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

ORDER PO-2246

Appeal PA-030169-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The requester made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specific incident. Specifically, the requester sought access to the following information:

> … all documentation whatsoever from the files of the Cayuga Ontario Provincial Police in regard to this matter, including but not limited to any incident reports, any reports relating to how this matter was dealt with, any statements made by [the requester and another named individual], or anyone else in regard to these allegations, and any notes taken by any investigating officer.

The Ministry issued a decision to the requester, granting partial access to the records. The Ministry denied access to certain portions of the records, relying on the following exemptions in the *Act*:

- section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement); and

- section 49(b) (invasion of privacy) in conjunction with sections 21(2)(f) (highly sensitive) and 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law).

The Ministry also withheld certain information on the basis that it was not responsive to the request. Finally, the Ministry advised the requester that one police officer was unable to locate his notebook that might contain references to this incident and that another police officer did not make any notes with respect to this matter.

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting the Ministry to make written representations. The Ministry submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellant, together with a copy of the Ministry's representations. The appellant, in turn, provided representations.

In its representations, the Ministry withdraws its reliance on section 49(a) in conjunction with section 14(2)(a). This exemption claim is therefore no longer at issue.

In addition, in its representations the Ministry submits that its reliance on section 49(a) in conjunction with section 14(1)(l) relates specifically to a four-digit computer code appearing on page 1. In his representations, the appellant indicates that he does not require access to this code. Accordingly, this information is no longer at issue.

RECORDS:

Two records are at issue. Record 1 consists of a one-page occurrence report (page 1). Record 2 consists of three pages of a police officer's notebook entries (pages 2-4). Except for the four-digit computer code on page 1, the withheld portions of these records remain at issue.

BRIEF CONCLUSION:

Some of the information in the records is not responsive to the request. Of the responsive information, most portions are exempt from disclosure, while the remaining portions are not exempt and must be disclosed.

DISCUSSION:

RESPONSIVENESS

The Ministry takes the position that certain portions of Record 2 (the police officer's notebook entries) are not responsive to the request.

Previous orders of this office have established that in order for a record to be responsive, it must be "reasonably related" to the request (for example, Order P-880).

In its representations, the Ministry submits that some of the entries in question "predate the police officer's involvement in respect to [the] incident involving the appellant." The Ministry submits that the other entries relate to "the police officer's work schedule and other law enforcement matters not relating to the incident involving the appellant."

The appellant submits that he is interested in obtaining access only to information pertaining to allegations made about him, and not unrelated police activities.

I have reviewed Record 2 and I find that the portions that the Ministry has identified as being non-responsive are indeed not "reasonably related" to the incident described in the appellant's request. Rather, they are about matters wholly unconnected with this incident and they are therefore not responsive. Accordingly, I will uphold the Ministry's decision to deny access to these portions of Record 2.

PERSONAL INFORMATION

I must now decide whether any of the information remaining at issue contains personal information, and if so, whose.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including the individual's age (section 2(1)(a)), address (section 2(1)(d)) or medical history (section 2(1)(b)), the views or opinions of another

individual about the individual (section 2(1)(g)) or the individual's name if 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 (section 2(1)(h)).

The Ministry submits that the records contain the personal information of the appellant and other individuals.

The appellant accepts that some of the information at issue may constitute personal information.

I have reviewed the records and I find that they contain the personal information of the appellant and other individuals.

INVASION OF PRIVACY

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from disclosure that limit this general right.

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the information at issue. The Ministry initially relied specifically on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) and the factor favouring privacy protection at section 21(2)(f). In its representations, the Ministry also relies on section 21(3)(a). For his part, the appellant takes the position that section 21(2)(d) applies. These sections read:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> 21(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

> (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;

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellant's right of access to his own personal information against other individuals' right to the protection of their privacy.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

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

I have concluded that none of the exceptions at sections 21(1)(a) through (e) applies in this case.

With respect to the section 21(3)(a) presumption, the Ministry submits:

> … parts of the personal information remaining at issue contain medical information relating to an identifiable individual. … release of this personal information would constitute an unjustified invasion of this individual's personal privacy.

With respect to the section 21(3)(b) presumption, the Ministry submits, among other things:

> … the personal information remaining at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. …
>
> …
>
> The … information documents the investigation undertaken by the OPP in response to an incident involving the appellant and other identifiable individuals. … [the personal information] was compiled and is identifiable as part of an investigation into a possible violation of law, namely, the *Criminal Code*.

The appellant submits that some of the individuals whose personal information is at issue either waived their privacy rights or did not have an expectation of privacy because they are a party to a civil action. In addition, he submits that some or all of the information at issue will be required to be produced in the civil action in any event. The appellant also submits that section 21(2)(d) applies because "disclosure of the police records is important to [his] ability to defend himself in the lawsuit." Finally, the appellant submits that any presumption under section 21(3) is "rebutted by the fact that the entire matter has been made the subject of the claims … in a civil lawsuit."

I will first address the appellant's argument that the information will eventually be produced in the course of civil litigation. Whether or not the same or similar information may be obtained through avenues outside the *Act*, such as civil litigation, is irrelevant to whether the Ministry must disclose the information at issue in the records under the *Act*. Information that may be exempt under the *Act* may be available through other avenues, and vice versa (see, for example, section 64 of the *Act* and Order PO-1688).

Certain personal information in the police officer's notes (on page 3) relates exclusively to the appellant, and similar information in the occurrence report has already been disclosed to the appellant. Disclosing this information would not result in an unjustified invasion of another individual's privacy and the information therefore does not qualify for exemption under section 49(b). I will therefore order the Ministry to disclose this information on page 3 to the appellant.

I find that portions of the occurrence report relate to the medical condition of an individual other than the appellant. I also find that all the remaining personal information at issue in both records was compiled and is identifiable as part of an investigation into a possible violation of law. The fact that an individual may be involved in a civil action does not mean that he or she has waived his or her privacy rights under the *Act*. Accordingly, disclosing this information is presumed to constitute an unjustified invasion of privacy under sections 21(3)(a) (part of the occurrence report) and 21(3)(b) (the remaining personal information in both records). These presumptions are not rebutted by section 21(4) in this case. As noted above, a section 21(3) presumption cannot be rebutted by either one or a combination of the factors set out in section 21(2). Thus, subject to my discussion below on the "compelling public interest" override, I find that

disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b). In addition, I am satisfied that the Ministry did not err in exercising its discretion to withhold this information.

PUBLIC INTEREST IN DISCLOSURE

In his representations, the appellant states that "there is … a public interest in having the records released so that truth and justice will not be jeopardized in the civil proceedings" and "[t]here should now be an overriding public interest in seeing that justice is carried out in the civil proceedings." With these submissions, the appellant indirectly raises the possible application of the "public interest override" at section 23, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Because section 23 may override the application of section 21, it may also override the application of section 49(b) in conjunction with section 21 (for example, Order P-541). If section 23 were to apply in this case, it would have the effect of overriding the application of section 49(b), and the appellant would have a right of access to the information at issue.

In order for section 23 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemption (here, section 49(b)) (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

In this instance, the appellant's interest in obtaining access to the information is private in nature, and it does not amount to a "public interest" within the meaning of section 23. Accordingly, the "public interest override" at section 23 does not apply.

I am enclosing with the copy of this order being sent to the Ministry a copy of page 3 highlighting those portions that the Ministry must not disclose. I will order the Ministry to disclose the remaining information on page 3.

ORDER:

1. I order the Ministry to disclose to the appellant the information on page 3 that is not exempt from disclosure by **March 19, 2004**. I am providing the Ministry with a highlighted version of page 3 with this order, identifying the portions that it must not disclose. The Ministry must disclose the remaining information on page 3.

2. I uphold the Ministry's decision to deny access to the remaining information.

3. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Ministry to provide me with a copy of page 3 that is disclosed to the appellant.

Original Signed by: February 27, 2004
Shirley Senoff
Adjudicator