



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2140

Appeal PA-020341-1

Ministry of the Attorney General



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 Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to videotapes taken of an interview with the complainant in a criminal matter involving the requester and a “profile” prepared about the appellant by the investigating Police Service. The Ministry located two responsive videotapes and one profile and denied access to them, in their entirety, claiming the application of the invasion of privacy exemptions in sections 21(1) and 49(b) of the *Act*.

The requester, now the appellant, appealed the Ministry’s decision to deny access to the records. During the mediation stage of the appeal, the appellant indicated that he was no longer seeking access to the profile document. The Ministry advised the appellant that it was also relying on the discretionary exemptions in section 49(a) (discretion to refuse requester’s own information), taken in conjunction with sections 19 (solicitor-client privilege) and 20 (danger to health or safety) of the *Act* with respect to the videotapes.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I decided to seek representations from the Ministry initially, as it bears the onus of establishing the application of the exemptions claimed. The Ministry provided me with submissions, the non-confidential portions of which were shared with the appellant along with a copy of the Notice of Inquiry. The appellant advised that he did not intend to make any submissions in response to the Notice.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Do the Videotapes Contain Personal Information?

The personal privacy exemptions in sections 21(1) and 49(b) apply only to information which qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” is defined, in part, to mean recorded information about an identifiable individual, including 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 [paragraph (h)].

I have reviewed the contents of the videotapes which comprise the records at issue in this appeal and conclude that they contain the personal information of the complainant, her husband, the appellant and a number of other identifiable individuals. The information includes references to the race, age, sex and marital status of these individuals [paragraph (a)]; information relating to the education and employment history of identifiable individuals [paragraph (b)]; the individuals’ addresses [paragraph (d)]; the views of other persons about the individual [paragraph (g)]; and the individuals’ names along with other personal information relating to them [paragraph (h)].

Are the Videotapes Exempt from Disclosure under Section 49(b) of the Act?

The Ministry's Representations

The Ministry submits that the videotapes which form the records at issue in this appeal were "compiled during the course of a police investigation into criminal matters that resulted in the laying of criminal charges". It goes on to add, relying on the presumption against disclosure in section 21(3)(b), that "where the personal information was compiled as part of an investigation into a possible violation of law, disclosure of that personal information is presumed to constitute an unjustified invasion of personal privacy."

The Ministry points out that once a presumption against disclosure has been established, such as that under section 21(3)(b), it cannot be overcome by any one or a combination of factors under section 21(2). It also submits that there is no public interest in the disclosure of the contents of the videotapes to the appellant within the meaning of section 23 of the *Act*.

Findings With Respect to Section 49(b)

Under section 49(b) of the *Act*, 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.

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.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) 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 institution 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 21 exemption. [Order PO-1764]

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

Based on my review of the contents of the videotapes and the representations of the Ministry, I am satisfied that they were compiled and formed part of an investigation into a possible violation of law, in this case the *Criminal Code*. As such, I find that the personal information contained in the videotapes is subject to the presumption against disclosure in section 21(3)(b).

I further find that none of the exceptions in section 21(4) applies and that the appellant has not argued that section 23 ought to apply to the information in the records. Therefore, I conclude that the information contained in the videotapes qualifies for exemption under the discretionary exemption in section 49(b).

Exercise of Discretion

The Ministry has provided me with confidential submissions with respect to the reasons behind its decision to exercise its discretion not to disclose the contents of the records to the appellant. In the portion of its representations which were shared with the appellant, the Ministry indicates that it took several factors into account, including the “highly sensitive and confidential nature of the information being requested that is in respect of a criminal matter”.

Based on both the confidential and the non-confidential submissions of the Ministry, I am satisfied that it exercised its discretion not to disclose the records to the appellant in an appropriate manner. The appellant was tried and convicted of a number of offences in which the complainant was the victim. I find that the videotapes requested bear directly on the evidence relied upon to convict the appellant and that the disclosure of this information would only serve to “re-victimize” the complainant in this case. I find nothing inappropriate in the manner in which the Ministry exercised its discretion not to disclose the records.

ORDER:

I uphold the Ministry’s decision and dismiss the appeal.

Original signed by: _____

Donald Hale
Adjudicator

April 23, 2003 _____