

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4327

Appeal PA21-00010

Ministry of the Solicitor General

December 20, 2022

Summary: The ministry received a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to an incident which involved the appellant. The ministry issued a decision granting the appellant partial access to records citing a number of exemptions under the *Act*. The appellant appealed the decision to the IPC. In this decision, the adjudicator finds that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 49(b). The ministry's decision to withhold the personal information at issue from the appellant is upheld and the appeal is dismissed.

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(2)(d), 21(2)(f), 21(3)(b), and 49(b).

OVERVIEW:

[1] This order resolves an appeal of an access decision the Ministry of the Solicitor General (the ministry) made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant seeks access to Ontario Provincial Police (OPP) records relating to an allegation of assault at a maximum security prison involving himself.

[2] The ministry issued a decision granting the appellant partial access to the responsive records it located. The ministry claimed that the withheld portions of the records qualified for various exemptions under the *Act* or contained non-responsive

information.

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner (IPC) and a mediator was assigned to explore settlement with the parties. During mediation, the appellant confirmed that he was not pursuing access to the information the ministry identified as non-responsive. The appellant also narrowed the scope of the appeal to the withheld information located at the bottom of page #8 of a report prepared by the OPP.

[4] The ministry takes the position that disclosure of the information at issue to the appellant would constitute an unjustified invasion of personal privacy under section 49(b). The ministry also claimed that this information qualified for exemption under section 49(a), read with with sections 14(1)(l)(facilitate commission of an unlawful act) and/or 19(solicitor-client privilege).

[5] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process in which an adjudicator may decide to conduct an inquiry. I decided to conduct an inquiry and invited the written representations of the parties. The parties submitted representations in response. The parties' representations were shared with one another in accordance with the IPC's *Code of Procedure and Practice Direction 7*.¹

[6] In this order, I find that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b). The ministry's decision to withhold the information from the appellant is upheld and the appeal is dismissed.

RECORDS:

[7] The record is an OPP General Report relating to the incident involving the appellant. The appellant seeks access to the last entry made on the last page of the report under the heading "police action taken."

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it? Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?
- B. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

¹ The parties did not object to sharing copies of each other's representations with one another.

DISCUSSION:

A. Does the record contain “personal information” as defined in section 2(1) and, if so, whose personal information is it? Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

Personal Information

[8] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains “personal information,” and if so, to whom the personal information relates.

[9] It is important to know whose personal information is in the record. If the record contains the requester’s own personal information, his access rights is greater than if it does not.² Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.³

[10] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.⁴ Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁵

[11] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.⁶ However, in some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.⁷

[12] The parties do not dispute that the record contain the personal information of the appellant. The parties also agree that the record relates to the OPP’s investigation into whether the appellant assaulted a correctional officer. The parties also acknowledge that during the investigation, the appellant alleged a *Criminal Code* violation against the correctional officer.

² Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

³ See sections 21(1) and 49(b).

⁴ See the definition of “record” in section 2(1).

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

[13] Having regard to the representations of the parties and the record itself, I find that the withheld information constitutes the personal information of both the appellant and the correctional officer. Namely, personal information relating to their criminal or employment history (paragraph (b) of the definition of "personal information" in section 2(1) along with their name (paragraph (h)).⁸ Given the allegations the appellant made against the correctional officer, I am satisfied that the information in the records relating to this individual reveals something of a personal nature though the information also relates to them in their professional or official capacity.

[14] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.⁹

Personal Privacy

[15] 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.

[16] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of the exceptions in sections 21(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[17] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[18] In determining whether the disclosure of the personal information in the records

⁸ "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, and
(h) the individual's name if 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 However, the requester's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy; Order PO-2560.

would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹⁰

[19] If any of sections 21(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). 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.¹¹ The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹²

Analysis and findings

[20] In the absence of contrary evidence from the appellant, I agree with the ministry's assessment that the withheld personal information does not fit within the exceptions set out in section 21(1)(a) to (e) nor section 21(4) of the *Act*. Accordingly, I will turn to discuss whether any of the factors or presumptions under sections 21(2) and (3) apply.

[21] The ministry relies on the presumption in section 21(3)(b) and the factor favouring non-disclosure in section 21(2)(f) to withhold the personal information under section 49(b). The appellant says that the factor weighing in favour of disclosure at section 21(2)(d) applies. Both parties also raise unlisted factors. Sections 21(2)(d), 21(2)(f) and 21(3)(b) state:

(2) 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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) 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.

¹⁰ Order MO-2954.

¹¹ Order P-239.

¹² Order P-99.

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

[22] In support of its position that the presumption at section 21(3)(b) applies, the ministry submits that the withheld personal information was collected during an OPP investigation into an alleged assault. In its representations, the ministry states:

The record at issue was specifically created as a result of an OPP investigation. The investigation led to the OPP seeking the advice of an Assistant Crown Attorney. Depending on the outcome of the investigation, charges under the *Criminal Code* could have been laid.

[23] I note that the portion of the record disclosed to the appellant indicates that “the investigation will be closed and no further work will be done.” However, even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹³

[24] Having regard to the representations of the parties along with the record itself, I find that the presumption at section 21(3)(b) applies in this circumstance. The record contains information about an investigation into a possible *Criminal Code* violation. Although no charges were laid, there need only have been an investigation into a possible violation of law for the presumption at section 21(3)(b) to apply.¹⁴ Section 21(3)(b) therefore weighs in favour of non-disclosure of the withheld personal information.

21(2)(d): the personal information is relevant to the fair determination of the appellant’s rights

[25] This section weighs in favour of allowing requesters to obtain someone else’s personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?

¹³ Orders P-242 and MO-2235.

¹⁴ Orders P-242 and MO-2235.

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?¹⁵

[26] In his representations, the appellant states that:

.. [b]y law I am entitled to a parole hearing which will consist of reports made by my case management team relating to my behaviour overall while incarcerated, and various documented incidents. The right to a fair parole hearing is drawn from the concepts of common and statute law. This right is related to a proceeding which is existing, and requires information that is up to date, relevant, accurate and complete. The information requested is required in order to properly prepare for any questions that may arise as a result of this incident, and will also give a clearer picture of whether or not one could infer that I may or may not have committed a criminal act.

[27] Even if I was satisfied that parts 1, 2, and 4 of the four-part test have been met, I find that the appellant's evidence does not establish that part 3 of the test has been established. Based on my review of the record and the appellant's representations, I find that the personal information at issue is not significant to a determination to the right in question. In my view, the right identified by the appellant is not significantly impacted if the appellant is not granted disclosure to the personal information at issue that relates to another individual. The appellant already has in his possession documents which confirm that the OPP's investigation into the alleged assault resulted in no *Criminal Code* being laid against him.

[28] Accordingly, I find that this factor has no application in the circumstances of this appeal.

21(2)(f): the personal information is highly sensitive

[29] This section is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁶ For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.¹⁷

[30] The appellant questions whether the personal information at issue is highly sensitive and suggests that even if it is, his rights should prevail considering the seriousness of the allegation made against him.

¹⁵ See 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.).

¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁷ Order MO-2980.

[31] The personal information at issue relates to another individual and appears in an OPP report. Accordingly, I am satisfied that the context in which the information appears is highly sensitive. In addition, given the circumstances of the appeal and the contents of the record, I am satisfied that there is a reasonable expectation of significant personal distress on the part of the correctional officer if the withheld information is disclosed to the appellant. Accordingly, this factor, weighs in favour of non-disclosure of the withheld personal information.

Other factors or relevant circumstances

[32] Other factors (besides the ones listed in sections 21(2)(a) to (i)) must be considered under section 21(2) if they are relevant. As stated above, both parties raised unlisted factors in their representations. I will only address the unlisted factor raised by the appellant here as I have already found that the presumption at section 21(3)(b) and factor at section 21(2)(f), both weighing in favour of privacy protection apply in the circumstances of this appeal.

[33] In his representations the appellant voiced concerns about a cover up and said that these concerns should be considered as an unlisted factor. In support of this argument, he states:

It is of my opinion that the ministry may be trying to withhold the information to cover up the fact that the [correctional officer] may have been dishonest with police, or their reasons behind not laying any charges may not reflect well on the service.

[34] The IPC has in previous decisions considered the following other factors as an unlisted factor:

- inherent fairness issues,¹⁸ and
- ensuring public confidence in an institution.¹⁹

[35] In my view, the appellant's evidence does not demonstrate that without access to the withheld information he lacks an opportunity to refute the allegations made against him. Accordingly, I find that there is insufficient evidence to conclude that inherent fairness issues are relevant in this appeal. The OPP conducted an investigation into an allegation of assault against the appellant and in doing so also investigated the appellant's allegation against the correction officer. In addition, the OPP determined that no charges were warranted and the file was closed.

[36] Furthermore, I am not satisfied that the appellant's questions about whether the correctional officer provided the OPP with truthful information or whether there is some

¹⁸ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

¹⁹ Orders M-129, P-237, P-1014 and PO-2657.

other issue behind the decision to not lay charges against him gives rise to a systemic or operational issue which may warrant disclosing the personal information at issue.

[37] Having regard to the above, I find that the unlisted factor raised by the appellant has no application.

Absurd result – the section 49(b) exemptions may not apply

[38] An institution might not be able to rely on the section 49(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.²⁰

[39] For example, the “absurd result” principle has been applied when:

- the requester sought access to their own witness statement,²¹
- the requester was present when the information was provided to the institution,²² or
- the information was or is clearly within the requester’s knowledge.²³

[40] The appellant takes the position that he is already aware of the correction officer’s version of the events and that withholding the record “becomes absurd when the result of the investigation is already common knowledge, and the requester wants nothing more than an explanation onto how the OPP came to this result.”

[41] I have considered the appellant’s evidence and find that the absurd result does not apply. The appellant himself admits that the personal information at issue is not clearly within his knowledge. In any event, if disclosure is inconsistent with the purpose of the personal privacy exemption, the absurd result principle may not apply.²⁴

Summary

[42] As I have found that the presumption at section 21(3)(b) and factor at section 21(2)(f) weighing in favour of privacy protection apply in the circumstances, I find that disclosure of the withheld personal information at issue would constitute an unjustified invasion of personal privacy under section 49(b), subject to my finding on the ministry’s exercise of discretion.

²⁰ Orders M-444 and MO-1323.

²¹ Orders M-444 and M-451.

²² Orders M-444 and P-1414.

²³ Orders MO-1196, PO-1679 and MO-1755.

²⁴ Orders M-757, MO-1323 and MO-1378.

B. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

[43] The section 49(b) exemption is discretionary (the institution “may” refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[44] In addition, the IPC 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.

[45] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ The IPC cannot, however, substitute its own discretion for that of the institution.²⁶

[46] The appellant takes the position that the ministry failed to consider relevant considerations, such as:

- he alleged wrong-doing on the part of the correctional officer identified in the record,
- the personal information at issue also constitutes his personal information,
- he has “compelling” reasons for pursuing access to the withheld information, and
- disclosure could increase public confidence in the operation of the institution.

[47] Based on my review of the parties’ representations and the manner the ministry severed the records, I am satisfied that the ministry considered the principle that exemptions from the right of access should be limited and specific when applying exemptions. I am also satisfied that the ministry balanced the nature of the information at issue and the extent to which it is significant and/or sensitive to the ministry and other individuals taking into consideration the wording of the exemption and the interests it seeks to protect. I also find that the appellant’s arguments fail to establish that the principle that the privacy of individuals should be protected, should be set aside in the circumstances of this appeal to respond to his desire to have a more fulsome understanding as to why charges were not laid.

²⁵ Order MO-1573.

²⁶ Section 54(2).

[48] In addition, I find there is insufficient evidence to demonstrate that the ministry exercised their discretion to withhold the personal information at issue in bad faith or for an improper purpose.

[49] Having regard to the above, I find that the ministry properly exercised their discretion to withhold the personal information at issue under the discretionary personal privacy exemption at section 49(b) and uphold its decision to withhold the personal information at issue.

ORDER:

The appeal is dismissed.

Original signed by: _____

Jennifer James
Adjudicator

December 20, 2022 _____