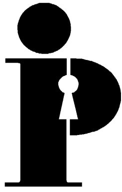

ORDER PO-2571

Appeal PA-060140-1

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 access to information related to an Ontario Provincial Police (OPP) matter involving the requester. The Ministry is responsible for overseeing the operation of the OPP.

The requester sought the following information:

> On [date and time] I received a visit from two OPP officers [names and detachments]. During their visit, they hand-delivered a letter from OPP Sergeant [name].
>
> I request the following material/documents:
>
> 1. A copy of any occurrence report and/or supplementary report completed by any of the three aforementioned officers which preceded or followed the visit and is related to the letter.
>
> 2. A copy of memo book notes made by these officers made prior to and following the visit related to this matter.
>
> 3. A copy of any statement completed by and of the above three persons and related to this matter.
>
> 4. A copy of any e-mail correspondence sent or received by any of the aforementioned officers which dealt with the matter.

In response to the request, the Ministry located responsive records and denied access to them claiming the application of the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 14(1)(c), (d), (e), (i), (l), and 14(2)(a), and the solicitor-client exemption in section 19. The Ministry also denied access to the responsive records on the basis that they are exempt under section 49(b) (invasion of privacy of another individual), in conjunction with the factors in section 21(2)(e), (f), (h), and the presumptions in section 21(3)(b) and (d).

The requester, now the appellant, appealed that decision.

During the mediation process, the Ministry released a supplementary decision which provided the appellant with partial access to 10 pages of records. The appellant was not satisfied with this disclosure.

Accordingly, the file was referred to me to conduct the inquiry. I sent a Notice of Inquiry setting out the facts and issues to the Ministry initially, seeking its representations. The Ministry provided me with representations in response. I then sent a Notice of Inquiry and copy of the Ministry's representations to the appellant. Portions of the Ministry's representations were not

disclosed due to my concerns about confidentiality. I received representations from the appellant in response to the Notice of Inquiry. Portions of the appellant's representations were also provided to me in confidence.

RECORDS:

The records consist of police reports, supplementary reports, officer notes, correspondence and email correspondence, more particularly described in the following index:

Index of Records

Record	Ministry Page(s)	Type of Document	Access	Exemptions
1	1	Occurrence Summary	Partial	49(a), 14(1)(e), 14(1)(1), 49(b)
2	2	Police Report	Partial	49(a), 14(1)(e), 14(1)(1), 49(b)
3	3	Police Report	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
4	4	Police Report	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
5	6 to 19	First Officer's Notes	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 19, 49(b)
	20 to 23		Partial	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
	24 to 27		Nil	49(a), 14(1)(c) 14(1)(e), 14(1)(1), 49(b)
6	29 to 30	Second Officer's Notes	Partial	49(a), 14(1)(1) (only police codes are exempted)
7	32	Correspondence	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)

8	33 to 44	Third Officer's Notes	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
9	45 to 47	E-mail correspondence	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)
10	48 to 56	Interview Report	Nil	49(a), 14(1)(c), 14(1)(e), 14(1)(1), 49(b)

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* 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].

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].

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 Parties

The Ministry submits that the records contain the personal information of the appellant and other identifiable individuals, namely certain OPP officers in their personal and private capacity. The appellant does not directly address this issue in his representations.

Analysis/Findings

On my review of the records, I find that they contain the personal information of the appellant, including:

- the views and opinions of other individuals about the appellant;
- his educational and employment history; and,

- his own personal views and opinions.

Accordingly, I am satisfied that the records at issue contain the personal information of the appellant, pursuant to the definition of personal information in section 2(1).

I also find that these records contain the personal information of identifiable individuals (the OPP officers) other than the appellant, including:

- their names, sex, dates of birth, addresses and telephone numbers;

- the appellant's views and opinions about these other individuals; and,

- their own personal views and opinions.

Accordingly, I am satisfied that the records at issue contain the personal information of individuals other than the appellant, pursuant to the definition of personal information in section 2(1).

Although most of the information about the OPP officers relates to them in their personal capacity, some of the information is about the officers in their official capacity. Despite this, I find that the information reveals something of a personal nature about these individuals. As I stated in Order PO-2525:

> 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.

In conclusion, I find that the records contain the personal information of the appellant and other identifiable individuals, the named OPP officers.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

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

I have found that the 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 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).

In this case, the Ministry relies on section 49(b) in conjunction with section 21(1), for all of the records except for Record 6, where only the police codes have been exempted under sections 49(a) and 14(1)(l).

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).

The Ministry has claimed that disclosure constitutes a presumed unjustified invasion of personal privacy by reason of the application of section 21(3)(b), for all of the records except for Record 6. 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

With respect to the claimed section 21(3)(b) presumption, the Ministry states that:

> It is of the opinion that the personal information in the records 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 Ministry submits that the content of the records at issue is supportive of its position in this regard.
>
> The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The [*Police Services Act*] *PSA* provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.
>
> The Ministry submits that the application of section 21(3)(b) … is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).
>
> The Ministry submits that none of the circumstances outlined in section 21(4)… would operate to rebut the presumption of an unjustified invasion of personal privacy that has been established under sections 21(3)(b)…

Representations of Appellant

The appellant states that:

> Given the partial disclosure of requested records in this appeal, the appellant has learned that an occurrence report was completed naming him as a suspect for Criminal Harassment. If the appellant could be charged with this offence for sending two e-mails and approaching an individual to query him on a matter, then every reporter and journalist could become subject to such a charge. Once again, no police officer was willing to swear to a criminal information alleging the appellant had committed this offence…
>
> The fact that the appellant was named as a "suspect" in a Criminal Harassment Occurrence Report was inappropriate. …[T]he appellant has read over hundreds of occurrence reports. There was no criminal harassment and therefore there should not have been an occurrence report stating there was such an incident…
>
> In addition, the wording used by the officer who completed the report clearly shows that the appellant was the subject of a labeling or defamation process prior to the officers coming to his residence. The appellant learned during the mediation stage that this officer had contact with two people at GHQ (General Headquarters) before visiting him. He wants to know who these people are.

Analysis/Findings

I am satisfied the personal information in all of the records, except Record 6, 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 allegations against the appellant of criminal harassment, an offence under section 264 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 v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767*]. 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,* cited above]. Section 23 has not been raised by the appellant and section 21(4) is inapplicable in this appeal.

Section 21(3)(b) still applies despite the fact that 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 also considered the appellant's representations concerning the exception contained in the final clause of section 21(3)(b) and the need to disclose the information to continue an investigation.

The appellant wishes to continue his investigation into whether he was subject to defamatory statements. However, the factor in section 21(2)(d) (fair determination of rights) does not operate to override the presumption section 21(3)(b) [*John Doe*, cited above].

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, in which 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 Accordingly, I disagree with the appellant's argument that section 21(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.

Subject to my discussion of the Ministry's exercise of discretion below, disclosure of the personal information in the records, except for Record 6, would, therefore, constitute an unjustified invasion of personal privacy and is exempt under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

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.

The Ministry relies on section 49(a) in conjunction with section 14(1)(l), to exempt the police codes from disclosure.

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.

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.)].

Where section 14(1)(l) uses the words "could reasonably be expected to", the institution 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*].

Representation of the Parties

The Ministry submits that:

> …[it] has applied section 14(1)(1) to the operational police code information contained in the responsive records including "ten" codes, location and zone codes.

> The Ministry submits that the release of these operational police codes would leave OPP officers more vulnerable and compromise their ability to provide effective policing services. As noted previously release of records in response to a request [under the *Act*] is generally viewed as release to the world at large. For example, if individuals engaged in illegal activities were monitoring OPP radio communications and had access to the meanings of the various police codes it would be easier for them to carry out criminal activities and would jeopardize the safety of OPP officers. Intimate knowledge of the whereabouts of a given officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activities.
>
> The Ministry refers to … Orders M-393, M-757, PO-1877, PO-2209 and PO-2394 in support of its position with respect to the withholding of operational police codes contained in the records at issue.

The appellant submits in response that:

> …this is not a valid ground to withhold the information given the information is already in the public domain. A Google search will provide anyone with access to the information concerning these codes.

Analysis/Findings

Although the appellant claims that a Google search will reveal what the police codes mean, this is not the issue before me. The information that may be revealed by a Google search, would include the information claimed by the Ministry to be exempted, namely, the specific "ten" codes, location and zone codes, that are recorded in Record 6.

I adopt the following statement of Adjudicator Steven Faughnan in Order PO-2409:

> [T]he 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).

Therefore, I find that disclosure of the police codes 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 would disclose specific information to others regarding OPP operations.

Subject to my discussion of the Ministry's exercise of discretion, below, I uphold the Ministry's decision to deny access to the undisclosed information from Record 6 and any other record that contain police codes, under section 49(a) of the *Act* in conjunction with section 14(1)(l).

EXERCISE OF DISCRETION

The sections 49(a) and (b) exemptions are discretionary, and permit 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 Parties

The Ministry submits that:

> The Ministry is cognizant of the appellant's right of access to personal information records held by the Ministry. The Ministry took into account that the appellant is an individual rather than an organization. The Ministry considered releasing the exempt records at issue to the appellant notwithstanding that discretionary exemptions from disclosure applied to the records at issue.
>
> The Ministry was mindful of the fact that the responsive records in this particular instance reflect health and safety concerns. This circumstance adds a heightened level of sensitivity to the requested law enforcement records.
>
> The Ministry initially exercised its discretion to deny the appellant access to the requested personal information records in their entirety. The Ministry subsequently reconsidered this decision and exercised its discretion to provide the appellant with access to information contained in 10 pages of the records at issue.

> The historic practice of the Ministry when responding to personal information requests for police records is to release as much information as possible in the circumstances. However, in the circumstances of the appellant's request, the Ministry is of the view that release of any of the records at issue is not appropriate.
>
> Given the highly sensitive nature of the matters reflected in the records, the Ministry was satisfied that release of the records at issue would cause personal distress to identifiable individuals. The Ministry was also satisfied that the information at issue was compiled and identifiable as part of an investigation into a possible violation of law.
>
> The Ministry in its exercise of discretion took into consideration the fact that confidentiality of information in some instances is necessary for public safety and protection.
>
> The Ministry carefully considered whether it would be possible to release any nonexempt information from the records at issue. As noted previously, the Ministry has issued a supplemental decision letter to the appellant and released some of the requested records to him.
>
> The Ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's request was not appropriate.

The appellant submits that:

> The Ministry advocates …that the historic practice of the Ministry when responding to personal information for police records is to release as much information as possible in the circumstances. The appellant's experience to date is that the precise opposite is true. To date, the appellant has only received …memo book notes and occurrence report… but that occurred during the mediation stage of his complaint after he had appealed the Ministry's decision to withhold all information.

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 would compromise the confidentiality of information necessary for public safety and protection.

I also find that the Ministry properly exercised its discretion under section 49(b) with respect to the records that contain the personal information of identifiable individuals other than the appellant. I find that the Ministry considered relevant factors and did not consider irrelevant ones with respect to these records. I agree with the Ministry that due to the highly sensitive

nature of the matters reflected in the records, that release of the records at issue would cause personal distress to identifiable individuals.

As I have found all of the records to be exempt from disclosure, there is no need for me to consider in this order as to whether the exemption in section 19 (solicitor-client privilege) of the *Act* applies to Record 5.

ORDER:

I uphold the Ministry's decision.

Original Signed by: April 30, 2007
Diane Smith
Adjudicator