

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3824

Appeal PA16-375

Ministry of Community Safety and Correctional Services

March 6, 2018

Summary: The appellant requested information under the *Freedom of Information and Protection of Privacy Act* about a police investigation into the unauthorized installation of a camera in a fire hall. The Ministry of Community Safety and Correctional Services (ministry) withheld some information applying the personal privacy exemption in section 21 of the *Act*. This order upholds the ministry's decision in part. The personal privacy exemption does not apply to some information withheld by the ministry because it relates to an individual in their professional capacity. This information and some withheld personal information about two affected parties who consented to disclosure of their personal information is ordered disclosed.

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

Orders and Investigation Reports Considered: PO-2225, PO-2571, PO-2955, MO-2565, PO-3617.

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 (ministry) for access to records regarding an investigation into the unauthorized installation of a camera in a fire hall. In particular, the appellant requested copies of the investigating officer's notes and any related records including reports, witness statements and photographs.

[2] The ministry issued a decision granting partial access to the records, withholding some information under sections 14 (law enforcement) and 21(1) (personal privacy) of the *Act*. The ministry also withheld some information, predominantly police officers' notebook entries as not responsive to the request. The information in the notebooks is about other incidents unrelated to the incident at issue in this request.

[3] The appellant appealed the ministry's decision.

[4] Two of three affected parties consented to the ministry disclosing any personal information about them in the records to the appellant. The ministry provided the appellant with audio witness statements of these two affected parties. The ministry also advised the appellant that the only information withheld under section 14(1)(l) was "police codes".

[5] The appellant continued to seek access to information withheld under section 14(2)(a) and 21, including an audio witness statement of the remaining affected party who did not consent to their information being disclosed. As mediation did not resolve the appeal, it proceeded to the adjudication stage, where an inquiry is conducted.

[6] The inquiry began by inviting representations from the ministry and the affected party on the issues in a Notice of Inquiry. The ministry withdrew its reliance on section 14 in its representations. Accordingly, section 14 is no longer at issue in the appeal.

[7] I invited the appellant to provide representations and then invited the ministry and affected party to provide reply representations, though only the ministry did so. I shared the parties' representations in accordance with *IPC Practice Direction 7*.

[8] This order finds that some information withheld by the ministry is not personal information because it is about an individual in his professional capacity. This information and some withheld personal information about two affected parties who consented to disclosure of their personal information can be disclosed. The personal information of the affected party must be withheld under section 21.

RECORDS:

[9] The records at issue contain information withheld under section 21 (personal information) as follows:

- portions of page 1 (Occurrence Summary);
- portions of pages 2-3 (General Occurrence Report);
- portions of pages 4-6 (Supplementary Occurrence Reports);
- portions of pages 8-10 (emails containing photographs);

- portions of pages 13-28 (Police Officer notebook entries). Pages 13-15, 22 and 27 are withheld entirely;
- portions of pages 30-33 (Police Officer notebook entries). Pages 30-31 are withheld entirely;
- pages 34-36 (witness statement summary);
- portions of pages 37-39 (witness statement summaries); and
- an audio recording of a witness statement.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, who does it relate to?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, who does it relate to?

[10] To determine which sections of the *Act* may apply, it is necessary to decide whether the information contains "personal information," which is defined in section 2(1) of the *Act*:

"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,
- (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,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(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;

[11] The examples of personal information in section 2(1) are not exhaustive, so information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[12] Sections 2(3) and 2(4) also relate to the definition of personal information. They state:

(3) 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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] To qualify as personal information, information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity is not "about" the individual.²

[14] 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.³

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[16] The appellant submits that the ministry should disclose the information because it is not personal information under the *Act*, so the section 21(1) exemption cannot apply to it. The appellant's argument is that the information relates to the affected party in a professional, official or business capacity and is not personal information.

[17] The information at issue relates to an investigation into an incident at the affected party's workplace. The appellant submits that:

- the affected party was acting in his capacity as an employee when he made statements to police;
- the information he used for those statements was only available because of his employment;
- the events relate to the affected party's workplace; and
- the events occurred in the course of his employment.

[18] The appellant points out that the affected party refers to the incident in the context of a legal action he brought for constructive dismissal. It says this is further proof of the nexus between the incident and the affected party's employment.

[19] The appellant also cites section 2(3) of the *Act* (above) to support its position.

[20] Finally, the appellant submits that the affected party has already disclosed his identity in the course of the constructive dismissal litigation, so the fact that disclosing the records will reveal his identity is not a factor weighing against disclosure.

[21] The ministry makes two direct responses to the appellant's representations. First, the ministry submits that just because an employee's complaint to police relates to their employment does not mean the protections in the *Act* do not apply. Second, it submits that revealing some of one's own personal information during litigation does not negate the *Act's* protections for personal information.

[22] The ministry's representations submit that the information at issue is the personal information of the affected party collected during a law enforcement investigation.

[23] The ministry submits that the personal information at issue comprises:

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- the name, address, telephone number, date of birth and employment history of the affected party;
- details of a complaint made by the affected party to the police;
- photos; and
- personal information about the affected party provided by another individual.

[24] The ministry notes that 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.

[25] The ministry submits that the information at issue is about an individual in a personal capacity, forming part of a law enforcement investigation into allegations of improper conduct. The ministry submits that in the context of this appeal the information is personal in nature and cites Order PO-2571 in support of this analysis.

[26] In Order PO-2571 most information about police officers related to them in their personal capacity. The order found that even the information about the officers in their official capacity revealed something of a personal nature about them, because the information related to an investigation or assessment of their performance and conduct.

[27] The ministry also submits that the subject matter of the records in this appeal means severing identifying information such as names would not serve to remove personal information from the records. It cites Order PO-2955 in support of this approach.

[28] Order PO-2955 dealt with records containing the personal information of identifiable individuals, including their names, addresses, telephone numbers, records of police interactions with affected persons and the statements of affected persons to the police. Adjudicator Haly found that the individuals would be identifiable even if their names and contact information were severed from the record.

Analysis

[29] Order MO-2565 involved a similar situation to the present appeal. That order considered a request for officer's notes of an incident where a company's truck felled power lines in front of an appellant's home. The information at issue contained the name, date of birth, home address and phone number of the truck driver.

[30] Some of the information was the truck driver's personal information pursuant to paragraphs (a) (age) and (d) (residential address and telephone number) of the definition of "personal information" in section 2(1) of the municipal equivalent to the *Act*.

[31] Adjudicator Loukidelis found the individual was driving the company vehicle in his business, professional or official capacity. Considering the context in which the information appeared, the driver's name fell within the scope of section 2(2.1) of the *Act* (the equivalent to section 2(3) of the *Act*) because it identified him in a professional rather than personal capacity. Accordingly, this information did not qualify as "personal information."

[32] Information in the record relating to the company was also not "personal information". The company's name, its insurance policy numbers and an associated expiry date did not qualify as "personal information" because it was not *about* an identifiable individual, as required by section 2(1). The above information was therefore ordered disclosed.

[33] The adjudicator then considered whether the personal privacy exemption applied to the information that was personal information under section 2(1), which included the driver's date of birth, personal phone number and home address. Disclosing the truck driver's personal information was found to be a presumed unjustified invasion of his personal information, applying the investigation presumption at section 14(3)(b) of the *Act*.

[34] Order PO-2225 provides a useful framework for considering whether information is personal information or not. That order involved a request for information in Ontario Rental Housing Tribunal (tribunal) databases identifying individuals or corporations who owed money to the tribunal. Former Assistant Commissioner Mitchinson found that the names of non-corporate property owners owing money to the tribunal was about those individuals in a business rather than a personal capacity, and therefore did not qualify as "personal information" as defined in section 2(1) of the *Act*.

[35] Order PO-2225 sets out a two-step analysis for determining whether to characterize information as "personal" or "professional":

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government⁵ context that is removed from the personal sphere?
2. 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?

[36] In Order PO-3617 Adjudicator Higgins thoroughly considered the appropriateness

⁵ As I noted in Order MO-3420, Order PO-2225 refers to "official" as "official government," but the word "government" is not contained in the definition in the *Act*.

of this two-step approach, and the distinction it draws between business and personal information. Adjudicator Higgins found the approach consistent with the “modern principle” of statutory interpretation. As he observes, the two-step analysis in Order PO-2225 is intended to assist in understanding how the term “individual” in the preamble of the definition of personal information, as well as the wording of items (b) and (h) of the definition (reproduced above), would apply to information in the business, professional or official sphere.

[37] I have considered the two-step analysis in reaching my conclusions below.

Findings

[38] The incident the request relates to occurred in the workplace, and is about workplace conduct. It is clear the affected party became aware of the incident because of his employment and contacted the police due to his responsibility for the workplace. However, as Order MO-2565 illustrates, where a workplace event is the catalyst for creating records, information arising from that event can still be personal information.

[39] Further, I find that the incident arises in the broader context of an employment dispute between the parties to the appeal. Most of the responsive police records were created after the labour dispute was well advanced. The withheld information reflects this, containing a mix of information about the police investigation of the incident and the broader labour dispute. The blend of information in the records reflects how the two issues are related. Therefore, though the appellant’s request is for information about the incident, the responsive records also contain information about the labour dispute.

[40] The connection between the incident and the labour dispute is significant. As Order PO-2571 (summarized above) illustrates, information relating to employment disputes typically reveals information of a personal nature because it deals with issues of performance and conduct.

[41] I also note that as the affected party is a former employee, the appellant already knows the identity of the affected party.

[42] Though the police created the records in conducting the investigation, they also relate to the labour dispute, so the question is whether it is possible to identify and disclose withheld information about the workplace incident that reveals only information about the affected party (or others) in a business or professional capacity.

[43] I have carefully reviewed the withheld information. I am satisfied that some withheld information arises in the affected party’s professional or business capacity and does not reveal something of a personal nature. I note Order PO-2571 dealt with a request for information about the performance and conduct of affected party police officers. I distinguish that order to the extent that the information at issue in this appeal is about the performance and conduct of affected parties who have consented to their

personal information being disclosed.

[44] Some other withheld information, in particular excerpts from police officer's notebooks, is not responsive to the appellant's request. The excerpts comprise notebook entries unrelated to the incident that is the subject of the appellant's request. Information that is not responsive is on pages 13-18, 19 (all), 20, 21(all), 22, 23(all), 25(all), and 26-28 of the records.

[45] I am satisfied for the reasons above that the remaining withheld information is personal information. Some of that information is personal information of the affected parties who consented to their personal information being disclosed, including emails between the consenting affected parties. In the copy of the records supplied to me by the ministry no individuals can be identified in withheld photos accompanying the emails, due to the poor quality of the reproductions. I understand from the witness statements of one of the individuals who consented to their personal information being disclosed that the photos are of him, the other affected party who consented to their information being disclosed and a third individual, whose consent to disclosure was not sought or received. I assume the ministry withheld the photos because identifiable individuals who did not consent to their personal information being disclosed appear in the photos. There is nothing to be gained in ordering disclosure of the poor quality photos that do not reveal any individual's identity. However, if the ministry's version of the withheld photos contain images of the affected parties who consented to disclosure of their personal information, they should be disclosed to the appellant in accordance with the affected parties' consents.

[46] As the ministry withdrew its reliance on the section 14 law enforcement exemption, the withheld information that is not personal information (that can be severed from personal information in the records) can be disclosed to the appellant, including information in the audio recording. Personal information of the affected parties who consented to their information being disclosed to the appellant can also be disclosed.

[47] I will now consider whether the remaining information, namely the personal information of the affected party who did not consent to their personal information being disclosed, must be withheld under the personal privacy exemption in section 21.

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[48] 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. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" (section 23)

applies.⁶ Neither of these sections is raised in this appeal and in the circumstances, I find that they do not apply.

[49] In this appeal, the police are relying on the presumption in section 21(3)(b), which states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information, was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[50] In order for the presumption against disclosure in section 21(3)(b) of the *Act* to apply as claimed by the police, the personal information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

[51] Having reviewed the records, I agree that the personal information relating to the affected party was compiled and is identifiable as part of an investigation by the police into the unauthorized installation of a camera in a fire hall. I am satisfied that the investigation was directed at determining whether a violation of the *Criminal Code* had occurred. Therefore, I find that the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law.

[52] I find that the presumption in section 21(3)(b) applies to the affected party's personal information in the record at issue and that its disclosure is presumed to constitute an unjustified invasion of personal privacy.

[53] As stated previously, a presumption under section 21(3) cannot be rebutted by one or a combination of factors under section 21(2). Because I find the presumption in section 21(3)(b) applies, it is not necessary for me to consider the possible application of the section 21(2) factors or any unlisted factors.

ORDER:

1. I order the ministry to disclose to the appellant:
 - a. those portions of the records which I have highlighted in the copy of the records provided to the ministry with this order; and
 - b. the withheld audio recording, except for the information from 1:30 to 1:49; 6:57-7:50; 9:23-9:27; 17:46-23:22; 29:46-29:48; 29:59-30:01;

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

30:08-30:11; 30:26-30:34 and 32:22-34:20, which reveals personal information that must be withheld under section 21(1) of the *Act*.

2. I order the ministry to disclose the information to the appellant by **April 12, 2018** but not before **April 9, 2018**.
3. I find the unhighlighted portions of the records must be withheld under section 21(1) of the *Act*.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ March 6, 2018