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

ORDER PO-2291

Appeal PA-030078-1

Ministry of Public Safety and Security

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to a criminal code offence involving the requester.

The Ministry responded to the request by granting partial access to the responsive records, and denying access to the remaining records on the basis of the exemptions provided by the following sections of the *Act*: 49(a) (discretion to refuse requester's own information), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement), 19 (solicitor-client privilege) and 49(b) (invasion of privacy) with reference to sections 21(2)(f) and 21(3)(b).

The Ministry also identified that some of the information in the records was not responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

During the mediation stage, an additional responsive record was located, and the Ministry granted access to portions of it. The appellant confirmed that he was not pursuing access to the information severed from this record, and it is not at issue in this appeal.

Also during mediation, the appellant confirmed that he was pursuing access to the witness statements (pages 14-27) and not to the information withheld under section 14(1)(l). The scope of the appeal was therefore narrowed to the witness statements identified as pages 14-27, which were withheld in whole or in part.

The mediator sent out a Mediator's Report, identifying for the parties the issues and the records remaining at issue. After the Mediator's Report was sent out, additional responsive records were identified. The Ministry then issued a supplementary decision letter, referring to four additional records (transcripts of statements) and denying access to these records on the basis of section 49(b) with reference to sections 21(1)(f), 21(2)(e), 21(2)(f) and 21(3)(b). The Mediator's report was amended to include these records as records at issue in this appeal.

Mediation did not resolve the issues, and this file was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and the Ministry provided representations in response. In its representations, the Ministry identifies that it is no longer relying on the exemption in section 14(2)(a), and that section is no longer at issue in this appeal.

I then sent the revised Notice of Inquiry, along with the non-confidential portions of the Ministry's representations, to the appellant. The appellant provided brief representations in response.

RECORDS:

The records remaining at issue in this appeal are:

1) Pages or portions of pages 14 – 27 (witness statements), and
2) Pages 29 – 226 (four additional statements).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the individual's age, sex, marital or family status [section 2(1)(a)], medical, psychiatric, psychological, criminal, or employment history [section 2(1)(b)], address or telephone number [section 2(1)(d)], the personal opinions or views of that individual except where they relate to another individual [section 2(1)(e)], the views or opinions of another individual about the individual [section 2(1)(g)], or 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 [section 2(1)(h)].

The Ministry submits that the information remaining at issue contains the types of personal information set out in the sections of the *Act* referred to above, and that it relates to the appellant and other identifiable individuals. The appellant does not directly address this issue; however, his representations suggest that he is of the view that the records contain his personal information.

Based on my review of the contents of the records, I find that all of the records remaining at issue contain the personal information of the appellant and other identifiable individuals within the meaning of that term in section 2(1).

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.

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 appellants' right of access to their 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.

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at sections 21(3)(b) and 21(3)(d) and the factor favouring privacy protection at section 21(2)(f). The appellant does not specifically refer to a particular section of the *Act*; however, he refers to his interest in obtaining access to the records to assist in other court proceedings. In my view he is raising the factor in section 21(2)(d) of the *Act*. 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,
>
> > (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;
> >
> > (d) relates to employment or educational history;

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

> … 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 OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition, authority and jurisdiction of the OPP. Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.
>
> The records remaining at issue were prepared during the investigation undertaken by the OPP into allegations that the appellant had committed an offence. As a result of the OPP investigative findings, the appellant was arrested and charged with [an identified crime under a specified section of the *Criminal Code*]. In the course of their investigation, the OPP interviewed a number of identifiable individuals. The Ministry submits that the exempt information was compiled and is identifiable as part of an investigation into a possible violation of law. The Ministry submits that the release of this information is presumed to constitute an unjustified invasion of the personal privacy of other individuals.

With respect to the section 21(3)(d) presumption, the Ministry submits that the exempt information contains information concerning the employment history of various identifiable individuals, including OPP officers. In support of its view that the personal information of OPP officers is contained in the records, the Ministry relies on the following quotation from Order M-451 in which former Inquiry Officer Holly Big Canoe stated as follows with respect to section 14(3)(d) of the *Municipal Freedom of Information and Protection of Privacy Act* (similar to section 21(3)(d) of the *Act* at issue in this appeal):

> The Police submit that section 14(3)(d) applies to police officers' employment dates and periods of absence, submitting that such information constitutes employment history. In my view, the information relating to the police officers' periods of absence does not constitute employment history for the purposes of section 14(3)(d), and the presumption does not apply. However, disclosure of the

> date on which each police officer commenced employment would constitute a presumed unjustified invasion of personal privacy, and section 14(3)(d) applies.

As identified above, the records remaining at issue consist of the recorded statements of identifiable individuals other than the appellant. Some portions of some of the witness statements have been disclosed to the appellant, and some witness statements have been denied to the appellant in their entirety.

I find that the records and portions of records remaining at issue were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the records is presumed to constitute an unjustified invasion of the privacy of the identifiable individuals under section 21(3)(b) of the *Act*. I also accept that portions of the records contain the employment history of identifiable individuals (including, in some cases, the employment history of OPP officers), and that section 21(3)(d) applies to portions of the records. As set out above, these presumptions cannot be rebutted by the factors in section 21(2), and in my view they are not rebutted by section 21(4) or the "compelling public interest" override at section 23, which was not raised in this case. I therefore find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b).

Absurd result

The appellant takes the position that he should receive the information because he is already aware of it through the Crown disclosure process in the criminal proceedings. He states:

> It is my position that … I have read all and took notes of it. [Although I was not allowed to have it in my custody], I could read it in my lawyer's office or in the Crown's office any time I chose, [and] I think I should be granted access.

The appellant is implicitly relying on the "absurd result" principle. Based on this principle, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b) and/or 21, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

Previous orders have also stated that, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

With respect to whether or not disclosure is consistent with the purpose of the section 21(3)(b) exemption, Senior Adjudicator Goodis recently reviewed this issue in Order PO-2285. He stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted:

Senior Adjudicator Goodis went on to refer to the following excerpt from Order MO-1378:

> The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
>
> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the *Act*.
>
> In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

I adopt the approach taken to the absurd result principle set out above, as well as the approach taken by the Senior Adjudicator in Orders MO-1378 and PO-2285.

Accordingly, whether or not the appellant has had access to the information contained in the records, the section 21(3)(b) presumption may still apply.

I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, and the nature of the investigation undertaken by

the OPP. I find that, in these circumstances, there is particular sensitivity inherent in the records remaining at issue in this appeal, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, as well as the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

Ministry's 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. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the record.

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. These reasons were shared with the appellant.

I am satisfied, based on the Ministry's representations and the circumstances of this appeal, that the Ministry properly exercised its discretion in refusing to disclose the remaining records under section 49(b).

Having found that the records qualify for exemption under section 49(b) of the *Act*, it is not necessary for me to review the application of the other exemptions relied on by the Ministry.

ORDER:

I uphold the Ministry's decision.

Original Signed by: June 14, 2004
Frank DeVries
Adjudicator