



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1966

Appeals PA-000396-1 and PA-000397-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The appellant submitted two requests to the Ministry of the Solicitor General (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to information. In her initial request, she sought access to the notes, occurrence reports, and related information of nine named officers of the Ontario Province Police (OPP). This information concerns various incidents and disputes involving the appellant that occurred between 1997 and 2000.

The Ministry located approximately 164 pages of records (records 1, 2, 3, 4, 5, 6, 7, and 8) as responsive to the request. It granted partial access to them, claiming the exemptions at section 49(a) together with section 14, and section 49(b) together with sections 21 (invasion of privacy) and 19 (solicitor-client privilege). The Ministry also indicated that it had withheld information that was not relevant to the request. The appellant appealed the Ministry's decision under Appeal PA-000396-1.

Shortly after, the appellant submitted a second request seeking access to a general occurrence report (record 9) and a videotape (record 10) that was provided to the Police by a third party. Both documents concern a specific property dispute involving the appellant and third parties, in 1998. The videotape is a recording of a specific incident that occurred on a certain date. In its decision letter, the Ministry advised the appellant that it had no videotape responsive to the request. The Ministry located the general occurrence report and granted partial access to it, relying on the exemptions at sections 49(a) and 14, and sections 49(b) and 21. The appellant appealed the Ministry's decision and this office opened Appeal PA-000397-1.

Because the issues in these appeals are similar, this office combined them.

During mediation, a number of events occurred:

- The Ministry agreed to disclose one entry on page 2 of record 1 as the information related solely to the appellant.
- The appellant agreed not to pursue information which the Ministry deemed was not relevant to her request including dates, police "ten-codes" and computer system information. As a result, section 14(1)(l) is no longer at issue in these appeals.
- The appellant reiterated her belief that the OPP has a copy of the videotape of the 1998 property incident. The Ministry conducted an additional search but did not locate the responsive videotape.
- The appellant indicated that there are additional police officers' notes which are responsive to her request. Consequently, reasonableness of the Ministry's search has been added as issue.
- The Mediator contacted four affected persons, who are witnesses and/or parties to the appellant's allegations, to determine whether they would consent to the disclosure of their personal information in the responsive records. Two

individuals did not respond and two indicated that they did not consent to disclosure of their personal information.

As further mediation was not successful, both appeals proceeded to adjudication. I sent a Notice of Inquiry to the Ministry, initially, summarizing the facts and issues of the appeals. During the adjudication stage, the Ministry reconsidered its position and issued supplemental decision letters for both appeals. Under Appeal PA-000396-1, the Ministry advised that it had obtained consent from an identified third party to disclose his personal information. This individual's personal information, found at pages 63, 64, 69, 90, 91, 94, 95, 96, 102, 103, 106 and 114, is no longer at issue. It also issued a supplemental decision for Appeal PA-000397-1, advising that the responsive videotape had been located but access was denied on the basis of section 49(b).

The Ministry returned representations and in them advised that it was withdrawing its reliance on the exemptions at section 49(a) and sections 14 and 19. It continues to rely on the exemption at section 49(b), together with section 21, to deny access to the remaining information at issue in these appeals. The Ministry's representations were shared with the appellant, in their entirety, together with a copy of the Notice. The appellant also returned submissions.

RECORDS:

There are a total of 11 records, in part and in full, at issue in these appeals. In Appeal PA-000396-1, the Ministry withheld portions of records 1, 2, 3, 4, 5, 6, 7 and 8. These records consist of OPP officers' notes and related correspondence, witness statements, and general occurrence reports.

There are two records at issue in Appeal PA-000397-1. Record 9 consists of the undisclosed portions of a 10-page general occurrence report that was prepared by the OPP concerning the 1998 property dispute. Record 10 is a videotape recording of a property dispute that occurred on a certain date.

DISUCSSION:

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as in this case, the issue to be decided is whether the Ministry conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

A preliminary step in determining whether the search conducted by the Ministry for responsive records was reasonable is to determine whether the Ministry properly interpreted the appellant's request. The *Act* recognizes that both requesters and institutions have obligations in ensuring that a request is responded to properly. Section 24(1) specifies that a requester must provide sufficient detail to enable an experienced government employee to identify the record. Section

24(2) requires institutions to inform and assist requesters in reformulating their requests in those cases where a request does not sufficiently describe the record sought.

To properly discharge its obligations under the *Act*, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

The appellant submits that additional notes concerning the property dispute should exist. These notes, she contends, were taken during her telephone conversations with named OPP officers, and on the day OPP officers attended at her property.

In its representations, the Ministry submits:

As a result of the appellant's two access requests on [dates], the Ministry contacted the OPP and asked that a records search be undertaken. The required search was quite extensive as the appellant had requested access to a variety of documents, including OPP occurrence and supplementary reports, related correspondence, relevant OPP officers' notebook entries for nine different officers and a videotape. The requested records spanned a period of several years. The OPP estimated that it could take as long as 34 hours to locate all of the responsive records.

...

Following release of the Ministry's [date] decision letters and the appellant's subsequent appeals, the Ministry was advised that the appellant believed that additional records, specifically OPP officers' notebook entries, existed. The Ministry asked the involved OPP officers to undertake a comprehensive second search through their notebooks to ascertain whether any additional entries could be found regarding the appellant. It should be noted that not all contacts with members of the public in all instances are recorded in by OPP officers and also that stated dates are sometimes unreliable. No additional responsive notebook entries were located.

Together with its representations, the Ministry included copies of statements from several named OPP Officers advising that they had submitted for disclosure all entries that are responsive to the appellant's request and that a second review of notebooks did not result in identifying additional records. The matter of the responsive videotape was addressed by a named OPP Sergeant who acknowledged receiving a copy from a member of the public. He goes on to say that he reviewed the videotape then returned it. Unknown to him, a second copy had been sent to a named OPP Officer. The responsive videotape was then forwarded to the named Sergeant.

From my review of the OPP officers' statements, and the representations, I am satisfied that the Ministry has taken all reasonable steps possible to respond to the appellant's requests. I accept that the Ministry has sufficiently described its efforts to determine the existence of additional

notebook entries. I find that the searches it has undertaken for records responsive to the requests have been reasonable.

PERSONAL INFORMATION

The next issue to be determined is whether the record contains personal information and if so, to whom that personal information relates.

The personal privacy exemptions in section 49 apply only to information that qualifies as "personal information", as defined in section 2(1) of the *Act*. The Ministry submits that the records contain the type of information listed in this section, which reads, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital status of the individual,
- (b) information relating to the education or the medical psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- ...
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

Records 1, 2, 3, 4, 5, 6 and 7 contain OPP officers' notes, and includes the names of the appellant and third parties, their addresses and phone numbers, dates of birth, as well as their views and opinions. Records 8 and 9 are general occurrence reports on which the names of the appellant and these identifiable individuals appear, as well as details of other information about them. I find that this information contained in these records qualifies as "personal information" under the *Act*.

The appellant, third parties and OPP officers appear in the responsive videotape, record 10. With respect to the OPP officers, previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some

circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" (Orders P-427, P-1412 and P-1621). Applying this principle to the responsive videotape, I am satisfied that the OPP Officers appear in their professional rather than personal capacity, and therefore the information associated with them does not qualify as their personal information.

The faces of third parties, who are not OPP officers, also appear in the videotape, and their voices can be heard, making them identifiable. In the circumstances, neither the third parties' personal information, nor that of the appellant, can be reasonably severed from the videotape. As such, I find that the responsive videotape, as a whole, qualifies as the personal information of the appellant and third parties within the meaning of the definition under section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION /UNJUSTIFIED INVASION OF OTHER INDIVIDUALS' PRIVACY

The Ministry claims that the records at issue are exempt under the provisions of sections 21 and/or 49(b).

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. Section 49(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Under section 49(b), where a record contains the personal information of both the requester 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. Accordingly, I will consider whether disclosure of the personal information in the records at issue would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

Where the records, as in this instance, contain the personal information of the appellant and of others, 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. Section 21(2) provides some criteria for the institution to consider in making this determination, and 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.

With respect to section 21(3), 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]. That is, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

Sections 21(3)(b) and 49(b)

The Ministry relies on section 21(3)(b) of the *Act*, which reads:

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 Ministry submits:

The exempt information in part documents investigations undertaken by the OPP in response to complaints and incidents involving the appellant and other identifiable individuals. In the course of their investigations, the OPP interviewed witnesses and other identifiable individuals. The Ministry submits that the exempt personal information was compiled and is identifiable as part of investigations into possible violations of law.

The appellant's representations focus on matters relating to the property dispute. In this regard, she does not disagree specifically with the Ministry's submissions as stated above. The appellant provides details of the property incident, raising particular issues with the events that led to the OPP taking her, and the identified third person, into custody.

As noted earlier, records 9 and 10 contain information concerning the 1998 property dispute. Records 1, 2, 3, 4, 5, 6 and 7 contain information on various incidents that are not related to the property dispute. They include complaints that the appellant made to the OPP, against identifiable third persons, for trespassing, harassing phone calls and mail, and possession of stolen property.

Based on the submissions of the Ministry and my review of the records, I accept that the information contained in these records was compiled and is identifiable as part of investigations into possible violations of law, specifically under the *Criminal Code*. Disclosure would be deemed to constitute an unjustified invasion of the personal privacy of the individuals to whom that information relates. This presumption would still apply, even if no charges had been laid (Orders P-223, P-237 and P-1225). Therefore, I find that the section 21(3)(b) presumption of an

unjustified invasion of personal privacy applies, and therefore the records may be withheld under section 49(b).

Where a record contains the personal information of both an appellant and other individuals, and the institution determines that disclosing these records would constitute an unjustified invasion of another individual's personal privacy, the institution has discretion under section 49(b) to either disclose the information to the appellant or to deny the appellant access.

The Ministry states that it has carefully weighed the appellant's right of access to her own personal information against the interest of third parties to privacy protection. The Ministry notes that a substantial amount of the responsive information was released to the appellant. It concluded that release of additional information, specifically the personal information of third parties, was not appropriate in the circumstances. The information remaining at issue consists of third party personal information that was compiled and is identifiable as part of an investigation into a possible violation of law.

I am satisfied that the Ministry properly exercised discretion to withhold other individual's personal information, and I uphold its decision to deny access to these records under section 49(b) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by:
Dora Nipp
Adjudicator

November 14, 2001