



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2660

Appeal PA07-129

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 the complete file of an investigation relating to the requester, including all occurrence reports, supplementary reports, e-mail and correspondence from any officers, crown attorneys or any other witnesses involved in this matter.

The Ministry located the responsive records and granted partial access to them. Access to some of the information in the records was denied pursuant to section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1) and (2) (law enforcement), 15(b) (information received from another government) and 17(2) (tax information), and section 49(b) (personal privacy) of the Act. Access to some information was also denied because it was not responsive to the request.

The requester (now the appellant) appealed the decision.

During mediation the Ministry issued a supplemental decision letter to the appellant, releasing one additional paragraph from the records. As further mediation was not successful in resolving the issues in this appeal, the file was moved to the adjudication stage of the inquiry process.

I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and two persons whose personal information may be contained in the records (the affected persons), initially, seeking their representations. I received representations from the Ministry and one affected person. The affected person who responded to the Notice of Inquiry did not agree to the release of any personal information. In its representations, the Ministry withdrew its reliance on section 49(a) in conjunction with sections 14(2) and 15(b). I then sent a Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations, seeking her representations. The appellant did not provide representations in response.

RECORDS:

The records remaining at issue consist of an interview report, occurrence reports and a video taped witness statement, as described in the following chart:

Record #	Ministry page #	Description of Record	Exemptions Claimed	Disclosed by Ministry?
1	1	Occurrence Summary	49(a) with 14(1)(l); 49(b) with 21(2)(f) and 21(3)(b); non-responsive	partial
2	2	General Occurrence Report	49(b) with 21(2)(f) and 21(3)(a) and (b); non-responsive	no

Record #	Ministry page #	Description of Record	Exemptions Claimed	Disclosed by Ministry?
3	3 to 7	General Occurrence Report	49(b) with 21(2)(f) and 21(3)(b), and (f); non-responsive 49(a) with 17(2) for pages 3 to 5 and 7; 49(a) with 14(1)(d) and 14(1)(l) for pages 5 and 7 49(b) with 21(3)(a) for pages 3, 4 and 7; 49(b) with 21(3)(e) for pages 4 and 5; 49(b) with 21(3)(c) for page 5	partial
4	8	Document Report	49(b) with 21(2)(f) and 21(3)(b); non-responsive	no
5	9	Supplementary Occurrence Report	49(b) with 21(2)(f) and 21(3)(b); non-responsive	no
6	10	Supplementary Occurrence Report	non-responsive	All but non-responsive portions
7	11 to 16	Interview Report	49(a) with 17(2) for pages 13 and 14; 49(b) with 21(2)(f) and 21(3)(b)	no
8		Videotape	49(a) with 14(1)(d) and 17(2); 49(b) with 21(2)(f) and 21(3)(b)	no

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 24 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; and

.

- (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].

The Ministry submits that:

The Ministry has identified parts of the requested records as containing administrative information that is not responsive to the appellant's request. This information consists of document printing information that was created subsequent to the receipt of the appellant's request. This information reflects when the reports in question were printed and by whom. The reports were printed for the sole purpose of responding to the request submitted by the appellant. The printing information post-dates the submission of the appellant's access request.

The Ministry notes that in Order PO-2254, Adjudicator Sherry Liang accepted the Ministry's position regarding the non-responsiveness of administrative information relating to the printing of responsive reports. Adjudicator Liang commented:

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. In this appeal, the Ministry states that some of the information in the record is "administrative information relating to the printing of the reports" and is accordingly not responsive to the request. I have reviewed the information at issue, and I agree with the Ministry's submission. The information in these portions of the record reflect when the record was printed and by whom, and was created after the appellant's request. I am satisfied that this information is not covered by the scope of the appellant's request, and I uphold the Ministry's decision to withhold this information.

The Ministry submits that the identified non-responsive information does not concern nor relate to the matters involving the appellant.

Analysis/Findings

I agree with the Ministry's submission that it has identified the responsive information that reasonably relates to the appellant's request. The remaining information is non-responsive. The information severed by the Ministry relates to the printing of the documents in connection with the appellant's request. This information is not part of the records as originally prepared, and I find that those portions of the records do not reasonably relate to the subject matter of the appellant's request. As the only severance made on Record 6 is the non-responsive information, I will uphold the Ministry's decision to withhold this portion of this record, as well as upholding the Ministry's decision to withhold the non-responsive information in the remaining records. Therefore, Record 6 and the non-responsive information in the remaining records are not at issue.

PERSONAL INFORMATION

I will now determine whether the records contain "personal information" as defined in section 2(1) and, if so, to whom it relates.

The Ministry submits that the records contain personal information of the appellant, the affected persons and one other identifiable individual whom the Ministry understands is now deceased (the deceased), as defined in the following paragraphs of section 2(1):

"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,
- (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,
- (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.)].

Analysis/Findings

The records at issue contain the personal information of identifiable individuals, namely, the appellant, the affected persons and the deceased. As the deceased has not been dead for more than 30 years, the deceased's information is still considered personal information pursuant to section 2(2) of the *Act*.

The personal information in the records of the identifiable individuals includes their ages, sex, marital or family status, medical and employment history, information relating to financial transactions in which these individuals have been involved, addresses, telephone numbers, views or opinions of another individual about the individuals and the individuals' names where they appear with other personal information relating to these individuals.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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) in conjunction with sections 14(1) and 17(2). I will begin my analysis with section 14(1).

LAW ENFORCEMENT

All of the records at issue in this appeal are Ontario Provincial Police (OPP) records, related to a police investigation. The OPP is part of the Ministry.

I will now determine whether the discretionary exemptions at sections 14(1)(d) and (l) apply to the records.

Sections 14(1)(d) and (l) state:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (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; or
 - (l) facilitate the commission of an unlawful act or hamper the control of crime.

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 term “law enforcement” has been found to apply in the following circumstances:

- a municipality’s investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

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.)].

Except in the case of section 14(1)(e), where section 14 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*].

Section 14(1)(d): confidential source

The Ministry has claimed section 14(1)(d) for portions of pages 5 and 7 of Record 3 and for the videotape. It submits that:

[T]he records at issue contain information that was provided by a confidential source. The free exchange of necessary information between law enforcement officers and other parties is a necessary and vital component of law enforcement

investigations. Given the high sensitivity of the complaint issues, the confidential source of information would reasonably have expected that the information provided in the course of the relevant law enforcement investigation would be kept as confidential as circumstances would permit.

Analysis/Findings

The institution 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].

I have reviewed the information at issue in the records and the representations of the Ministry and find that disclosure of the information at issue in Record 3 and the entire videotape (Record 8) would identify a confidential source of law enforcement information and information supplied by this confidential source. Specifically, disclosure would reveal information given only by this source about the investigation into a possible violation of law by the appellant. Additionally, I accept, based on my review of the records at issue, that the source had a reasonable expectation that his or her identity would remain confidential in the circumstances.

Having found that the disclosure of the information at issue could reasonably be expected to reveal the identity of a confidential source of information in respect of a law enforcement matter within the meaning of section 14(1)(d), accordingly, I find that subject to my analysis of the Ministry's exercise of discretion, this information at issue in pages 5 and 7 of Record 3, as well as the entire videotape, qualifies for exemption under section 49(a).

Section 14(1)(l): commission of an unlawful act or control of crime

The Ministry has applied section 14(1)(l) to the various operational police codes information including "ten" codes and location and zone codes in Record 1 and pages 5 and 7 of Record 3. The Ministry submits that:

...the public disclosure of these operational police codes would leave police officers more vulnerable and compromise their ability to provide effective policing services. For example, if individuals engaged in illegal activities were monitoring police 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 police 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.

Analysis/Findings

The application of section 14(1)(l) to the police codes and descriptive information concerning these codes has been considered in numerous orders of this office. Adjudicator Steven Faughnan stated 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)... 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.

I agree with and adopt the findings of Adjudicator Faughnan in Order PO-2409 that disclosure of the police codes and descriptive information concerning these codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Therefore, I find that the undisclosed operational police codes information in the records at issue falls within the ambit of section 14(1)(l). Accordingly, subject to my analysis of the Ministry’s exercise of discretion, the exemption in section 49(a) applies to this information.

PERSONAL PRIVACY

I will now determine whether the discretionary exemption at section 49(b) applies to the remaining personal information in all of the records, except Records 6 and 8, which I have dealt with above.

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.

Under section 49(b), where a record contains 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 may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information at issue does not fit within these paragraphs.

In deciding whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Ministry has claimed the application of the presumption in section 21(3)(b) for all of the records at issue. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

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;

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

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].

The Ministry submits that:

...the personal information records at issue consist of highly sensitive personal information that was compiled and is identifiable as part of an Ontario Provincial Police (OPP) investigation into a possible violation of law. The Ministry submits

that the content of the responsive records, both disclosed and undisclosed parts, 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* (the *PSA*) provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.

The exempt information documents the law enforcement investigation undertaken by the [named] OPP Detachment into the circumstances of an alleged fraud. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The focus of the OPP investigation was to determine whether any laws had been violated in respect to the alleged fraud. Fraud is an offence under section 380(1) of the Criminal Code.

Analysis/Findings

I find that section 21(3)(b) applies in the circumstances of this appeal. I have reviewed the portions of the records remaining at issue and in my opinion, the personal information severed from the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law, namely section 380(1) of the Criminal Code. The fact that charges were not laid does not affect the application of section 21(3)(b) [Order PO-1849]. The presumed unjustified invasion of personal privacy at section 21(3)(b) therefore applies to this information.

Section 21(4) does not apply to this information and the appellant did not raise the possible application of the public interest override at section 23 of the *Act* (*John Doe*, [cited above]).

Therefore, subject to my analysis of the Ministry's exercise of discretion, I find that because the remaining withheld portions of the records are subject to the section 21(3)(b) presumption, this information qualifies for exemption under section 49(b). Disclosure of this information is presumed to be an unjustified invasion of personal privacy.

As I have found that the remaining withheld portions of the records qualify for exemption under the section 21(3)(b) presumption, it is not necessary for me to address whether the presumptions in sections 21(3)(a), (c), (e) and (f) and the factor in section 21(2)(f) might also apply.

EXERCISE OF DISCRETION

Because sections 49(a) and (b) are discretionary exemptions, I must also review the Ministry's exercise of discretion in deciding to deny access to the withheld information.

The sections 49(a) and (b) exemptions 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

The Ministry submits that:

[It] is cognizant of the appellant's right of access to personal information in the records held by the Ministry. The Ministry took into account that the appellant is an individual rather than an organization. The Ministry also considered the relationship between the appellant and other individuals referenced in the records. The Ministry considered releasing the exempt records at issue to the appellant notwithstanding that discretionary exemptions from disclosure applied to the records.

The Ministry was mindful of the fact that the responsive records in this particular instance document an investigation into alleged fraud incident involving the appellant and an identifiable individual who apparently is now deceased. This circumstance adds a heightened level of sensitivity to the requested law enforcement records.

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. The Ministry has issued two decision letters providing the appellant with partial access to a substantial portion of the responsive records.

Given the highly sensitive nature of this matter, the Ministry was satisfied that release of additional information from the records remaining at issue would cause personal distress to identifiable individuals. The Ministry was also satisfied that the information remaining at issue was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry considered whether release of the records at issue could generally discourage members of the public from reporting potential violations of law to the police and undermine public confidence in the ability of the OPP to provide policing services.

The Ministry in its exercise of discretion took into consideration the fact that confidentiality of information in certain instances.

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

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.

Analysis/Findings

I find that the Ministry exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the records for which it has claimed the sections 49(a) and (b) exemptions. In particular, the appellant does not have a sympathetic or compelling need to receive the information and the information is sensitive as it was gathered from the affected persons during a law enforcement investigation. Furthermore, one of the identifiable individuals referred to in the records is deceased and, therefore, was not contacted to obtain their consent to release of their personal information. Disclosure will not increase public confidence in the ability of the OPP to provide policing services. In the circumstances of this appeal, the privacy rights of the deceased and the affected persons are significant. Accordingly, I uphold the Ministry's exercise of discretion and find that the records are properly exempt under sections 49(a) and (b).

Because I have found that the information at issue in the records is exempt by reason of section 49(a) in conjunction with sections 14(1)(d) and (l), and section 49(b) in conjunction with section 21(3)(b), there is no need for me to consider whether this information is also exempt by reason of section 49(a) in conjunction with section 17(2).

ORDER:

I uphold the Ministry's decision and dismiss this appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ April 8, 2008