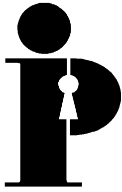

ORDER PO-2604

Appeal PA07-117

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

The requester submitted a request to 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 a copy of her complete file in relation to a specific Anti-Rackets Project that was undertaken by the Anti-Rackets Branch of the Ontario Provincial Police (the OPP). She indicated that the Anti-Rackets investigation had been ongoing for several years and has now been concluded. She indicated further that she was named in this investigation in the context of her employment position.

The Ministry located responsive records and granted partial access to them. The Ministry applied the exemptions found in sections 49(a) (discretion to refuse requester's own information) of the *Act* in conjunction with sections 14(1)(d), 14(1)(h), 14(1)(l) and 14(2)(a) (law enforcement), and 49(b) (invasion of privacy) of the *Act*, with reliance on sections 21(2)(f), 21(3)(b) and 21(3)(d), to deny access to the remainder. The Ministry also informed the requester that some of the information is not responsive to the request.

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

During mediation, the appellant narrowed the information at issue to pages 17 to 19 only (using the Ministry's numbering) – a document entitled, Synopsis of Interview Report. As a result, only the exemption found at section 49(b) of the *Act*, with reliance on sections 21(2)(f) and 21(3)(b), remains at issue.

I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry provided representations in response and with one exception, consented to sharing them with the appellant. The Ministry asked that I withhold Attachment A of its representations, which comprises the third party response provided by an affected party. I agreed that sharing this page of the representations would reveal the identity of the affected party and thus satisfied the IPC's criteria for withholding representations. The substantive portions of the Ministry's representations were shared with the appellant, in their entirety and a Notice of Inquiry was sent to her in order to provide her with an opportunity to respond to the Ministry's representations and to the issues set out in the Notice. The appellant submitted representations.

RECORD:

Remaining at issue is a three-page document entitled, Synopsis of Interview Report, denied in its entirety.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. 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]. Nevertheless, 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 have reviewed the record to determine if it contains personal information and, if so, to whom the personal information relates, and I make the following findings:

- The record contains information pertaining to the individual interviewed and several other identifiable individuals;

- The record also contains information pertaining to the appellant, which is intertwined with that of the other identifiable individuals;

- The information in the record pertains to these individuals in relation to business/employment relationships;

- The information is contained in a witness statement that was obtained by the OPP as part of their investigation in the context of an on-going investigation into a possible violation of law;

- Although the record contains information about the individuals referred to in it in their professional/employment capacities, I find that disclosure of the information in the record would reveal something of a personal nature about these individuals, that is, that they are involved in a criminal investigation.

Accordingly, I find that the information about the identified individuals referred to in the record constitutes their personal information.

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 exceptions to this general right of access. Section 49(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the record contains the personal information of the appellant and other identifiable individuals.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) 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 head to consider in making a determination as to 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(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure 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], though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption. (See Order PO-1764)

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

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

In this case, the Ministry has decided to deny access to the record, in its entirety, on the basis that it is exempt under section 49(b), in conjunction with the presumption at section 21(3)(b), which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

Representations of the Parties

The Ministry states that:

> The exempt information documents the law enforcement investigation undertaken by the OPP into the circumstances of an alleged fraud…the focus of the OPP investigation was to determine whether any laws had been violated in respect to the alleged fraud. Fraud is an offence under section 380(1) of the *Criminal Code*.

The Ministry indicated further that it contacted the interviewee to determine whether this person would consent to disclosure and consent was declined.

The appellant does not appear to dispute that the information was compiled as part of an investigation into a possible violation of law. Rather, she takes the position that the record "would have been disclosed at a pre-trial hearing by the Ministry of the Attorney General…as part of evidence…that was used in the laying of an information under the Ontario Health Act…" The appellant submits that disclosure of the record is not unjustified as it was used and disclosed in a court document. The appellant appears to recognize that she may have to seek a copy of the record through the courts.

Findings

On the face of the record it is clear that the interview was conducted by a member of the OPP as part of an investigation into a possible violation of law, that being an allegation of fraud. I find that the personal information in the record was compiled and is identifiable as part of an investigation into a possible violation of law under section 380(1) of the *Criminal Code*. Accordingly, the presumption at section 21(3)(b) applies to the personal information contained in the record.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt, 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)

- the requester was present when the information was provided to the institution (Orders M-444, P-1414)

- the information is clearly within the requester's knowledge (Orders MO-1196, PO-1679, MO-1755)

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge (Orders M-757, MO-1323, MO-1378).

The appellant's representations suggest that withholding the record from disclosure would result in an absurdity as it is likely that the record has been disclosed in a court proceeding.

Section 64 of the *Act* provides:

> (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.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449). In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section (under the municipal *Act*) as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
>
> Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:
>
>> This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. In this case, the fact that information may be withheld under the *Act* does not impinge on the ability of a party to litigation to obtain relevant information through Crown disclosure which should enable him or her to prepare a defence (PO-2563). Similarly, the fact that information may be obtainable through discovery or disclosure is not determinative of whether access should be granted under the *Act* (Order MO-2114).

The record at issue in the current appeal forms part of the OPP investigation file into an alleged fraud. Apart from her assertion that the record would have been disclosed at a pre-trial hearing, the appellant has presented no evidence that the record has previously been disclosed to her or that it might otherwise be available to the public. I have no evidence before me that the appellant would be entitled to a copy of this record even if she were to attend at the court office and request it. Finally, I am not satisfied that possible disclosure of the record through the court process means that non-disclosure under the *Act* is an absurdity. Consequently, I find that withholding the record at issue from disclosure would not result in an absurdity.

As I have found that the presumption in section 21(3)(b) applies to the personal information at issue, its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the identifiable individuals in the records. Therefore, subject to my discussion below of the Exercise of Discretion, I conclude that disclosure of the personal information in the record would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant, and that this information qualifies for exemption under section 49(b).

Exercise of Discretion

As I noted above, the section 49 exemption is discretionary, and permits an institution to disclose

information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry indicates that it considers each request for access to information on an individual case-by-case basis and that its historic practice, when responding to requests for personal information, is to release as much information as possible in the circumstances. The Ministry indicates that it considered whether disclosure of the information would undermine public confidence in the ability of the OPP to provide policing services. The Ministry notes that it considered disclosing the information to the appellant despite the application of a discretionary personal privacy exemption, but concluded that given the highly sensitive nature of the content of the record, its disclosure would cause personal distress. Finally, the Ministry indicates that it considered the record with a view to severing non-exempt information but found that severing was not feasible in the circumstances.

The appellant submits that the Ministry is acting in bad faith in withholding the record as the identity of the interviewee and the information in the record has already been divulged. As I indicated above, the appellant has provided no evidence to support this assertion.

Having reviewed the submissions made by the parties and all of the circumstances of this appeal, I find that the Ministry exercised its discretion under section 49(b) in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors.

I conclude that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the individuals identified in them, other than the appellant, and they are properly exempt under section 49(b) of the *Act*.

Severance

Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only

"disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed (Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)).

The Ministry indicates that it has turned its mind to whether the information pertaining solely to the appellant in the record can reasonably be released while still protecting the portions of the records that qualify for exemption under section 49(b) and determined that it could not. After reviewing the record, I find that the appellant's personal information cannot be reasonably severed, as it is intertwined with that of the other identifiable individuals in such a way that disclosure would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 16, 2007
Laurel Cropley
Adjudicator