



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

# **ORDER PO-2868**

## **Appeal PA09-36**

### **Ministry of Community Safety and Correctional Services**



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## **NATURE OF THE APPEAL:**

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 copies of the video statements made by the requester and his two children to the Ontario Provincial Police (OPP).

By way of background, the requester's children live in Newfoundland with their mother, who is the custodial parent. In September 2007, the Provincial Court of Newfoundland granted the requester access to his children, including for the month of August. In August 2008, the children travelled to Ontario and stayed with the requester.

The requester alleges that during this one-month visit, the children told him that their mother had physically abused them on several occasions. At the end of the one-month visit, the requester did not return the children to Newfoundland. The OPP subsequently received an *ex parte* court order from Newfoundland requiring that the children be apprehended and returned to their mother.

The OPP went to the requester's residence and apprehended the children, who were then brought to a local detachment. The requester and his children made statements to the OPP that were recorded on videotape. The children were then returned to their mother in Newfoundland. The requester was not present when his children made their video statements to the OPP but believes that they told the officer conducting the interview that their mother had physically abused them.

After receiving the requester's access request under the *Act*, the Ministry located the three video statements sought by the requester, which are contained on two DVDs. It then sent a decision letter to him that provided full access to the DVD containing his own video statement. However, it denied him access to the DVD containing the video statements of his two children, pursuant to the discretionary exemption in section 49(b) (personal privacy), read in conjunction with the factor in section 21(2)(f) (highly sensitive) and the presumption in section 21(3)(b) (investigation into violation of law) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to this office. During the mediation stage of the appeal process, the appellant confirmed that he is not the custodial parent of the children. He further indicated that he did not wish the custodial parent to be notified about his request.

This appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, which submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations. In response, the appellant submitted representations to this office.

Next, I sent the appellant's complete representations to the Ministry and invited it to reply to his representations. The Ministry submitted brief reply representations to this office.

## **RECORDS:**

The records at issue are two video statements provided by the appellant's children to the OPP. Both statements are contained on a single DVD.

## **DISCUSSION:**

### **PERSON LESS THAN SIXTEEN YEARS OF AGE**

Section 66(c) of the *Act* states:

Any right or power conferred on an individual by this Act may be exercised,  
if the individual is less than sixteen years of age, by a person who  
has lawful custody of the individual;

Under this section, a requester can exercise another individual's right of access under the *Act* if he can demonstrate that

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

If the requester meets the requirements of this section, then he is entitled to have the same access to the personal information of the individual as the individual would have. The request for access to the personal information of the individual will be treated as though the request came from the individual himself [Order MO-1535].

In their representations, both the Ministry and appellant agree that the two children are less than sixteen years of age and the requester does not have lawful custody of them. The custodial parent is the mother, who resides in Newfoundland, not the appellant. In such circumstances, I find that section 66(c) does not apply and the appellant cannot, therefore, exercise his children's access rights under the *Act*.

### **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), which states, in part:

"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 if they relate to another individual,
- (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, 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 Ministry submits that the children's video statements contain the types of personal information listed in paragraphs (a), (b), (d), (e), (g) and (h) of section 2(1) of the *Act*. The appellant states that he agrees that the records contain the personal information of himself, his children, and the children's mother.

I have carefully reviewed the video statements of the two children. I agree with the parties that these records contain the personal information of the appellant, his two children and the children's mother. Consequently, it must now be determined whether the personal privacy exemption in section 49(b) of the *Act* applies to this personal information.

## **PERSONAL 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 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.

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 under section 49(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b). I find that none of these paragraphs apply in the circumstances of this appeal.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

Section 21(3)(b) of the *Act* 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;

The Ministry submits that the section 21(3)(b) presumption applies to the personal information in the children's video statements:

The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* (the *PSA*) provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.

The exempt information was compiled during a law enforcement investigation conducted by the OPP. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry submits that the application of section 21(3)(b) of [the *Act*] is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The appellant does not directly cite the section 21(3)(b) presumption in his representations but he suggests that it does not apply:

[The appellant] is of the opinion that the information compiled was not as a result of a law enforcement investigation but compiled as a result of a request made by [the appellant] to have the children interviewed prior to departing the office of the OPP, as a result of allegations of abuse, including assault of a minor at the hands of the custodial parent ...

I am not persuaded by the appellant's submissions on this point. Even if the information in the video statements was compiled because the appellant asked that his two children be interviewed, the OPP clearly conducted these interviews as part of a law enforcement investigation. The personal information in the video statements was compiled by the OPP and is identifiable as part of its investigation into possible violations of the *Criminal Code*.

It does not appear that any criminal charges were laid as a result of the OPP's investigation. However, 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 [Orders P-242 and MO-2235]. I find, therefore, that the section 21(3)(b) presumption applies to the personal information in the children's video statements.

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 21(3), it 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]. I have considered the exceptions in section 21(4) of the *Act* and find that the personal information in the children's video statements does not fall within the ambit of this section. Moreover, the "public interest override" in section 23 does not apply, because the appellant has a private, not a public interest, in seeking access to these records.

In short, I find that disclosure of the personal information in the children's video statements is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b). Once established, the section 21(3)(b) presumption cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. As a result, it is not necessary to consider the Ministry's submission that the factor in section 21(2)(f) weighs in favour of withholding the video statements.

As noted above, if any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Consequently, I find that the personal information in the children's video statements qualifies for exemption under section 49(b) of the *Act*, subject to my review of whether the Ministry exercised its discretion properly in applying this exemption.

### **EXERCISE OF DISCRETION**

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.

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 submits that it exercised its discretion properly in withholding the personal information in the children's video statements under section 49(b) of the *Act*:

The Ministry considered releasing the exempt statements at issue to the appellant notwithstanding that a discretionary exemption from disclosure applied to the information.

The Ministry was mindful of the fact that the responsive records in this particular instance document a highly sensitive matter primarily relating to individuals other than the appellant.

The historic practice of the Ministry when responding to personal information requests for police records is to release as much information as possible in the circumstances. The Ministry has provided the appellant with total access to his own statement.

Given the highly sensitive nature of this matter, the Ministry was satisfied that release of additional information from the records remaining at issue would cause personal distress to identifiable individuals. The Ministry was also satisfied that the information remaining at issue was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry carefully considered whether it would be possible to sever any non-exempt information from the records at issue. However, the Ministry concluded that severing was not feasible in this instance.

The Ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's request was not appropriate.

The appellant submits that the Ministry did not exercise its discretion properly in withholding the personal information in the children's videotapes under section 49(b) of the *Act*:

[The appellant] is also mindful of the major purposes and objects of the Ministry and [the *Act*]. However, [the appellant] is of the view that the Ministry has not taken into account the children's privacy rights, including the right to live without fear and to live without abuse and harm from the custodial parent.

[The appellant] submits that criminal charges cannot be laid against [the custodial parent] without the evidence, being the video statements of the children. [The appellant] is also of the view that the Ministry has not completely and accurately considered the relationship between [the appellant], his children and the other individuals referenced in the records. If the Ministry had done so in an accurate manner, the Ministry would note that although [the appellant] is not the custodial parent, he is the parent that seeks out the best interest of the children in an attempt to "rescue" his children from the continuous harm at the hands of the custodial parent ...

[The appellant] is of the view that although this matter may be highly sensitive and may cause personal distress of identifiable individuals, including the custodial parent, the Ministry should note that the children are already enduring personal distress by the custodial parent and her abusive nature of parenting the children.

In its reply representations, the Ministry suggests that the appellant bring his concerns to the attention of appropriate authorities in Newfoundland. In addition, it provides contact information for two OPP officers in the event the authorities in Newfoundland deem it appropriate to request information from the OPP.

In my view, the Ministry exercised its discretion based on proper considerations. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors in withholding the personal information in the children's video statements under the discretionary exemption in section 49(b). I find, therefore, that its exercise of discretion was proper.

Finally, I would note that my findings in this order do not prevent these records from being made available or produced in other legal proceedings. Section 64 of the *Act* states:

- (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.



**ORDER:**

I uphold the Ministry's decision to deny access to the children's video statements.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ January 25, 2010