



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2356

Appeal PA-030276-1

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 an investigation by the Ontario Fire Marshal's Office into a fire in Richmond Hill, Ontario. In particular, the requester sought access to "the notes, coloured photographs, and final report prepared by [named investigators] and any other representatives of the Ontario Fire Marshall's Office that were involved in this occurrence." The requester is a consulting engineering firm retained by the insurer of the owner of the property where the fire occurred.

The Ministry issued a decision to the requester denying access to the responsive records, relying on the following exemptions in the *Act*:

- sections 14(1)(a), 14(1)(b), 14(1)(l) and 14(2)(a) (law enforcement); and
- section 21(1) (invasion of privacy) with specific reference to 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 requester (now the appellant) appealed the Ministry's decision.

At mediation the appellant advised that it did not wish to pursue access to correspondence between the appellant and the Ministry but sought access to all other responsive records. The Ministry maintained its refusal to release any responsive records because the fire was still under investigation. Mediation did not resolve this appeal, and the file was transferred to adjudication.

A Notice of Inquiry was sent to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. Prior to its filing its representations, in accordance with section 28 of the *Act*, the Ministry sent a letter to an affected party advising that as the fire was no longer under investigation by the Ontario Fire Marshal's Office (OFM), it was considering the possibility of disclosing the records, and asked for the person's views. The affected party objected to the release of any records to the appellant.

The Ministry then filed partial representations. In its partial representations, the Ministry confirmed that the OFM investigation was complete and stated that it was in the process of consulting with the York Regional Police (the Police) to ascertain if their investigation was also complete. The Ministry also withdrew its reliance on section 14(2)(a), maintaining its reliance on the exemption in section 21(1), and requested an opportunity to consult with the Police before addressing the application of the section 14 exemptions.

Shortly thereafter, the Ministry advised this office that it had conducted the necessary consultations with the Police and was withdrawing its reliance on sections 14(1)(a), 14(1)(b) and 14(1)(l) of the *Act*. Accordingly, only the application of the section 21(1) exemption remains at issue in this appeal. The Ministry also advised that one of the pages (page 28) of the records was released to the appellant, because, the Ministry said, it did not contain personal information.

A Notice of Inquiry together with a copy of the Ministry's representations, with confidential portions removed, was then sent to the appellant.

The appellant, in turn, provided representations. Amongst other things, the appellant made factual and legal submissions with respect to whether the information at issue was "personal information" and the application of sections 21(1) and 23 of the *Act*, to which I decided the Ministry and the affected party should be given an opportunity to reply. A Notice of Inquiry setting out the issues to be addressed in reply was then sent to the Ministry and the affected party. Both provided representations in reply.

RECORDS:

The records consist of internal correspondence, fire investigation reports, engineering equipment examination and radiographic report, occurrence reports, handwritten notes and photographs. The undisclosed portions of the records remain at issue.

PERSONAL INFORMATION

Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual," including the individual's age, sex or family status (section 2(1)(a)), the individual's address or telephone number (section 2(1)(d)), the personal opinions or views of the 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)), and 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 information at issue qualifies as personal information in accordance with the above-mentioned sections, and points to the contents of the records in support of its position.

The appellant submits:

... a distinction must be made between the individual's personal information and the individual's professional official government capacity information. The records contain information that was produced in a professional or official government capacity. ... In addition, the records contain certain photographs, to which access has been denied. In prior representations made by the Ministry, they have stated that photographs do not contain personal information and are therefore exempt. ... Photographs by their very nature "are what they are" and do not contain personal information as defined by the Act.

Analysis

With respect to the appellant's first assertion, if the information in a record is "personal information", the nature of the information does not change simply because the record is prepared by individuals acting in a professional capacity. [Orders PO-2066 and PO-2339]

With respect to the reference to "prior representations made by the Ministry", in its reply representations, the Ministry submits that the appellant appears to be referring to the circumstances of his request under the *Act* for access to OFM photographs addressed in order PO-2313.

I can only deal with submissions of fact and law that are relevant to this appeal. In Order PO-2313, the Ministry sought to rely on the discretionary exemption at section 22(a) (information publicly available) to deny access to the photographs at issue in that appeal. In this appeal, the Ministry has only raised section 21(1), and not 22(a), as an applicable exemption and that is the exemption that will be addressed. As a result, Order PO-2313 has no bearing on the appeal before me.

As in Order PO-2066, all the records at issue in this appeal, including the photographs, relate to the investigation into the circumstances of the fire and this information is inextricably linked to the individuals identified in the records, in particular the affected party, as in some way being personally involved in or connected to the matter being investigated. The appellant is well aware of the individual who was the focus of the investigations. None of the records contain the appellant's personal information or the personal information of any party he is representing. I therefore find that all the records, including the photographs, contain the personal information of the affected party and/or another individual.

INVASION OF PRIVACY

Section 21 reads, in part:

- (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
 - (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access; or
 - ...
 - (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

- (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,
 - (f) the personal information is highly sensitive;
 - (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (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;

Section 21(1) is a mandatory exemption protecting information whose disclosure constitutes an unjustified invasion of another individual's privacy. Where a requester seeks access to another individual's personal information, section 21(1) prohibits an institution from disclosing this information unless any of the exceptions at sections 21(1)(a) through (f) apply. If any of these exceptions apply, the information cannot be exempt from disclosure under section 21(1). Section 21(1)(f), in particular, permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Sections 21(2) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy. 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.

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

The requested records document the investigation undertaken by the OFM and the York Regional Police Service in regard to the circumstances of the ... fire. The ... records at issue contain personal information that was compiled and is identifiable as part of the OFM and York Regional Police Service investigation into a possible violation of law. The Ministry refers to the content of the records at issue in support of its position in this regard.

Fire investigations may reveal possible violations of law relating to federal *Criminal Code* offences, such as arson, and provincial offences, such as violations of the *Fire Code*. The Ministry submits that the application of section 21(3)(b) of [the *Act*] is not dependant upon whether charges are actually laid... .

With respect to sections 21(2)(f) and 21(2)(h), the Ministry submits:

... the records at issue contain highly sensitive personal information about the homeowner and another identifiable individual. These individuals would have a reasonable expectation of confidentiality in respect to the information they provided to the OFM in the circumstances of this particular fire.

In response, the appellant submits:

The Ministry decided that the release of the information would cause the involved identifiable individual ... excessive personal distress without considering that much of the information contained in the records is also contained in the “information to obtain search warrant”.

The records ... would certainly not be considered to be “highly sensitive personal information”. The records contain observations and opinions expressed by the OFM as a result of the examination and testing of the physical evidence. This physical evidence was examined and tested with the view of determining the cause and origin of the fire. Physical evidence cannot be misconstrued to be “high[ly] sensitive personal information”.

...

The Ministry has suggested that the OFM and the police investigations are somehow intertwined, however, nothing could be further from the truth. The police and the Crown must maintain ... impartiality when considering the evidence which forms part of a criminal brief. The OFM simply provides a statement of facts and opinions which must be considered by the Crown. It is not necessary for the Crown to act on the opinions provided by the OFM. ...

With respect to the appellant's submission that much of the information contained in the records is also contained in the "information to obtain search warrant", in reply, the Ministry submits that the appellant raised a similar argument in the appeal that resulted in the issuing of Order PO-2066, and that this argument should be disposed of in the same way here. In his reply submissions, amongst other things, the affected party recounts the personal distress he has suffered because of the fire and subsequent investigation. He states that he feels victimized. He also relies on Order PO-2066 in support of his position that the records at issue should not be disclosed.

Analysis

Section 21(3)(b)

Turning now to section 21(3)(b) of the *Act*, in order for that section to apply, the "personal information" must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

On their face, all the records clearly relate to an investigation by the OFM into a fire.

Previous orders of this office have found that in conducting an investigation into the cause of a fire, the OFM is not performing a law enforcement function. As a result, section 21(3)(b) cannot apply to the "personal information" in records forming part of such an OFM investigation, unless the evidence indicates that the information was compiled and is identifiable as part of an investigation into a possible violation of law by an agency performing a law enforcement function (Orders PO-2066, PO-2271 and PO-2339).

The evidence before me (and in particular the contents of the records themselves) indicates that the OFM provided its Fire Investigation Reports (pages 1-27) to the Police to facilitate the Police's criminal investigation. Accordingly, I find that all the personal information at issue in pages 1-27, was compiled and is identifiable as part of an investigation into a possible violation of law, thereby triggering the presumption of an unjustified invasion of privacy at section 21(3)(b).

It is not clear from the materials before me, however, whether the OFM provided any of the remaining records (pages 29-131) to the Police, and if so, which ones. However, the OFM took the position that it would await the results of the investigation conducted by the Police before withdrawing its reliance on section 14 of the *Act*, suggesting that the investigations remained somehow intertwined. However, in accordance with the previous orders of this office, without more, the Ministry has not provided sufficient evidence to persuade me that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b).

Information to Obtain Search Warrant

In Order PO-2066, the adjudicator had the occasion to address the appellant's submission that much of the information contained in the records was also contained in the "information to obtain search warrant". Although in the appeal before me I can not say with certainty that a comparable "information to obtain search warrant" (which was attached to the appellant's representations in the appeal leading to Order PO-2066) exists, if it does, this issue is addressed by the following excerpt from Order PO-2066, which I adopt in its entirety for the purpose of this appeal:

Previous orders of this office have pointed out that the *Act* establishes a regime and process for obtaining access to records which is separate and distinct from the discovery or disclosure mechanisms related to court actions (Orders 48, P-609, PO-1688, M-982, M-1109, MO-1192 and MO-1477). Sections 64(1) and (2) of the *Act* clearly contemplate that access may be considered under the two separate regimes. These sections provide:

- (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
- (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

I am not persuaded, by the appellant's arguments or the evidence he has produced in this inquiry, that the findings of various courts vis-à-vis disclosure within the context of a court action or application can necessarily be applied or equated to disclosure under the *Act*.

I do note however, that if a search warrant exists and the same information is contained in it as in the records, this would, in my view bolster a finding that the personal information contained in the records is in fact, "highly sensitive" for the purposes of section 21(2)(f) of the *Act*.

Sections 21(2)(f) and (i)

I am satisfied that the circumstances of the investigation and focus of the investigation, along with the uncertainty as to its outcome, have caused the affected party discomfort and dismay. I find that, in the circumstances of this appeal, much of the personal information in pages 29 to 131, is "highly sensitive" within the meaning of section 21(2)(f) because its disclosure could reasonably be expected to cause an individual excessive personal distress (see Orders M-1053, PO-1736 and PO-2339). Finally, I find that on balance, the factors favouring privacy-protection at section 21(2)(f) outweigh any factors favouring disclosure in this case. As I have found that section 21(2)(f) applies, it is not necessary for me to address the application of section 21(2)(h).

PUBLIC INTEREST IN DISCLOSURE

In his representations, the appellant 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.

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 21(1)) (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)).

The appellant submits:

For this case, there is a compelling public interest to ensure that individuals guilty of breaking a law are prosecuted to the full extent of the law, both civilly and criminally. The public stakeholders that pay for increased insurance premiums are victims of fraudulent insurance claims. There is a public interest to ensure that insurance companies are not victims of fraudulent claims, bad faith claims, and claims involving punitive damages.

In this instance, the appellant’s interest in obtaining access to the information relates to an insurance matter and it is private in nature; it does not amount to a “public interest” within the meaning of section 23. Accordingly, I find that the “public interest override” at section 23 does not apply (see Orders PO-1833 and PO-2339).

SEVERANCE

While the names of the individuals who responded to the fire and who conducted the investigations (from the OFM and the Police) would not be exempt, in my view, the records cannot reasonably be severed of this information, since to do so would reveal only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information. As a result, I uphold the Ministry’s decision not to sever information from the records for the purpose of disclosing it to the appellant. (Generally on this issue, see Orders PO-1727 and PO-1878).

FINAL COMMENT

The appellant included in his representations a binder of cases and materials dealing with, amongst other things, the preservation of and access to evidence, suggesting that the principles enunciated in those court decisions support a conclusion that the exemptions do not apply in the

current appeal. It is not necessary for me to deal in detail with these arguments that were raised and disposed of in the appeals that resulted in Orders PO-2066 and PO-2085. I rely on the reasoning in those cases, which recognize that the access to information regime established by the *Act* has its own separate criteria and process for disclosure.

ORDER:

I uphold the decision of the Ministry and dismiss this appeal.

Original Signed By: _____ December 29, 2004
Steven Faughnan
Adjudicator