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

ORDER PO-2533

Appeal PA-050060-1

Ministry of Government Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry of Consumer and Business Services (the Ministry) received a request from a lawyer, on behalf of a requester, for the entire content of the Ontario Racing Commission's (ORC) file relating to the requester. The request included records relating to any investigation of the requester that was conducted in 2003. Accompanying the request was a signed consent authorizing the release to his lawyer of any documentation or information (including personal information) that concerned the requester.

The Ministry identified records responsive to the request and forwarded a decision letter to the requester. As set out in the index that accompanied its decision letter, the Ministry relied on the exemptions in sections 14 (law enforcement), 15 (relations with other governments), 17(1) (third party information), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*, to deny access to certain records, in whole or in part.

The requester (now the appellant) appealed this decision. For the sake of clarity, although the appellant is represented by counsel, I will simply refer to the representations and positions of "the appellant" in describing the history of this appeal.

At mediation, the Ministry withdrew its reliance on the exemption at section 17(1) of the *Act*, and issued a revised decision letter along with a new index of records (the new index). In addition, because the mediator was of the view that some of the records appeared to contain the personal information of the appellant as well as other identifiable individuals, she raised the possible application of the exemption in section 49(b) (personal privacy) to a number of records.

The matter did not resolve at mediation and the file was moved to the adjudication stage. I sent a Notice of Inquiry to the Ministry, initially, inviting it to provide representations. Because it also appeared to me that some of the records may contain the personal information of the appellant and the personal information of other identifiable individuals, I decided to add sections 49(a) and (b) (discretion to refuse access to one's own personal information/personal privacy) as issues in the appeal. The Ministry submitted representations in response to the Notice. In its representations the Ministry asked that a portion of its representations not be shared due to confidentiality concerns.

A Notice of Inquiry, along with a copy of the non-confidential representations of the Ministry was then sent to the appellant's representative. Although invited to do so, the appellant did not file any representations in response to the Notice.

RECORDS:

The records described in the index prepared by the Ministry as Records 1, 9, 10, 11, 12, 13, 14 (volume 2), 14 (volume 3), 15A, 16, 17, 19, 20, 22, 23, 34C, 34J, and 55 in their entirety and the withheld portions of Records 4 and 5 are at issue in this appeal.

Although the Ministry assigned a single number to certain records, they are actually composed of a combination of records, including copies of records the Ministry identified separately in the index of records. I have therefore renumbered the records as follows:

Record 1	Updated Synopsis dated November 26, 2003
Record 4	Letter dated July 6, 2004
Record 5	Letter dated June 6, 2004
Record 9	Letter dated July 7, 2003
Record 10	Document dated February 28, 2003, defined by the Ministry as a "Report"
Record 11	Document dated March 27, 2003, defined by the Ministry as a "Supplementary Report" with Requirement to Provide Documents dated February 21, 2003 and letter dated February 25, 2003 attached
Record 13	Document defined by the Ministry as a "Supplementary Report" with copy of a Requirement to Provide Documents dated February 21, 2003 and a letter dated February 25, 2003 attached
Record 14	Three volumes defined by the Ministry as a "Report Volumes 1, 2 and 3" • Volume 1 (listed as Record 12 in the index) contains a copy of Record 10, a copy of Records 22 and 23, data sheets, Requirements to Provide Documents and a document dated February 22, 2003 • Volume 2 consists of Transcribed Witness Interviews • Volume 3 consists of a synopsis, a copy of Record 11 and a copy of Record 13
Record 15A	Fax cover page dated March 25, 2003 with a letter dated March 4, 2003 attached
Record 16	A copy of Record 10
Record 17	Record defined by the Ministry as an Ontario Provincial (OPP) Report dated August 23, 2002
Record 19	Two facsimile cover pages followed by a sheet of data, a copy of Record 17, and a copy of Record 20
Record 20	Document defined by the Ministry as an OPP Record dated July 22, 2002
Record 22	Document defined by the Ministry as an OPP Report dated January 16, 2003
Record 23	Document defined by the Ministry as an OPP Report dated January 6, 2003
Record 34C	Handwritten notes defined by the Ministry as a Summary of Findings
Record 34J	Handwritten notes the Ministry submits were prepared by an ORC solicitor
Record 55	Document defined by the Ministry as a record dated August 18, 1977

DISCUSSION:

PERSONAL INFORMATION

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.

Section 2(1) of the *Act* defines "personal information", in part, 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 where they relate to another individual,
>
> (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.

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.)].

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], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

All of the records and parts of the records at issue relate to an investigation into the alleged improper conduct of the appellant. Some of the records contain information about the appellant that meets the definition of "personal information" in paragraphs (a) (age and sex), (b)

(employment history of the individual or information relating to financial transactions in which the individual has been involved), (c) (address and telephone number), (g) (views of other individuals about the appellant) and (h) (the appellant's name along with other personal information relating to him). I also find that some of the records also describe the appellant and the views of other individuals about him (paragraphs (g) and (h)).

In addition, some records contain the personal information of individuals who were (or alleged to be) involved with the appellant or who witnessed events relating to the conduct of the appellant. This information qualifies as the personal information of these individuals because it includes information about their age (paragraph (a)), employment history or information relating to financial transactions in which they have been involved (paragraph (b)), their addresses and telephone numbers (paragraph (c)) or their names along with other personal information about them (paragraph (h)).

In addition, a number of the records contain the views and opinions of witnesses about the alleged improper conduct of other individuals purported to be involved with the appellant, and therefore contain the "personal information" of these individuals allegedly involved with the appellant under paragraph (g) of the definition.

Finally, some records contain information regarding complaints that the appellant made about the alleged improper conduct of certain identifiable individuals. These records therefore contain the "personal information" of those identifiable individuals under paragraph (g) of the definition.

I find that of all the records, except for a sheet of data in Record 19 and Record 55 contain the personal information of the appellant, along with other identifiable individuals. A sheet of data in Record 19 and Record 55 contain the personal information of the appellant only, and not of other identifiable individuals.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49(a) provides a number of exemptions from this right. It reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, **14**, 14.1, 14.2, **15**, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. [emphases added]

LAW ENFORCEMENT

The Ministry submits that Records 1, 9, 10, 11, 13, 14 (volumes 1, 2 and 3), 16, 17, 19, 20, 22, 23 and 55 fall under the exemption in section 49(a), taken in conjunction with the law

enforcement exemptions in sections 14(1)(b) and (d) or 14(2)(a) of the *Act*. These sections read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of regulating and enforcing compliance with a law.

General Principles

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Under sections 14(1)(b) and (d), 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.)].

It is not sufficient for the Ministry to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

As set out in section 5 of the *Racing Commission Act* (the *RCA*), the object of the ORC is to govern, direct, control and regulate horse racing in Ontario. Under section 11 of the *RCA*, the Commission is empowered to make rules for the conduct of horse racing (which include Rules of Standardbred Racing and Rules of Thoroughbred Racing). Under Chapter 4 of the Rules of Standardbred Racing, the Commission delegates its power to supervise Standardbred Racing to the Commission Administration. Under section 4.02(iv), the Commission Administration may conduct investigations into the conduct of racing and of the participants in racing.

The Ministry states that the ORC investigative unit is staffed by seconded officers from the OPP as well as ORC investigation staff. In fulfilling its duties under the *RCA*, the ORC investigative unit carries out investigations and inspections of individuals that are licensed under the *RCA*, to determine whether there has been compliance with the *RCA* and the Rules of Racing.

The Ministry states that investigations conducted by the ORC could lead to proceedings under the *Provincial Offences Act* (the *POA*) before the Ontario Court of Justice (Provincial Offences Division) or before a tribunal constituted under the *RCA*.

Under section 7(l) of the *RCA* the ORC has the power to fix and collect fines and impose other penalties (including revocation or suspension of a licence) for a contravention of the *RCA* or the Rules of Racing.

I find that, in the circumstances before me, the process of enforcing the provisions of the *RCA* involves investigations or inspections which could lead to proceedings before a tribunal constituted under the *RCA* where penalties could be imposed. As a result, the records at issue relate to "law enforcement" under part (b) of the definition above. I also find, based upon the contents of some of the records at issue, that the OPP was involved in "policing" when it prepared certain documents, and as a result, this activity also qualifies as "law enforcement" under part (a) of the definition above.

Section 14(2)(a)

The word "report" in section 14(2)(a) means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Order P-200]. In order for a record to qualify for exemption under section 14(2)(a), the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders MO-1238, 200 and P-324]

In Order MO-1238 Senior Adjudicator Goodis considered the assertion in that appeal that this office took too narrow a view of what constituted a "report" under the municipal equivalent of section 14(2)(a). References in the excerpt that follows refer to the municipal equivalents of sections 14(1)(a) and (f) and 14(2)(b) through (d) of the *Act*. He wrote:

> ... an overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous. The Legislature could not have intended that result. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission") (at p. 294):
>
> > The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality. Neither is it surprising that none of these schemes simply exempts all information relating to law enforcement. The broad rationale of public accountability underlying freedom of information schemes also requires some degree of openness with respect to the conduct of law enforcement activity. Indeed, if law enforcement is construed broadly to include the enforcement of many regulatory schemes administered by the provincial government, an exemption of all information pertaining to law enforcement from the general right to access would severely undermine the fundamental objectives of a freedom of information law.

This office's interpretation of the word "report" in section 8(2)(a) is not only plausible, but also promotes the purposes of the legislation. The Commissioner's interpretation takes into account the public interest in protecting the integrity of

> law enforcement procedures which underlies the purpose of the exemption. To the extent that any harm could reasonably be expected to result from disclosure of law enforcement records, the various exemptions in sections 8(1) and 8(2)(b) to (d) may apply (for example, where disclosure could reasonably be expected to interfere with a law enforcement matter under section 8(1)(a), or deprive a person of the right to a fair trial under section 8(1)(f)). In addition, certain law enforcement records which consist of a formal statement or account of the results of the collation and consideration of information qualify for exemption under section 8(2)(a), regardless of the potential for harm from disclosure [see, for example, Order MO-1192]. At the same time, this interpretation takes into account the public interest in openness as articulated by the Williams Commission, since records which do not meet the specific definition of report, and which do not otherwise qualify for exemption under the remaining provisions of section 8, cannot be withheld under this exemption.

In Order MO-1238, Senior Adjudicator Goodis also made it clear that the title of a document will not necessarily determine whether or not it is a "report" under section 14(2)(a). For example, he found that the municipal equivalent of section 14(2)(a) did not apply to a Field Inspection Report or an Inspection Record of a municipal building department, both of which contained entries made over a period of time, on the basis that documents of this kind did not satisfy the first requirement of the test.

In Order PO-1959, Adjudicator Sherry Liang considered the Ministry of the Attorney General's position in that appeal that the entire file of the Special Investigation Unit (SIU) should be considered to qualify as a "report" for the purposes of section 14(2)(a). In the course of addressing that issue, Adjudicator Liang wrote:

> I accept, and it is not seriously disputed by the appellant, that Record 2 qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that Record 4, the cover letter to Record 2, qualifies for exemption, as the two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director.
>
> . . .
>
> I find that none of the remaining records at issue meet the definition of a "report". To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant

> Commissioner Tom Mitchinson made the following comments about police occurrence reports:
>
> > An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".
>
> On my review of the incident reports, supplementary reports and police officers' notes at issue in this appeal, I am satisfied that they also do not meet the definition of a "report" under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature.

The Ministry submits that Records 1, 9, 10, 11, 14 (volumes 1, 2 and 3), 16, 17 and 19 consist of a compilation of information gathered as part of an investigation in Ontario by the ORC and/or the OPP relating to the appellant, a consideration of that information, as well as a formal statement of the results of the investigation. The Ministry submits, therefore, that Records 1, 9, 10, 11, 14 (volumes 1, 2 and 3), 16, 17 and 19 fall within section 14(2)(a) and are, accordingly, exempt under section 49(a).

Applying the reasoning in the orders I have noted above, I find that Records 1, 9, 11, a synopsis and the copy of Record 11 in Record 14 (volume 3), 17 and the copy of Record 17 in Record 19 and 34C (for which, as set out in the index, the Ministry claimed the application of the section 14 exemption generally) consist of the required "formal statement of the results of the collation and consideration of information" and were "prepared by an agency which has the function of enforcing and regulating compliance with a law" thereby qualifying as "reports" under section 14(2)(a) of the *Act*.

A document dated February 22, 2003 (which is contained in Record 14 (volume 1)) and Record 15A were generated by an agency in Quebec (the Régie des alcools, des courses et des jeux) that operates in the same way as the ORC. Based upon my review of *An Act respecting racing* and the rules of racing in that province, I find that, in the circumstances before me, the process of enforcing the provisions of that statute involve investigations or inspections which could lead to proceedings before a tribunal where penalties could be imposed. As a result, the records at issue relate to "law enforcement" under part (b) of the definition above. Furthermore, the document dated February 22, 2003 which is contained in Record 14 (volume 1) and Record 15A consist of the required "formal statement of the results of the collation and consideration of information" and were "prepared by an agency which has the function of enforcing and regulating compliance with a law" thereby qualifying as "reports" under section 14(2)(a) of the *Act*.

I find that the remaining responsive records do not qualify as "reports", under section 14(2)(a) because they simply consist of observations and recordings of fact rather than formal, evaluative accounts.

I therefore conclude that Records 1, 9, 11, a document dated February 22, 2003 contained in Record 14 (volume 1), a synopsis and the copy of Record 11 contained in Record 14 (volume 3), 15A, 17, the copy of Record 17 contained in Record 19 and 34C fall within section 14(2)(a), and are exempt under section 49(a) of the *Act*. That does not end the matter, however. Despite this finding, the Ministry may exercise its discretion under section 49(a) to disclose the information in those records to the appellant. This is addressed in the section on "exercise of discretion", below.

I will now address the balance of the records that the Ministry claimed were subject to sections 14(1)(b) and (d) of the *Act*.

Section 14(1)(b): Law Enforcement Investigation

The Ministry submits that Records 10 (a copy of which is contained in Record 14 (volume 1)), the data sheets and Requirements to Provide Documents contained in Record 14 (volume 1), 16 and 19 were created by investigators with the ORC investigative unit. To that I would add Record 13 (a copy of which is contained in Record 14 (volume 3)). The Ministry further states that Records 22 and 23 (copies of which are contained in Record 14 (volume 1)), 55 and the remainder of Records 14 (volumes 2 and 3) and 19 (being two facsimile cover pages and a copy of Record 20) were prepared by the OPP. The Ministry submits that all of these records were created as part of an investigation into the conduct of the appellant, which is now at an end.

The Ministry submits that section 14(1)(b) should apply nonetheless. It argues that if the appellant reapplies for licensing under the *RCA* all the material that was generated in this completed investigation would be highly relevant and would be used by the Director of the ORC in determining the appellant's suitability to hold a license. The Ministry submits that this information would, on that basis, continue to fall within the scope of section 14(1)(b).

I do not agree. This office has stated on numerous occasions that the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085]. To accept the Ministry's argument would mean that the records generated in the context of many investigations the ORC conducts and completes would forever fall under the section 14(1)(b) exemption, because the subject of the investigation may reapply for a licence. That cannot be the case.

I find that there is no evidence that an investigation into the appellant's conduct remains ongoing and, therefore, that section 14(1)(b) does not apply.

Section 14(1)(d):Disclose Confidential Source

In order to establish that the exemption in section 14(1)(d) applies, the Ministry must establish a reasonable expectation that the identity of the source, or the information given by the source, would remain confidential in the circumstances [Order MO-1416].

The Ministry states that the remaining records consist in large part of summaries of interviews with witnesses. The Ministry submits that the individuals spoke to the ORC investigators and the OPP on the understanding that the information they provided would remain confidential. The Ministry further submits that even if the names of the witnesses were severed, their identities would be readily apparent to the appellant.

In my view, it is not sufficient for the Ministry to simply state, without more, that "those individuals [witnesses] spoke to the ORC's investigators and the OPP on the understanding that the information they provided would remain confidential". Rather, some evidence in support of how that understanding arose is required. I have reviewed the remaining records and I find no reference to a witness providing information on a confidential basis. Furthermore, unlike Record 55, there is no notation of confidentiality on the other remaining records. There is also no indication, like in Order M-4, that it is a standard practice for the ORC or the OPP that a witness be advised that their identity or the information they provided would be kept confidential. Although circumstances in which such information is given may give rise to an expectation of confidentiality, I am not satisfied that those circumstances exist with respect to the remaining records.

Therefore, I find that section 14(1)(d) does not apply to the records.

RELATIONS WITH OTHER GOVERNMENTS

Section 15(b) of the *Act* provides that:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

In their representations, the Ministry submits that the section 15(b) exemption applies to Records 1 and 15A, which I have already found to qualify as "reports" under section 14(2)(a), and to be exempt under section 49(a). As a result, it is not necessary for me to consider whether those records also fall within section 15(b) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

General principles

When the request in this matter was 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 contains two branches. Branch 2 of section 19 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation." The Ministry alleges that Record 34J is "the ORC's solicitor's notes, used to prepare for a hearing". Based upon my review of this record, I concur. I therefore find that this record falls within branch 2 of section 19 of the *Act*, because that was prepared by or for Crown counsel "in contemplation of or for use in litigation", namely a hearing under the *RCA*. As a result, subject to the discussion of the Ministry's exercise of discretion below, I find that the exemption in section 49(a) of the *Act* applies to it.

I now turn to the section 49(b) exemption claimed by the Ministry.

PERSONAL PRIVACY

Section 49(b) of the *Act* reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under section 49(b), the information in question must be the personal information of an individual or individuals other than the person requesting it. If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the Ministry may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

Under section 49(b), the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose

disclosure does not constitute an unjustified invasion of personal privacy. In this case the Minstry relies on sections 21(3)(b) and (d).

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764]. The application of section 23 of the *Act* has not been raised in this appeal.

As I have found a sheet of data in Record 19 and Record 55 contains the personal information of the appellant only, and not of other individuals, its disclosure would not result in an unjustified invasion of another individual's personal privacy under section 49(b). As no other discretionary exemptions were claimed and no mandatory exemptions apply, I will order that a sheet of data in Record 19 and Record 55 be disclosed to the appellant.

Sections 21(3)(b) and 21(3)(d)

Sections 21(3)(b) and (d) read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation; or
>
> …
>
> (d) relates to employment or educational history.

The Ministry submits that the personal information in all of the remaining records was compiled by the OPP and the ORC and is identifiable as part of an investigation into a possible violation of law, thereby falling within the presumption in section 21(3)(b). The Ministry also submits that Records 10, 13, 16, 22 and the remaining portions of Record 14 (volumes 1, 2 and 3) contain information about the educational and employment history of individuals other than the appellant. The Ministry submits that the presumption in section 21(3)(d) applies to that information.

Analysis and Findings

I have reviewed the records remaining at issue and in my opinion, the personal information in the remaining records was compiled and is identifiable as part of an investigation into a possible violation of law. Furthermore, some of the information in the remaining records relates to employment or educational history of individuals other than the appellant. The presumed unjustified invasion of personal privacy at sections 21(3)(b) and/or (d) therefore applies to this information. Section 21(4) does not apply, nor has the appellant raised the possible application of section 23. Accordingly, subject to the discussion on the Ministry's exercise of discretion and the "absurd result" principle below, I conclude that the disclosure of this information would constitute an unjustified invasion of personal privacy and it is exempt under section 49(b) of the *Act*.

Absurd result

Previous orders have determined that, where a requester originally supplied the information, or a 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 [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In my view the transcript of an interview of the appellant found in Record 14 (volume 2) is clearly within his knowledge. This is acknowledged by the Ministry in its representations and it advises that it is prepared to release this information to the appellant. In my view releasing this information would not result in an unjustified invasion of another individual's personal privacy under section 49(b), whether or not any of the presumptions in section 21(3) apply. Rather, to decline to grant access to this information, under the circumstances, would lead to an absurd result. As a result, I will order that this information be disclosed.

Severance

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The Ministry submits any attempt at severance would leave nothing remaining.

I agree with the Ministry that no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed

is substantially unintelligible. The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)]. With these principles in mind, I have arrived at the following conclusions.

Some of the personal information exempt from disclosure under section 49(b) is readily severable from non-exempt information in Record 20, a copy of which is also contained in Record 19.

It is not practicable to sever any of the other records that I have found to be exempt under sections 49(a) or 49(b) of the *Act*.

EXERCISE OF DISCRETION

Introduction

On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion in denying access to all or parts of the records that I have determined should be withheld, and, if so, to determine whether it erred in so doing.

I may find that the Ministry 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 these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

I have reviewed the representations of the Ministry, and in the circumstances of this appeal, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the Ministry's decision to withhold the severed portions of Records 4 and 5 and Records 1, 9, 10, 11, 13, 14 (volume 1), 14 (volume 2 (except for the transcript of an

interview of the appellant)), 15A, 16, 17, 19 (except for a sheet of data and the non-highlighted portions of Record 20), 22, 23, 34C, and 34J in their entirety

2. I order the Ministry to disclose to the appellant the non-highlighted portions of Record 20 that are found in the copy of that record provided to the Ministry with this order, all of the transcript of an interview of the appellant found in Record 14 (volume 2), a sheet of data in Record 19, and all of Record 55, by sending him a copy of the records by **January 29, 2009** but not before **January 24, 2007**. The highlighted information on Record 20 is **not** to be disclosed.

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

Original signed by: December 21, 2006
Steven Faughnan
Adjudicator