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

ORDER PO-2732

Appeal PA06-296

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*) which read as follows:

> On [three specified dates], [5 identified (Ontario Provincial Police (OPP)) Detective Constables] were involved with an investigation. These officers conducted an investigation concerning myself [requester's name] and [a named individual] and others. The investigation took place in [a specified Township and County and certain addresses on identified roads]. Every resident was questioned with the same six questions. Who devised the questions? I am seeking the response from each resident and the officers' notes and remarks.

The request went on to identify that the requester was interested in records identifying who ordered the investigation, what the costs (including staff and overtime costs) were, what initiated the investigation and what the results of the investigation were. The requester also sought access to the notes of the investigating officers, reports, and information about calls made to a specific contact number.

The Ministry responded to the request by denying access to responsive records on the basis of the exemptions found in section 49(b) (invasion of privacy) and section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(a), (b), (l) and 14(2)(a) (law enforcement), and section 19 (solicitor-client privilege).

The requester (now the appellant) appealed the Ministry's decision.

During mediation certain portions of the records which were not responsive to the request were removed from the scope of the appeal. Also during mediation the Ministry advised that no records relating to the costs and overtime for the investigation existed, and the appellant agreed that this was no longer an issue.

Furthermore, during mediation the Ministry issued a supplemental decision letter to the appellant, claiming that the discretionary exemption in section 14(1)(e) applied to the records. The appellant objected to the Ministry's raising of this section at this stage of the appeal, and the issue of the late raising of a discretionary exemption was included as an issue in this appeal.

Mediation did not resolve the issues and this file was transferred to the inquiry stage of the process.

A Notice of Inquiry setting out the facts and issues in this appeal was sent to the Ministry, initially, and the Ministry provided representations in response. In its representations, the Ministry identified that it was no longer relying on the exemptions in sections 14(1)(b) and 14(2)(a) of the *Act*, and those sections were removed from the scope of this appeal. The Ministry also prepared an index of the records at issue.

A revised Notice of Inquiry, along with a copy of the non-confidential portions of the Ministry's representations and the index, was sent to the appellant. In response, the appellant submitted representations on the application of the exemptions to the records, and also referred to

additional records which he believes exist. The Ministry was then provided with a copy of the appellant's representations and invited to provide reply representations, which it did.

The Ministry was subsequently invited to address the appellant's concerns that additional responsive records exist (namely, two videotaped statements, and information about the review/analysis or conclusion of the results of the canvassing of the neighbourhood). In response to this invitation, the Ministry issued a supplementary decision letter to the appellant, in which it stated that it had not considered the two videotaped statements responsive to the initial request, but then stated:

> However, in the interest of resolving the part of your appeal relating to the responsiveness of [the two videotaped statements], the Ministry has decided to include the … videotaped statements and related videotape statement synopsis and officer's notes within the scope of your request.

The Ministry's supplementary decision letter then identified that access to these videotaped statements was denied on the basis of sections 49(b) and 49(a) in conjunction with sections 14(1)(a), (b), (e), (l) and 19 of the *Act*.

In addition the Ministry's supplementary decision letter stated:

> With respect to the existence of records relating to the review/analysis and conclusion of the canvass results including communication to the complainants about the outcome of the canvass, please be advised that information responsive to this part of your request is contained within [identified pages] of the responsive records. A supplemental records search recently undertaken by the OPP did not result in the identification of any additional records responsive to this part of the request.

Furthermore, the Ministry provided this office with representations addressing the issue of whether its search for responsive records was reasonable, and attaching two sworn affidavits relating to the nature and result of the searches conducted.

The Ministry's reply representations were then sent to the appellant, and the appellant was invited to respond to them. No further representations were provided to this office.

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

NOTE

The appellant in this appeal had made an earlier request to the Ministry under the *Act* for other records. The earlier request sought access to records relating to noise complaints made by a named individual relating to the appellant. The Ministry denied access to the responsive records in the earlier request, and the appellant's appeal of that decision resulted in the opening of appeal

PA-060109-1. Mediation did not resolve the issues in appeal PA-060109-1 and it was transferred to the Adjudication stage of the process. Appeal PA-060109-1 was also assigned to the adjudicator previously assigned to the current appeal.

After sending the parties Notices of Inquiry, and receiving representations in that file, the previous adjudicator decided to combine the two appeals. However, after reviewing the issues and records in both files, I have decided to address the issues in separate orders. As a result, this order will only address the issues in Appeal PA06-296. I will address the issues in Appeal PA-060109-1 in a separate order.

RECORDS:

There are 173 pages of records at issue in this appeal. These records include the neighbourhood canvass synopsis (pages 1-6), neighbourhood canvass results/forms and interview reports (pages 7 – 96), OPP officers' hand written notes and notebook entries (pages 97, 98 and 101 – 139), an email chain (pages 99-100) and videotape statement synopses and officers' notes (pages 140 – 173). Also at issue are the videotape statements of two individuals.

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. 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 where 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]. However, 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].

In addition, 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.)].

The Ministry's representations simply state that the records at issue "contain personal information relating to the appellant and other identifiable individuals." The appellant does not directly address the issue of whether the records contain personal information.

Analysis and findings

I have carefully reviewed the records at issue in this appeal.

Pages 1 – 6 are identified by the Ministry as the "Complaint Canvass Synopsis," including a cover page with a description (page 1). Page 2 contains six questions used in the canvass, and pages 3 – 6 consist of a table summarizing the canvass results, including the names and

addresses of the individuals canvassed, as well as a brief summary of the comments made by those individuals.

Pages 7 – 96 of the records consist of the completed "Canvass Forms" or "Interview Reports" which were used in the OPP's canvass of the neighbourhood. These forms include information about the identity of the persons being canvassed, their addresses and dates of birth, and various comments and answers to the questions asked of the individuals being canvassed. A number of the forms also include additional information about the individuals being canvassed, including identities of others in the neighbourhood, their perspectives on various activities, as well as other information relating to them.

Pages 97, 98 and 101-139 consist of officers' notebook entries. The responsive portions of these notebook entries contain information about the canvass of the neighbourhood, as well as other information about police officers' discussions with identifiable individuals relating to the neighbourhood canvass.

Pages 99-100 consist of an e-mail chain between an individual and the Police.

Pages 140 – 173 consist of the officers' notes and transcriptions of the two videotaped statements identified as responsive to the request.

On my review of the records at issue in this appeal, I am satisfied that all of the records contain the personal information of identified individuals. They contain information relating to these individuals' age, marital or family status (paragraph (a)), their address and telephone number (paragraph (d)), their personal opinions or views (paragraph(e)), correspondence sent to an institution by them (paragraph (f)), and their names where they appear with other personal information relating to them (paragraph (h)).

In addition, a number of the records contain information which qualifies as the personal information of the appellant, as these records contain information relating to his address (paragraph (d)), and his name where it appears with other personal information relating to him (paragraph (h)).

INVASION OF PRIVACY

As I indicated above, I find that some of the records contain only the personal information of individuals other than the appellant. For these records, I will determine whether the mandatory exemption at section 21(1) applies to exempt them from disclosure. For the remaining records that do contain the appellant's personal information, my assessment of this issue will be conducted under the discretionary exemption at section 49(b) of the *Act*.

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 disclosure that limit this general right.

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellant's right of access to their own personal information against other individuals' right to the protection of their privacy.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy."

In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 21 or 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled 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 section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

Representations

The Ministry relies on section 49(b) in support of its decision to deny access to the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) of the *Act*. These sections read:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,

> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> 21 (3) 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;

With respect to the section 21(3)(b) presumption, the Ministry submits:

> The Ministry is of the opinion that the personal information records at issue consist of highly sensitive personal information that was compiled and is identifiable as part of 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* provides for the composition, authority and jurisdiction of the OPP. The duties of a police officer include investigating possible law violations.
>
> The records at issue document the OPP's involvement with respect to a longstanding and escalating neighbour dispute primarily involving the appellant and [an affected party] that resulted in the OPP law enforcement activities undertaken between [two identified dates]. Other individuals identified in the responsive records have also had involvement with respect to this matter. The records contain detailed information in relation to the OPP investigation of alleged unlawful activities. The focus of the OPP investigation was to determine whether sufficient evidence existed to lay criminal charges, in particular, [identified *Criminal Code* charges] against any individuals.
>
> The Ministry submits that the application of section 21(3)(b) of [the *Act*] is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The appellant addresses the possible application of section 21(3)(b) by asking that this office review the content of the records that the Ministry claims falls within the exemption. The appellant then states that, to his knowledge, all investigations are closed, and that one trial took place and another will be occurring. The appellant proceeds to argue that the disclosure is necessary to prosecute the violation, and that "the results of the investigation are required for a fair trail and a proper defence."

Both the Ministry and the appellant refer to a number of the factors under section 21(2) that they believe apply to the records at issue.

Finding

Previous orders have established that, 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].

Based on the representations of the Ministry and my review of the records, I am satisfied that the records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the records is presumed to constitute an unjustified invasion of the privacy of the identifiable individuals referred to in those records under section 21(3)(b). As set out above, a presumption cannot be rebutted by the factors in section 21(2), and in my view they are not rebutted by either the exceptions in section 21(4) or the "compelling public interest" override at section 23, which was not raised in this case. Therefore, I find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b), for any of the records which contain the personal information of the appellant, and under section 21(1) for records which only contain the personal information of individuals other than the appellant.

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 from disclosure. Having found that the records remaining at issue qualify for exemption under section 21(1) and/or 49(b), I must now determine whether any portions of those records could reasonably be severed.

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.)].

After reviewing the records remaining at issue, I find that it is possible to sever some of the information on a few of these pages in such a way that the information relating to identifiable individuals other than the appellant is not disclosed.

In particular, in this appeal, when the names of identifiable individuals, along with some additional information, are removed from the six questions asked in the neighbourhood canvass, I am satisfied that the questions are severable from the rest of the record, and these questions

contained on page 2 of the records can be disclosed to the appellant. In addition, the excerpt from the summary of the canvass results on page 3 of the records relating solely to the appellant can be severed and provided to the appellant.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b) and/or 21, 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, M-613]
- 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]

Previous orders have also stated that, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

With respect to whether or not disclosure is consistent with the purpose of the section 21(3)(b) exemption, Senior Adjudicator Goodis reviewed this issue in Order PO-2285. In that order, in which the records at issue were described by Adjudicator Goodis as "particularly sensitive," he stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester.

I adopt the approach taken to the absurd result principle set out above, as well as the approach taken by the Senior Adjudicator in Order MO-2285.

In its representations the Ministry takes the position that the absurd result principle does not apply in the circumstances of this appeal. In the appellant's representations, the appellant refers to certain information that he is aware of, and suggests that he ought to get other information as well.

On my careful review of the information remaining at issue in this appeal, I am not satisfied that the records ought to be disclosed to the appellant on the basis of the absurd result principle.

Many of the records consist of statements and other information provided to the police by identifiable individuals. Although the appellant may be aware of the nature of some of the statements, I have not been provided with evidence to support a finding that the appellant was present when the information was provided to the police, or that the information is clearly within his knowledge. Accordingly, the absurd result principle does not apply in this appeal to the information remaining at issue.

In summary, I find that the exemptions in sections 21(1) and/or 49(b) apply to all of the records except for portions of pages 2 and 3. I will now review whether these portions of pages qualify for exemption under any of the other exemptions claimed by the Ministry.

Section 49(a)

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

The Ministry has claimed the application of sections 14(1)(a), (e) and (l) to the pages of the records remaining at issue. Because I have found that all of the records remaining at issue contain the personal information of the appellant, I will examine the application of these exemptions in the context of section 49(a). It is not necessary for me to review the application of these exemptions to the portions of the record which I have found qualify for exemption under section 49(b).

Furthermore, as identified above, the late raising of the discretionary exemption in section 14(1)(e) was identified as an issue in this appeal. I have found above that many of the records qualify for exemption under sections 49(b) and/or 21(1), and there is no need to consider the application of section 14(1)(e) for those records. Given my findings, below, there would be no useful purpose served in addressing the late raising issue with respect to the remaining records in the circumstances of this appeal.

Sections 14(1)(a), (e) and (l)

Sections 14(1)(a), (e) and (l) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

> (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 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.)].

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.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (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*].

Sections 14(1)(a): law enforcement matter

Previous orders have established that "matter" may extend beyond a specific investigation or proceeding [*Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.)]. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

The Ministry submits as follows in support of its position that the report qualifies for exemption under section 14(1)(a):

> … the disclosure of the records at issue may reasonably be expected to interfere with an ongoing law enforcement matter. As previously noted, the appellant has been charged with [an identified offence under the *Criminal Code*].
>
> … release of the responsive records may reasonably be expected to reveal to some degree the extent and nature of the anticipated evidence in regard to the criminal prosecution that is before the court.

The Ministry also provides additional representations on an ancillary matter; however, this issue was addressed by the previous adjudicator in an earlier letter to the Ministry.

On my review of the information remaining at issue in this appeal (the questions on page 2 and the excerpt from the summary of the canvass results on page 3 relating solely to the appellant), I am not satisfied that the disclosure of these portions of the records could reasonably be expected to interfere with an ongoing law enforcement matter. Based on the Ministry's representations, it appears that the matters referred to in these portions of pages relate to an earlier investigation, and not the one referred to by the Ministry in its representations. In addition, on my review of the portions of the records remaining at issue, I am not satisfied that their disclosure could reasonably be expected to interfere with an ongoing law enforcement matter. Accordingly, these portions of the records do not qualify for exemption under section 49(a) in conjunction with 14(1)(a).

14(1)(e): life or physical safety

In the case of section 14(1)(e), the Ministry must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.

The Ministry states that the release of the information in the records may reasonably be expected to endanger the life or physical safety of an individual. The Ministry also refers to an identified member of the OPP who identified the concerns he had if any information were to be released to the appellant.

I have carefully considered whether the information remaining at issue in this appeal qualifies for exemption under section 14(1)(e). In my view, I am not satisfied that this remaining information (the questions on page 2 and the excerpt from the summary of the canvass results on page 3 relating solely to the appellant) qualifies for exemption under section 14(1)(e). I have found above, that this information does not contain the personal information of any identifiable individuals other than the appellant. In view of the limited information remaining at issue, and the nature of this information, I am not satisfied that the Ministry has established that there exists a reasonable basis for its belief that the disclosure of this information could endanger the life or physical safety of a law enforcement officer or any other person.

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

The Ministry submits that the release of the responsive records "may reasonably be expected to hamper the OPP in their efforts to respond to future incidents involving the appellant … and in its ability to provide effective policing services to the neighbourhood." The Ministry also provides specific references to the application of this section to the 10-codes contained in the records.

On my review of the information remaining at issue in this appeal (the questions on page 2 and the excerpt from the summary of the canvass results on page 3 relating solely to the appellant), I am not satisfied that the disclosure of these portions of the records would facilitate the commission of an unlawful act or hamper the control of crime.

Although I accept the Ministry's position that disclosure of some of the portions of the record which I have found to qualify for exemption under section 49(b) and/or 21(1) may result in the harms identified in section 14(1)(l), with respect to the discreet portions of the records remaining at issue, I am not satisfied that the disclosure of this information could reasonably be expected to facilitate the commission of an illegal act and hamper the control of crime. Accordingly, these portions of the records do not qualify for exemption under section 14(1)(l) nor 49(a).

Ministry's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act*'s discretionary exemptions. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the records.

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. The Ministry states:

> The Ministry is cognizant of the appellant's right of access to personal information records held by the Ministry. The Ministry considered releasing the exempt records to the appellant notwithstanding that discretionary exemptions from disclosure applied.

The Ministry then states that, in exercising its discretion to withhold the records, the Ministry "carefully considered the relationship between the appellant and the other individuals referenced in the records at issue." The Ministry proceeds to identify a number of other factors it considered in exercising its discretion to withhold the records.

The Ministry's representations were shared with the appellant. The appellant's representations on this issue focus on the reasons why the appellant believes he ought to have access to the records, and provides additional information about the background to this request.

Finding

I have carefully considered the positions of the parties and the records remaining at issue. All of the records which I have found to qualify under section 49(b) contain the personal information of identifiable individuals, and were compiled as part of an investigation into a possible violation of law. Most of the records consist of statements made by individuals to the Police, or notes of those statements. Given the nature of the information in the records I have found to be exempt, and given the other factors referenced by the Ministry and the circumstances of this appeal, I am satisfied that the Ministry properly exercised its discretion in refusing to disclose the records under section 49(b). Accordingly, I uphold the Ministry's decision to deny access to the records which I have found qualify for exemption under section 49(b) of the *Act*.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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

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

Representations

As identified above, in response to the revised Notice of Inquiry sent to the appellant, the appellant took the position that additional records responsive to his request ought to exist (in particular, two videotaped statements, and information about the review/analysis or conclusion of the results of the neighbourhood canvass). When that information was shared with the Ministry, the Ministry issued a supplementary decision letter to the appellant, in which it stated

that it had not considered the two videotaped statements responsive to the initial request, but that, in the interest of resolving the issue of the responsiveness of the two videotaped statements, the Ministry included the videotaped statements, as well as the related videotape statement synopsis and officer's notes, within the scope of your request. The Ministry then identified that access to those records was denied.

In addition the Ministry's supplementary decision letter stated that, with respect to the existence of records relating to the review/analysis and conclusion of the canvass results, that information was contained within identified pages of the responsive records. The Ministry also identified that a supplemental records search was undertaken by the OPP, and that no additional responsive records were located. The Ministry provided representations addressing the issue of whether its search for responsive records was reasonable, and attached two sworn affidavits relating to the nature and result of the searches conducted.

The Ministry's representations on this issue were shared with the appellant, and the appellant did not provide further representations on this issue.

The Ministry's representations refer to the two sworn affidavits in support of its position that the search conducted for responsive records was reasonable.

The first affidavit is sworn by the Deputy Coordinator of the Ministry's Freedom of Information and Protection of Privacy Office. It sets out in detail the actions that were taken when the request came in, and that this individual was aware of the earlier request received by the same requester. The affidavit then identifies what she considered to be the scope of the request, and the actions taken to locate records, and the results of those actions (the identification of 139 pages of records). The affidavit then identifies some of the specific information contained in the records which addresses some of the questions raised in the request, and also identifies that, although the Ministry did not consider the videotaped statements (with the accompanying synopsis and officer's notes) responsive to the request, the Ministry did issue a supplemental decision letter on those records, and they were included in the scope of the appeal.

The second affidavit is sworn by a police constable with the OPP, who had direct involvement with the request and subsequent appeal. The police constable reviews the request and summarizes the searches conducted for responsive records (both the initial and the subsequent searches) and the results of those searches. The constable also identifies by name the various members of the OPP who were involved in the investigation and who were consulted when the search was conducted, and confirms that no additional responsive records were located.

Findings

As identified above, in reasonable search appeals, the *Act* does not require the institution to prove with absolute certainty that further records do not exist; however, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. Although a requester will rarely be in a position to indicate

precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Based on the representations provided by the Ministry (in particular the two sworn affidavits provided, in which the Ministry reviews in detail the nature of the searches conducted for responsive records), and in the absence of additional representations from the appellant, I am satisfied that the searches conducted by the Ministry were reasonable.

ORDER:

1. I order the Ministry to disclose a copy of portions of pages 2 and 3 of the records to the appellant by sending the appellant a copy of the information by **December 5, 2008** but not before **November 28, 2008**. I have provided the Ministry with a severed copy of those pages of the records, indicating those portions which should be disclosed.

2. I uphold the Ministry's decision that the other responsive records qualify for exemption under section 49(b) of the *Act*.

3. I uphold the Ministry's search for responsive records, and find that it was reasonable.

4. In order to verify compliance with the terms of Order provision 1, I reserve the right to require the Ministry to provide me with a copy of the material which it discloses to the appellant.

Original signed by: October 31, 2008
Frank DeVries
Adjudicator