

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4343

Appeal PA20-00804

Ministry of the Solicitor General

January 26, 2023

**Summary:** The Ministry of the Solicitor-General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for reports of the Ontario Provincial Police (OPP) relating to a homicide investigation that occurred on the requester's property. The ministry issued a decision, ultimately denying access to the responsive records pursuant to the mandatory exemption at section 21(1) (personal privacy) and the discretionary exemptions at section 49(b) (personal privacy) and 49(a) read with section 14(1)(l) (law enforcement) of the *Act*. In this order, the adjudicator upholds the ministry's claim under sections 21(1) and 49(b) and finds that all of the withheld information is exempt from disclosure. He dismisses the appeal.

**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 privacy), 21(1) and 49(b).

**Orders and Investigation Reports Considered:** Order P-1618.

### OVERVIEW:

[1] After a police investigation into a homicide that occurred on the appellants' property, the Ministry of the Solicitor-General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for reports relating to the incident. The appellant subsequently clarified that he seeks information regarding an incident that occurred at his address on a specified date, and was handled by the Ontario Provincial Police (OPP).

[2] The ministry issued a decision denying access to the responsive records pursuant to the mandatory personal privacy exemption at section 21(1) and the discretionary law enforcement exemption at section 14(1)(l) of the *Act*. The ministry also advise that it withheld some information on the basis that it was not responsive to the request.

[3] The appellant's representative (hereafter referred to as the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to facilitate a mediated resolution.

[4] During mediation, the appellant advised that he did not wish to pursue access to the portions of the records withheld on the basis that they are not responsive to the request. Those portions are no longer at issue in this appeal.

[5] On review of the records, the mediator noted that one of the records, a three-paged initial report, appears to contain the personal information of the appellant. As a result, the mediator raised the possible application of sections 49(a) and (b) of the *Act* for that record. The ministry agreed that, as the identified report appears to include the personal information of the appellant, for that record the appropriate exemptions to consider are the discretionary exemptions at section 49(a), read with section 14(1)(l), and 49(b).

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. The original adjudicator assigned to this appeal began an inquiry, inviting the ministry to provide representations. The representations were shared with the appellant who in turn provided his own representations. Subsequently, I was assigned to the appeal to continue with the adjudication.<sup>1</sup>

[7] In this order, I uphold the ministry's decision that the withheld information is exempt from disclosure under section 21(1) and 49(b), and dismiss the appeal.

## **RECORDS:**

[8] The records at issue consist of four police reports:

- a general report (pages 1 to 7) – section 21(1) has been claimed, the ministry withdrew its reliance on section 14(1)(l) that was also claimed for some of this information
- a general report (page 8) – section 21(1) has been claimed, the ministry withdrew its reliance on section 14(1)(l) that was also claimed for some of this information

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<sup>1</sup> After my own review of the parties' representations, I determined that no further submissions were required before making my decision.

- an initial report (pages 9 to 11) – as this record contains the appellant’s personal information, section 49(a), read with section 14(1)(l) (for some of the same information at pages 10 and 11) and section 49(b) (for all of the information) have been claimed
- a supplementary report (page 12) – section 21(1) has been claimed

## **ISSUES:**

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b) apply to the information for which it was claimed?
- C. Did the institution exercise its discretion under sections 14(1)(l), 49(a) and/ or 49(b)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Preliminary Issue**

[9] In his representations, the appellant attempts to expand the scope of his request to any information the police may have relating to what occurred on his property in the relevant time period. However, the scope of the appellant’s request and any records resulting from an expanded request are not at issue in this appeal. If the appellant is seeking additional information regarding the police investigation on his property, beyond the reports requested in this appeal, he can make a new request to the ministry for that information.

### **Issue A: Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?**

[10] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.<sup>2</sup> Where the records contain the requester’s own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 49(b) may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 21(1) may apply.

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<sup>2</sup> Order M-352.

[11] Accordingly, 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. That term is defined in section 2(1) as follows:

[12] "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 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;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>3</sup>

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

[15] Sections 2(2), (3) and (4) of the *Act* exclude some information from the definition of personal information. Sections 2(3) and (4) are described above. Section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years.

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<sup>3</sup> Order 11.

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

### ***Representations***

[16] The ministry submits that the records contain personal information within the meaning of the non-exhaustive definition of this term set out in section 2(1) of the *Act*. It submits that the responsive personal information belongs to affected third party individuals. It submits that the information includes their names, addresses, dates of birth, information about their medical conditions, past police records, employment, as well as their actions and observations collected during a homicide investigation.

[17] The ministry submits that due to the nature of the records (a law enforcement investigation where the appellant is expected to know at least some of the third party individuals,) even if identifying information such as the names were removed from the records, it is reasonable to expect that the third party individuals could still be identified. Therefore, the ministry submits that it is of the view that none of the personal information should be disclosed. The ministry submits that it relies upon this position based on past OPP orders, including PO-2955, PO-3766, and PO-3897.

[18] The appellant provided representations in this appeal. His representations consist mostly of background information leading up to his access request. He does not address whether there is personal information as defined in the *Act* in the records. The appellant submits that he has "a citizen's presumptive right to information held by state authorities as it relates exclusively to the citizen himself and to the occupation of his property."

### ***Finding***

[19] Having reviewed the records at issue, I find that they contain the personal information of identifiable individuals and that the initial report (page 9-11) also contains the personal information of the appellant. I find that the records consist of the following:

- the general reports contain the personal information of identifiable individuals. The personal information includes the names, addresses and other personal identifies, such as age and gender. The reports also document the incident and investigation by the police and includes statements made by individuals the police spoke to. The general reports do not contain any of the appellant's personal information.
- the initial report contains the personal information of identifiable individuals including employment, criminal and medical history, names, addresses, age, gender and includes statements made by individuals the police spoke to. The personal information of the appellant in this record is limited to his name and address.

- The supplementary report, although it does not contain the actual names of identifiable individuals, it contains information that would identify an individual given the context, and includes details of the police investigation.

[20] After my review, I find that the records contain information that qualifies as personal information of identifiable individuals, as defined in paragraphs (a), (b), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. I will now consider if disclosure of the general and supplementary reports would be an unjustified invasion of personal privacy in section 21(1) and if disclosure of the initial report would constitute an unjustified invasion of personal privacy in section 49(b).

**Issue B: Does the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b) apply to the information for which it was claimed?**

[21] 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 some exemptions from this right.

[22] 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.

[23] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester, even if doing so would result in an unjustified invasion of the other individual's personal privacy.<sup>5</sup>

[24] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution cannot disclose that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or the section 21(1)(f) exception applies, because disclosure would not be an "unjustified invasion" of the other individual's personal privacy.

[25] Also, 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.<sup>6</sup>

[26] Sections 21(1) to (4) provide guidance in deciding whether the information is exempt under section 21(1) or 49(b), as the case may be.

[27] Since I have found that general reports and supplementary report contain the

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<sup>5</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

<sup>6</sup> Order PO-2560.

personal information of individuals other than the appellant, I must consider whether section 21(1) applies to this information. Since I have found that the initial report contains the personal information of both an identifiable individual and the appellant, I must consider whether section 49(b) applies to this information.

### ***Representations***

[28] The ministry submits that it withheld the records because to disclose them would constitute an unjustified invasion of the privacy of third party individuals identified in law enforcement records.

[29] The ministry submits that it withheld all of the records at issue on the basis that to disclose them would presumptively constitute an unjustified invasion of personal privacy of third party individuals in accordance with section 21(3)(b). The ministry submits that as the records were created and compiled as a result of an OPP law enforcement investigation, section 21(3)(b) must apply.

[30] The ministry relies upon prior IPC orders, including PO-3766 and PO-3897, which, it submits, related to similar policing records and found that the presumption at section 21(3)(b) applied.

[31] The ministry also submits that in the alternative, the factor at section 21(2)(f) (highly sensitive) applies in this appeal to withhold access to the same records. The ministry relies on past IPC orders including Order P-1618, where it was found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the police is "highly sensitive" for the purpose of section 21(2)(f). The ministry submits that this reasoning should be applied to the records at issue as some of the third party individuals are described as witnesses or suspects.

[32] The appellant's representations mainly focus on describing the appellant's medical condition and background to the incident that lead to the police investigation. He notes that during the police investigation, he was barred from entering his premises and that the police refused to tell him anything about what happened other than serve him with a search warrant authorizing the police to enter the premises. The appellant submits that without a single further word of explanation or any further documentation, the police continued to occupy his property for a full week, barring him from entering. After considering the appellant's representations, I will address this unlisted factor as a factor in favour of disclosure.

### ***Analysis and finding***

[33] The ministry claims that section 21(3)(b) applies to all of the withheld personal information. If this presumption applies to the information, then disclosure is presumed to be an unjustified invasion of personal privacy. This section states:

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

(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;

[34] This presumption requires only that there be an investigation into a *possible* violation of law.<sup>7</sup> So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.<sup>8</sup>

[35] It is clear that the information at issue was compiled by the OPP in the course of its investigation of the matters involving the identifiable individuals and another identifiable individual. I am satisfied that the personal information at issue for which the section 21(1) and 49(b) exemptions are claimed was compiled and is identifiable as part of the police investigation into a possible violation of law, and falls within the presumption in section 21(3)(b).

[36] In addition, I am satisfied that because of the nature of the investigation and the personal information contained in the withheld records, the personal information is highly sensitive (section 21(2)(f)). In making this finding, I adopt the reasoning in Order P-1618 where it was found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the police is "highly sensitive" for the purpose of section 21(2)(f).

[37] Although the appellant did not comment on section 21(2) factors that might support disclosure of the withheld information, I have assessed the various enumerated considerations in section 21(2) and also considered any unlisted factors, including his right to know what occurred on his property. However, after reviewing the information in the withheld records, I give this factor little weight because the investigation's focus is the homicide that occurred and only peripherally deals with the appellant's property because that is where the investigation occurred.

[38] Because the factor in section 21(2)(f) and the presumption in section 21(3)(b) apply to the withheld information, and I give the factor favouring disclosure little weight, I am satisfied that the disclosure of the withheld personal information would constitute an unjustified invasion of the personal privacy of the identifiable individuals and find that all of the abovementioned severances qualify for exemption under section 21(1) and with regard to the initial report, section 49(b).

[39] Accordingly, I find that the general and supplemental reports are exempt from disclosure under section 21(1). I also find that the initial report is exempt from

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<sup>7</sup> Orders P-242 and MO-2235.

<sup>8</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).



disclosure under section 49(b), subject to my review of the ministry's exercise of discretion, below.<sup>9</sup>

**Issue C: Did the institution exercise its discretion under sections 49(b)? If so, should the IPC uphold the exercise of discretion?**

[40] 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 and on appeal, the IPC may determine whether the institution failed to do so.

[41] 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.

[42] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>10</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>11</sup>

[43] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:<sup>12</sup>

- 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,

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<sup>9</sup> I confirm that I have also found that section 21(1) or section 49(b) applies to the information withheld by the ministry under section 14(1)(l).

<sup>10</sup> Order MO-1573.

<sup>11</sup> Section 54(2).

<sup>12</sup> Orders P-344 and MO-1573.

- 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,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

### ***Representations***

[44] The ministry submits it has acted appropriately in exercising its discretion to not release personal information collected from a law enforcement agency as a result of a homicide investigation. It submits that it has acted in accordance with its usual practices.

[45] The appellant does not address the ministry's exercise of discretion in his representations.

### ***Finding***

[46] Based on the information I have found exempt under section 49(b), I find that the ministry has properly exercised its discretion. I am satisfied the ministry properly considered the interests sought to be protected and the wording of the exemption claimed. I find the ministry also considered its historic practice with respect to similar information as well as the nature of the information and the extent to which it is sensitive. I find the ministry has not exercised its discretion in bad faith. Further, I find that the appellant's personal information cannot be severed and disclosed from the records at issue as to do so would be disclosing meaningless snippets.<sup>13</sup> Accordingly, I uphold the ministry's exercise of discretion.

### **ORDER:**

The appeal is dismissed.

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<sup>13</sup> See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1997] OJ No 1465 (Div. Ct.)

Original Signed By: \_\_\_\_\_

Alec Fadel  
Adjudicator

January 26, 2023 \_\_\_\_\_