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

ORDER PO-2251

Appeal PA-030014-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), an individual requested that the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) provide him with 12 items, listed as "A" to "L", related to a numbered class action law suit. The Ministry's initial decision granted him only partial access to some of the items. The individual appealed the Ministry's decision.

All of items B, C, D, E, F, G and J were otherwise dealt with and so were removed from the scope of this appeal.

During mediation, the mediator confirmed the appellant's outstanding requests and clarified the Ministry's position. The Ministry also issued a revised decision letter to the appellant, dated April 16, 2003, in which it continued to deny access to the records, in whole or in part. The outstanding requested items, and their associated issues, are described below.

Item A a list of all property seized on October 17, 1996 from a particular location, with numerous other details also to be provided

Item I all information about the appellant provided to the Crown Attorney, the Justice of the Peace and Judges by the OPP and SSM from October 1996 to date

With respect to items A and I, the Ministry found approximately 150 pages of responsive records. It denied access to those records, in whole or in part, on the basis of these three sections of the *Act*

Section 49(a) (discretion to refuse requester's own information) in conjunction with

- 13(1) - advice or recommendations
- 14(1)(c) and 14(2)(a) – law enforcement
- 14(1)(e) – endanger life or safety
- 14(1)(l) – facilitate commission of unlawful act
- 19 – solicitor-client privilege

Section 49(b) (discretion to refuse requester's own information) in conjunction with

- 21 – personal privacy [with reliance on sections 21(2)(f), 21(3)(b) and 21(3)(d)]

Section 22(a) (information publicly available)

Item H the search warrant rationale provided to the Justice of the Peace, the time of application for and execution of the warrant, and who requested the warrant

Item K all information contained in the Firearms Interest Police (FIP) database concerning the appellant; and who posted, proof read and approved/justified the entries

Item L all information about the appellant contained on CPIC; and who posted, proof read and approved/justified the entries

With respect to these three items, the Ministry advised that any responsive records would be in the custody of other institutions. The appellant's position is that these records should be in the custody of the Ministry. Therefore, the issues of reasonable search and custody or control remain in dispute here.

I initially sought representations from the Ministry. I received those representations and then shared the non-confidential portions of them with the appellant. I sought representations from the appellant, but he chose not to make a response.

RECORDS:

There are approximately 150 pages of records at issue in this appeal. They consist of correspondence, court documents, a crown brief synopsis, will say statements, general occurrence reports, property reports and disposition orders.

ANALYSIS:

RAISING NEW DISCRETIONARY EXEMPTIONS LATE

The Ministry decided to apply section 22(a) to pages 42-71 of the records during the mediation phase of the process while it was reconsidering its position with respect to some of the records generally. The Ministry submits that applying this discretionary exemption late has had no adverse impact on the appellant given the nature of the exemption itself. These records consist of court documents that the Ministry claims are available to the public through the courts. Furthermore, the Ministry argues that the appellant is not prejudiced by their actions because these pages actually comprise the appellant's own information. These pages comprise an application record filed in court on the appellant's behalf by his lawyer. The Ministry argues that the appellant likely already has a copy of these pages.

In Order P-658, former Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it would not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a

stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In determining whether to allow the Ministry to claim this discretionary exemption, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

In this case, the Ministry has not provided any evidence of extenuating circumstances. The Ministry's initial decision in respect of the application record was made on November 25, 2002 and the Ministry then relied on sections 49(a) and (b). This office's Confirmation of Appeal notice indicated that the Ministry would be permitted to claim additional discretionary exemptions until March 25, 2003. The Ministry dropped the section 49 exemptions and instead claimed the section 22(a) exemption on April 16, 2003, well beyond the notice period. The Ministry has not provided any explanation for its failure to claim the exemption initially and then beyond the notice period. This failure is especially problematic given the fact that the application record itself is dated October 5, 2000 for an application that was to be brought in court on October 11, 2000. Presumably, then, the application record has been a public court record since that time.

Furthermore, while the Ministry submits that there is no prejudice to the appellant in the circumstances, it is clear that in fact there is no prejudice to the Ministry in denying the exemption claim. It is clear to me that the Ministry has the application record readily available, and clearly there are no confidentiality concerns with disclosing these pages. Given this fact and the lack of evidence of extenuating circumstances, on balance I find it appropriate to decline to consider the section 22(a) discretionary exemption that was raised late in this appeal process.

As no other exemptions have been claimed for pages 42-71, I find that these records should be disclosed to the appellant.

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(a) of the *Act*, the Ministry has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

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.

Where, however, the 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 an institution from releasing this information.

As the personal privacy exemptions in section 49 apply only to information that qualifies as personal information, I must first assess whether the relevant records contain personal information and, if so, to whom that information relates.

I have considered the representations before me and examined all of the records at issue.

In my view, all of the records, except for pages 126-127, contain personal information of identifiable individuals. The types of personal information include:

> information relating to the education, criminal or employment history of the individual [paragraph (b)]
>
> any identifying number assigned to the individual [paragraph (c)]
>
> the address and telephone number of the individual [paragraph (d)]
>
> the views of opinions of another individual about the individual [paragraph (g)]
>
> 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)].

These pages contain the appellant's personal information exclusively: pages 72-73 and 120-150. Accordingly, only section 49(a) can apply.

These pages contain the personal information of the appellant and other individuals: 1, 2-7, 9-10, 12-13, 14, 19, 26, 35-38, 40, 42-71, 85, 87-88, 93, 106-108, 115 and 119. Therefore, section 49(b) must be applied to these records.

These records contain the personal information of others exclusively: 76-78, 80 and 116-118. Consequently, neither section 49(a) nor (b) should be applied. Instead, the analysis with respect to these records must be under section 21.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

As indicated, under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

The Ministry withheld pages 72-73 relying on section 49(a) in conjunction with sections 13 and 19. It withheld pages 120-150 of the records relying on section 49(a) in conjunction with section

14. The Ministry applied section 22 to pages 42-71. I will examine each of these exemptions in turn.

SOLICITOR-CLIENT PRIVILEGE

The Ministry applied section 49(a) in conjunction with section 19 to pages 72-73. These pages comprise correspondence between the Chief Firearms Office of the OPP and the OPP detachment in Sault Ste. Marie.

General principles

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation.

The Ministry specifies that it relied on Branch 2.

Statutory privileges under Branch 2

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses the two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

The common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the

purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Generally, the Ministry submits that the Police prepared all the records at issue for Crown counsel who was providing them with advice during the investigation. More particularly, the Ministry asserts that some of the documents are communications between the Crown and the Police with respect to the ongoing litigation and disposition of the matter. Though the litigation has come to an end, the Ministry submits that the common law principle of termination of litigation does not apply to a criminal prosecution as the conclusion of the litigation does not negate the application of the Branch 2 statutory litigation privilege [as per *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)].

In my view, pages 72-73 do qualify for exemption under section 19. These pages contain a summary of the legal advice provided by the Legal Services Branch of the Attorney General about a particular issue related to the disposition of the appellant's case. While they are not a direct communication from the solicitor to the client, they are a clear direction to the OPP to take action as per the legal advice reflected in the correspondence. In the circumstances, then, I am persuaded that disclosure of these pages would disclose or reveal information that is subject to solicitor-client communication privilege.

ADVICE TO GOVERNMENT

The Ministry applied the section 13 exemption only to pages 72-73. Having found that these pages are exempt from disclosure in their entirety on the basis of section 19, I need not consider the applicability of section 13 to them.

LAW ENFORCEMENT

The Ministry applied the section 14 exemption to pages 120-150, with the exception of page 123. The Ministry no longer relies on section 14 to deny access to page 123, a disposition order, and submits that is a court record that is publicly available directly from the court where the proceedings took place. For reasons already stated above, as no exemptions have been applied to it, the Ministry should disclose this record to the appellant.

With respect to the remaining records, the Ministry applied sections 14(1)(c), (e) and (l) in particular. The Ministry submits that these pages contain general information regarding procedures or courses of action used by law enforcement with respect to the forfeiture of weapons to the Attorney General.

> As a result of numerous Criminal Code convictions against the appellant, on January 29, 2001, Provincial Court Judge J.D. Greco signed an Order of Disposition with respect to the weapons, ammunition or other explosives that were seized during the investigation. The Order indicates that all the weapons, ammunition or other explosive substances be forfeited to the Attorney General to be disposed of as he sees fit in accordance with the law.

The Ministry makes further representations in which it reveals the actual content of these pages and describes how disclosure of these pages could reasonably be expected to

- reveal investigative techniques and procedures currently in use or likely to be used in law enforcement
- endanger the life or physical safety of a law enforcement officer or any other person
- facilitate the commission of an unlawful act or hamper the control of crime

I am unable to reiterate the Ministry's specific arguments here due to confidentiality concerns. Suffice it to say that the Ministry has provided sufficient evidence to satisfy me that disclosure of the specific and sensitive contents of these pages could reasonably be expected to reveal investigative techniques and procedures currently in use or endanger the life or safety of a law enforcement officer or other person. Except for pages 126-127, which contain no personal information, the rest of the pages here are exempt from disclosure pursuant to section 49(a) in conjunction with section 14(1)(e). Pages 126-127 are exempt under section 14(1)(c).

INVASION OF PRIVACY

The exemptions related to the protection of personal privacy only apply where the personal information of other individuals is at issue. Where the records contain the personal information of the appellant in addition to that of other individuals, the proper analysis is the application of section 49(b). Therefore, I will consider the application of section 49(b) to these pages: 1, 2-7, 9-10, 12-13, 14, 19, 26, 35-38, 40, 85, 87-88, 93, 106-108, 115 and 119.

Where the records contain only the personal information of others, the applicable exemption is section 21. Therefore, I will consider the application of section 21 to these pages: 76-78, 80 and 116-118.

Introduction

As noted earlier, 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.

Where, however, the 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 an institution from releasing this information.

In both these situations, 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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which 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 21(2) *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In this case, the Ministry has claimed the application of the presumption at 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 that

- the personal information of others found at pages 26, 76-78 and 80 relates to their employment and/or education and disclosure of it is presumed to be an unjustified invasion of personal privacy also under section 21(3)(d)
- the withheld information of others at pages 35-38 and 87-88 is highly sensitive pursuant to section 21(2)(f)

- the rest of the personal information contained in the records was compiled and is identifiable as part of an OPP investigation into a possible violation of law pursuant to section 21(3)(b)

The Ministry asserts that none of the information at issue falls within the types of information listed under section 21(4). Finally, the Ministry confirms that it disclosed to him all of the appellant's own personal information except for those portions that were mixed with the personal information of others.

I agree with the Ministry that section 21(3)(b) applies to the bulk of the records here because the personal information in these records was compiled and is identifiable as part of the OPP's investigation into the appellant's possible violations of the *Criminal Code*. As such, release of that personal information is presumed to constitute an unjustified invasion of personal privacy. I also agree that disclosure of the personal information of others found at pages 26, 76-78 and 80 is an unjustified invasion of personal privacy pursuant to section 21(3)(d) because that information relates to the employment or educational history of these individuals.

I also find that the records at pages 35-38 and 87-88 contain highly sensitive information pertaining to individuals other than the appellant. The information in these records is highly sensitive due to the nature of the inquiry that resulted in the production of these records and also due to the identity of the individuals themselves. As such, I find that the Ministry was correct in considering the factor at section 21(2)(f) in deciding that disclosure of these records would be an unjustified invasion of personal privacy.

Finally, I find, having reviewed all of these records, that where the appellant's own personal information has been withheld from him it appears together with personal information of other individuals and is so intertwined with it that it is not reasonably severable.

SEVERANCE

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

In the circumstances, I am satisfied that the Ministry carefully considered the records and reasonably severed the records under section 10(2), providing the appellant with as much information as possible, while withholding other information on the basis of the applicable exemptions.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act*'s discretionary exemptions.

The sections 49(a) and (b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. Therefore, I must also review the Ministry's exercise of discretion in deciding to withhold the information.

I have examined the Ministry's specific representations on the exercise of its discretion. I find that the exercise of discretion was based on proper considerations such as

- the purposes of the *Act*
- the wording of the exemption and the interests it seeks to protect
- the nature of the information and the extent to which it is significant and sensitive to the Ministry and the appellant
- the historic practice of the Ministry with respect to similar information

Furthermore, I find that the Ministry took into account other relevant factors and did not base its decision on irrelevant factors. Finally, there is no evidence before me that the Ministry exercised its discretion in bad faith or for an improper purpose

Therefore, I am satisfied that the Ministry properly exercised its discretion in reaching the decision in this case.

REASONABLENESS OF SEARCH/CUSTODY OR CONTROL

In this case, the appellant believes that the Ministry did not conduct reasonable searches in attempting to locate items H, K and L of his request. Again, those records are: a search warrant provided to a Justice of the Peace, all information contained in the Firearms Interest Police (FIP) database concerning the appellant and all information about the appellant contained on CPIC.

In general, the Ministry submits that experienced staff, familiar with the types of records requested, conducted two independent searches and could locate no responsive records. First, the OPP detachment in Sault Ste. Marie was asked to undertake a search for records responsive to request items H, K and L. Then, subsequent to the initial searches, additional searches for these records were undertaken during the mediation phase of the appeal process but no responsive records were located.

The Ministry also makes more detailed and specific submissions related to the issue of custody or control of these specific records. As these submissions are relevant to my finding on the issue of reasonable search, I reproduce them here:

> With respect to item H, information regarding the search warrant, during the initial search for records the Sault Ste. Marie OPP informed the Freedom of Information Office that they had prepared an "Information to Obtain a Search Warrant" in 1996. They also advised that the Information was presented to the Justice of the Peace in order to obtain a search warrant. *The Justice of the Peace filed the Information in court and the OPP did not keep a copy of the Information*. The requester was informed of this in the Ministry's initial decision and that the

> records may be available from the court office. During mediation, the Ministry agreed to conduct an additional search for these records and to confirm whether or not they are within the Ministry's custody. A second search was conducted for responsive records and the OPP confirmed that they did not keep a copy of the Information and the Justice of the Peace filed the Information in court. It is submitted that a reasonable effort to identify and locate responsive records relating to the search warrant has been made.
>
> With respect to part K and L, the Ministry informed the appellant in its initial decision that these records were under the control of the Department of Justice Canada and the Royal Canadian Mounted Police.
>
> The FIP database falls under the jurisdiction of the Canadian Firearms Centre, Department of Justice Canada. The database is an index of local police records that has been created relating to events described in section 5 of the Firearms Act (criminal violence, history of violence and violence related to mental illness). The database is a lead to a location where a police report exists that may have relevant information relating to the eligibility or continued eligibility of a person to hold a firearms license. No details of the event are kept in the FIP database and Firearms Officers and the Canadian Firearms Centre primarily use it. The FIP index is not intended for the use of the OPP.
>
> With respect to Part L, the appellant was seeking all information regarding himself contained on CPIC. The appellant indicated in his request that he wanted an original CPIC computer printout in this regard. *As the appellant appeared to be requesting that the Ministry conduct a criminal history records check, the appellant was informed in the Ministry's initial decision that these records are under the custody and control of the Royal Canadian Mounted Police and that CPIC inquiries were not conducted in response to freedom of information requests.* The appellant was also advised that CPIC information must be requested by the subject individual at this local police service. During mediation, the Ministry agreed to conduct an additional search with respect to items K and L to confirm whether the Ministry had copies of any relevant records. The second search confirmed that no responsive records could be located with respect to either item.
>
> (Emphasis added)

I must decide whether the Ministry conducted a reasonable search for the records as required by section 17 of the *Act*. In this case, it is clear to me that the Ministry made a reasonable effort to identify and locate any responsive records it might have. Furthermore, it is also clear to me that the Ministry was unable to locate these records because it does not have custody or control of the records.

According to the representations of the Ministry, item H (the search warrant) is a record held by the Justice of the Peace. In the absence of evidence that the Ministry has a copy of the search warrant that exists independently of the court file held by the Justice of Peace, I find that the Ministry does not have this record within its custody or control. In so concluding, I rely on the findings made in Order P-994, which were summarised in Order P-1397, and relied upon in numerous subsequent orders. The relevant record in Order P-994 was an "information" (a document used to initiate a criminal prosecution). Inquiry Officer Laurel Cropley made several findings, some of which are applicable here:

- records of this type found within a court file are in the possession of the Ministry, but it is only bare possession, and they are not under the Ministry's control;

- based on Order P-239, "bare possession" does not amount to custody for the purposes of the *Act*; rather, there must be "some right to deal with the records ...";

- copies of such records which exist independently of a "court file" may be within the custody or control of an institution and, in that event, would be subject to the *Act*; and

- all of the above findings apply as well to records held by Justices of the Peace.

I am also satisfied that items K (the FIP database information) and L (the CPIC record) are not in the custody or control of the Ministry.

The Ministry's representations persuade me that the Ministry does not compile the information sought in item K nor does it have access to it.

With respect to item L, the CPIC record, it is clear from its representations that the Ministry does not have a copy of the appellant's CPIC record because it did not itself conduct a criminal history records check of the appellant that would result in the production of such a record. As found in Order MO-1596, where it is accepted that the institution has not itself made a request of the RCMP for a record such as this, the record does not exist within the institution's custody or control. As with item K, it is apparent that this information is in the custody and control of a federal institution rather than this Ministry.

In each case, I am satisfied that the Ministry's searches for records responsive to these parts of the appellant's request were reasonable. Moreover, the evidence before me suggests that the appellant may obtain the information he seeks in items H, K and L by making requests of the appropriate institutions.

ORDER:

1. I order the Ministry to disclose pages 42-71 and 123 to the appellant no later than **April 2, 2004**.

2. I uphold the Ministry's decision to deny access to the remainder of the records.

Original signed by: March 12, 2004
Rosemary Muzzi
Adjudicator