



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

ORDER PO-2934

Appeal PA08-264

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The appellant manufactures and sells commercial gases. One of its customers has claimed that the appellant sold it an acetylene cylinder that leaked and caused an explosion. The appellant 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 an Ontario Provincial Police (OPP) investigation report and any other documents relating to an explosion at a laboratory in Red Lake.

The Ministry located records responsive to the request, including occurrence reports and the handwritten notes of seven OPP officers. It then sent a decision letter to the appellant that granted partial access to these records. The Ministry denied access to portions of the records pursuant to the discretionary exemptions in sections 14(1)(l) (commission of an unlawful act or control of crime) and 14(2)(a) (law enforcement report) of the *Act*, and the mandatory exemption in section 21(1) (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 possible violation of law). It denied access to additional portions of the records on the basis that they are not responsive to the request.

After reviewing the severed records, the appellant asked the Ministry to reconsider its decision to withhold certain portions of the records, and requested the disclosure of photographs that were taken by the OPP during its investigation of the explosion. In response, the Ministry sent a supplementary decision letter to the appellant that provided access to the photographs in their entirety. However, it continued to deny access to the withheld portions of the written records pursuant to the same exemptions cited in its original decision letter.

The appellant appealed the Ministry's decision to this office. During the mediation stage of the appeal process, the Ministry stated that the discretionary exemption in section 14(1)(l) applied to certain police codes and zone codes that appeared in the records. In addition, it stated that the mandatory exemption in section 21(1) applied to the personal information of several affected parties.

The Ministry also sent a second supplementary decision letter to the appellant that granted access to additional information in the records.

The appellant informed the mediator that it takes the position that the withheld information relating to several individuals in the records does not qualify as "personal information," because it identifies them in a professional capacity.

At the conclusion of mediation, the appellant confirmed that it is continuing to seek access to all of the withheld information in the records at issue, including the police codes and the information that the Ministry claims is not responsive to its request.

This appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. The adjudicator previously assigned to this appeal started his inquiry by sending a Notice of Inquiry to the Ministry. In response, the Ministry submitted representations

to this office. In its representations, the Ministry states that it is no longer relying on the discretionary exemption in section 14(2)(a) of the *Act*. Consequently, that exemption is no longer at issue in this appeal. In addition, the Ministry issued a third supplemental decision letter to the appellant that provided access to additional information from the records at issue.

The previous adjudicator then sent the Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations. The appellant also submitted representations. After reviewing them, the previous adjudicator decided to seek representations in reply from the Ministry and provided it with a copy of the appellant's representations, in their entirety. The Ministry submitted representations in reply.

The appeal file was subsequently transferred to me to complete the adjudication process. After reviewing the file and the representations submitted by the Ministry and the appellant, I decided that, in fairness, the individuals referred to in the records should be notified and offered an opportunity to provide submissions on the disclosure of records that contain information pertaining to them. As a result, I notified four affected parties. The Corporation of the Municipality of Red Lake responded on behalf of one affected party; a former employee of the Municipality. This affected party did not express an objection to the disclosure of information about him in the records. The other affected parties did not respond to the Notice that was sent to them.

RECORDS:

The records at issue are summarized in the following chart:

Title/description of record	Page numbers	Ministry's decision	Exemption claimed/reason for withholding information
Occurrence summary	1	Withheld in part	Sections 14(1)(l), 21(1), Non-responsive
General occurrence report	2-7	Withheld in part	Section 21(1), Non-responsive
First OPP officer's notes	8-13	Withheld in part	Section 21(1), Non-responsive
Second OPP officer's notes	14-19	Withheld in part	Section 21(1), Non-responsive
Third OPP officer's notes	20-23	Withheld in part	Section 21(1), Non-responsive

Fourth OPP officer's notes	24-25	Withheld in part	Non-responsive
Fifth OPP officer's notes	26	Withheld in part	Non-responsive
Sixth OPP officer's notes	27-29	Withheld in part	Sections 14(1)(l), 21(1), Non-responsive
Seventh OPP officer's notes	30-33	Withheld in part	Non-responsive

DISCUSSION:

PRELIMINARY MATTER:

Records at Issue

Section 14(1)(l)

The Ministry states that section 14(1)(l) was used to remove the ten-codes, location and zone codes from the records. Citing Orders M-393, M-757, PO-1877, PO-2209, PO-2339, PO-2394, PO-2409 and PO-2660, the Ministry states:

[D]isclosure of these operational police codes would leave OPP officers more vulnerable and compromise their ability to provide effective policing services...Intimate knowledge of the whereabouts of a given officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activities.

In his representations, the appellant states that he does not take issue with the Ministry withholding police codes, but states that “[i]f anything other than police codes has been redacted pursuant to section 14(1)(l), such information must be disclosed.

This office has issued many orders regarding the release of Police codes and has consistently found that section 14(1)(l) applies to police codes (for example, see Orders M-393, M-757, MO-1715 and PO-1665). In the circumstances, I accept that the appellant does not wish to challenge the well-established findings of this office regarding this type of information. Rather, it simply seeks to ensure that the exemption has been properly applied to the information in the records.

Accordingly, I have reviewed the records and will confirm that the portions of pages 1, 27, 28 and 29 that have been withheld pursuant to section 14(1)(l) contain only police ten-codes, location and zone codes. I therefore find that the ten-codes, location and zone codes contained in the records are no longer at issue in this appeal.

RESPONSIVENESS:

The Ministry takes the position that some of the information in the records comprised of faxing and printing information is “administrative information” and is, accordingly, not responsive to the request. In addition, the Ministry notes that the remaining portions of the records marked as non-responsive relate to other matters in which the police officers were involved that are unrelated to the explosion which lies at the root of the request.

The appellant does not take issue with the removal of information “that is genuinely non-responsive – dealing with other investigations and unrelated matters,” such as purely administrative matters. Rather, the appellant is concerned that the Ministry “had not made its determination with due care and attention.” Referring to the size and location of a number of redactions, the appellant submits that “these redactions [were] not characteristic of content that had nothing to do with the incident.” The appellant points to one page of the record as an example of the basis for his concern.

To be considered responsive to the request, records must “reasonably relate” to the request (Order P-880). Given the appellant’s concerns, I have carefully reviewed the information at issue, and I agree with the Ministry’s submission. Some of the information in these portions of the records reflect when the record was printed and by whom, and was created after the appellant’s request, as part of the retrieval process and/or relate to purely administrative matters. Consistent with previous orders of this office (for example, Order PO-2254), I am satisfied that this information is not covered by the scope of the appellant’s request, and I uphold the Ministry’s decision to withhold this information.

With respect to the remaining information that the Ministry has withheld as non-responsive, I am satisfied that all of it pertains to other matters that the police officers were involved in during their tour of duty. I find that the information that has been withheld as non-responsive is clearly unrelated to the appellant’s request. Accordingly, I uphold the Ministry’s decision to withhold this information.

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. The request in this appeal was made in May 2008.

Section 2(3) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity.” Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

Representations

The Ministry submits that the records contain the personal information of the individuals identified in them, because the information relates to them in their personal capacity, stating:

The Ministry submits that the content of the records at issue is reflective of this circumstance. At the time the records were created, the OPP was investigating a possible violation of law and sought information regarding this incident from affected persons.

The Ministry submits further that the records do not contain the personal information of the appellant or anyone associated with it.

The appellant refers to the modification to the definition of personal information in section 2(3) as the basis for its position that the name and contact information do not qualify as personal information. It then makes substantial submissions on this issue.

The appellant also states that the information it is seeking “includes factual observations of the events leading to the discharge of acetylene gas by employees of the appellant’s Customer. This includes observations made while two of these employees (named) were working with the cylinder in the course of their duties. The appellant submits that such observations of fact should not be construed as “personal information” as this information is not “about” the individual.

The appellant submits further that “factual observations of a witness are not correctly construed as personal information unless those observations are inextricably blended with the witness’s personal opinions and other such personal information.”

In reply, the Ministry states:

[T]he appellant objected to the Ministry providing notice to individuals whose privacy would be impacted by the release of their personal information to seek their views. The Ministry is of the opinion that these individuals should be contacted and given the opportunity to share their views...

The Ministry describes the OPP investigation done at the scene of the incident and maintains its position that the information compiled by the OPP during that investigation relating to the individuals interviewed constitutes their personal information.

Analysis and Findings

The information at issue in this discussion is the names and titles of a number of individuals, their home addresses and telephone numbers and dates of birth, as well as statements given by them regarding their observations and/or actions taken on the date of the incident. As well, the names of various government employees and other individuals who had been contacted as part of their employment responsibilities is at issue.

In addressing this issue, I have adopted the approach taken by adjudicator Colin Bhattacharjee in Order MO-2342, in which he determined that the names and charges against certain licence holders did not constitute “personal information” within the meaning of section 2(1) of the definition. In conducting his analysis on this issue, the adjudicator adopted the following approach established by Assistant Commissioner Tom Mitchinson in Order PO-2225:

Order PO-2225 sets out this office’s current approach to the personal information/business information distinction. In that order, former Assistant Commissioner Tom Mitchinson addressed the issue of whether the name of an individual who operates a business, but is not incorporated, is personal information or business information. The information at issue in that order was the names of non-corporate landlords who owed money to the Ontario Rental Housing Tribunal.

In his analysis, former Assistant Commissioner Mitchinson posed two questions that help to illuminate the distinction between information about an individual acting in a business capacity as opposed to a personal capacity:

... the first question to ask in a case such as this is: “*in what context do the names of the individuals appear*”? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

....

The analysis does not end here. I must go on to ask: “*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

With respect to the first question, the Assistant Commissioner concluded that the names of the non-corporate landlords appear in a business context. In Order MO-2342, the adjudicator found that the names of the individual (non-corporate) defendants charged by the City’s mobile enforcement team under Chapter 545 of the *Municipal Code* were operating in a business context, not a personal context.

Although the affected parties in the current appeal are not all business owners or holders of a licence, as was the case in the above two orders, I find that the approach is similarly applicable to individuals identified in the records in their capacity as employees and where the records relate to them in their employment context.

It is important to note that both MO-2342 and PO-2225 related to requests that pre-dated the amendment to the definition of personal information in sections 2(3) and 2(4). In the current appeal, the request was made subsequent to the enactment of these amendments, and I must, therefore, consider it in deciding this issue.

In this appeal, with one exception, the individuals identified in the records were operating in their employment capacities at the time of the work-place incident that resulted in an explosion at the work place. I will address the information in the record pertaining to the excepted individual at the end of the “personal information” discussion. Given the wording of section 2(3) as referenced above, I conclude that at a minimum the names and titles of the individuals identified in their official or employment capacities do not qualify as their personal information. Accordingly, I find that the names and titles of these individuals identified in the records do not constitute personal information. As the mandatory exemption in section 21(1) can only apply to personal information, this exemption cannot apply to this information.

Although not necessary, in the circumstances, I would also answer the first question set out in Order PO-2225 by finding that the names and titles of the individuals referred to in the records appear in their employment capacity.

In my view, the approach identified above is still relevant to the remaining information in this discussion. Accordingly, my finding above regarding the first question does not end the analysis. I must go on to ask: “is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?”

As I indicated above, the records also contain the home addresses, telephone numbers, and dates of birth of certain individuals; information which I find is inherently personal. In the circumstances, I find that this information reveals something of a personal nature about the identified individuals and thus qualifies as their personal information.

The remaining portions of withheld information contain the observations, comments or actions taken by these individuals at the time of the incident.

The Ministry has argued that the nature of this information is personal, due to its connection to the police investigation. I am not persuaded that the characterization of statements given by individuals in their professional or employment capacity automatically changes simply because they are given to the police during an investigation. Previous orders of this office have not drawn this distinction. For example, in Order P-1409, Senior Adjudicator John Higgins considered records that contained information pertaining to the views or activities of government officials relating to events that took place in September 1995 at Ipperwash Provincial Park, where a shooting occurred and an individual was killed, as well as comments made by “spokespersons” and “native leaders.” Following an extensive discussion of the distinction

between personal and professional capacity, he concluded that references to individuals as “spokespersons” (for occupiers of the park and for occupiers of another property), native leaders and the views and/or activities of government officials did not constitute the personal information of these individuals, where the information related to their employment or official functions and did not contain evaluations or criticisms of these individuals.

Although the records at issue in that case did not contain statements made to the police as is the case in the current appeal, the seriousness and sensitivity of the context in which the records were made is similar. (See also: Appeal MO-2374, relating to the views and opinions of employees during a forensic audit). In Order MO-2510, Adjudicator Frank DeVries considered information about three individuals whose employment responsibilities include activities relating to road construction and/or road signage that was compiled as part of a police investigation into a motor vehicle accident, as follows:

I find that if the withheld information relating to affected parties B and C was disclosed, it would *not* reveal something of a personal nature about them. There is nothing present in the records at issue that causes the information relating to these individuals to cross over into the “personal information” realm. The involvement of these two individuals was predominantly in the context of their employment responsibilities relating to road construction and/or road signage...

Based on my review of the information contained in the record relating to affected parties B and C, as well as based on the above statement made by these individuals, I am satisfied that the withheld information relating to these two individuals constitutes their “professional information” and does not qualify as “personal information.”...

However, the information relating to affected party D is qualitatively different. Although this individual’s employment responsibilities also include activities relating to road construction and/or road signage, the records indicate that this individual’s conduct was scrutinized and questioned. Previous orders of this office have established that information about persons in their professional or employment capacity may qualify as their personal information if it involves an evaluation of that individual’s performance as an employee or an investigation into his or her conduct as an employee [see, for example, Orders P-939, PO-2414, PO-2516, PO-2524, MO-2395].

I have carefully reviewed the withheld information in the records at issue. In my view, the information contained in these police records reveals something of a personal nature about affected party D, as this individual’s conduct was scrutinized. Because the information relating to affected party D examines and relates to the conduct of this individual, and is contained in these records relating to a police investigation, it takes on a different, more personal quality. Consequently, I find that the information relating to affected party D reveals something of a personal nature about him. Even though such information appears

in a professional context, its disclosure would reveal something inherently personal in nature about this individual.

I agree with the analysis and findings of the previous decisions of this office, referred to above. In my view, simply providing a statement to the police during an investigation is insufficient to change the character of information provided in an employment context into something that is inherently personal in nature about the individuals who provided the statement. I have reviewed the withheld portions of the records and find that there is nothing in them to indicate that any of these individuals' conduct was scrutinized and questioned; nor do they contain any other information that could be characterized as "inherently personal." Rather, the comments made by the individuals referred to in the records relate directly to the events that occurred and the actions they took in dealing with the workplace incident. Accordingly, I conclude that there is nothing about the remaining information at issue that, if disclosed, would reveal something of a personal nature about the individual. As a result, this information does not qualify as the personal information of the individuals referred to in the records within the meaning of that term as defined in section 2(1).

In summary, I conclude that only the home addresses, telephone numbers and dates of birth of the individuals referred to in the records in their official or employment capacities qualify as personal information. Moreover, I find that the records do not contain the personal information of the appellant.

One portion of page 16 of the records contains information about an individual living in the vicinity of the explosion. I am satisfied that this individual is identified in his personal capacity. Accordingly, I find that the paragraph on page 16 pertaining to him, including the comments he made to the OPP about the impact of the explosion on him, qualify as his personal information.

PERSONAL PRIVACY

Having determined that portions of the information contained in the records is the personal information of individuals other than the appellant, the mandatory exemption at section 21(1) requires that the ministry refuse to disclose the information unless one of the exceptions to the exemption at sections 21(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 21(1)(f), which states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

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 personal privacy within the meaning of section 21(1)(f). Section 21(2) provides criteria to consider in making this determination, section 21(3) lists the types of information whose disclosure is presumed to

constitute an unjustified invasion of personal privacy and section 21(4) refers to certain 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 the "presumed unjustified invasion of personal privacy" at section 21(3)(b), which reads:

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;

The appellant submits that there was no police investigation into the explosion. He argues further that “there is no evidence in the material, or anywhere, to indicate that there was ever a scintilla of a suspicion of a criminal act...there was no death and no bodily harm.” On the contrary, the appellant asserts that the matter had always been treated as an accident.

The appellant makes further submissions on this issue pertaining to the names and titles of the individuals identified in the records and the comments they made to the OPP. In view of my decision above with respect to what constitutes personal information, I have not included these submissions in this discussion.

Analysis and Findings

At the outset, it is important to note that the only information at issue in this discussion is the home addresses, telephone numbers and birth dates of the individuals identified in the records in their official or employment capacities, and information on page 16 relating to a neighbouring homeowner. I have already found that most of the information that the appellant states that he is seeking does not qualify for exemption under the *Act* as it is not “personal information” and cannot, therefore, be exempt under the section 21(1). Moreover, I have found that the information at issue in this discussion is “inherently personal” to the individuals referred to in the records.

I am satisfied that the OPP responded to an emergency call and acted in a policing capacity in their investigation to determine whether the incident was the result of a possible violation of law. Previous orders of this office have consistently found that the presumption only requires that there be an investigation into a possible violation of law (see: Orders MO-2114, PO-2587 and PO-2633, for example). In addition, the presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237, P-1225 and MO-2417), or where it was determined that there was no violation of law, as long as the investigation began as one into a possible violation of law (Order MO-2254).

The appellant submits that the absurd result principle applies in this appeal because it already knows the names of the individuals and has received a summary of their comments. Again, the appellant's representations focus on information that I have already found is not exempt under section 21(1). I have no evidence before me that it is aware of the other personal information in the records. Moreover, I find that there is no basis to conclude that it would be absurd to withhold the home addresses, telephone numbers and birth dates of the individuals referred to in the records. Similarly, I am not persuaded that it would be absurd to withhold information provided by an individual who was personally affected by the explosion in the circumstances of this appeal.

Accordingly, I am satisfied that the OPP responded to an emergency call with a view to investigating whether a possible violation of law had occurred. On this basis, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b) and its disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(1).

ORDER:

1. I uphold the Ministry's decision to withhold the affected parties' home addresses, telephone numbers and birth dates as well as the paragraph on page 16 of the records pertaining to a neighbouring homeowner.
2. I order the Ministry to disclose the remaining information by providing the appellant with a copy of the records **by January 18, 2011 but not before January 13, 2011.**
3. In order to verify compliance with the order, I reserve the right to require the Ministry to provide me with a copy of the portions of the records disclosed to the appellant.

Original signed by: _____
Laurel Cropley
Adjudicator

December 14, 2010 _____