, I find that this information not only extends beyond the normal employment responsibilities of these individuals, but that such an investigation has the potential of seriously impacting on them personally. In this context, I find that the information in the record is “about” them personally and thus qualifies as their personal information.

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(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 another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the Act or if a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 23 exemption.

The Ministry claims that the presumption in section 21(3)(b) of the Act applies to exempt the personal information in the record from disclosure. This section states:

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

In this regard, the Ministry states:

The police report at issue documents a criminal investigation undertaken by the Major Cases section of the OPP Criminal Investigation Bureau. The investigation resulted from criminal allegations brought forward by the appellant and another individual following their acquittal of a Conspiracy to Traffic (in Codeine/Tylenol #3) charge under the Narcotic Control Act. The OPP investigation focussed on the conduct of named officers from the RCMP and Windsor Police Service and whether there was evidence of criminal activity on the part of the officers. In particular, the OPP investigator attempted to determine whether the involved officers conspired to obstruct justice with respect to the investigation and prosecution of the appellant and the two other individuals. Obstructing Justice is an indictable offence under section 139 of the Criminal Code.

The Ministry notes that as a result of the findings of the OPP investigator and further to consultation with the Crown Attorney, no charges were laid against any individual. The Ministry also points out that as a result of the disclosure that was given to the appellant, the information disclosed on page 12 of the record contains the complete investigation findings.

The appellant believes that the investigation conducted by the OPP was incomplete in that the "conspiracy to obstruct justice ... is only one of the nine criminal allegations laid against the RCMP ... by the Windsor RCMP and not me." He also indicates that disclosure of personal information compiled during an investigation into allegations of criminal offences would not constitute an unjustified invasion of privacy. In this regard, he states:

If criminal conduct and allegations of criminal offences are invasion of privacy then that excuse can be used to cover up any criminal allegations and they can freely do that. All the nine criminal allegations laid against the RCMP are indictable offences.

In Order PO-1706, I noted the rationale behind the inclusion of the presumption in section 21(3)(b) in the Act as follows:

The extent to which "law enforcement" information should be protected under the Act was discussed in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

In addition to investigative records relating to individuals who have engaged in criminal activity, or are suspected of having done so, information concerning witnesses, informants, relatives or associates of suspected parties or victims will also be recorded ... The interest of such individuals in obtaining access to law enforcement files is an aspect of the informational privacy problem which will be the subject of discussion in subsequent sections of this report ... As will be seen, however, we feel that the law enforcement exemption to the freedom of information scheme should be paralleled by a similar exemption from the general rule that

persons about whom personal information is recorded by government should be afforded an opportunity to see their files.

The Williams Commission Report examined the need to protect the identities of confidential sources in both the criminal and quasi-criminal or regulatory context and observed:

... the effect of erring on the side of too much disclosure in law enforcement matters may have very severe consequences for affected individuals. Inadvertent disclosure of the identity of informants, for example, could not only prove embarrassing but may place their lives or safety in peril.

In commenting on whether personal privacy interests in law enforcement matters should be protected under the law enforcement exemption or a more general personal privacy exemption, the Williams Commission Report concluded:

... the exemption of sensitive personal information [in the law enforcement context] is a more general problem and, for this reason, a general exempting provision relating to privacy invasion is included ... in our proposals. It is our view, therefore, that it would be redundant to make reference to the privacy protection issue in the context of the law enforcement exemption.

I have taken these comments and observations into consideration in examining this issue.

In Order P-223, former Assistant Commissioner Tom Wright commented on the interpretation of section 21(3)(b):

I note that this subsection does not specify whether the "investigation into a possible violation of law" must be one which examines the activities of the individuals who are subject to investigation or is more properly referable to those of the individuals interviewed in the course of such investigations. It is my opinion that the subsection may be interpreted in either way.

Consistent with this approach, orders of this office have held that the presumption in section 21(3)(b) is potentially applicable to the personal information of **any** person where it is compiled and is identifiable as part of an investigation into a possible violation of law.

...

In my view, the approach taken to the interpretation of section 21(3)(b) by this office in past orders recognizes the sensitivity of records which are compiled as part of a law enforcement investigation and the need to protect the privacy interests of individuals involved in such matters. Further, this approach is consistent, generally, with the purposes

of the Act which include the protection of the privacy of individuals with respect to personal information about themselves held by institutions.

I am satisfied that the personal information in the records was compiled and is identifiable as part of an investigation conducted by the OPP into the allegations of criminal conduct on the part of the investigating officers involved in the Joint Forces investigation. I am also satisfied that the purpose of the OPP investigation was to determine whether there has been a violation of law, in this case, obstructing justice under section 139 of the Criminal Code. Therefore, I find that disclosure of the personal information in this appeal would constitute a presumed unjustified invasion of personal privacy pursuant to section 21(3)(b) of the Act. Further, this presumption still applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

I find that none of the circumstances outlined in section 21(4) which would rebut a section 21(3) presumption are present in this appeal. The appellant has not raised the application of the public interest override and I find, in the circumstances of this appeal, that it does not apply.

Exercise of discretion

The Ministry indicates that in balancing the appellant's right of access to his own personal information against the other identifiable individuals' rights to privacy protection it took into consideration that a presumption against disclosure applies to the personal information as it was compiled and is identifiable as part of an investigation. The Ministry states that identification of individuals in this context is highly sensitive and that it took this into consideration in exercising its discretion in this case. Moreover, the Ministry notes that the appellant has already received a substantial portion of the record and has thus been provided with a significant amount of information concerning the criminal investigation resulting from his allegations, including the findings of the OPP investigator. Based on the totality of the Ministry's representations, I find nothing improper in the head's exercise of discretion. As a result, I find that the discretionary exemption in section 49(b) applies to the withheld portions of the record.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ June 28, 2000