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

ORDER PO-2873

Appeal PA08-261

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to … "any and all information and records of myself."

The Ministry located responsive records and issued a decision granting partial access to them. The Ministry denied access to the remainder of the information pursuant to section 49(a) (discretion to refuse requester's own information), with reference to the law enforcement exemption at sections 14(1)(a), 14(1)(c), 14(1)(e), 14(1)(g), 14(1)(l), 14(2)(a), and sections 15(a), 15(b) (intergovernmental relations), as well as section 49(b), with reference to the presumption in section 21(3)(b) and the factor favouring non-disclosure in section 21(2)(f) (personal privacy). The Ministry also advised that some information had been removed from the records as it is not responsive to the request.

The Ministry subsequently issued a second decision granting further partial access to the responsive records, and denying access to the remainder of the information on the basis of the exemptions set out above. The Ministry again advised that some information had been removed from the records as it is not responsive to the request.

The requester (now appellant) appealed the decision.

During mediation, the appellant informed the mediator that he believes that there should be more responsive records relating to "overt and covert" police operations from a particular Ontario Provincial Police (OPP) detachment. Subsequently, the Ministry conducted another search for records and later stated that it did not locate any additional responsive records. The appellant indicated that he still believes that there should be more records.

Also, during mediation, the Ministry contacted the Canada Border Services Agency and obtained its consent to release the portions of the records relating to its involvement with the appellant. The Ministry then disclosed select portions of pages 38, 55 and 56 to the appellant. The Ministry later issued another decision regarding these same records which disclosed additional portions of the records and denied other portions pursuant to the exemptions and reasons noted above.

The appellant informed the mediator that he still believes that more records should exist. He explained that on July 14, 2008, while attempting to cross the United States border to get back into Canada, he heard the customs officer speak to an OPP officer about him and heard this customs officer mention his medical status. He believes that the OPP officer provided the customs officer with information about his medical status and that this conversation must have been recorded in the OPP records.

The mediator relayed this information to the Ministry, however, after undertaking another search, the Ministry took the position that no further responsive records exist. The appellant continues to believe that additional records should exist. Reasonableness of search is therefore at issue in this appeal.

During mediation, the appellant advised that he is not pursuing access to pages 2-35, 38 and 56 of the records. Therefore, these pages are not at issue in this appeal.

The appellant confirmed that he continues to seek access to pages 1, 36, 37 and 39 to 55. The appellant also indicated however, that he does not wish to pursue access to the portions of these records which the Ministry deemed not responsive to his request or to any police codes that may be contained in these records. The remainder of the information within these records remains at issue.

Further mediation was not possible and this file was forwarded to the adjudication stage of the appeal process. I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal.

The Ministry submitted representations. In its representations, the Ministry notes that, after reviewing the Notice of Inquiry, a further search for responsive records was conducted and an additional 34 pages of records were located (pages 57 to 90). The Ministry issued a further decision on August 7, 2009, in which it granted partial access to the newly located records. The Ministry also indicated that certain information text such as computer generated text and administrative codes, as well as information relating to other police matters was withheld as it was not responsive to the appellant's request.

The Ministry granted full access to pages 59, 65, 68, 69, 86, 87, 88, 89 and 90. The Ministry withheld access to the remaining records and portions of the newly located records on the basis of sections 14(1)(c), (e), (l), 15(b), 21(2)(f), 21(3)(b), 49(a) and 49(b). I have included these newly located records as records at issue in this appeal.

In addition, the Ministry indicated, in its August 7, 2009 decision letter and in its representations, that it was raising the application of a new discretionary exemption (section 14(1)(d)) to the withheld information on page 1 of the previously located records). The Ministry also indicated that section 14(1)(e) should also apply to page 39 of the previously located records. The Ministry states that, as a result of administrative oversight, the exemption was not noted on this page. This raises the issue of whether the Ministry can raise a new discretionary exemption at this stage in the appeal process.

The Ministry also indicates in its representations that it is withdrawing its reliance on sections 14(1)(a), (g), 14(2)(a) and 15(a). Accordingly, I will not consider these exemptions further.

After reviewing the Ministry's submission, I sought representations from the appellant. I sent him a Notice of Inquiry, modified to reflect the above changes, along with the non-confidential portions of the Ministry's representations.

I asked the appellant to review the Ministry's representations on the issues raised in the Notice of Inquiry. In the Notice of Inquiry, I referred to the information that the Ministry had removed from the records as being non-responsive and noted that, in light of the appellant's earlier agreement to remove this type of information from the scope of the appeal, I assumed that he is

also not interested in pursuing this information in the newly located records. I indicated further that if this is not the case, the appellant should so indicate.

The appellant wrote to this office to advise that he did not intend to provide representations in this matter, other than to state that he is particularly interested in obtaining records relating to a conversation between an OPP officer and a customs officer at the US border on a particular date. He indicates further that he has "received no information about that – no denial and no reasons for denial," even though, as he states, the mediator confirmed that records exist regarding this conversation. I will address this issue below.

As the appellant did not address the non-responsive portions of the records, I will assume that he is not interested in pursuing this information and will not consider it further in this decision.

RECORDS:

The records remaining at issue in this appeal comprise the withheld portions of pages 1, 36, 37, 39 to 55, 57, 58, 60 to 64, 66, 67, 70 to 85. These records contain Occurrence Summaries and Reports, E-mails and Police Officer's Notes.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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 [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.

As I noted above, in his letter to this office following receipt of the Notice of Inquiry and the submissions of the Ministry on this issue, the appellant stated that he is particularly interested in obtaining records relating to a conversation between an OPP officer and a customs officer at the US border on a particular date. He indicates further that he has "received no information about that – no denial and no reasons for denial," even though, as he states, the mediator confirmed that records exist regarding this conversation.

The Ministry submitted an affidavit sworn by its Deputy Freedom of Information and Privacy Co-ordinator (Deputy FOIC) in which she outlines in considerable detail the steps taken to

search for records responsive to the appellant's request. The Deputy FOIC noted that the appellant's request was for "any and all information and records of myself." She describes the efforts made by the FOI Office to contact the appellant over a two-month period of time in order to clarify his request, and obtain information from him to enable the program analyst assigned to the task to conduct the necessary records search. The Deputy FOIC notes that during this time, the program analyst confirmed with the appellant that she would conduct searches for records from two identified OPP Detachments. She also confirmed with him that she would search for "all records of any kind involving the appellant and to extend the records search activities to the OPP Professional Standards Bureau."

The Deputy FOIC indicates that searches for responsive records were conducted at the request stage, and at the mediation and adjudication stages of the appeal. The following sets out the steps taken at each stage as described by the Deputy FOIC:

- At the request stage, searches were conducted in the following offices: OPP Eastern Region – Central Hastings OPP Detachment; OPP Central Region – Northumberland OPP Detachment (Campbellford Site); OPP Professional Standards Bureau; and OPP Behavioural Sciences and Analysis Section/OPP Security Bureau.

- The searches were all conducted by knowledgeable staff in each respective office. Searches at the two OPP detachments were initially conducted using the "Niche RMS", which is the records management system in use by the OPP to record information relating to incidents investigated by the OPP. The purpose of this step in the search process was to identify any incidents involving the appellant and to facilitate a review of any electronic and/or hard copy records identified by the search.

- The search in the OPP' Central Region failed to reveal the existence of any occurrences involving the appellant. The search of the OPP Eastern Region produced a number of responsive reports and related documents (pages 1 – 3, 19 – 29 and 36). The search in the OPP Eastern Region was "expanded to include OPP officers' note book entries and all documents of any type pertaining to the appellant." This included a search of the notebook entries of 10 OPP officers, which produced a number of additional pages of records (pages 6 – 18, 30 – 35, 42 – 56).

- This expanded search also produced five additional responsive pages of records (pages 37 – 41).

- In addition, two other officers were contacted and advised that they had made no note book entries regarding the appellant.

- A search was conducted at the Professional Standards Bureau using its case management system for any records concerning the appellant. Three documents were located, which were determined to be duplicates of pages 22 – 24 of the records located at the OPP Eastern Region detachment. No other records were located.

- One of the OPP officers identified in the records had changed offices twice, and a search was conducted of these two offices. In addition, the officer reviewed his note books and located entries related to the appellant (pages 4 and 5). No other responsive records were located.

- During mediation of the appeal, an additional search of the OPP Central Region was conducted. No additional records were located.

- Following receipt of the Notice of Inquiry, additional searches were conducted in all of the offices previously searched, as well as in the OPP investigation and Support Bureau – Child Sexual Exploitation Section (CSES).

- In the OPP Central Region, an officer who had been referenced in the records previously located was contacted and asked to review his note books. He produced two pages of records (pages 57 and 58). No other records were located in this detachment.

- In the OPP Eastern Region, two officers who were referred to in the records previously located were contacted and asked to review their note books. Neither officer located additional records pertaining to the appellant. However, one officer identified records that had been sent to another police service. These records were obtained from the other police service and included as records responsive to the request (pages 59 – 84). No other records were located.

- Additional requests were made to the OPP Professional Standards Bureau to search for responsive records. This office confirmed that it only had one file pertaining to the appellant, which had been forwarded to the Central Hastings OPP Detachment. An officer in this branch was also contacted and he indicated that the only note he made regarding the appellant was contained on the cover of the case file folder. The case folder cover was photocopied and provided to the FOIC (page 87). In addition, the duplicate copies of pages 22 – 24 referred to above were provided to the FOIC (pages 88 – 90). No other records were located.

- A review of the records previously located led the Ministry to make inquiries in the OPP Investigation and Support Bureau – CSES. This office confirmed that it had received a request for assistance from a named police service, but that an OPP occurrence number was not generated in that case. Nevertheless, this office conducted a search through its records and located a reference to the appellant in its Investigative Case Tracking ledger only (pages 85 – 86). No additional records were located.

Based on the submissions provided by the Ministry, I find that experienced Ministry staff searched in locations at which responsive records could reasonably be expected to be located. Moreover, I have reviewed the records that were provided to this office. I note that some of these records do contain information of the nature sought by the appellant. In fact, some of the information in these pages of records has been disclosed to the appellant, namely, portions of pages 38, 55 and 56. The Ministry has withheld the remaining information on the basis of the exemptions noted above.

Accordingly, based on the evidence before me, I am satisfied that the search undertaken to locate responsive records was reasonable in the circumstances.

PERSONAL INFORMATION

General principles

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 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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

Finally, 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 submits that the records at issue contain the types of information described in the definition of personal information referred to above.

Based on my review of the records at issue, I find that they all contain the appellant's personal information as they relate to various matters pertaining to him. In addition, a number of the records also contain the personal information of other identifiable individuals. The personal information of individuals other than the appellant is contained in pages 39, 52, 54, 58, 61-64, 67, 70-84

Although the Ministry claims that page 1 contains the personal information of individuals other than the appellant, I find that the information is about an organization, rather than about an individual, and therefore, does not qualify as personal information. Similarly, the Ministry claims that the information on pages 60 and 66 is personal information. After reviewing the information on page 60 and comparing it with the information on the other pages associated with it, in particular, the information contained on page 66, I conclude that the references on pages 60 and 66 relate to an individual in her professional capacity and therefore do not qualify as personal information.

Moreover, I note that the Ministry did not identify the information in pages 39, 54 and 58 as personal information. Although pages 39, 54 and 58 do not refer to an individual by name, the

information in them is sufficiently detailed that the individual may be identified if the information is disclosed. Accordingly, I find that pages 39, 54 and 58 also contain the personal information of an individual other than the appellant.

In summary, pages 39, 52, 54, 58, 61-64, 67, 70-84 and 85 contain the personal information of individuals other than the appellant. Pages 1, 36, 37, 40-51, 53, 55, 57, 60 and 66 contain only the personal information of the appellant.

PERSONAL PRIVACY

The Ministry claims that disclosure of the personal information of individuals other than the appellant in pages 1, 52, 60-64, 66-67 and 70-85 would constitute an unjustified invasion of the personal privacy of these individuals. As I have found that pages 1, 60 and 66 do not contain the personal information of individuals other than the appellant, the personal privacy exemption in section 49(b) is not applicable to these pages.

Moreover, because I have found that pages 39, 54 and 58 do contain the personal information of other individuals, I will consider the application of section 49(b) to these pages.

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 exceptions to this general right of access. Section 49(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the records identified above contain the personal information of the appellant and other identifiable individuals.

Under section 49(b) of the *Act*, 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 may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining 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 head to consider in making a determination as to 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(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 Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the exemption. (See Order PO-1764)

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

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 49(b).

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.

In this case, the Ministry has decided to deny access to portions of the records on the basis that they are exempt under section 49(b), in conjunction with the factor at section 21(2)(f) and the presumption at section 21(3)(b). These two sections state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

The Ministry submits:

> [T]he personal information contained in the records at issue consists of highly sensitive personal information that was compiled and is identifiable as part of police investigations into possible violations of law…

> The Ministry submits that the content of the records at issue is supportive of its position in this regard.

The Ministry submits further that the personal information of the appellant and the other involved individuals in the records is interconnected and that release of the withheld personal information to the appellant would disclose the identities of the other individuals.

As I noted above, the records consist of occurrence reports and police officers' notes and pertain to various incidents investigated by the OPP in which the appellant was involved. Based on my review of the records, I find that all of the personal information contained in them was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the presumption in section 21(3)(b) applies to this information. The Ministry has severed the records so that information pertaining only to the appellant has been disclosed to him. The remaining personal information is intertwined and cannot be severed without disclosing the personal information of individuals other than the appellant.

Absurd Result

I note that the personal information on pages 67, 70-84 and 85 was provided to the OPP by the appellant in support of a complaint that he made. Given that the personal information in these pages is not only clearly known to him, but was provided by him, the question arises whether withholding this information would result in an absurdity.

Previous orders of this office have found that 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), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444 and M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414 and MO-2266]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1676, PO-1679, MO-1755 and MO-2257-I]

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 within the requester's knowledge [Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642].

The Ministry takes the position that the absurd result principal does not apply in the circumstances of this appeal, but does not explain why it has taken this position. In arriving at

my decision, I have taken into account the Ministry's concerns regarding the sensitivity of personal information compiled in the law enforcement context (as noted above), as well as the particular circumstances of this case, as they are apparent from a review of some of the records at issue.

In my view, the mere fact that the personal information was provided to the OPP in a law enforcement context (in this case, to support the appellant's complaint) is not, in itself, sufficient to cause that information to fall outside of the absurd result principle. It is apparent, from the Ministry's representations and some of the records at issue, that much of the information at issue in this appeal should not be disclosed to the appellant. However, in the context in which the personal information at issue in pages 67, 70-84 and 85 was provided to the OPP by the appellant and based on the nature of the information itself, I am not persuaded that the Ministry's concerns about disclosure of this particular information have merit.

The personal information in pages 67, 70-84 and 85 is clearly known by the appellant; he provided it to the OPP in circumstances where he claimed to be the victim of harassment. In the circumstances, I find that it would be absurd to withhold this information from him. Accordingly, I find that disclosure of the personal information on pages 67, 70-84 and 85 would not constitute an unjustified invasion of personal privacy. As no other exemptions have been claimed for this information, I will order that it be disclosed to the appellant.

I find that the presumption in section 21(3)(b) applies to the remaining personal information in pages 39, 52, 54, 58 and 61-64. Subject to my findings under the exercise of discretion, these pages qualify for exemption under section 49(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Introduction

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.

Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, **14**, 14.1, 14.2, **15**, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

In this case, the Ministry relies on section 49(a) in conjunction with sections 14 and 15. I will begin with section 14.

LAW ENFORCEMENT

The Ministry submits that the withheld information in pages 1, 36, 37, 39-55, 57 and 58 is exempt under sections 14(1)(c), (d), (e) and/or (l) of the *Act*. I note that the Ministry has withheld portions of pages 1, 36 and 55 and has withheld the remaining pages in their entirety. I have found that the personal information on pages 39, 52, 54 and 58 qualifies for exemption under section 49(b). I will only review the remaining portions of these pages under section 14(1).

General principles

Sections 14(1)(c), (d), (e) and (l) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (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;
>
> (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, or

(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.)].

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*].

Section 14(1)(e)

I turn first to the Ministry's submission that the records are exempt under section 14(1)(e). The Ministry claims that all of the records in this discussion, except pages 1, 51 and 52 are exempt under section 14(1)(e). I note that the Ministry raised this exemption with respect to page 39 in its representations, well after the time for the raising of new discretionary exemptions. The appellant was given an opportunity to address this issue, but chose not to make representations.

The Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act (the Code) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11.01 of the Code (New Discretionary Exemption Claims) specifies that an institution has a 35-day window to raise new discretionary exemptions and that an Adjudicator may decide not to consider a new discretionary exemption that is raised after that time. In deciding whether or not to permit the Ministry to raise a discretionary exemption late in the process, I will consider its reasons for doing so and any harms to either party in agreeing or refusing to permit the late raising.

After reviewing the information that the Ministry seeks to withhold in this appeal, I find that the information contained on page 39 is similar to that contained in the other records. I find further

that the appellant will not be at a disadvantage as a result of the late raising of section 14(1)(e) for one additional record. I accept the Ministry's explanation that due to an oversight it did not identify the exemption on this page. In the circumstances, I will permit the Ministry to raise this exemption for page 39 late in the process.

In determining the application of section 14(1)(e), I note that a person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003]. Moreover, the term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

In its submissions, the Ministry quotes from the Court in *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.) (noted above) as follows:

> The expectation of harm must be reasonable, but it need not be probably. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety…It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.

The Ministry submits that, in the circumstances of this appeal, disclosure of the information it has withheld under section 14(1)(e) could reasonably be expected to endanger the life and physical safety of individuals. In support of this claim, the Ministry attached to its representations an affidavit sworn by an individual with knowledge of this issue. Due to the confidential nature of the information contained in the affidavit, I am unable to describe it further. However, I find that the affidavit, when viewed with the information contained in the records at issue, supports a conclusion that the Ministry has provided a reasonable basis for believing that disclosing these records and portions of records could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

As I indicated above, the Ministry has not claimed the discretionary exemption in section 14(1)(e) for the information contained in pages 51 and 52, although this information is virtually identical to the other information for which the exemption has been claimed. Pages 51 and 52 comprise one officer's notes and are very difficult to read, but with some effort it is possible to discern the content. It is apparent that the Ministry has exhibited a clear intention to withhold the information that is contained in these pages. Despite the Ministry's failure to claim section 14(1)(e) for these two pages, I find that it would be inconsistent with the findings in this order to disclose them.

Accordingly, I find that pages 36, 37, 39-55, 57 and 58 qualify for exemption under section 14(1)(e) of the *Act*.

Section 14(1)(d)

As I noted above, in its representations, the Ministry raised, for the first time, the application of section 14(1)(d) for page 1. Again I must determine whether the Ministry's late raising of a new discretionary exemption should be permitted, and my discussion of the late-raising issue under section 14(1)(e) (above) is similarly applicable.

In this case, the Ministry explains that it decided to notify an affected party after the Notice of Inquiry was received. After receiving the affected party's views regarding disclosure of the information at issue, the Ministry decided to raise section 14(1)(d). As I indicated above, the appellant was provided with an opportunity to address the late raising of this new exemption claim, but chose not to.

The Ministry had only claimed the personal privacy exemptions for this page, initially. I found above that the information at issue on this page does not qualify as personal information, as it was clearly information about an organization. Given the Ministry's stated concerns about disclosure of the records at issue in this appeal, I find it reasonable that the Ministry would seek to obtain the views of the affected party even at this late stage in the appeal process. In the circumstances, I accept the Ministry's explanation for the late raising of this discretionary exemption for page 1 of the records.

Although it is not in the appellant's interest to be advised of new discretionary exemptions at the representations stage, I find that he is not disadvantaged, nor will he suffer prejudice, as he was notified of the additional exemption prior to making his representations and was thus given an opportunity to address it. In balancing the appellant's interests against the interests of the affected party and the interests in having this issue adjudicated, I find that the latter interests outweigh those of the appellant in the circumstances of this appeal. Therefore, I will consider whether section 14(1)(d) applies to withhold portions of page 1 from disclosure.

In order to invoke the protection of section 14(1)(d), the Ministry 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].

The Ministry notes that page 1 is an occurrence summary relating to a "Traffic Complaint". The Ministry indicates that, as a result of this incident, "a standard traffic complaint form letter was sent to the appellant." As I indicated above, only portions of this page have been withheld from the appellant. The Ministry's confidential representations discuss the results of their notification of the affected party, which in my view, supports the Ministry's decision to claim section 14(1)(d) for the information that it withheld from this page. Accordingly, I find that the withheld portions of page 1 qualify for exemption under section 14(1)(d).

EXERCISE OF DISCRETION

General principles

The section 14, 49(a) and 49(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

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 states that it is mindful of the purposes and objects of the *Act* and stresses that it considers each request for information on a case-by-case basis. The Ministry notes that as a result of its initial access decision and three supplemental decision letters, it has released a substantial number of responsive records to the appellant.

The Ministry indicates that it considered whether the exempted information could be released to the appellant, but decided that, given the sensitive nature of the matters reflected in the records, significant law enforcement harms would result. The Ministry states further that it undertook a review of the exempted records to determine whether the severing of any additional non-exempt information could be done, but concluded that additional severing was not feasible.

In the end, the Ministry indicates that it concluded in its exercise of discretion that disclosure of the records at issue in this appeal was not appropriate. The Ministry submits that it properly exercised its discretion in refusing to disclose the records at issue.

Based on my review of the records at issue, the Ministry's representations specifically relating to its exercise of discretion and generally, and the circumstances of this particular appeal, I find that the Ministry properly exercised its discretion not to disclose the records that I have found to qualify for exemption under sections 49(b) and 49(a), in conjunction with sections 14(1)(d) and (e).

Accordingly, I find that with the exception of pages 67, 70-84 and 85, the remaining records are exempt under section 49(a) and 49(b) of the *Act*.

Because of the decisions I have made in this order, it is not necessary for me to consider the other exemptions claimed by the Ministry.

SUMMARY

The following summarizes the decisions that I have made in this order:

- Pages 39, 52, 54, 58, 61-64, 67, 70-84 and 85 contain the personal information of individuals other than the appellant. Pages 1, 36, 37, 40-51, 53, 55, 57, 60 and 66 contain only the personal information of the appellant.

- Disclosure of the personal information on pages 67, 70-84 and 85 would not constitute an unjustified invasion of personal privacy. As no other exemptions have been claimed for this information, I will order that it be disclosed to the appellant.

- The presumption in section 21(3)(b) applies to the remaining personal information in pages 39, 52, 54, 58 and 61-64.

- Pages 36, 37, 39-55, 57 and 58 qualify for exemption under section 14(1)(e) of the *Act*, and the withheld portions of page 1 qualify for exemption under section 14(1)(d).

- The Ministry properly exercised its discretion under sections 49(b) and 49(a), in conjunction with sections 14(1)(d) and (e).

- The Ministry's search for responsive records was reasonable.

ORDER:

1. I order the Ministry to disclose the withheld portions of pages 67, 70-84 and 85 to the appellant, by providing him with a copy of these pages on or before **March 12, 2010**.

2. I uphold the Ministry's decision to withhold the remaining records and parts of records.

3. The Ministry's search for records was reasonable and this part of the appeal is dismissed.

4. To verify compliance with this order, I reserve the right to require the Ministry to send me a copy of the records disclosed pursuant to order provision 1.

Original signed by: February 19, 2010
Laurel Cropley
Adjudicator