

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3608

Appeal PA14-590

Ministry of Community Safety and Correctional Services

May 17, 2016

Summary: The issues in this appeal are whether the information the appellant requested contains personal information as defined in section 2(1), and whether it is exempt under the discretionary exemption in section 49(b) (personal privacy) of the *Act*. In this order, the adjudicator finds that the records contain the personal information of the appellant and five other individuals. She upholds the ministry's decision, in part, and orders the ministry to disclose the appellant's personal information to her, as well as that of one other individual who provided his consent to disclose his personal information to the appellant. The ministry's exercise of discretion is also upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 21(1), 21(1)(a), 21(1)(b), 21(3)(b), 21(2)(a), 21(2)(d), 21(2)(f), 23 and 49(b).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Community Safety and Correctional Services (the ministry). The access request, made under the *Freedom of Information and Protection of Privacy Act* (the *Act*), was for an identified Ontario Provincial Police (OPP) file relating to a complaint the requester had filed with the OPP. The purpose of the investigation was to determine if a private investigator contravened the *Private Security and Investigative Services Act, 2005* (PSISA).

[2] The ministry subsequently clarified the scope of the request with the requester,

who advised the ministry that she was not seeking access to records that she had already provided to the OPP. In turn, the ministry located responsive records and issued a decision to her, granting partial access to the records. The ministry denied access to some of the information, claiming the application of the discretionary exemptions in: section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement report); and section 49(b), in conjunction with section 21(1) (personal privacy) of the *Act*. In addition, the ministry advised the requester that other information was withheld because it was not responsive to the request. The requester (now the appellant) appealed the ministry's decision to this office.

[3] During the mediation of the appeal, the mediator notified two third parties (the affected parties) who may have an interest in the records. They did not provide their consent to disclose their personal information in the records. Also during mediation, the appellant advised the mediator that she was no longer seeking access to the information that was withheld under section 14(1)(l), as well as the information that the ministry identified as non-responsive. Consequently, this information is no longer at issue.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry and the appellant, which I received and which were shared in accordance with this office's *Code of Procedure* and *Practice Direction 7*. In its representations, the ministry advised that it was no longer relying on the law enforcement exemption in section 14(2)(a). Therefore, this exemption is no longer at issue.

[5] I also sought representations from two affected parties, and received representations from one of them. In addition, there is a third affected party who I was unable to seek representations from due to the absence of contact information.

[6] For the reasons that follow, I find that the records contain the personal information of the appellant and five other identifiable individuals. I find that most of this personal information is exempt from disclosure under section 49(b), in conjunction with section 21(1). However, I find that other personal information in the records is not exempt and I order the ministry to disclose it to the appellant. Lastly, I uphold the ministry's exercise of discretion to withhold the personal information that I have found to be exempt.

RECORDS:

[7] There are 29 pages of records, consisting of two letters, officer's notes and occurrence reports. There is also one audio CD, which contains OPP interviews of the appellant and three affected parties. The hard copy records were disclosed to the appellant, in part. With respect to the CD, the ministry disclosed the appellant's interview with the OPP to her. As previously stated, the information that the ministry

withheld under section 14(1) is no longer at issue, as well as the information it identified as non-responsive to the request. It is worth noting that I have reviewed the records and note that extensive information in the officer's notes is not responsive to the request, because it refers matters that are completely unrelated to the investigation of the appellant's complaint. As well, some of the information in the occurrence summaries is non-responsive because it is administrative information relating to the preparation of the records for disclosure, and is not the substantive content of these records. The non-responsive information is contained in:

- all of pages 4, 10, 11, 12, 18 and 20;
- most of pages 3, 5, 6, 7, 13, 14, 15, 16, 17, 19 and 22; and
- some of pages 8, 9 and 23-29.

ISSUES:

- A. Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption in section 49(b) apply to the information at issue?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain 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,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except 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.

[9] Section 2(3) also relates to the definition of personal information and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[10] 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.¹ Even if the 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.²

[11] The ministry submits that the records contain the personal information of various affected parties, including their names, addresses, dates of birth, telephone numbers and employment history. In addition, the ministry submits that the records contain the opinions or factual statements provided by, or about, affected parties. Lastly, the ministry argues that while some of the information at issue identifies affected parties in their business capacity, it still qualifies as their personal information because it reveals something of a personal nature about them, namely, their involvement in a law enforcement investigation.³

[12] The appellant states that it is likely that the records contain the name and telephone numbers of other individuals, as defined in paragraph (d) of the definition of personal information in section 2(1). In addition, the appellant submits that it is likely that there are views about her and one of the affected parties in the records.

[13] Conversely, the appellant's position is that some of the information in the records does not qualify as personal information because it refers to individuals in their business/professional capacity, and that section 2(3) of the *Act* applies to that

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ The ministry refers to Order PO-2225 to support its position.

information, especially given the fact that the complaint was made about a private investigator in his professional capacity.

Analysis and findings

[14] I have reviewed the hard copy records and the audio CD. I find that the hard copy records contain the personal information of the appellant and five identifiable individuals. The audio CD contains the personal information of three identifiable individuals. The personal information in the records includes:

- information relating to the family status of two individuals, which falls within paragraph (a) of the definition of personal information in section 2(1) of the *Act*;
- information relating to the employment history of one individual, which falls within paragraph (b) of the definition;
- the address and telephone number of four individuals, which falls within paragraph (d) of the definition;
- the individuals' names where it appears with other personal information relating to them or where the disclosure of the name would reveal other personal information about them, which falls within paragraph (h) of the definition; and
- the name and address of one individual in a business capacity but which reveals something of a personal nature about this individual.

[15] I also note that most of the appellant's own personal information contained in the records has already been disclosed to her. However, I find that her personal information is also contained on page 5 of the records, but that this information was withheld from her.

Issue B: Does the discretionary exemption in section 49(b) apply to the information at issue?

[16] 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.

[17] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[18] However, if any of paragraphs (a) to (e) of section 21(1) apply, the personal privacy exemption is not available.

[19] In applying the section 49(b) exemption, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of 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. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[20] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁴

[21] The ministry is claiming the application of the exemption in section 49(b), relying on the presumption in section 21(3)(b) and the factor in section 21(2)(f). Section 21(3)(b) of the *Act* states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of the law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[22] Section 21(2)(f) of the *Act* states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

[23] The ministry submits that the personal information is exempt from disclosure under section 49(b) because the presumption in section 21(3)(b) applies to it. It states that the records were compiled by, and are identifiable as part of an OPP investigation into a possible violation of the *PSISA*. While the OPP investigation did not result in charges, the ministry indicates that the OPP could have laid charges under the *PSISA* had an offence occurred.⁵

[24] In the alternative, the ministry submits that it relies on the factor in section 21(2)(f) because the personal information at issue is highly sensitive. The ministry goes on to argue that in Order P-1618, this office found that the personal information of individuals who are *complainants, witnesses or suspects* as part of their contact with

⁴ Order MO-2954.

⁵ Under section 45 of the *PSISA*, an individual convicted of an offence is subject to a fine of up to \$25,000, as well as a term of imprisonment of up to one year.

the OPP is highly sensitive for the purposes of section 21(2)(f).⁶ This is especially so, the ministry states, because none of the affected parties have provided their consent to disclose their personal information to the appellant.

[25] The ministry was also asked to provide representations on the absurd result principle. The ministry states:

The Ministry submits that the absurd principle does *not* apply because disclosure would be inconsistent with the purpose of the exemption, to protect the privacy of the affected parties whose personal information has been collected as part of a law enforcement investigation.

The Ministry relies on the reasoning set out in previous orders, including Order MO-2321, which recognized the inherent sensitivity of law enforcement records as being inconsistent with the application of the absurd result principle.

[26] The affected party, who provided representations, advised that she does not consent to the disclosure of her personal information to the appellant.

[27] The appellant's position is that most of the information at issue is within her knowledge and that she actually provided the information to the OPP as part of her complaint regarding the private investigator. She submits that the absurd result principle applies in these circumstances.

[28] The appellant also advises that sections 21(1)(a) and (b) of the *Act* apply. First, the appellant states that she obtained the consent of one of the affected parties⁷ to disclose his personal information to her. The appellant provided this office with the written consent of this individual to disclose his personal information to her, a copy of which was provided to the ministry. Second, the appellant submits that the disclosure of the information at issue is necessary for the health and safety of the affected party referred to above, with whom the appellant resides. The appellant advises that this affected party is facing a criminal proceeding, with possible incarceration, which would adversely affect his health. The records, the appellant submits, would exonerate him or at least assist him the defence of this criminal matter.

[29] With respect to the possible application of the presumption in section 21(3)(b), the appellant argues that this section is designed to protect the privacy of individuals in circumstances where the information at issue is unknown, not in circumstances where the information is known to the requester and provided by the requester.

[30] The appellant also submits that section 21(3)(b) does not apply if the records were created after the completion of an investigation, and that the records at issue

⁶ See also MO-1378.

⁷ The individual the appellant refers to is the affected party that this office was unable to notify of the appeal, due to lack of contact information.

were created after the completion of the investigation of her complaint. She states:

Records that were submitted in order to close the investigation, and summarising the reasons for such a decision, would have been developed following the completion of said investigation and are thus requested under this Appeal.

[31] Turning to the factors in section 21(2), the appellant submits that the factor in section 21(2)(d), which favours disclosure is applicable. She states that the personal information at issue is relevant to a fair determination of her rights. In particular, the appellant argues that she has been *implicated* in the proceedings pertaining to the affected party with whom she resides. She also states that she lost six week's worth of work due to police actions against her, which she believes are related to a dispute between herself, her partner and the other affected parties. She further advises that her rights were affected by the actions of the other affected parties. Lastly, the appellant raises the possible application of the public interest override in section 23 of the *Act*.

[32] In reply, the ministry submits that the authorization signed by the affected party, which accompanied the appellant's representations, is invalid because it is incorrectly dated.

[33] In sur-reply, with respect to the affected party's signed authorization to consent to the disclosure of his personal information, the appellant states that the date of the authorization was simply an error. The appellant also raised, for the first time, the application of the factor in section 21(2)(a). This factor, which favours disclosure of personal information, provides for the head to consider whether disclosure of the information is desirable to the purpose of subjecting the ministry and the OPP to public scrutiny. The appellant states:

As a member of the public, who launched the complaint, I deserve to understand how such a decision was made, particularly as I never agreed with or accepted the decision as claimed by the investigating officers.

Analysis and findings

[34] As previously stated, a portion of page 5 of the records contains the appellant's personal information, which can be severed from the rest of the page. Accordingly, the appellant's personal information on page 5 is not exempt from disclosure and I will order the ministry to disclose it to her.

[35] In addition, included in the appellant's representations was the written consent of one of the affected parties to disclose his personal information to the appellant. Consequently, section 21(1)(a) of the *Act* is relevant to this personal information, and states:

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

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[36] Despite the fact that the affected party's written consent was incorrectly dated,⁸ I find that this inadvertent error does not render the consent invalid, in the circumstances of this appeal. I accept the appellant's evidence that the incorrect date was a simple error. Consequently, I find that section 21(1)(a) applies to this affected party's personal information, and that because he has provided his consent to disclose his personal information to the appellant, it is not exempt from disclosure under section 21(1). This personal information is contained in pages 9, 22, 24 and 29 of the hard copy records and on the audio CD and can be severed from the other individual's personal information.

[37] Turning to the remaining personal information at issue, the appellant claims that section 21(1)(b) applies, which creates an exception to the exemption in section 21(1) and allows for the disclosure of personal information in compelling circumstances affecting the health or safety of an individual. In my view, this exception does not apply in these circumstances. The purpose of this exception is to allow for the disclosure of personal information in compelling circumstances where the health and safety of an individual is at risk unless the individual is notified of the existence of certain information, for example, in the case where an individual requires significant or potentially life saving medical information.⁹ The appellant has not provided sufficient evidence that the circumstances surrounding this request are compelling enough to affect the health or safety of an individual, or how the disclosure of the personal information of other individuals would be necessary for that individual's health or safety.

[38] The ministry is relying on the presumption in section 21(3)(b) to exempt the information at issue from disclosure. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law,¹⁰ and even if no criminal proceedings were commenced against any individuals, it may still apply. The presumption can apply to a variety of investigations, including those related to by-law enforcement¹¹ and violations of environmental laws or occupational health and safety laws.¹²

[39] I am satisfied that the OPP conducted an investigation into a possible violation of the law, namely the *PSISA* and that the records at issue were compiled and are identifiable as part of that investigation. I am also satisfied that the records were

⁸ It was dated a for a month after the representations were submitted to this office.

⁹ See Order PO-2541.

¹⁰ Orders P-242 and MO-2235.

¹¹ Order MO-2147.

¹² Orders PO-1706 and PO-2716.

created contemporaneously with the investigation and not following its conclusion. Consequently, I find that the presumption in section 21(3)(b) applies to the remaining personal information at issue.

[40] Turning to the factors in section 21(2), the list of factors in section 21(2) is not exhaustive, and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹³ Some of the factors weigh in favour of the disclosure of personal information, while others weigh against it. The ministry has claimed the application of the factor in section 21(2)(f), which weighs against disclosure because it refers to personal information that is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁴ Based on my review of the nature of the personal information at issue and the surrounding circumstances that led to the complaint to the OPP, I find that it does not qualify as being highly sensitive, and I do not afford this factor any weight.

[41] In contrast, the appellant has raised the application of the factors in sections 21(2)(a) and 21(2)(d), which weigh in favour of disclosure of personal information. Section 21(2)(a) states that the head shall consider whether the disclosure of personal information is desirable for subjecting the activities of government and its agencies to public scrutiny. The appellant submits that she requires the information to understand how the OPP made the decision to decline to lay charges under the *PSISA*. In my view, the reason why no charges were laid is contained in the portions of the records that were already provided to the appellant. In addition, I find that the disclosure of the remaining personal information at issue would not assist in subjecting the activities of the OPP to public scrutiny. Accordingly, I do not give this factor any weight.

[42] Section 21(2)(d) which also weighs in favour of the disclosure of personal information, applies where disclosure of the personal information is relevant to a fair determination of rights affecting the person who made the request. In Order P-312, the adjudicator set out a four-part test which must be met in order for section 21(2)(d) to apply, including that:

- the right in question is a legal right based on a statute or the common law;
- the right relates to an existing or contemplated proceeding;
- the personal information being sought has some significance to the determination of the right; and
- the personal information is necessary for the individual in question to prepare for the proceeding or to ensure an impartial hearing.

¹³ Order P-99.

¹⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[43] I find that the appellant has not provided sufficient evidence of an applicable legal right or of a particular proceeding relating to her, or how the personal information in the records is relevant to, or necessary for, her to prepare for any proceeding. Consequently, this factor does not apply and I give it no weight.

[44] The appellant also argues that the absurd result principle applies, because the information at issue is within her knowledge and was provided to the OPP by her. In these circumstances, I find that the absurd result principle does not apply. The information that the appellant provided to the OPP has already been disclosed to her, and the information provided by the affected party (with whom she resides) to the OPP I have ordered to be disclosed to her. The remaining information at issue, I find, is not clearly within the appellant's knowledge and, therefore, does not fall within the absurd result principle.

[45] Consequently, having considered and weighed the factors and presumptions in sections 21(2) and (3), I find that disclosure of the remaining information at issue would constitute an unjustified invasion of the personal privacy of the affected parties and that it is, therefore, exempt under section 49(b) in conjunction with section 21(1).

[46] In her representations, the appellant raised the possible application of the public interest override in section 23 of the *Act*. I find that there is no compelling public interest in the disclosure of the personal information of the affected parties because the information in the records relates to a private matter between the appellant and the affected parties, the disclosure of which would not shed light on the operations of government or its agencies. Therefore, I find that section 23 is not applicable in these circumstances.

Issue C: Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[47] 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.

[48] 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; or 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.¹⁵ This office may not, however, substitute its own discretion for that of the institution.¹⁶

[49] Relevant considerations may include those listed below. However, not all those

¹⁵ Order MO-1573.

¹⁶ See section 54(2).

listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁷

- The purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking his or her own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- The historic practice of the institution with respect to similar information.

[50] The ministry submits that it exercised its discretion properly and acted in accordance with its usual practices. It also stated that it took relevant factors into consideration, including the heightened sensitivity of the personal information of affected parties, which is contained in records resulting from a law enforcement investigation. The ministry further argues that disclosure of the records would result in members of the public no longer being cooperative with the police, out of concern that any personal information they provide to the police could be subject to disclosure under the *Act*. Lastly, the ministry submits that it disclosed as much information as possible to the appellant, withholding only the personal information of other individuals.

[51] The appellant states that she believes the ministry failed to take certain circumstances into consideration in exercising its discretion. In particular, she submits that the ministry did not consider her sympathetic and compelling need for the information at issue and also the relationship between her and the affected parties. Moreover, the appellant submits that, contrary to the ministry's position, the failure to disclose the records would result in members of the public no longer cooperating with the police because the public would lose faith in law enforcement and the way it manages complaints.

¹⁷ Order P-344 and MO-1573.

Analysis and findings

[52] I have carefully considered the representation of the parties. I find that the ministry took into account relevant factors weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that it considered the appellant's position and circumstances and balanced it against the protection of the other identifiable individuals' personal privacy in exercising its discretion not to disclose the information at issue. I am also mindful that the ministry has disclosed most of the appellant's personal information to her, and withheld only the personal information of others, which I have found to be exempt from disclosure under the *Act*, with the exceptions of the individual who provided consent to disclose his personal information to the appellant and to the appellant's personal information contained in one record that was not disclosed to her.

[53] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion under 49(b) to withhold the personal information that I have found to be exempt.

[54] In sum, I find that the records contain the personal information of the appellant and five affected parties. I uphold the ministry's decision in part, and order it to disclose the personal information to the appellant that I have found not to be exempt under section 49(b). Lastly, I uphold the ministry's exercise of discretion to withhold the personal information I have found to be exempt.

ORDER:

1. I order the ministry to disclose further portions of pages 5, 9, 22, 24 and 29 to the appellant by **June 22, 2016** but not before **June 17, 2016**. I have included copies of these records with this order. The ministry is to disclose the portions that I have highlighted to the appellant.
2. I order the ministry to disclose the portion of the CD containing the OPP's interview with the affected party who provided his consent to disclose his personal information to the appellant by the same date as that set out in order provision 1.
3. I reserve the right to require the ministry to provide this office with a copy of the records it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ May 17, 2016