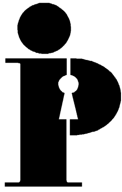

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2440

Appeal PA-050086-3

Ministry of the Attorney General

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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 all records relied upon by a specific Assistant Crown Attorney in support of a submission made in court. The requested records relate to allegations of wrongdoing stemming from an incident involving the requester, a police officer and others.

The Ministry identified 48 pages of responsive records. The records include a letter, along with various occurrence reports, witness statements and police officers' notes. Access to these records was denied pursuant to the exemptions in section 19 (solicitor-client privilege) and section 21(1) (invasion of privacy) with reference to the presumption in section 21(3)(b) of the *Act*.

In addition, the Ministry identified that access to an additional 102 pages was denied under section 22(a) of the *Act* (information published or available) because this record is a transcript of a court proceeding available to the public. The requester was also specifically advised as to how she could obtain the court transcript.

The requester, now the appellant, appealed the decision.

During the mediation stage of the appeal, the appellant advised that she wished to appeal the decision of the Ministry to apply each of the exemptions relied upon to deny access to the records. Mediation did not resolve the issues in this appeal, and it proceeded to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially. In addition, as the responsive records appeared to contain the personal information of the appellant, I invited the Ministry to address the possible application of sections 49(a) and 49(b) to the records at issue in this appeal.

The Ministry provided representations in response to the Notice of Inquiry. The Ministry also indicated that it decided to release the sole letter responsive to the request (pages 30-48 of the records) to the appellant. Those pages are therefore no longer at issue in this appeal.

I then sent the Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant. The appellant did not provide representations in response to the Notice.

RECORDS:

Access was denied to 29 pages of responsive records on the basis of the exemptions in section 49(b) and section 49(a), taken in conjunction with section 19. These 29 pages consist of witness statements, interview notes and occurrence reports.

Access was denied to the other record, a 102-page court transcript, on the basis of the exemption in section 49(a), taken in conjunction with section 22(a).

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

I find that all of the records remaining at issue contain information relating to the appellant and the incident involving her and certain other identifiable individuals. The records contain the appellant's personal information as defined in paragraphs 2(a), (b), (d), (e), (g) and (h) of the definition of "personal information".

In addition, I find that the records also contain the personal information of other identifiable individuals. Four of the documents (consisting of pages 5-7 and 9-29) are statements made by identifiable individuals other than the appellant about the incidents involving them and the appellant. These records contain the views and opinions of these individuals about specific incidents, along with their names and other personal information relating to them. These records, therefore, contain the "personal information" of these individuals as defined in paragraphs 2(e) and (h) of the definition in section 2(1) of the *Act*.

Finally, the other records at issue also contain information about a specific incident involving the appellant, an identified police officer and other identifiable individuals. As set out above, to qualify as personal information, the information must be about the individual in a personal capacity; however, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.

The circumstances of this appeal are somewhat unusual. The incident which resulted in the creation of the records at issue involved the appellant, the police officer and other persons, and resulted in the appellant laying an information and bringing a private prosecution against the police officer and other persons. Previous orders have determined that, in circumstances where allegations of wrongdoing are brought against an individual, including a police officer, records relating to those allegations are no longer within the realm of the "professional" capacity of the individuals, and the information in those records constitutes the personal information of the individuals against whom the allegations are made (see Orders P-1117 and M-1053).

On my review of the records at issue, I find that they relate directly to the incident that gave rise to the allegations of wrongdoing against the police officer and other persons. Accordingly, I am satisfied that these records also contain the personal information of those individuals under paragraph 2(h) of the definition in section 2(1) of the *Act*.

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 appellant's right of access to her 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) to support its decision to deny access to pages 1-29 of the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) 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 (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;

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

> The records were compiled during the course of a police investigation into a civilian complaint with respect to a possible violation of law. Disclosure of the third party personal information contained in the records would constitute an unjustified invasion of personal privacy….

Based on the representations of the Ministry and my review of the records, I am satisfied that the 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 referred to in those records under section 21(3)(b). As set out above, a presumption cannot be rebutted by the factors in section 21(2), and in my view they are not rebutted by either the exceptions in section 21(4) or the "compelling public interest" override at section 23, which was not raised in this case. Therefore, I find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b).

Absurd result

In this appeal, some of the records relate to an incident in which the appellant was present. Previous orders have determined that, where a requester originally supplied the information, or a 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, former Senior Adjudicator Goodis 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.

I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, 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, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

Having found that pages 1-29 of the records qualify for exemption under section 49(b) of the *Act*, it is not necessary for me to also consider the possible application of sections 49(a) and 19 to them.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

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

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their 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 information.

The Ministry has claimed the application of section 22(a) to a 102-page transcript of court proceedings. Because I have found that all of the records remaining at issue contain the personal information of the appellant, I will examine the application of this exemption in the context of section 49(a).

Information available to the public

The Ministry has taken the position that the transcript of the court proceedings is publicly available, and that section 22(a) applies. Section 22(a) states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]

- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

In its representations, the Ministry refers to previous orders of this office (Orders M-383, P-123 and P-368) to support its position that the transcripts of the court proceedings are publicly available for the purpose of section 22(a). The Ministry also identifies the fee structure that exists for obtaining the transcripts. In addition, in its decision letter, the Ministry advised the appellant how she could directly obtain the court transcript.

Findings

I have reviewed the orders referred to by the Ministry. In Order M-383, the institution claimed that the equivalent provision to section 22(a) found in the *Municipal Freedom of Information and Protection of Privacy Act* applied to transcripts from two proceedings in the Ontario Court (Provincial Division). The adjudicator in that appeal referred to Order P-327, in which former Assistant Commissioner Tom Mitchinson found that this exemption was intended to provide government organizations with "... the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access", and also stated that the exemption was "not intended to be used in order to avoid an institution's obligations under the Act." She agreed with the former Assistant Commissioner, and found that, in her appeal, where the record was a complete transcript of two court proceedings, the balance of convenience favoured the use of the exemption.

I adopt the approach to this exemption taken in previous orders, and find that, in the circumstances of this appeal and in the absence of representations from the appellant, the 102-page transcript of the court proceedings qualifies for exemption under section 22(a) of the *Act*. Accordingly, the record is exempt from disclosure under section 49(a).

EXERCISE OF DISCRETION

The exemptions in sections 49(a) and (b) are discretionary and permit the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

The Ministry made submissions in support of its decision to exercise its discretion not to disclose to the appellant the information which is exempt under sections 49(a) and 49(b). The Ministry's

representations were shared with the appellant, who did not respond to them.

In considering all of the circumstances surrounding this appeal, as well as the representations of the Ministry, I am satisfied that the Ministry has taken the appropriate factors into consideration in exercising its discretion, and has not erred in deciding not to disclose the records under sections 49(a) and (b) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by: December 28, 2005
Frank DeVries
Adjudicator