



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

ORDER PO-2854

Appeal PA08-296

Ministry of the Attorney General



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BACKGROUND:

According to the website of the Special Investigations Unit (SIU),

[The SIU] is a civilian agency that investigates cases of serious injuries (including allegations of sexual assault) and deaths involving the police. Pursuant to section 113 of the *Police Services Act*, the Director of the SIU is mandated to consider whether a criminal offence has been committed by an officer(s) in connection with the incident under investigation and, where warranted by the evidence, to cause a criminal charge or charges to be laid against the officer(s). The Director reports the results of investigations to the Attorney General.

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to a specific SIU investigation:

Please be advised that we have been retained by [a named individual] to represent his interests with respect to the death of his [son] in a motor vehicle accident, which occurred on [a specified date].

We understand from our client that this matter was being investigated by the [SIU] and that the investigation is now complete. We therefore request that you provide us with a copy of the Investigation Report. Enclosed is an Authorization and Direction from our client.

The Ministry identified three records as responsive to the request, and issued a decision granting partial access to two records. Access to portions of those two records (cover letters to the Attorney General and the Chief of the relevant police force), and the entire third record (the SIU Director's Report to the Attorney General), was denied pursuant to sections 14(2)(a) (law enforcement report) and 21(3)(b) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to this office, and a mediator was appointed to try to resolve the issues. During mediation, the appellant advised that he sought access to the full SIU Director's Report to assist him with the grieving process, which raised the possible application of section 21(4)(d) of the *Act*. This provision provides an exception to the presumed unjustified invasion of personal privacy in section 21(3)(b), as well as the other presumptions contained in section 21(3), for "compassionate reasons."

During discussions with this office, the Ministry indicated that section 21(4)(d) had been considered at the request stage, and had resulted in the partial disclosure of the two cover letters that accompanied the Report. However, the Ministry maintained its denial of access to the SIU Director's Report in its entirety. The appellant subsequently clarified that he did not wish to pursue access to the information withheld from the two letters. Consequently, those two records are no longer at issue and the sole record remaining at issue in this appeal is the 14-page Report.

No further resolution of the appeal through mediation was possible, and it was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry outlining the facts and issues to the Ministry, initially, seeking representations, which I received. I then sent a modified Notice of Inquiry, along with a complete set of the Ministry's representations, to the appellant's representative to seek representations on the issues, which I received.

As the appellant is represented by an agent in this appeal, all actions and positions taken with respect to this appeal by the appellant's representative are considered to have been taken by the appellant. In this order, I will simply refer to the representations and positions of "the appellant" in describing the circumstances of the appeal.

DISCUSSION:

LAW ENFORCEMENT

The Ministry claims that the discretionary exemption in section 14(2)(a) applies to the record. This provision states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law [see Order 200 and Order P-324].

With respect to the first part of the above three-part test, the word "report" is not defined in the *Act*. However, previous orders of this office have established that for the purpose of section 14(2)(a), the word "report" means "a formal statement or account of the results of the collation and consideration of information." The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

With respect to the second part of the test, in order for a record to qualify for exemption under this section, the matter to which the record relates must satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section states:

"law enforcement" means,

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

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

Representations

The Ministry explains that the SIU Director's Report is derived from the investigative brief, which is a compilation of the information gathered during the investigation into the incident, as well as the steps taken in the discharge of the SIU's investigative function under section 113 of the *PSA*. The Ministry states that:

The information includes all documentary material obtained by the SIU from third parties or generated by the SIU ... as well as records in the form of audio and video recordings. ... Based upon a review of the investigative brief and the information contained therein, the Director decided that criminal charges were not warranted in this case.

As in all SIU cases, the Director's Report in this case was prepared on the basis of the investigative brief. It constitutes a summary of the material information contained in the investigative brief together with the SIU Director's analysis of that information and ultimate decision in respect of whether a criminal charge or charges should be laid. The Director's Report is a confidential report that is sent exclusively to the Attorney General pursuant to the statutory reporting duty set out in section 113(8) of the *Police Services Act (PSA)*.

According to the Ministry, the Report therefore qualifies as "a formal statement or account of the results of the collation and consideration of information" for the purposes of section 14(2)(a).

The Ministry's representations set out the statutory scheme of SIU investigations provided for in section 113 of the *PSA*. The Ministry submits that this statutory regime, which includes the creation of investigative briefs and Director's reports, supports its position that the Director's Report in this appeal is a report "prepared in the course of law enforcement investigations by an

agency which has the function of enforcing and regulating compliance with the law, namely, the criminal law.” Accordingly, the Ministry submits that the SIU Director’s Report meets all three parts of the section 14(2)(a) test. Furthermore, the Ministry submits that it exercised its discretion properly in applying the exemption to deny access to the SIU Director’s Report.

The appellant acknowledges the role of the SIU as an independent oversight agency that investigates circumstances surrounding police actions which have resulted in the serious injury or death of a civilian. The appellant concedes that the record qualifies as a report prepared in the course of law enforcement by the SIU, which is a “civilian law enforcement agency.” The appellant argues, however, that the fact that no charges were laid against the subject officer in this case means that the record does not satisfy all three parts of the test for exemption under section 14(2)(a).

The appellant submits that the Ministry did not exercise its discretion properly in this case because the appellant does not have a complete picture of the circumstances surrounding his son’s death. The appellant provided an excerpt from a September 2008 report prepared by the Ontario Ombudsman’s Office regarding the SIU (*Oversight Unseen*): “What the Public Doesn’t Know”, which appears at paragraphs 302 – 319 of the report. The appellant specifically directed my attention to paragraph 313, which refers to the difficulty encountered by the public and media in obtaining SIU reports under the *Act* based on concerns about the potential for compromising the integrity of investigations or violating personal privacy. The Ombudsman notes that disclosure of SIU reports “might be justified on the basis of a compelling public interest,” but that Ministry officials have responded by asserting that confidentiality is essential to the process. In reference to public disclosure of the SIU reports, the Ombudsman observes that the SIU claims that “that mandatory disclosure would undermine its ability to discharge its investigative mandate.”

Analysis and Findings

Based on my review of the record, the representations provided by the parties, and the circumstances of this appeal, I find that the SIU Director’s Report is exempt under section 14(2)(a) of the *Act* for the following reasons.

Previous decisions of this office have addressed the application of section 14(2)(a) to records compiled by the SIU in the course of an investigation undertaken pursuant to section 113 of the *PSA* (Orders PO-1959, PO-2414 and PO-2524). In many of these appeals, there were a good deal more records at issue, such as officer’s notes, investigator’s notes, correspondence, audio or videotapes of police and witness interviews along with written synopses, and other documents that together reflected the entirety of the SIU’s investigation under section 113 of the *PSA*. In Order PO-1959, Adjudicator Sherry Liang reviewed the claim of the Ministry, based on Orders P-1315 and P-1418, that the entire SIU file should be construed to constitute a “report” for the purpose of section 14(2)(a). In rejecting this argument, Adjudicator Liang referred to Order PO-1819 in which a record-by-record approach to the review of the exemption claim was taken. Following the record by record approach, Adjudicator Liang found that only the SIU Director’s Report, the cover letter to that document and other investigative documents comprised “a formal statement of the results of the collation and consideration of information” for the purposes of the

exemption under section 14(2)(a). In Order PO-2524, Adjudicator Steven Faughnan addressed the same argument posited by the Ministry, again relying on Orders P-1315 and P-1418, in relation to the entire contents of an SIU investigative file. Adjudicator Faughnan affirmed the view of this office that the records at issue in such appeals should be looked at individually as to whether or not they qualified for exemption under section 14(2)(a) or other provisions of the *Act*.

Notably, in this appeal the only record remaining at issue is the actual SIU Director's Report. Respecting access to this record, the appellant referred me to the Ontario Ombudsman's report (*Oversight Unseen*) regarding transparency and public confidence in the SIU investigation and reporting process. In referring to the Ombudsman's report, the appellant appears to be advancing a public interest argument in support of his claim that the SIU Director's Report should be disclosed in the present appeal. The public interest override in section 23 of the *Act* was not specifically raised or argued in the circumstances of this appeal. Moreover, in my view, the appellant's interest in the record at issue in this appeal is essentially private in nature [Orders P-12, P-347 and P-1439]. Nonetheless, I think it would be helpful to address the basis of the appellant's arguments about SIU transparency.

For context, I reviewed the entire excerpt from *Oversight Unseen* provided by the appellant in his representations. At the beginning of this excerpt, the Ombudsman notes that "the *Police Services Act* is silent regarding public disclosure of the Director's reports" [paragraph 303]. Concerns about the transparency of investigations into "police shootings" of civilians led to a review of the issue by the Honourable George W. Adams in 1989 (Task Force on Race Relations and Policing), and a second report in 2003. The Ombudsman's review of the topic refers to steps taken since the Adams' reports were issued to address concerns about transparency. He describes the ongoing frustration of some affected parties who feel that the "nature of the information conveyed ... is the real issue" [paragraph 306].

Some complained they were provided with very limited information about the SIU's investigation and the Director's conclusions. However, we learned that it is not uncommon for SIU investigators to bring the Director's reports to meetings with affected individuals and to read them the entire report – editing out any names or information that they consider particularly sensitive. At times, even witness names have been disclosed [paragraph 307]. ...

It is clearly in the public interest, when the SIU investigates and decides not to charge officers involved in cases of serious injury or death, for the affected individuals and their loved ones to be provided with sufficient information to allow them to understand the reasoning behind the Director's decisions. ... I believe the solution ... is to follow Mr. Adams' original recommendation and make the reports completely public [paragraph 310].

In paragraph 318 of *Oversight Unseen*, the Ombudsman states that "if the Director of the SIU were to be expressly granted discretion to provide more open disclosure, the various interests at stake could be appropriately balanced." To that end, the Ombudsman recommended that the SIU "be legislatively required to publicly disclose Director's reports, in cases involving decisions not to charge... (Recommendation 39)". The Ombudsman also recommended that:

Until such time as there is a statutory provision requiring disclosure of Director's reports, the [SIU] should provide greater information to police officials, affected individuals and the public about the basis for decisions not to charge officers with criminal offences. (Recommendation 21)

There is no evidence before me that a statutory amendment of the sort advanced by the Ombudsman in Recommendation 39, which would require disclosure of SIU Director's Reports, has been passed by the Ontario legislature. Moreover, my obligation and authority under the *Act* is to review the Ministry's exemption claim under section 14(2)(a) respecting the SIU Director's Report based on the circumstances of the appeal, the evidence presented and consideration of the reasoning articulated in past orders of this office.

Turning to the facts of the present appeal, therefore, it is worth noting that the Ministry disclosed the cover letters to the SIU Director's Report to the appellant, nearly in their entirety. As I understand it, this was not always the practice of the Ministry. I accept that the SIU Director's Report represents the summary of the most germane information gathered in the course of the SIU investigation under section 113 of the *PSA*, as well as the SIU Director's analysis of that information and ultimate decision regarding whether criminal charges should be laid. Moreover, I find that the SIU Director's Report qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of the required "formal statement of the results of the collation and consideration of information" (Order PO-1959). Next, the appellant acknowledges, and I agree, that the record in this appeal qualifies as a report prepared in the course of law enforcement by the SIU, which is a "civilian law enforcement agency." Therefore, subject to my review of the Ministry's exercise of discretion below, the SIU Director's Report qualifies for exemption under section 14(2)(a) of the *Act*.

The Ministry had the discretion under section 14(2)(a) of the *Act* to disclose the SIU Director's Report even if it qualified for exemption. This is the essence of a discretionary exemption. On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the Ministry erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant considerations. In such a case, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations (section 54(2) of the *Act*). However, I may not substitute my own discretion for that of the Ministry.

In denying access to the SIU Director's Report, I am satisfied by the evidence that the Ministry exercised its discretion to deny access in a proper manner, taking into account relevant considerations and without taking into account irrelevant considerations. Accordingly, I uphold the Ministry's exercise of discretion, and I find that the record is exempt under section 14(2)(a).

ORDER:

I uphold the Ministry's decision to deny access to the record.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ December 14, 2009