



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2771**

**Appeal PA07-468**

**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 (Act)* for a copy of an audiotape recording of three telephone conversations between the requester and another individual.

The Ministry located the responsive records and claimed that disclosure of the audiotape would constitute an unjustified invasion of privacy under sections 21(1) and/or 49(b) of the *Act*. Section 49(b) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the discretion to grant requesters access to their own personal information.

The requester (now appellant) appealed the Ministry's decision to this office and the appeal was assigned to a mediator.

During mediation, the Ministry explained that the CD disc provided to this office does not contain a recording of the third telephone conversation as the audiotape containing the recordings is damaged at the end of the second conversation. At the end of mediation, the appellant advised that he continues to seek access to the recordings contained on the audiotape. The issues remaining in dispute between the parties were transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I decided to commence my inquiry by seeking the representations of the Ministry, initially. The Ministry provided representations in response, which were provided to the appellant, in their entirety. The appellant was then given an opportunity to make representations, which he did. The majority of the appellant's representations focussed on certain events that fall outside the jurisdiction of this office. Accordingly, I decided to summarize the appellant's position relating to the application of the exemptions of the *Act* in a letter to the Ministry seeking its supplemental representations. In response, the Ministry provided supplemental representations to this office.

## **RECORDS AT ISSUE:**

The records at issue consist of the audio-tape recordings of one complete telephone conversation and a partial telephone conversation between two individuals contained on one CD disc.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine whether sections 21(1) and/or 49(b) of the *Act* apply, it is necessary to decide whether the records contains "personal information" and, if so, to whom it relates.

The Ministry submits that the records contain the "personal information" of identifiable individuals as described in the definition of that term in section 2(1) of the *Act*. In particular, the Ministry submits:

The records themselves are steeped with personal information as they pertain to a number of individuals. Disclosed are particular identifiers and information

relating to race, sex, national and ethnic origin, marital status, criminal history, employment history, financial transactions, addresses, telephone numbers, and of course, personal views and opinions. Even though the parties conversing on the CDs only identify themselves using first names (it remains unknown whether these are true names or simply aliases), the information exchanged between the two could easily be used to identify a number of individuals and, potentially, even those speaking on the CDs themselves should the information be distributed to the public.

The term “personal information” is defined in part, 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,
- (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,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

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].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The appellant concedes that portions of the records contain the personal information of his ex-wife and the other caller. However, the appellant submits that the information relating to other individuals falls short of qualifying as personal information as the information is of a general nature. The appellant's position is that the audiotape recordings contain telephone conversations between himself and another individual about his ex-wife and that the individual recorded their conversations without his consent. The appellant submits that this individual impersonated another individual to solicit information from him, but that he now knows his true identity. The appellant's position is that the telephone discussions relate to matters personal to him, and as a result contain only his "personal information".

***Do the records contain personal information relating to other identifiable individuals?***

The Ministry argues and I agree that the audiotape recordings contain the personal information of other identifiable individuals. In fact, based on my review of the records I am satisfied that the records contain the personal information of several individuals, in addition to the appellant's ex-wife and the other caller. Though I accept the Ministry's evidence that it remains unknown whether the first and last name used by the other caller is his true name or an alias or an attempt to impersonate another individual, I am satisfied that the information contained in the records constitute both his personal information and the personal information of other identifiable individuals.

In particular, I am satisfied that the telephone conversations contained on the audiotape contains personal information relating to race, sex, national and ethnic origin and marital status of identifiable individuals as defined in paragraph (a) of section 2(1). I am also satisfied that the records contain information relating to criminal history or employment history, along with information relating to financial transactions in which the individual has been involved, as defined in paragraph (b) of the definition. Finally, I am satisfied that address and telephone information and the personal views and opinions of individuals identified in the records, along with the names of individuals reveals personal information about them within the meaning of paragraphs (d), (e), (g) and (h) of section 2(1).

***Do the records contain the personal information of the appellant?***

The Ministry's representations state:

Although the requestor claims to be one of the two individuals conversing on the CDs, neither party clearly identify themselves as being the requestor (either by first or last name). Furthermore, the CDs came into the possession of the police as evidence in an investigation into a potential violation of the law and, despite best

efforts being made, it cannot be determined that the requestor was involved in providing the CDs to the authorities.

As previously mentioned, the Ministry was invited to provide supplemental representations. My letter to the Ministry stated:

I have received representations from the appellant, and have decided that I require further representations from you in reply. In his representations, the appellant submits that the records at issue capture discussions he had with another individual about his wife. The appellant's position is that any "personal information" contained in the records at issue relate to himself, his wife and the individual recording the conversation. In his appeal letter, the appellant advises that this individual is [name of a specified individual] and that [this individual] has admitted in a police statement that he recorded telephone conversations between himself and the appellant.

The appellant submits that he has a right to access the recordings as they relate to him and contain information he provided to the individual recording him.

...

Accordingly, I require clarification as it appears that the Ministry is submitting that the records at issue "are clearly identifiable as part of an investigation into a possible violation of law, specifically, as potential evidence" while maintaining that there is "no clear evidence" that the records relate to the appellant.

At the end of my letter, the Ministry was invited to provide supplemental representations addressing the following questions:

1. What evidence, if any, supports or does not support the appellant's position that he is one of the individuals recorded on the CDs?
2. What evidence, if any, supports or does not support the appellant's position that the other individual recorded on the CD is the same individual the appellant advises provided a police statement admitting that he had recorded conversations between himself and the appellant?

The Ministry's supplemental representations state:

When considering [the Ministry's] position, one must be cognizant of the fact that certain pieces of potential evidence can form part of an investigation and yet, in the end, never be used or linked to the those charged with an offence. Investigations into alleged offences are regularly cast widely in an effort to generate as many potential leads as possible. On many occasions, information is

collected which may have little or no apparent connection to the offence being investigated. This is why such evidence is tested under the strict evidentiary requirements present in a trial setting. Understood in this manner, there is nothing contradictory in having the Ministry assert, on the one hand, that there is no clear evidence that the Appellant is one of the people featured on the CD while also maintaining that the CDs were compiled as part of an investigation into a possible violation of the law. Given that the matter was withdrawn before the evidentiary value of the CDs could be established, there is no way of knowing whether the Crown would have found, or established, any connection at all between the contents of the CDs and the allegations against the Appellant. All that one can say in the present circumstances is that the CDs, in whatever manner, for whatever purpose, nevertheless found their way into the investigation into the offences against the Appellant, which is a far cry from stating that they, from an evidentiary point of view, are in any way linked or connected to the Appellant simply by way of their inclusion into the investigative brief surrounding the alleged offences.

With respect to the appellant's evidence that the other individual recorded on the CD is the same individual who provided a police statement admitting that he had recorded conversations between himself and the appellant, the Ministry states:

Since receiving the request for supplemental submissions, the Ministry has made every effort to confirm the existence of any such statement. No such statement was found.

I have carefully reviewed the records and am satisfied that the appellant is one of the individuals on the audiotape for the purpose of this appeal. In making my decision, I considered the representations of the appellant, which indicate that he used a specified name to identify himself to the other caller. This name is the same name one of the individuals on the audiotape used to identify himself. It appears that this name is a short form for the appellant's legal name. The appellant's representations indicate that he also uses this name. I also took into consideration that the individual having this name provided a telephone number to the other individual which is the same telephone number the appellant provided this office with his contact information for this appeal. Finally, one of the other identifiable individuals referred to in the audiotape has the same name as the individual the appellant identified in his representations as his ex-wife.

Having regard to the above, I find that the telephone conversations contained in the audiotape contain the personal information of the appellant. Accordingly, section 49(b) is the appropriate exemption to be applied in the circumstances of this appeal.

### *Summary of Findings*

I find that the records contain the “personal information” of the appellant and other individuals.

Accordingly, I will review whether disclosure of this information qualifies for exemption under section 49(b) of the *Act*. As previously stated, section 49(b) recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the discretion to grant requesters access to their personal information.

If an institution denies an individual access to their personal information, it must provide evidence that in its exercise of discretion consideration was given to whether the information should be released to the requester because it contains his or her personal information.

## **PERSONAL PRIVACY**

### **General Principles**

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 this right.

Under section 49(b), where a record contains 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. Section 49(b) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information. [Order M-352] 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.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f). The Ministry claims that the presumption at section 21(3)(b) applies in the circumstances of this appeal.

If section 21(3) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. The appellant has not claimed that any of the

exclusions in paragraph 21(4) or that the public interest override at section 23 applies in the circumstances of this appeal. In my view, sections 21(4) and 23 have no application to this appeal.

***21(3)(b): investigation into violation of law***

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. Section 21(3)(b) states:

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;

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]

There is no dispute between the parties that the records relate to and formed part of an investigation into a possible violation of law. The Ministry submits that the audiotape recordings were placed in the Crown brief relating to a charge laid against the appellant. The appellant concedes that the audiotape recordings he has requested had formed part of the Crown Attorney's case against him. However, the Crown Attorney's Office did not prosecute the matter and as a result the audiotape was not offered as evidence supporting the charge laid against the appellant.

Having regard to the representations of the parties, I find that the records were compiled and are identifiable as part of a police investigation into a possible violation of law, which resulted in a charge being laid against the appellant which was ultimately stayed.

I find that the presumption at section 21(3)(b) applies to all of the personal information contained in the audiotape. As a result, disclosure of this information would be a presumed unjustified invasion of the personal privacy of other identifiable individuals, and thus qualifies for exemption under section 49(b).

In making my decision, I also considered the absurd result principle as the appellant takes the position that he is already aware of the personal information about other identifiable individuals exchanged between himself and the other caller. In particular, the appellant states in his representations that "I have originally asked to hear these tapes or obtain them either way to be able to understand what exactly has been recorded, although I have an idea because there are [three] conversations all of which were me speaking."



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), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. For the principle of absurd result to apply in the circumstances of this appeal, it must be shown that the information at issue is clearly within the appellant's knowledge [Order MO-1323].

I have carefully considered the appellant's representations and am not satisfied that this is one of those "clear cases" in which the absurd result principle would outweigh the privacy interests of the other individuals identified in the audiotape. In making my decision, I took into consideration that the records contain the personal information of other identifiable individuals supplied by the other caller, and as a result this information is intertwined with the information the appellant provided to the other caller. In my view, the appellant's evidence suggesting that he has a general recollection of the telephone conversations he had with the other caller is not sufficient to support a finding that the information at issue is clearly within his knowledge. As a result, I find that the absurd result principle does not apply to this appeal and as a result the exemption in section 49(b) also applies in the circumstances of this appeal.

Having regard to the above, I am satisfied that disclosure of this personal information would give rise to an unjustified invasion of personal privacy and thus qualifies for exemption under section 49(b). As mentioned above, a finding that information qualifies for exemption under section 49(b) does not end the matter and the Ministry may exercise its discretion to disclose this information to the appellant.

## **EXERCISE OF DISCRETION**

### **General principles**

The section 49(b) 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)].

In support of its decision to not disclose the information at issue to the appellant, the Ministry states:

The Ministry recognizes that, in general, individuals should have access to their personal information except when the Ministry is required to withhold such information under the *Act*. In this case, the Ministry has exercised its discretion in good faith in deciding not to release the records in question either in full or in part, particularly given the fact that the requestor's interest in having the records disclosed is a purely private interest as opposed to a public one.

Factors considered by the Ministry in refusing to disclose the CDs included the following: the requestor's interest in gaining access to the records; the fact that neither party on the CDs is clearly identified as being the requestor; the nature of the records as potential evidence in a criminal investigation; the sensitive nature of the records' contents and the context of their creation, and finally; the public interest in fostering an ongoing relationship of confidence between the Ministry and law enforcement agencies.

The appellant's representations did not specifically address the exercise of discretion issue. However, throughout his representations the appellant submits that the information at issue relates to himself.

Having regard to the parties representations, I am satisfied that the Ministry has properly taken into account only relevant factors, and not irrelevant ones, in exercising its discretion to withhold the records I found exempt under section 49(b). In particular, it appears that the Ministry took into consideration that the records contain the personal information of identifiable individuals other than the appellant and that one of the purposes of the *Act* is that the privacy of individuals should be protected. I also took into consideration that the purposes of the *Act* include the principle that requesters should have a right of access to their own information. However, in my view, the personal nature of the information relating to other individuals and sensitivity of it outweighs this principle in the circumstances of this appeal.

Accordingly, I conclude that the Ministry properly exercised its discretion in deciding to withhold the audiotape from the appellant.

## **ORDER:**

I uphold the Ministry's decision to deny the appellant access to the records at issue.

Original Signed By: \_\_\_\_\_

March 27, 2009

Jennifer James  
Adjudicator