



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2644

Appeal PA06-299

Ministry of Community Safety and Correctional 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/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The requester in this appeal is the father of a young man who disappeared in Northern Ontario in 2006. The requester submitted a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act) for “any and all documents” pertaining to the police investigation regarding his son’s disappearance.

The Ministry identified 250 pages as responsive to the request and denied access to them, in their entirety, claiming the application of the exemptions in section 49(a), along with sections 14(1)(a), (b), (f), and (l), 14(2)(a) (law enforcement) and 19 (solicitor-client privilege), and section 49(b), in conjunction with section 21(1) (personal privacy). The Ministry specified that it was relying on the factor listed in section 21(2)(f) and the presumption in section 21(3)(b) as the basis for withholding the personal information contained in the records. The Ministry also informed the requester that portions of the records are not responsive to the request.

The requester (now the appellant) appealed the Ministry’s decision to deny access to the records that were responsive to his request.

No issues were resolved during mediation and this appeal was transferred to the adjudication stage of the process. The adjudicator assigned to the file sent a Notice of Inquiry to the Ministry, initially, setting out the facts and issues on appeal and seeking representations. The Ministry provided submissions in response, along with an index of records. The Ministry’s index of records identifies those records or parts of records that are “non-responsive”. The Ministry also provided a copy of the records that clearly identifies those portions that are non-responsive. Further, in its submissions, the Ministry indicated that it no longer relies on the discretionary exemptions in sections 14(1)(f), 14(2)(a) and 19. Accordingly, these exemption claims were removed from the scope of the appeal.

The previous adjudicator sent an amended Notice of Inquiry to the appellant, which reflected the removal of the exemptions in sections 14(1)(f), 14(2)(a) and 19 from the scope of the appeal. Copies of the Ministry’s complete representations and the index of records were included with the Notice of Inquiry.

The appellant did not submit representations. When contacted by a staff person from this office, the appellant indicated that none would be forthcoming.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

There are 250 pages of records at issue in this appeal. The records consist of Occurrence Summaries, a Missing Person Report, Witness Statements, General Occurrence Reports, Supplementary Occurrence Reports, Notes Reports, and the notes of 13 OPP officers.

The non-responsive portions of the records are primarily contained in the police officers’ notes. I have reviewed those portions and note that they pertain to other matters dealt with by the individual police officers while on duty, which is routinely the case in these types of documents

(Orders M-1032, MO-1192 and MO-1219). The remaining non-responsive portions throughout the records relate to administrative information connected to the processing of the appellant's access request. None of the portions that have been withheld as non-responsive pertain to the investigation of the appellant's son's disappearance. Accordingly, I find that these portions of the records are not responsive to the request and do not form part of the records at issue in this appeal.

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. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. 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]. Nevertheless, 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].

The Ministry submits that the records contain the types of personal information contemplated in the definition with respect to the missing person and other identifiable individuals. The Ministry acknowledges that the records at issue also contain information relating to the appellant and other family members, but notes that the amount of personal information in the records about them is minimal.

I have reviewed the records to determine if they contain personal information and, if so, to whom the personal information relates, and I make the following findings:

- The records all contain recorded information about the appellant's missing son and thus contain his son's personal information;
- Many of the records also contain recorded information about other individuals involved in the investigation, primarily as witnesses and/or contacts. Many of these individuals have been identified in their professional or employment-related capacities. However, given the nature of the investigation, the investigation of a missing person, I find that their involvement was in their personal capacities. Accordingly, the information about them in the records constitutes their personal information;
- Some of the records contain recorded information about the appellant and other family members and qualifies as their personal information. I agree with the Ministry

that this information is minimal in nature and is only contained in a few of the pages of the records.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their personal information held by a government body. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

if 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; [emphasis added]

In this appeal, the Ministry relies on section 49(a) in conjunction with sections 14(1)(a), (b) and (l). In the event that the records are found to contain the appellant's personal information, section 14 must be read in conjunction with section 49(a). As I indicated above, some of the records at issue contain the appellant's personal information. Accordingly, I will consider the application of section 49(a) in conjunction with section 14 for these records. I will consider the application of section 14 only for the remaining records.

I will begin my analysis by considering section 14(1)(a) of the *Act*.

Section 14(1)(a) – interfere with a law enforcement matter

Section 14(1)(a) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

interfere with a law enforcement matter;

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. 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)

The Ministry submits that the Ontario Provincial Police (the OPP) are conducting an investigation in order to determine the whereabouts of the missing person and to determine whether there has been a violation of the *Criminal Code* or any other law in connection with the individual's disappearance.

The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code* (Orders M-202, PO-2085). 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.)).

Consistent with previous orders of this office, I find that the OPP investigation into the disappearance of the appellant's son involves an investigation into a possible violation of, *inter alia*, the *Criminal Code*, and thus qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*. Accordingly, I find that the records at issue in this appeal relate to "law enforcement", as defined in section 2(1).

In order to establish that section 14(1)(a) applies, 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (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 an institution 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*).

Furthermore, the use of the word "interfere" contemplates that the particular law enforcement matter is still ongoing (see Orders M-258, M-302, M-420 and M-433). The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters (Orders PO-2085 and MO-1578). The purpose of the exemption contained in section 14(1)(a) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing, and second that disclosure of the records could reasonably be expected to interfere with the matter (Order M-1067).

Representations

The Ministry has combined its representations on sections 14(1)(a) and (b). Although I will cite references to both sections below, I find that the Ministry has met its burden under section 14(1)(a) and it is not necessary for me to consider the possible application of section 14(1)(b). The Ministry states:

...the responsive records are relevant to a matter that is currently actively under investigation by the OPP...Although the ground and air search efforts with respect to the disappearance of the missing person has been suspended, the police investigation remains in progress.

The OPP investigation has been undertaken with a view to a future law enforcement proceeding in the event that a violation of law is ultimately identified as a factor in the missing individual's disappearance.

It is unknown whether the missing person's disappearance was voluntary or not. Release of the requested records to the appellant and other individuals with whom the records may be shared has the potential to reveal detailed operational information relating to the investigation that could frustrate the ability of the OPP to continue the investigation and resolve the matter of the individual's disappearance. Knowledge of the extent and nature of the information received and used by the OPP could lead to investigative harms such as the suppression and/or destruction of potential investigative evidence in the event that the individual's disappearance is ultimately connected to a possible violation of law.

Release of the records would reveal the specific strategies and methodologies employed by the OPP during the course of the missing person investigation. In such investigations, valuable law enforcement investigative information may be collected from sources and analyzed, but not necessarily immediately used, acted upon, or disseminated. Also, innocuous or irrelevant information may over time become sensitive or valuable as circumstances change in the context of a missing person investigation. The records reveal the step by step activities undertaken by the OPP during the course of the investigation.

The public dissemination of information by the police in such cases must be carefully managed in order to achieve the objective of facilitating the investigation to locate the missing person while at the same time not revealing information that could ultimately frustrate or interfere with the conduct of the investigation or an eventual prosecution should a violation of law be established in relation to the missing person's disappearance.

As I indicated above, the appellant chose not to submit representations in this appeal.

As some time had passed since the Ministry had submitted representations, once this appeal file was transferred to me, I asked a staff person from this office to contact the Ministry to determine the status of the OPP investigation into the appellant's son's disappearance. The Ministry confirmed, after consulting with the OPP that the investigation remains open.

Findings

I have reviewed the records at issue in this appeal and find that they are consistent with the Ministry's description of the nature of the information contained in them cited above. I find that the Ministry's representations provide the kind of detailed and convincing evidence necessary to establish the harms envisioned under section 14(1)(a). In particular, the Ministry describes the nature of missing person investigations and explains how information which appears innocuous at one point could become highly relevant at another point. The Ministry explains further that the dissemination of information obtained during the investigation is carefully managed so that it does not undermine the integrity of the investigation or other evidence and thus frustrate the OPP's efforts to find answers.

Keeping in mind the difficulty of predicting future events in a law enforcement context, I am satisfied that disclosure of the records at issue in this appeal could reasonably be expected to undermine the efforts of the OPP to either locate the missing person, or to investigate the circumstances surrounding his disappearance and would, therefore, interfere with an on-going law enforcement matter.

EXERCISE OF DISCRETION

As I noted above, the section 14 and 49(a) exemptions are discretionary. In these cases, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Accordingly, I must also review the Ministry's exercise of discretion in deciding to deny access to the information that I have found to be exempt. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their 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].

The Ministry indicates that it is mindful of the purposes of the *Act* and the appellant's right of access to his own personal information. However, it states that its decision to deny the appellant access to the records in their entirety was based on very careful consideration of all relevant factors.

The Ministry indicates that it took into consideration that the appellant has a sympathetic or compelling need to receive information. The Ministry indicates further that it is aware of the family relationship between the appellant and the missing person. The Ministry notes that the OPP has been in contact with the missing person's family and has shared as much information relating to his disappearance as deemed appropriate in view of the on-going investigation.

The Ministry submits that although its historic practice is to release as much personal information as possible in response to requests for law enforcement records, in the circumstances of this case, its position is that release of any information at this time is not appropriate in view of the on-going investigation into the disappearance of the missing person. The Ministry found it highly relevant in exercising its discretion that disclosure may frustrate this investigation.

While I am sensitive to the suffering the missing person's family must be experiencing at not knowing where their loved one is, and their desire to know and understand the efforts that have been made by the OPP, having reviewed the Ministry's explanation for its exercise of discretion in the context of this particular case, as discussed above, I find that the Ministry's decision takes into account relevant considerations and does not take into account irrelevant considerations. Accordingly, I find that the Ministry has properly exercised its discretion under section 14(1)(a) alone or in conjunction with section 49(a) to withhold the records remaining at issue, in their entirety.

On a final note, the Ministry has acknowledged the unique relationship between the appellant and the missing person and the compassionate nature of this request. Recognizing that law enforcement investigations can be very dynamic, the Ministry may, at some point, be able to release additional information to the missing person's family.

Because of the findings that I have made above, it is not necessary to consider the other exemptions claimed for the records at issue.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____

Laurel Cropley
Adjudicator

February 22, 2008 _____