Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2525

Appeal PA-050288-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for

> Copies of all of the notes made by all of the OPP officers that were directly and indirectly involved in the investigation of our allegations.

In his request the requester was referring to the allegations of corruption and criminal breach of trust he had reported to the OPP against certain individuals involved in the construction and registration of the home he owned with his wife. The request letter named nine Ontario Provincial Police (OPP) officers who were involved in the investigation of the appellant's allegations. The Ministry located responsive records from six of the named officers and granted partial access to them.

Access to the remaining information was denied pursuant to section 49(a) (discretion to refuse requester's information), read in conjunction with the exemptions in sections 14(1)(l) (law enforcement), 19 (solicitor–client privilege), 13(1) (advice or recommendations) and 15(a) (relations with other governments).

Access was also denied pursuant to section 49(b) (personal privacy). In support of its section 49(b) claim, the Ministry cited sections 21(2) and 21(3)(b) of the *Act*.

The Ministry indicated that two of the OPP officers were acting in a supervisory position and did not take notes. The Ministry could also not locate any notes taken by another officer identified in the request, who no longer worked with the OPP (the former Detective Constable). The Ministry also indicated that certain portions of the records contained information that was not responsive to the request.

The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the appellant confirmed that he was not seeking access to those portions of the records that were identified as containing non-responsive information and maintained that additional records beyond those identified by the Ministry ought to exist. Specifically, he refers to the Ministry's decision letter in which it states that there are no notes taken by three of the nine officers referred to in the request.

As further mediation was not possible, the matter was moved to the adjudication stage of the appeal process. This office sought representations from the Ministry, initially. The Ministry responded with representations, and indicated that it was no longer relying on the discretionary exemptions in sections 13(1) and 15(a) as a result of having made additional disclosure of information to the appellant. These exemptions are therefore no longer at issue.

This office then sent a Notice of Inquiry to the appellant enclosing a copy of the Ministry's severed representations. The appellant submitted representations in response to the Notice. The file was then transferred to me to conclude the inquiry.

RECORDS:

There are 37 records that remain at issue, consisting of copies of OPP officers' handwritten notes. The records, along with the exemptions claimed, are described in the following chart:

Record #	Ministry Page #	Exemptions Claimed	Date and Description of Record
1	2 - 5	49(b), 21(2)(f), 21(3)(b)	May 26, 2000, notes of appellant's meeting with OPP
2	7	49(b), 21(2)(f), 21(3)(b)	June 6, 2000, call to set up appointment for interview of an individual
3	8 - 10	49(b), 21(2)(f) and (h), 21(3)(b)	June 22, 2000, notes of interview of an individual
4	12	49(b), 21(2)(f), 21(3)(b)	July 4, 2000, appellant's attendance at Cobourg OPP office
5	16	49(b), 21(2)(f), 21(3)(b)	July 18, 2000, call from appellant's lawyer to OPP
6	18	49(b), 21(2)(f), 21(3)(b)	August 18, 2000, note re communication with supervisor concerning an individual
7	28	49(a), 14(1)(l)	Police code
8	29	49(a), 19	October 14, 2003, note re communication with Crown attorney
9	30	49(a), 19	October 22, 2003, note re communication with Crown attorney
10	31	49(a), 14(1)(l)	Police code
11	top 17 lines on page 32	49(a), 19	November 3, 2003, note of meeting with supervisor
12	next 8 lines on page 32	49(a), 19	November 3, 2003, note re communication with Crown Attorney
13	32 - 33	49(b), 21(2)(f), 21(3)(b)	November 3, 2003, telephone call with appellant
14	33 - 34	49(a), 19; 49(b), 21(2)(f), 21(3)(b)	November 4, 2003, OPP meeting with Crown Attorney
15	34	49(a), 14(1)(l)	Police code
16	39	49(b), 21(2)(f), 21(3)(b)	December 2, 2003, notes re arranging meeting with an individual
17	40	49(b), 21(2)(f), 21(3)(b)	December 7, 2003, officer note re: working on file, only one individual name deleted
18	41	49(b), 21(2)(f), 21(3)(b)	December 10, 2003, note re interview of an individual
19	42	49(a), 14(1)(l)	December 2003, note re an officer's

			whereabouts
20	42	49(b), 21(2)(f), 21(3)(b)	December 2003, note re one individual
21	44	49(b), 21(2)(f), 21(3)(b)	December 30, 2003, note re statement of one individual, only name deleted
22	52	49(a), 14(1)(l)	Police code
23	52	49(b), 21(2)(f), 21(3)(b)	January 13, 2004, one individual's name deleted
24	60 - 61	49(b), 21(2)(f), 21(3)(b)	August 14, 2000, individuals' names deleted
25	62	49(a), 14(1)(l)	Police code
26	64 - 65	49(b), 21(2)(f) and (h), 21(3)(b)	August 21, 2000, review of interview of an individual
27	66	49(a), 14(1)(l);	Police Code
28	66 - 67	49(b), 21(2)(f), 21(3)(b)	August 29, 2000, meeting with appellant
29	69	49(b), 21(2)(f), 21(3)(b)	September 11, 2000, officer's meeting with supervisory officer, only one individual's name deleted
30	76	49(b), 21(2)(f), 21(3)(b)	January 16, 2004, meeting with appellant, only one individual name deleted
31	80 & 82	49(a), 14(1)(l)	Police code
32	85 - 88	49(a), 14(1)(l)	Police code
33	94	49(a), 19	July 8, 2003, meeting with Crown Attorney
34	94 - 95	49(a), 19; 49(b), 21(2)(f), 21(3)(b)	July 8, 2003, meeting with Crown Attorney and appellant
35	98 - 99	49(b), 21(2)(f), 21(3)(b)	July 29, 2003, summary of case, individuals' names deleted
36	101 - 102	49(b), 21(2)(f), 21(3)(b)	July 30, 2003, meeting with appellant, individuals' names deleted
37	107	49(b), 21(2)(f), 21(3)(b)	June 16, 2004, meeting with appellant, one individual's name deleted

DISCUSSION:

The records can be classified in the following three categories:

1. police operational codes, which are non-specific to the appellant's complaint (section 49(a) in conjunction with section 14(1)(l));

2. notes that are claimed to be exempt from disclosure due to solicitor-client privilege (section 49(a) in conjunction with section 19);

3. notes recounting incidents specific to the appellant's complaint to the OPP (section 49(b) in conjunction with sections 21(2) and 21(3)(b)). These records contain the personal information of the appellant and/or other identifiable individuals.

PERSONAL INFORMATION

In order to determine the sections of the *Act* that 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) as follows:

> "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;

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 [Order 11].

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

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in Ontario *(Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations of the Ministry

The Ministry submits that:

> …the information remaining at issue contains the types of personal information listed [in section 2(1)(b), (d), (e), (g) and (h)] with respect to the appellant and other identifiable individuals including the individuals who are the subject of the appellant's allegations. Although some of these individuals were acting in their professional capacity in relation to the building of the appellant's home and related issues, in light of the nature and focus of the appellant's allegations, the information contained in the exempt parts of the responsive officers' notes should be considered these individuals' personal information. The Ministry submits that the exempt information is supportive of its position in this regard.

Representations of the Appellant

Although the appellant provided lengthy representations, he did not address directly the issue of whether the records contain personal information. The appellant did, however, provide extensive background material concerning the creation of the records that indirectly touches on this issue.

The appellant is seeking records comprised of OPP notes arising from a communication he had with the OPP. The appellant wanted the OPP to press charges against certain persons involved in the construction of his home and the decision as to whether this home was eligible for registration in the Ontario New Home Warranty Program (the Program).

The appellant provided a chronology of events with his representations. In his representations he states that this chronology was prepared by a supervisory officer at the OPP detachment where some of the records at issue originated. This chronology states in part:

> D/S/Sgt [name]
>
> Request by [appellant] That Anti-Rackets Bureau investigate the Ontario Home Warranty Program re Fraudulent Activities.

History:

In 1988 [the appellant] contracted [named builder] to construct for him a completed custom home...

[The appellant] made a claim to the (Ontario New Home Warranty) Program for workmanship defects in the home constructed by [named builder]. The Program initially concluded that [named builder] did not fall within the definition of "builder", therefore not eligible for Program coverage. At the persistence of [the appellant] another review was completed concluding that [named builder] was the "builder" of the [appellant's] Home.

The Program continued it investigation of [the appellant]'s claim and on 30 July 1993 advised him that it was denying coverage of all his claims. The basis of the denial was that it was the Program's position that all claims except those in respect of major structural defects must be reported within one year after the home was completed for possession. [The appellant] appealed to the regulatory administrative tribunal, CRAT (Commercial Registration Appeal Tribunal).

[The appellant] appealed to the regulatory administrative tribunal, CRAT (Commercial Registration Appeal Tribunal)…

CRAT rendered its decision denying [the appellant]'s claim. CRAT and all subsequent appeals including to the Supreme Court of Ontario, the Program argued that since the dollar value of work undertaken by [the appellant] was approximately 25% of the total home cost. The home is not covered because [named builder] did not do all the work…

Investigation to Date:

The initial complaint was made to the (named OPP) Detachment in 2000. The matter was reviewed and only one violation, which being of Provincial legislation, occurred in the geographic jurisdiction of the Detachment. This related to [named builder] not being a registered builder under the Act. The Crown was consulted and would not prosecute a 10-year-old POA violation.

[The appellant] initiated civil litigation against CRAT and its lawyers. Justice [name] dismissed the action…

[The appellant] made allegations of obstruction of justice, fraud and theft of evidence, which occurred in Toronto. [The appellant] alleges that lawyers for public agencies, officers of the court have been caught in lies, and there exists a conspiracy to "cover up" their actions. [The appellant] has been referred to the

> Toronto Police Service who will investigate the allegations. [The appellant] has met with investigators about his complaint.
>
> Request:
>
> [The appellant] and Counsel has requested that the OPP Anti-Rackets Section meet with [the appellant] and review his involvement with the Program and subsequent administrative proceedings in respect of [the appellant]'s belief that the Program is operating in a criminally fraudulent manner.

Analysis/Findings

The records all concern the appellant's complaint filed with an OPP detachment in 2000 against certain persons involved in the construction of his home and the decision as to whether his home was eligible for registration in the Ontario New Home Warranty Program (the Program). The appellant was also requesting that the OPP Anti-Rackets Section review the Program's administrative proceedings to determine if the Program was operating in a criminally fraudulent manner.

In determining whether the statements provided by several individuals were made in their professional or personal capacity, I have looked at the roles of these individuals as reflected in the records. These individuals were mentioned in the OPP notes in connection with their relationship with the appellant in the construction and registration of his home in the Program. They are described in the records by their title or otherwise identified as follows:

- individual 1 - the builder of the appellant's home
- individual 2 - the lawyer for the Program
- individual 3 - Program employee and proposed witness at the CRAT proceedings
- individual 4 - Manager for the Program's regional office
- individuals 5 and 6 - panel members at CRAT
- individual 7 - building inspector for appellant's home
- individual 8 - chief local building official and brother of individual 1
- individual 9 - regional operations manager for the Program's regional office
- individual 10 - Crown Attorney consulted about prosecuting the appellant's complaint
- individual 11 - appellant's former lawyer

After a review of the records, both disclosed and undisclosed, I find that the statements provided by these individuals to the OPP officers, were made in their professional, official or business capacity. Although the information relates to the individuals in their professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In assessing whether this type of information qualifies as "personal information," the following cases are of assistance:

An examination of an individual's job performance has been found to be "personal information". In Order P-1180, former Inquiry Officer Anita Fineberg stated:

> Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. [emphasis added]

Statements provided to investigators by potential witnesses has also been found to be "personal information". In Order PO-2271, Senior Adjudicator David Goodis stated:

> When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of these individuals doing their job in no way undermines this conclusion.

Although the personal information in the records is about the individuals other than the appellant in their professional capacity, this information relates to an investigation into or assessment of the performance or alleged improper conduct of these individuals. As such, the characterization of this information changes and becomes personal information.

The records containing personal information can be characterized as follows:

- Records 1, 4, 28, 30, 34, 36 and 37 contain notes of a meeting between the appellant and the OPP. Record 13 contains notes of the appellant's call to the OPP. These notes are the personal information of the appellant as these notes reflect the personal opinions or views of the appellant as they relate to another individual or individuals (paragraph (e)). These notes also contain the personal information of other individuals as the notes contain the views or opinions of the appellant about the other individuals (paragraph (g)).

- Records 2, 3, 6 and 26 are notes in connection with the OPP interview of another individual. These notes contain the personal information of this other individual as well as the personal information of the appellant as these notes reflect the views or opinions about the appellant and another individual (paragraph (g)).

- Records 5 and 24 are the notes of the appellant's lawyer's call with the OPP and contain the personal information of both the appellant and another individual, being their names which appear with other personal information relating to these individuals (paragraph (h)).

- Records 16, 17, 18, 20, 21 and 29 are notes of arrangements regarding the interviews of other individuals by the OPP. These notes contain the personal information of an individual other than the appellant as the disclosure of the other individual's name would reveal other personal information about the individual (paragraph (h)). These notes also contain the personal information of the appellant as his name appears with other personal information relating to him (paragraph (h)).

- Record 23 is a note of the appellant's request to the OPP and contains the personal information of another individual as the notes contain the views or opinions of the appellant about this other individual (paragraph (g)). These notes also contain the personal information of the appellant as his name appears with other personal information relating to him (paragraph (h)).

- Record 35 contains a summary of the investigation. These notes contain the personal information of the appellant as they set out the views or opinions of the officer about the appellant (paragraph (g)). These notes also contain the personal information of other individuals as they contain the views or opinions of the appellant and the officer about the other individuals (paragraph (g)).

Therefore, all of the records to which section 49(b) in conjunction with section 21(2) and 21(3)(b) have been claimed contain the personal information of the appellant and other individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

General principles

Section 47(1) 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.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) read in conjunction with section 14(1)(l) for records 7, 10, 15, 19, 22, 25, 27, 31 and 32 and section 49(a) read in conjunction with section 19 for records 8, 9, 11, 12, 14, 33 and 34. I will consider whether these records qualify for exemption

under section 14(1)(l) and section 19, subject to my discussion below as to the Ministry's exercise of discretion under section 49(a).

LAW ENFORCEMENT

As noted, the Ministry relies on section 49(a) read in conjunction with section 14(1)(l) for records 7, 10, 15, 19, 22, 25, 27, 31 and 32. I will consider whether the records qualify for exemption under section 14(1)(l) as a preliminary step in determining whether they are exempt under section 49(a). Section 14(1)(l) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

Representations of the Ministry

The discretionary exemption in section 14(1)(l) has been raised by the Ministry in this case with respect to police operational "ten" codes, and in one instance (Record 19) with respect to the whereabouts of one officer. The ten codes are described by the Ministry as codes used by the OPP officers in their radio communications with each other and their detachments and provincial communication centers. The Ministry submits that "release of these codes would compromise the effectiveness of police communications and jeopardize the safety and security of OPP officers".

Representations of the Appellant

The appellant submits that:

> With regard to (the) non-disclosure of the OPP "ten" codes, we'll leave that to your judgment knowing now what we've told you about this case. Naturally, we do not want to jeopardize the safety of the police officers.

Analysis/Findings

As section 14(1)(l) uses the words "could reasonably be expected to", the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General)* v. *Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), Ontario (*Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

As stated by Adjudicator Faughnan in Order PO-2409:

> In my view, the finding of the Divisional Court in *Ontario (Attorney General)* v. *Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, is applicable here. Saying that nothing has happened so far misses the point, since the test is whether harm could reasonably be expected to result from disclosing the operational codes (including the "ten" codes). In that vein, and without commenting on the accuracy or inaccuracy of the codes the appellant asserts are on a specific website, the fact that they might be publicly available does not mean that the Ministry's submissions on the reasonable expectation of harm resulting from their release are to be ignored. A long line of orders (for example M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339) have found that police codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release. In the circumstances of this appeal, I am also satisfied that the police have provided sufficient evidence to establish that disclosure of the operational codes (including the "ten" codes) that were withheld could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.
>
> I therefore find that the section 49(a) exemption applies to these operational codes (including the "ten" codes).

I agree with the findings of Adjudicator Faughnan in Order PO-2409 and find that disclosure of the police codes and related information in this case could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime as set out in 14(1)(l). Disclosure of the police codes and the whereabouts of one officer would disclose specific information to others regarding OPP operations.

I therefore uphold the Ministry's decision to deny access to the undisclosed information from Records 7, 10, 15, 22, 25, 27, 31 and 32 that contain police codes, along with the undisclosed information in Record 19 concerning the whereabouts of one officer, under section 14(1)(l) of the *Act* in conjunction with section 49(a). Except for the discussion of "Exercise of Discretion", below, I will not consider these records further in this order.

SOLICITOR-CLIENT PRIVILEGE

The Ministry relies on section 49(a) in conjunction with section 19, in claiming that Records 8, 9, 11, 12, 14, 33 and 34 are exempt from disclosure. I will consider whether these records qualify for exemption under section 19 as a preliminary step in determining whether they are exempt under section 49(a).

When the appellant's request and appeal were filed, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). The amendments are not retroactive, and the version I have just quoted therefore applies in this appeal.

The records can be characterized as follows:

- Record 11 reflects a discussion between the officer and his supervisor.
- Records 8, 9, and 12 are notes concerning the OPP arranging to meet with a Crown Attorney.
- Records 14 and 33 are notes of the Crown Attorney's meeting with the OPP about the appellant's complaint.
- Record 34 is a note concerning a meeting with the Crown Attorney where the appellant was present.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

In this case the Ministry relies on the application of both Branches 1 and 2 of section 19.

Branch 1: common law privilege

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and

given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Representations of the Ministry

In its representations, the Ministry states that:

> In Order 49, former Commissioner Sidney B. Linden established four criteria that must be met in order for a record to be exempt under Branch 1 of section 19. The four criteria are:
>
> 1. There must be a written or oral communication;
>
> 2. The communication must be of a confidential nature;
>
> 3. The communication must be between a client (or his agent) and a legal advisor;
>
> 4. The communication must be directly related to seeking, formulating or giving legal advice.
>
> The exempt officers' notes consist in part of confidential communications which directly relate to the seeking of legal advice by the OPP and the provision of legal advice by Crown counsel.
>
> The Ministry submits that solicitor-client privilege has not been waived with respect to the parts of the officers' notes exempted in accordance with section 19. The Ministry has consulted with the OPP and Crown counsel in this regard.
>
> With respect to the application of Branch 2 of section 19, the exempt information came into existence as a result of the allegations brought forward by appellant. Crown counsel was consulted by the OPP in regard to these allegations in contemplation of litigation.

Representations of the Appellant

The appellant submits that:

> With regard to ... solicitor-client privilege with regard to Communications between OPP and Crown counsel, we remind you we believe (the) Crown Attorney, ..., may have unduly influenced (the) OPP into prematurely ending its investigation of our allegations locally, as well as perhaps falsely leading the OPP to believe that this is a civil matter and not criminal … based on the OPP's notes.

Analysis/Findings

Records 8 and 9 are notes of the OPP officer as to the sending of an email to the Crown attorney (Record 8) and making an appointment with the Crown Attorney (Record 9).

Record 11 are notes contained at the top 17 lines of the blocked out information on page 32. These notes reflect two OPP officer's discussion of the appellant. I find that Record 11 does not contain information that is subject to solicitor-client privilege at common law. In particular, the top 10 of the 17 lines of Record 11 are notes of an officer's conversation with his supervisor as to whether to disclose to the appellant a copy of the appellant's taped interview. This portion of Record 11 contains the same information as revealed at page 50 and 52 of the already disclosed records. The next seven lines of Record 11 reflect a discussion between the officer and his supervisor as to whether to release other information that was promised to the appellant.

Record 12 are the notes at the last eight lines of the blocked out information on page 32. These notes reflect the officer telling his supervisor that he will be meeting the Crown Attorney and notes concerning the officer's review of the appellant's file before meeting the Crown Attorney.

Record 34 is a note concerning a meeting with the Crown Attorney where the appellant was present. The Ministry has disclosed at page 95 of Record 34 what was discussed at the meeting.

I find that Records 8, 9, 11, 12 and 34 are not solicitor-client communications for the purpose of giving or obtaining legal advice nor do they reveal such communications. I also find that they are not the solicitor's working papers. They are not exempt under branch 1.

Records 14 and 33 contain information obtained by an OPP officer at a meeting with a Crown Attorney. I do not agree with the Ministry that Record 33 qualifies for exemption as a confidential solicitor-client communication for the purpose of seeking legal advice. The contents of Record 33 have been disclosed to the appellant in the chronology provided to him by the OPP as referred to above.

As disclosure to outsiders of privileged information constitutes waiver of privilege, I find that privilege has been waived with respect to Record 33 under branch 1. Record 33 was not prepared by or for the Crown Attorney and therefore this record does not fall within branch 2.

I do, however, agree with the Ministry that Record 14 qualifies as confidential solicitor-client communication for the purpose of seeking legal advice. This record contains references to information concerning direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. Privilege has not been waived with respect to this record. Record 14 qualifies for the common law solicitor-client communication privilege (branch 1) and is therefore exempt under section 19.

In conclusion, I find that the undisclosed information in Records 8, 9, 11, 12, 33 and 34 are not subject to the solicitor-client exemption in section 19. These records do not reveal confidential

solicitor-client communications, or otherwise qualify for exemption, under branch 1. Nor do these records fall within branch 2 as encompassing the statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. These records were not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

As no other exemptions have been claimed by the Ministry to apply to these records, except for Record 34, and no mandatory exemptions apply, I will order Records 8, 9, 11, 12 and 33 to be disclosed. I will deal with Record 34, where section 49(b) read in conjunction with section 21 has also been claimed, with the other records for which that exemption is claimed, in my discussion below.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION/ INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

Records 1 to 6, 13 to 14, 16 to 18, 20 to 21, 23 to 24, 26, 28 to 30 and 34 to 37 contain personal information.

I have found that these records contain both the personal information of the appellant and other individuals. Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution has the discretion to refuse to disclose that information to the requester. I will therefore consider whether disclosure of the personal information in the records would result in an unjustified invasion of the personal privacy of other individuals and are, therefore, exempt from disclosure under section 49(b).

Section 21(1) requires that I determine whether disclosure of the personal information of the individuals would result in an unjustified invasion of these individuals' personal privacy. Sections 21(2), (3) and (4) provide guidance in determining whether "unjustified invasion of privacy" threshold under section 49(b) is met. 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 under section 49(b). 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" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In this case, the Ministry relies on the application of the presumption in section 21(3)(b).

The Ministry has claimed that disclosure constitutes an unjustified invasion of personal privacy by reason of the application of Section 21(3)(b).

Section 21(3) provides that:

> 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 law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Representations of the Ministry

The Ministry states:

> … [T]he personal information contained in the officers' notes at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.
>
> The exempt information contained in the officers' notes at issue was compiled and is identifiable as relating to the investigations undertaken by the OPP as a result of the appellant's allegations that other individuals have engaged in unlawful activities. In the course of the investigation, the OPP interviewed witnesses and other identifiable individuals. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. Specifically, it should be noted that the appellant's allegations include Criminal Breach of Trust, an offence under section 236 of the *Criminal Code*. The Ministry submits that the application of section 21(3)(b) of the *FIPPA* is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

Representations of the Appellant

Although the appellant provided lengthy representations, he did not address directly the issue of whether disclosure of the undisclosed portions of the records would be presumed to be an unjustified invasion of personal privacy. The appellant, however, does maintain that disclosure of the records is necessary to determine if the OPP prematurely ended its investigation or to determine the manner in which the investigation was carried out. In effect, the appellant is seeking to have the personal information released pursuant to the exception in section 21(3)(b), namely, that disclosure is necessary to prosecute a violation of law or to continue the investigation into a possible violation of law.

Analysis/Findings

I am satisfied the personal information in Records 1 to 6, 13 to 14, 16 to 18, 20 to 21, 23 to 24, 26, 28 to 30 and 34 to 37 was compiled and is identifiable as part of an investigation into a possible violation of law. In particular, the information was compiled during the course of an investigation

into the appellant's allegations concerning Criminal Breach of Trust, an offence under section 236 of the *Criminal Code*. There is, therefore, a presumed unjustified invasion of personal privacy in connection with the disclosure of these records. Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. Therefore, while I acknowledge the appellant's apparent interest in the information at issue to prosecute a violation of law or to continue the police investigation, I cannot consider whether the factor in section 21(2)(d) (fair determination of rights) applies.

Section 21(3)(b) still applies although no criminal proceedings were commenced against any of the other individuals. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law [Order P-242].

I have considered the appellant's representations concerning the exception in section 21(3)(b) and the need to disclose the information to continue an investigation, or to prosecute. In my view, the situation is similar to that in Order MO-1410. In that case the appellant argued that the *Act* (in that case the *Municipal Freedom of Information and Protection of Privacy Act*) did not specify who is to "continue the investigation". The appellant claimed that she was "entitled to continue the investigation into her spouse's death by retaining legal counsel and an accident reconstruction expert".

In Order MO-1410, Adjudicator Dora Nipp held:

> Previous orders of this office have established that the exception contained in the phrase "continue the investigation" refers to the investigation for which the personal information was compiled, i.e. the investigation "into a possible violation of law". Therefore, even though another party, in this situation the appellant, is continuing the investigation, this presumption applies (Orders M-249, M-718).

The situation is also similar to that in Order MO-1449. Adjudicator Laurel Cropley stated:

> In the circumstances of this appeal, the investigation conducted by the Police was concluded. Therefore, the disclosure of the personal information in the records is not necessary to continue that investigation. The appellant is essentially interested in commencing a new investigation into, not only the circumstances of her brother's death, but, apparently, into the actions of the Police with respect to the manner in which they conducted their investigation. …I find that the exception to section 14(3)(b) (section 21(3)(b) in the *Freedom of Information and Protection of Privacy Act*) does not apply.

I agree with and adopt the analysis and conclusion in Orders MO-1410 and MO-1499 and I disagree with the appellant's argument that section 14(3)(b) does not apply. I find that the presumption in section 21(3)(b) applies to the undisclosed personal information in the records.

Disclosure of this personal information is presumed to constitute an unjustified invasion of personal privacy of the individuals under section 21(3)(b) as the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. This presumed unjustified invasion of personal privacy under section 21(3) cannot be overcome by the exception in sections 21(4) as this exception does not apply to the information at issue.

Subject to my discussion of "Public Interest Override" and "Absurd Result", below, disclosure of the personal information in Records 1 to 6, 13 to 14, 16 to 18, 20 to 21, 23 to 24, 26, 28 to 30 and 34 to 37 would, therefore, constitute an unjustified invasion of personal privacy and is exempt under section 49(b).

ABSURD RESULT

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

This office has applied the "absurd result" principle in situations where the basis for finding that information qualifies for exemption under section 21(1) would be absurd and inconsistent with the purpose of the exemption [OrderPO-2451].

The "absurd result" principle was found to be also applicable where the information is clearly within the requester's knowledge, such as where the requester already had a copy of the record or where the requester was the intended recipient of the record [Orders MO-1196, PO-1679, MO-1755].

Representations of the Ministry

The Ministry submits that the absurd result principle does not apply to the undisclosed information. The Ministry argues that while the appellant may have some knowledge relating to the withheld

information, in view of the particular circumstances of the appellant's request and the sensitivities associated with his allegations and related matters, release of further information would not be appropriate.

Representations of the Appellant

Although the appellant provided lengthy representations, he did not address directly the issue of whether the absurd result principle should be implemented to allow disclosure of the undisclosed portions of the records. He does indirectly address this issue in his representations to the extent that he provides details of the names of the individuals in the undisclosed records and their respective roles in his case.

Analysis/Findings

I have concluded that, in the circumstances of this appeal, it would be absurd to not disclose the information in the records that has been clearly demonstrated as being within the appellant's knowledge.

The details of the records that are within the appellant's knowledge are described as follows:

- Records 1, 4, 28, 30, 34, 36 and 37 are notes of the meetings of the appellant and his lawyer with the OPP. The only information not disclosed from these records (with the exception of Record 34) is the names of the individuals. As the appellant supplied these names, it is absurd not to disclose this information. As the appellant was present during the meeting at Record 34, he is otherwise aware of the undisclosed information in Record 34.

- Record 13 is a note of an OPP officer's call to the appellant. It is clear from the content of this record that the appellant is otherwise aware of the undisclosed information; it is absurd not to disclose this information.

- Record 5 and 24 are notes of the appellant's lawyer's call with the OPP. As he was calling the OPP at the instructions and direction of the appellant, it is absurd not to disclose this information.

- Record 23 is a note concerning a review of a request by the appellant. The only portion that remains undisclosed is the name of the builder. The Ministry by means of its March 8, 2006 letter to the appellant has disclosed all of the information in this record, except for the name of the builder. It is absurd not to disclose this information, as the appellant is aware of the name of the builder.

- Record 33 is a note of a meeting with the Crown Attorney. The contents have been disclosed to the appellant in the chronology provided to him by the OPP.

- Record 35 is a summary of the appellant's case with the OPP. The appellant is otherwise aware of the undisclosed information in this summary as he provided this information to the OPP.

I, therefore, find that Records 1, 4, 5, 13, 23, 24, 28, 30, 33 to 37, should be disclosed to the appellant pursuant to the Absurd Result principle.

EXERCISE OF DISCRETION

I must determine whether the Ministry properly exercised its discretion in the non-disclosure of the records, with the exception of Records 1, 4, 5, 23, 24, 28, 30, 33 to 37 which I have found not exempt under section 49(b), and Records 8, 9, 11, 12 and 33 which I have found not exempt under section 19.

The records not subject to disclosure by reason of my findings above are as follows:

- Records subject to exemption pursuant to section 14(1)(l) by reason of being police operational codes (Records 7, 10, 15, 22, 25, 27, 31 and 32) or concerning the whereabouts of one officer (Record 19).

- Records subject to exemption pursuant to section 19 as being subject to solicitor-client privilege (Records 8, 9, 11, 12 and 14)

- Records subject to exemption pursuant to section 21(3)(b) (investigation into a possible violation of law). Records 2, 3, 6, 16 to 18, 20, 21, 26 and 29 are notes concerning the OPP's interview and/or interaction with certain individuals and contain the personal information of these persons.

The section 49 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.

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

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

Representations of the Ministry

The Ministry in its submissions states that:

> The Ministry considered releasing the exempted information to the appellant notwithstanding that discretionary exemptions from disclosure applied. In this regard, the Ministry has provided the appellant with partial access to the requested information. Two separate decision letters have been issued to the appellant.

As a result of the Ministry's response to the appellant's current request, as well as the Ministry's response to the appellant's earlier request for access to OPP reports (Request CSCS-P-2005-00642), the appellant has been provided with access to a substantial portion of the records created by OPP officers in the course of investigating his allegations.

In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant should the information remaining at issue be disclosed. However, the Ministry was mindful that much of the severed parts of the officers' notes remaining at issue was created as a result of the allegations the appellant has brought forward concerning other individuals. Given the sensitive nature of the responsive records, the Ministry was satisfied that release of additional information would cause personal distress to these other individuals. The potential harm to these individuals should the exempt information be released was a factor that the Ministry considered in its exercise of discretion.

In its exercise of discretion, the Ministry took into consideration the age of the exempt information contained in the undisclosed parts of the officers' notes remaining at issue in its exercise of discretion. The responsive officers' notes are dated between 2000 and 2004. The notes relate to matters that the appellant is continuing to pursue…

With respect to the non-disclosure of OPP "ten" codes, the Ministry carefully considered the potential harm to future law enforcement activities and the safety of OPP officers shout the specific "ten" codes used by the OPP publicly available. The Ministry is of the view that this potential harm is a significant factor.

With respect to the application of the solicitor-client privilege exemption from disclosure, the Ministry considered whether dissemination of information reflecting confidential communications between the OPP and Crown counsel could lead to an inhibition of the free exchange of information between Crown counsel and investigators that is necessary to ensure the effective handling of investigations and prosecutions. This was a significant factor for the Ministry in its exercise of discretion…

The Ministry carefully considered whether it would be possible to sever any additional non-exempt information from the remaining officers' notes at issue. However, the Ministry concluded that additional severing was not feasible in this instance.

Representations of the Appellant

The appellant does not directly address the Ministry's representations on the exercise of discretion issue. The appellant does however stress the need for access to these records to pursue his legal remedies against certain individuals. I have already dealt with his submission on this point in this order.

Analysis/Findings

I find that the Ministry has exercised its discretion under section 49(a) in conjunction with the exemption in section 14(1)(l) in a proper manner. I agree with the Ministry that disclosure of the records that contain the police codes (Records 7, 10, 15, 22, 25, 27, 31 and 32) and with respect to the whereabouts of one officer (Record 19) would leave OPP officers more vulnerable and compromise their ability to provide effective policing services.

I also find that the Ministry has exercised its discretion under section 49(a) in conjunction with the exemption in section 19 in a proper manner in the non-disclosure of the record that I have found subject to solicitor client privilege. Record 14 consists of confidential communications which directly relate to the seeking and provision of legal advice (Record 14). The Ministry did take into account relevant considerations concerning these officers' notes as the dissemination of this confidential communications between the OPP and Crown counsel could lead to an inhibition of the free exchange of information between Crown counsel and investigators.

Finally, I also find that the Ministry properly exercised its discretion under section 49(b) with respect to Records 2, 3, 6, 16 to 18, 20, 21, 26, and 29, which are notes concerning the OPP's interview and/or interaction with certain other individuals and contain the personal information of these individuals. I find that the Ministry considered relevant factors and did not consider irrelevant ones with respect to these records.

PUBLIC INTEREST OVERRIDE

The appellant has raised the issue as to whether the presumed unjustified invasion of personal privacy under section 21(3) can be overcome by the "public interest override" at section 23.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records exempt under sections 12, 14, 14.1, 14.2, 16, 19 or 22.

Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of

their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)]…

A compelling public interest has been found not to exist where, for example:

> • another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
>
> • a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
>
> • a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]…

Representations of the Ministry

The Ministry submits that there is no compelling public interest in the disclosure of the withheld parts of the officers notes at issue that would outweigh the presumed unjustified invasion of personal privacy that has been established under section 21(3)(b) of the *Act*. The Ministry did not find that disclosure of the remaining exempt information would increase public confidence in the delivery of public services as the appellant appears to have a private interest in the records at issue as a result of legal matters relating to the building of his home.

Representations of the Appellant

Although the appellant provided lengthy representations, he did not address in detail directly the issue of whether the public interest override provisions should be implemented to allow disclosure of the undisclosed portions of the records. He did indirectly address this issue. The appellant stated as follows in his representations:

> We sincerely hope that, knowing what you now know about our case, based on this brief and enclosures, you will use the public interest override and section 23 of the

> *Act* to now release all of the OPP notes, uncensored, that were made in our case, and that have been provided to you.

As noted above, he also submits that disclosure of the records is necessary to determine if the OPP prematurely ended its investigation or to determine how the investigation was carried out concerning the possible criminal charges against the individuals involved in the building and registration of his home under the Ontario New Home Warranty Program.

Analysis/Findings

The presumed unjustified invasion of personal privacy under section 21(3)(b) is not overcome in this case by the "public interest override" in section 23. I find that there is no compelling public interest in the disclosure of the personal information in this case as the appellant is requesting the information for a predominantly personal reason [Order M-319]. The appellant requires the information to pursue his legal remedies against the builder of his home and the government officials who were instrumental in the issuance of a building permit and associated documents connected to the building of his home. The appellant seeks to pursue these remedies as a result of the denial of coverage of his home under the government-sponsored insurance program, the former Ontario New Home Warranty Program (now known as the Tarion Program). In my view, even the appellants' comments about the possible "premature" ending of the investigation relate to a personal interest, rather than a public one, in the particular circumstances of this appeal.

I, therefore, find that section 23 does not apply to the undisclosed portions of the records as there is no public interest in disclosure of the records.

REASONABLE SEARCH

Adequacy of the Search for Records

The appellant takes issue with the Ministry's position that two OPP officers [the Detective Superintendent and the Deputy Inspector] did not make responsive notes as they were acting in a supervisory capacity and one former officer [the former Detective Constable] did not have any notes.

As the appellant has claimed that additional records exist beyond those identified by the institution, the issue to be decided is whether the Ministry has conducted a reasonable search for records within its custody or control. [Orders P-85, P-221, PO-1954-I].

The relevant section in determining whether a reasonable search for records has been conducted is Section 24. This section of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,

> (a)make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b)provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the Act. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [PO-2409].

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

The Ministry was asked to respond to a number of questions regarding the steps it took to respond to the appellant's request for responsive records. These questions include the following:

> Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
>
> Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations of the Ministry

The Ministry provided a 67 paragraph affidavit from the Freedom of Information Co-ordinator (the Co-ordinator) in response to the appellant's assertion that he believed that additional records exist beyond those identified by the Ministry. Specifically, the appellant asserts that notes should exist for the three officers for which the Ministry has claimed it does not have records.

In the affidavit, the Co-ordinator details searches made for responsive records at the following OPP locations:

- OPP Anti-Rackets Section
- OPP Central Region
- OPP Eastern Region
- OPP Business and Financial Services Bureau

The affidavit details the comprehensive records search undertaken for the notebooks of nine officers, including those of the three officers whose notebooks had not been produced in this appeal. The three officers are the two supervising officers, the Detective Superintendent and the Deputy Inspector, and the former Detective Constable. All three of these officers were contacted directly by the Ministry in order to ascertain the existence and/or whereabouts of their responsive notebooks. The Detective Superintendent and the Deputy Inspector confirmed that they did not make any notes concerning the appellant's case. The former Detective Constable advised that he believed he had left his notebooks in the vault at a certain OPP Detachment when he left for another assignment. The former Detective Constable further indicated that he checked his residence prior to moving to his present location with negative results. The former Detective Constable advised that unless his notebooks were lost by his movers, they should be at the vault site. He confirmed that he does not currently possess his notebooks.

The Ministry submits that four banker boxes of records were located at the site where the vault is that contained the former Detective Constable's papers. The former Detective Constable's notebooks were not found in the boxes.

The Ministry states that two colleagues and a supervisor of the former Detective Constable were also contacted. The Ministry submits that none of these officers had possession of the former Detective Constable's notebooks.

Representations of the Appellant

The appellant was provided with a copy of the Co-ordinator's affidavit, in conjunction with the Notice of Inquiry seeking his representations. The appellant states that:

> with regard to the notes made by the (former) Detective Constable ... that have gone missing, we would expect that you ask the appropriate police authority to investigate that matter to determine if the notes were intentionally misplaced, perhaps in order to cover up not only the crimes that have been perpetuated in our case, but why no charges have been laid.

The appellant did not otherwise respond to the representations of the Ministry concerning the search efforts to locate the former Detective Constable's missing notes and the search efforts to locate any responsive notes of the two OPP officers (the Detective Superintendent and the Deputy Inspector).

Analysis/Findings

The appellant must provide a reasonable basis for concluding that additional records exist. In this case, the appellant argues that notes ought to exist that were taken by the two supervisory OPP officers and by the officer who is no longer employed by the OPP.

As noted above, the issue to be decided is whether the Ministry has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. I have reviewed the records that have been located along with the representations of the appellant and the affidavit and representations of the Ministry on the issue of whether a reasonable search has been conducted for the requested records. The Ministry has provided a detailed sworn affidavit from a knowledgeable employee concerning the search efforts to locate these records.

Having carefully reviewed the parties' representations, including the comprehensive affidavit material submitted by the Ministry, and the responsive records, I am satisfied that the searches carried out by the Ministry were reasonable in the circumstances.

ORDER:

1. I uphold the Ministry's search for responsive records.

2. I order the Ministry to disclose to the appellant the following information:

   - all of the information in Records 1, 4, 5, 8, 9, 11, 12, 13, 23, 24, 28, 30, 33, 34, 35, 36 and 37.

   The Ministry is ordered to disclose this information to the appellant by sending him a copy of these records by **December 4, 2006.**

3. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon my request.

4. I uphold the Ministry's decision to deny access to the undisclosed portions of the remaining records.

Original Signed By: November 10, 2006
Diane Smith
Adjudicator