

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3726

Appeal PA15-436

Ministry of Community Safety and Correctional Services

April 27, 2017

Summary: The appellant submitted a request for police records, one relating to a complaint she filed with the police. The ministry granted partial access to the records and claimed that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b). The ministry also claimed that a small portion of the records contain police code information which qualified for exemption under the law enforcement provisions under section 14(1). The appellant appealed the ministry's decision to this office and claimed that the factor favouring disclosure at section 21(2)(d) and an unlisted factor apply. In this order, the adjudicator upholds the ministry's access decision and dismisses the appeal.

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

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for Ontario Provincial Police (OPP) reports relating to two specified dates.

[2] The ministry granted the appellant partial access to two OPP reports. The ministry claims that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) taking into account the presumption at section 21(3)(b) and the factor favouring non-disclosure at section 21(2)(f). The ministry also claims that the police code information contained in a small

portion of the records qualify for exemption under the law enforcement provisions under section 49(a) in conjunction with sections 14(1)(l) and 14(2)(a).

[3] The appellant appealed the ministry's decision to this office and a mediator was assigned to explore settlement with the parties.

[4] At the end of mediation, the appellant confirmed that she was no longer seeking access to the withheld information in the July 22, 2013 report or the police code information in the March 19, 2015 report. However, the appellant confirmed that she continues to seek access to an address withheld in the March 19, 2015 report. The appellant takes the position that this information should be disclosed to her on the basis that she provided the information to the OPP when she filed a complaint about the care her child received while in foster care.

[5] The appeal file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, a complete copy of the ministry's representations was provided to the appellant. The appellant was invited to provide representations but declined to do so. However, the appellant advised this office that she continues to pursue access and that the subject-matter of this appeal is related to a pending court case.

[6] In this order I find that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) and uphold the ministry's decision.

RECORDS:

[7] The only information at issue in this appeal is the withheld address information contained on page 5 of a report, dated March 19, 2015.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1), and if so, to whom does it relate?
- B. Would disclosure of the address information to the appellant constitute an unjustified invasion of personal privacy under section 49(b)?
- C. Did the ministry properly exercise its discretion under section 49(b)?

DISCUSSION:

A. Does the record 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 record contains “personal information” and, if so, to whom it relates.

[9] 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

[10] 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.²

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[12] The ministry submits that the address information at issue identifies the residence of other individual(s) at the time the report was created. I have reviewed the report and am satisfied that the withheld address information constitutes “personal information” as described in paragraph (d) in section 2(1) of the definition of that term.

[13] I am also satisfied that the report contains the personal information of the appellant. The report was created as a result of a complaint the appellant made to the OPP about the care her child received while in foster care. As a result, the report contains the appellant’s age (paragraph (a) of the definition of “personal information” at section 2(1)); and address and telephone number (paragraph (d)) which appears with other personal information relating to her along with her name (paragraph (h)).

[14] As the record contains the personal information of the appellant, I will determine whether disclosure of the address information would constitute an unjustified invasion of personal privacy under section 49(b). 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 own information.

B. Would disclosure of the address information to the appellant constitute an unjustified invasion of personal privacy under section 49(b)?

[15] Section 49(b) states:

¹ Orders P-257, P-427, P-3812, P-1621, R-980015, MO-1550-F and PO-2225.

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

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

A head may refuse to disclose to the individual to whom the information relates personal information,

if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[16] Because of the wording of section 49(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.

[17] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[18] In the circumstances of this appeal, I must determine whether disclosing the withheld address information to the appellant would constitute an unjustified invasion of their personal privacy under section 49(b).

[19] Sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 21(2) provides some criteria for the ministry 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 ministry has not claimed that any of the exceptions in section 21(1) or exclusions in section 21(4) apply and I am satisfied that none apply.

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

[20] 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.⁴ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁵

[21] In support of its position that the presumption under section 21(3)(b) applies, the ministry states:

The home address at issue has been withheld because of the Ministry's position that its release would presumptively constitute an unjustified invasion of personal privacy of one or more affected individuals who reside or resided at the home address, given that the home address was created as part of an OPP record involving an investigation.

...

⁴ Orders P-242 and MO-2235.

⁵ Orders MO-2213, PO-1849 and PO-2608.

The home address was collected by the OPP, and subsequently included in an OPP Occurrence Summary, which is an investigative record created by the OPP as part of an investigation into an incident involving the appellant. If the evidence gathered during the investigation had led to a determination that an offence had been committed, one or more charges could have been laid by the OPP. As a result, the ministry submitted that the records fall squarely within the presumption in section 21(3)(b).

[22] Though the appellant did not provide representations during the inquiry, I have reviewed the file materials and it appears that there is no dispute between the parties that the report in question was created because the appellant filed a complaint with the OPP.

[23] Having regard to the record itself and the ministry's representations, I am satisfied that the address information at issue was collected as part of the OPP's investigation into a possible violation of law, namely a *Criminal Code* offence.

[24] As the presumption only requires that there be an investigation into a possible violation of law, it applies even if no proceedings were commenced.

[25] Having regard to the above, I find that the presumption at section 21(3)(b) applies in the circumstances of this appeal.

Section 21(2) factors weighing in favour or against disclosure

[26] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁶

[27] The ministry claims that the factor favouring privacy protection at section 21(2)(f) applies in the circumstances of this appeal.⁷ Though the appellant did not provide representations during the inquiry, it appears that she takes the position that the address information at issue should be disclosed to her on the basis that she provided it to the OPP when she filed her report. In addition, the appellant advised this office that the withheld address is relevant to a pending court case which gives rise to the factor at section 21(2)(d).

Section 21(2)(d): Fair determination of rights

[28] For section 21(2)(d) to apply, the appellant must establish that:

⁶ Order P-239.

⁷ Section 21(2)(f) 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, the personal information is highly sensitive.

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁸

[29] Given that the subject matter of the appeal relates to the appellant's child being apprehended and placed in a foster home, I am satisfied that part 1 of the test has been met. However, in order for section 21(2)(d) to be given any consideration, the appellant must establish that all four parts of the test have been met. Even if I was presented with evidence that the appellant's legal rights are related to a proceeding that has not been completed, I find that the withheld address would not have some bearing on or is significant to the determination of the appellant's custody rights. In addition, there is no evidence before me demonstrating that the address information in question is required in order for the appellant to prepare for a child protection proceeding or other proceeding or to ensure an impartial hearing.

[30] Accordingly, I find that the factor in section 21(2)(d) has no application in this appeal.

Unlisted factor

[31] The list of factors under section 21(2) is not exhaustive. Accordingly, any circumstances that are relevant, even if they are not listed under section 21(2) must be considered.

[32] In my view, a relevant factor in this appeal is the appellant's position that she provided the information at issue to the OPP when she filed a complaint about the care her child received in foster care.⁹

[33] Based on my review of the file, it is clear that the address information in question is not within the appellant's knowledge. Because the report is computer-generated I am not able to assess the exact nature of the information the appellant provided the investigating officer as opposed to information the officer filled in.

⁸ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

⁹ See Order MO-3393 which found that a requester's request for their own statement provided to the police was a relevant unlisted factor in section 21(2).

Accordingly, it is not clear whether the appellant provided complete address information to the officer at the time she filed her complaint.

[34] Even if I was satisfied that the appellant provided the address in question to the OPP at the time she filed her complaint I find that it does not weigh in favour of disclosure given the circumstances of this appeal and sensitive nature of the information at issue. In arriving at this decision, I also took into account that the information at issue relates to other individuals.

Summary

[35] Given that the presumption at section 21(3)(b) applies and I found that no other factors favouring disclosure apply, I find that it is not necessary that I also make a finding whether section 21(2)(f)(highly sensitive) also applies.

[36] Accordingly, I find that disclosure of the address information to the appellant would constitute an unjustified invasion of personal privacy under section 49(b), subject to my assessment of whether the ministry exercised its discretion properly.

C. Did the ministry properly exercise its discretion under section 49(b)?

[37] 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[40] The ministry submits that it properly exercised its discretion and took into account relevant factors such as the purpose of the privacy protection exemption and the sensitive nature of the information. Namely, the address information at issue relates to a home address contained in a law enforcement record relating to the apprehension of a child.

¹⁰ Order MO-1573.

¹¹ Section 54(2).

[41] I have reviewed the ministry's representations and am satisfied that it properly exercised its discretion. I am also satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose. Given the manner in which the ministry severed the OPP reports provided to the appellant, I am satisfied that the ministry also took into account the principle that individuals should have a right of access to their own personal information. However, in my view, the sensitive nature of the address information at issue combined with the fact that it was compiled as part of the OPP's investigation/involvement regarding the apprehension of a child outweighs this principle.

[42] Accordingly, I find that the ministry properly exercised its discretion to withhold the personal information I found exempt under section 49(b).

ORDER:

The ministry's decision is upheld and the appeal is dismissed.

Original signed by: _____
Jennifer James
Adjudicator

_____ April 27, 2017