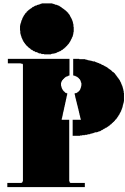

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2938

Appeal PA09-74

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 two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> 1. All of my personal information under the care and/or control of the Ministry including but not limited to the information held by the Deputy Minister, the Minister and/or the Private Investigators and Security Guard Branch.
>
> 2. I am also requesting access to any information on the "protocol" for the agency's licensing of individual private investigators in 1988. I am specifically looking for the agency's obligations relating to background checks.

In its initial decision, the Ministry granted partial access to the records responsive to the first request, denying access to some of the responsive information pursuant to the exemptions in sections 49(a) (refusal to provide access to requester's own information), in conjunction with sections 13(1) (advice or recommendations), 14(1)(c) (law enforcement), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), 15(b) (relations with other governments), 17(1) (third party information), and 19 (solicitor-client privilege), as well as section 49(b) (invasion of privacy). The Ministry also relied upon the exclusionary provision found in section 65(6) of the *Act* with respect to some of the responsive information and advised the requester that access to some of the information contained in the records was denied as it was not responsive to the request.

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

During mediation, the Ministry provided the appellant with an Index of Records and contacted several individuals whose rights may be affected by the disclosure of the information in the records (the affected parties) seeking their consent to the release of their personal information to the appellant. Following these communications, the Ministry provided the appellant with a supplementary decision which provided some additional access to the following records:

- Records 5, 6, 7, 21, 108, 109, 110, 116, 147 and 202.

The appellant expressed concerns about the adequacy of the decision letters provided to her by the Ministry as she believed the index of records should be more descriptive of the records, particularly where the Ministry described the records as "e-mails" and /or "correspondence". Accordingly, the appellant disputes the adequacy of the decision letter with respect to the following records:

- Records 6-10, 56-58, 72-75, 82,83, 87-93, 97-101, 133-138, 147, 148-153, 155, 166-193, 210-317, 321-323, 324, 327-329, 330, 333 and 336-477.

As well, the appellant advised that she disputes the Ministry's application of the exemptions claimed for the following pages:

- Records 6-10, 68 -71, 166, 144-147, 156, 166-193, 324, 327-329, 333 and 336-477.

In addition, the appellant indicated that she is not seeking access to the information in the records that is not responsive to the request; nor is she seeking access to Records 109-113, as they are duplicates of Records 6-10.

Finally, as a result of the mediation process, the appellant agreed that the second part of the request set forth above would form the basis for a new request. Accordingly, this aspect of the request is no longer at issue in this appeal.

I began the inquiry by providing the Ministry with a Notice of Inquiry setting out the facts and issues in the appeal and seeking its representations. The Ministry provided me with representations in response, a complete copy of which was shared with the appellant, along with a Notice of Inquiry. In its submissions, the Ministry withdrew its reliance on the mandatory third party information exemption in section 17(1). I have reviewed the records and agree with the Ministry that this mandatory exemption has no application to the present appeal. I also received representations from the appellant, which were then shared with the Ministry. I also sought and received further representations by way of reply from the Ministry.

RECORDS:

The appellant disputes the adequacy of the decision letter issued for the following:

- Records 6-10, 56-58. 72-75, 82,83, 87-93, 97-101, 133-138, 147, 148-153, 155, 166-193, 210-317, 321-323, 324, 327-329. 330, 333, 336-477;

and disputes the application of the exemptions claimed for the following:

- Records 6-10, 68 -71, 166, 144-147, 156, 166-193, 324, 327-329, 333, 336-477.

DISCUSSION:

ADEQUACY OF THE DECISION LETTER

The appellant takes the position that the Ministry's decision letter of February 18, 2009 was inadequate as it did not identify "what information and/or the type of information was being withheld; and obviously did not connect the information it refused access to, any specific provision, or reason." She goes on to argue that the Index of Records provided to her following the conclusion of mediation was also inadequate as it fails to "describe the type of information" contained in each of the records listed. As an example, the appellant cites some 200 pages of emails described simply as "emails", rather than including the date they were written and the author and recipient of each.

The obligations of institutions with respect to the provision of decision letters to requesters are set out in section 29(1)(b), which provides as follows:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In order to assist institutions in preparing a decision letter that meets the legislative requirements of the *Act*, the Commissioner's office issued a revised *IPC Practices* publication in September 1998, entitled "Drafting a Letter Refusing Access to a Record." This document, which was sent to all provincial and municipal institutions, sets out the components of a proper decision letter.

The Ministry argues that its decision letter complies with its long-standing format which cites the specific exemption claimed and that by reproducing the exemption in the decision letter, the appellant was apprised of the reason for its application to the records. It goes on to submit that the index provided to the appellant further elucidated the content of the records. Finally, it suggests that further disclosure of information about the records would reveal their substance and that "[T]his would defeat the purpose of not releasing records in accordance with this Act."

In Order PO-2913, adjudicator Laurel Cropley explained the purpose and requirements of a proper decision letter:

> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with **reasons** for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the *Act*. It does not provide an explanation of why the exemptions claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the *Act* under which access is refused.

On review of the Ministry's initial decision letter, I note that the Ministry simply reiterated the language of the legislation regarding the exemptions claimed for the withheld portions of the

records. With respect to the Ministry's assertion that section 65(6) applies to portions, it set out a very brief explanation for its decision to claim the exclusion. In my view, the Ministry's decision falls short of the requirements for an adequate decision letter as set out in previous decisions of this office, as well as the *IPC Practices*.

The question remains, having found the decision letter to be inadequate, what remedy is appropriate in the circumstances? In Order PO-2913, adjudicator Cropley concluded that, despite the inadequacy of the institution's decision letter, there remained no further action to take. She stated:

> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Similarly, in the current appeal, the appellant has asserted her right to appeal the decision of the Ministry, extensive mediation ensued and the issues on appeal modified. The records at issue have been clearly identified. The appellant has made extensive representations on both the records and the issues, which I will refer to in this order. In the circumstances, I find that no useful purpose would be served in dealing with this issue further, beyond identifying the inadequacy of the Ministry's decision.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The Ministry argues Records 166-193 and 336-477 fall outside the scope of the *Act* as a result of the operation of the exclusionary provisions in paragraph 3 of section 65(6). In addition, it submits that the exclusionary provision in paragraph 1 of that section also applies to those parts of pages 166-193 and 336-477 "that relate to the PSB [the Professional Standards Bureau of the Ontario Provincial Police] investigation." The Ministry does not elucidate further on exactly which pages it is referring to, nor does it describe what the "PSB investigation" relates to, other than to state that it arises from "complaints against a member of the OPP police officer [sic] to the Ombudsman and the PSB." The exclusionary provisions in paragraphs 1 and 3 of section 65(6) state:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution

between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Section 65(6)1: court or tribunal proceedings

Introduction

For section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Part 1 of the test

The Ministry submits that "the records", which it does not specifically identify, were "prepared and used by Ministry staff in the execution of their duties, and specifically for the purpose of discussing the complaints, and how to respond to them."

I have reviewed all of the records which the Ministry claims to be excluded under paragraph 1 of section 65(6). I agree that they were "prepared and used by Ministry staff", thereby satisfying the first part of the test.

Part 2 of the test

The Ministry goes on to submit that an internal disciplinary hearing under the *Police Services Act* could have been held if the complaint against the OPP officer had been upheld. That internal decision could have then been reviewed by the Ontario Civilian Commission on Police Services (OCCPS), now known as the Ontario Civilian Police Commission. No such proceeding was initiated in this case, however, and the records at issue do not reflect any such action by either the OPP or OCCPS.

I note that the records, including those already disclosed to the appellant, indicate that an investigation of the appellant's complaint to the Private Security and Investigative Services Branch (PSISB) about the conduct of the seconded OPP officer by the OPP's Professional Standards Bureau was begun in January 2007. This complaint arose from an investigation undertaken by an OPP officer who had been seconded to the PSISB into allegations by the appellant of improper conduct by a private investigator. The appellant alleged that the investigation had not been sufficiently thorough.

Based on my thorough review of all of the records identified as responsive to this request, including those which were disclosed to the appellant, several things become apparent:

- The vast majority of the records remaining at issue relate only to the Ministry's reaction to the investigation being undertaken by the office of the Ombudsman at the instance of the appellant;
- The Ombudsman investigation was focused on the manner in which the appellant's complaints had been handled by the PSISB and did not examine in any way the conduct of the seconded OPP officer who conducted the original PSISB investigation. Rather, this issue was being scrutinized by the OPP Professional Standards Bureau at the same time;
- The records also contain brief references to the existence of the OPP Professional Standards Bureau investigation into the actions of the OPP officer who conducted the PSISB investigation into the appellant's allegations of wrongdoing brought against a private investigator;

- The Ombudsman's investigation was concluded in April 2007 with a letter from its legal counsel outlining the steps to be taken by the PSISB respecting communications with complainants generally;
- The Ombudsman's recommendations did not address in any way the conduct of the OPP officer who had conducted the PSISB investigation because this was the subject of the Professional Standards Bureau investigation; and
- The Professional Standards Bureau investigation was also completed in 2007.

In my view, the preparation and use of the records at issue by the Ministry was not in relation to the Professional Standards Bureau proceeding. Rather, it was focused on the investigation undertaken by the Ombudsman's office into certain systemic problems inherent in the PSISB investigation process as opposed to anything relating to the appellant's specific complaint. Therefore, I find that the preparation and use of the records was about a matter unrelated to any anticipated proceedings before a tribunal, such as the OPP's Professional Standards Bureau.

As all three parts of the test under paragraph 1 of section 65(6) must be satisfied, I find that this exclusion has no application to the records at issue in this appeal.

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

I found above that the records were prepared and used by the Ministry, thereby satisfying the first part of the test under paragraph 3 of section 65(6).

Part 2: meetings, consultations, discussions or communications

I also find that the records were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications within the Ministry, thereby satisfying the second part of the test under paragraph 3 of section 65(6).

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above].

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above].

The records collected, prepared maintained or used by the Ministry … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

Based on my review of the contents of the records, I conclude that the subject matter of the meetings, consultations, discussions or communications that are documented are not about labour relations or employment-related matters in which the institution has an interest. While the records relate to the Ministry's actions and reactions to an investigation undertaken by the office of the Ombudsman, the subject matter of that investigation was not a labour relations or

employment-related matter. As I found above in my discussion of paragraph 1 of section 65(6), the Ministry "was focused on the investigation undertaken by the Ombudsman's office into certain systemic problems inherent in the PSISB investigation process as opposed to anything relating to the appellant's specific complaint." Similarly, I find that the information contained in the records represents the Ministry's internal discussion about how to react and manage the investigation then underway by the Ombudsman's office, as opposed to information about labour relations or employment-related matters.

For this reason, I find that the Ministry has failed to establish the application of paragraph 3 of section 65(6) to the records and I will now determine whether they ought to be disclosed or are subject to the various exemptions claimed for them.

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 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].

Section 2(3) also relates to the definition of personal information. This section states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

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 and 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 and MO-2344].

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 takes the position that Records 6-10, 68-71, 144-146, 147, 148-153 and 156 contain information that qualifies as the personal information of identifiable individuals other than the appellant. It submits that this personal information includes their birthdates (paragraph (a)), employment history (paragraph (b)), address and telephone number (paragraph (d)) and their views and opinions (paragraph (e)). The Ministry also acknowledges that the records contain the personal information of the appellant.

The appellant argues that in order for the records to be responsive to her request, they must contain her own personal information. The appellant goes on to submit that she personally provided the Ministry with certain personal information relating to another identifiable individual, who she refers to by name. She argues that any other information relating to other identifiable individuals was provided only in their professional, official or business capacity and does not, accordingly, qualify as the personal information of these individuals.

Analysis and findings

I have carefully reviewed all of the remaining records, and portions of records, at issue in this appeal in order to determine whether they contain "personal information" as that term has been defined in section 2(1). I make the following findings with respect to the records:

- Record 6-10 contains the personal information of the appellant and several other individuals identified in the record who provided character references on the appellant's behalf. The personal information includes the views and opinions of these individuals about the appellant, as contemplated by paragraph (g) of the definition. Record 6-10 also includes information that qualifies as the personal information of the individuals who provided the references, and other identifiable individuals, under paragraph (h) of the definition.

- Record 68 and the first ten paragraphs of Record 69 contain the personal information of the appellant and other identifiable individuals under paragraph (h) of the definition of that term in section 2(1). This information was provided to the investigator by the appellant and is, accordingly, known to her.

- The final two paragraphs of Record 69 and all of the undisclosed portions of Records 70 and 71 consist of the personal information of two identifiable individuals other than the appellant, as well as that of the appellant, under paragraph (h) of the definition.

- Records 144 and 145 also contain the personal information of the appellant and three other identifiable individuals under paragraph (h) of the definition. All of the information in these records was supplied to the investigator by the appellant and is, therefore, known to her.

- Records 146 and 147 contain the personal information of the appellant and two other identifiable individuals, consisting of their dates of birth, sex, addresses and telephone numbers, as contemplated by paragraphs (a) and (d) of the definition.

- The undisclosed portion of Record 156 is a reference to the personal opinion or view of an identifiable individual other than the appellant within the meaning of paragraph (e) of the definition. Because that reference is contained in a summary that relates to the appellant's complaint, however, I find that it also qualifies as her personal information under paragraph (h) of the definition.

- Records 166–193 pertain to internal Ministry communications relating to the appellant's complaint to the office of the Ombudsman. I find that because they pertain to that complaint, they contain information that qualifies as the

"personal information" of the appellant, but that they do not contain the personal information of any other identifiable individuals.

- Records 324, 327-330 and 333 represent internal Ministry emails relating to the appellant's complaint to the Deputy Minister in 2007. Based on my review, I conclude that they contain only the personal information of the appellant, but not any other identifiable individuals.

- Records 336 to 477 are email communications between legal counsel and other staff with the Ministry relating to the appellant's various complaints and requests for action. I find that because these records relate to matters initiated by the appellant, they contain information that qualifies as her personal information under paragraph (h) of the definition set out above in section 2(1). There are also references to the personal information of Ministry staff, including their availability for meetings, vacation plans and telephone numbers. I find that this information qualifies as the personal information of these individuals within the definition of that term in section 2(1).

By way of summary, I find that the majority of the records contain the appellant's personal information and that a significant minority also contain information that qualifies as the personal information of other identifiable individuals, as contemplated by the definition of that term in section 2(1).

INVASION OF PRIVACY

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

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

I have found above that Records 6-10 contains the personal information of the appellant and a number of other identifiable individuals. With respect to the personal information that relates only to the appellant, no unjustified invasion of personal privacy would result from the disclosure of this information to her, and it is not exempt under section 49(b). As no other exemptions have been claimed for them, and no mandatory exemptions apply, I will order that these portions of Records 6-10 be disclosed to the appellant. However, I find that the disclosure of the personal information of other identifiable individuals that is contained in Record 6-10 would constitute a presumed unjustified invasion of the personal privacy of these individuals under section 21(3)(g), which states:

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

> consists of personal recommendations or evaluations, character references or personnel evaluations;

I have provided a highlighted copy of Record 6-10 to the Ministry's Freedom of Information Co-ordinator with a copy of this order indicating those portions or Record 6-10 which are exempt from disclosure under section 49(b) and which are **not** to be disclosed.

In addition, I find that section 49(b) cannot apply to Records 166 to 193, 324, 327 to 330 and 333 because they contain only the appellant's personal information. I will address the application of the other exemptions claimed for these records below.

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. Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

In the circumstances, it appears that the presumption at paragraph (b) could apply to the personal information in Records 68-71, 144-145, 146, 147 and 156 because these records were compiled and are identifiable as part of an investigation into a possible violation of law. This investigation was undertaken by a member of the Ontario Provincial Police and could have resulted in charges being laid under the *Private Investigators and Security Guards Act*, which has been repealed and replaced by the *Private Security and Investigative Services Act,* The investigation was undertaken as a result of complaints received by the Private Security and Investigative Services Branch of the Ministry from the appellant about the conduct of a private investigation firm.

21(3)(b): investigation into violation of law

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 [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086, PO-1819 and PO-2019].

The presumption can apply to a variety of investigations, including those relating to by-law enforcement [Order MO-2147] and violations of the Ontario Human Rights Code [Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638].

I find that the presumption in section 21(3)(b) applied to the personal information contained in Records 68-71, 144-145, 146, 147 and 156 because these records were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the disclosure of the personal information in these records is presumed to constitute an unjustified invasion of another individual's personal privacy and they are exempt from disclosure under section 49(b).

Absurd result

I note that the undisclosed personal information in Record 68, paragraphs 1, 2, 3, 5, 6 and 7 of Record 69 and Records 144-145 was supplied to the investigator by the appellant herself.

In situations where the requester originally supplied the personal 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]

In the present case, based on a reading of the records themselves, it is evident that the appellant was the source of the personal information described in Record 68, paragraphs 1, 2, 3, 5, 6 and 7 of Record 69 and Records 144-145. Accordingly, I am of the view that to deny the appellant access to this information would give rise to an absurd result. I conclude that this information is not exempt from disclosure under section 49(b). As no other exemptions have been claimed and no mandatory exemptions apply to Record 144-145, I will order that it be disclosed to the appellant. I will address the application of section 49(a), taken in conjunction with section 14(2)(a), to Record 68 and paragraphs 4 and 8-12 of Record 69 below.

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that Records 166-193, 324, 327-330, 333 and 336-477 are exempt from disclosure under section 49(a), taken in conjunction with section 19 of the *Act,* which states as follows:

A head may refuse to disclose a record,

> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations of the parties

The Ministry submits that Records 166-193, 324, 327-330 and 333 are exempt under the solicitor-client communication privilege aspect of section 19. It argues that these records, which consist of emails passing between Ministry counsel and staff represent confidential communications about legal matters relating directly to the seeking or giving of legal advice between a solicitor and his or her client.

With respect to Records 336-477, the Ministry argues that these email communications "reveal the involvement of legal counsel in the various complaints made against the Ministry" by the appellant. It notes that these records refer to a Professional Standards Branch investigation undertaken by the Ontario Provincial Police. Accordingly, the Ministry argues that these records

are subject to litigation privilege as they "could have resulted in a disciplinary hearing under the *Police Services Act* had wrongdoing been found, which in turn could, at the time, have been appealed to the Ontario Civilian Commission on Police Services."

The appellant argues generally that the Ministry failed to provide sufficient details in its representations to support its reliance on this exemption. She submits that the information contained in these records was not prepared for the purpose of or in anticipation of litigation and that there is no indication in the Ministry's representations that the records were prepared by a lawyer and only shared within the Ministry.

Analysis and findings

It must be noted that, unlike the appellant, I have the benefit of reviewing the records and making my own determination as to their content, author, recipient and the date they were prepared. The appellant could not, of course, have had this opportunity for to do so would have rendered the appeal moot.

Based on my review of the contents of each of the records which are claimed to be exempt under section 19, I make the following findings:

- Records 166 to 176 do not qualify for exemption under section 19. They are email communications passing between three Ministry staff, none of whom are lawyers. These records do not represent confidential communications between a solicitor and his or her client, nor are they exempt under the litigation privilege aspect of section 19.

- Records 178 to 193 qualify for exemption under the solicitor-client communication privilege component of section 19. There are email communications passing between a solicitor and his clients and relate directly to the seeking and providing of legal advice about a legal matter. Accordingly, I find that Records 178 to 193 are exempt under section 49(a), taken in conjunction with section 19.

- The undisclosed portion of Record 324 appears to be part of a letter to the appellant written by a Ministry staff person who is not a lawyer. It clearly does not qualify for exemption under any aspect of section 19.

- Records 177, 327-330 and 333 are email communications passing between Ministry staff and counsel relating to the preparation of a response to the appellant's complaints to the Deputy Minister and Ombudsman in 2007. I find that these emails represent part of the continuum of communications between a solicitor and his clients for the purpose of keeping each other informed about the Ministry's response to the appellant's concerns. I find that these records fall within the ambit of the solicitor-client communication component of the section 19 exemption, and are accordingly exempt under section 49(a).

- Records 336 to 477 are email communications passing between the Ministry's staff and its counsel and relate to a wide variety of matters generally pertaining to the appellant's complaints to the Deputy Minister and Ombudsman. Based on my review of them, I conclude that they represent confidential communications between a solicitor and his clients concerning the seeking and giving of legal advice about legal issues involving the Ministry. Accordingly, I find that they qualify for exemption under section 19, and are exempt from disclosure under section 49(a).

By way of summary, I have found that Records 177, 178 to 193, 327-330, 333 and 336 to 477 are exempt from disclosure under section 49(a), in conjunction with section 19. Records 166 to 176 and 324 are not exempt under section 19. I will now determine whether they qualify for exemption under section 13(1), as claimed by the Ministry.

ADVICE OR RECOMMENDATIONS

The Ministry argues that Records 166-176 and 324 are exempt from disclosure under section 13(1), which states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

The Ministry submits that these emails contain "a proposed response to a writer" which qualifies as "advice or recommendations" for the purposes of section 13(1). The appellant submits that the Ministry has failed to describe the records in sufficient detail in its representations to enable her to "make argument."

Analysis and findings

As noted above in my discussion of the application of section 19 to Record 324, it appears to consist of a portion of a draft of a letter from a Ministry staff person to the appellant, responding to an email sent by the appellant on September 15, 2007. Based on my review of contents of this page, I find that it does not contain information that qualifies for exemption under section 13(1). As no other exemptions have been claimed for this document, and no mandatory exemptions apply, I will order that it be disclosed to the appellant.

Pages 166 to 176 are a series of email chains passing between Ministry staff in the process of responding to certain complaints brought by the appellant to the Deputy Minister and the Office of the Ombudsman. Many of the same messages appear again and again in these pages because they take the form of printouts made from email chains. The communications pass between the Director of the Ministry's Police Support Services Branch and other Ministry staff, including the Investigation and Enforcement Unit Manager and an Investigator with the Ministry's Private

Investigators and Security Guards Branch (the PISGB). The communications pertain to the response from the Ministry to the investigation then being undertaken by the Office of the Ombudsman at the behest of the appellant. In most cases, the communications are passing from a senior staff person to an individual who is subordinate in rank and offer not advice, but rather specific directives on the manner in which the writer instructs the recipient to act.

Taking into account the context surrounding the creation of these records and the nature of the information which they contain, I find that they do not qualify for exemption under the advice or recommendations exemption in section 13(1). I find that the records specifically direct the recipient on the way in which the Ministry is to respond to the Ombudsman's investigation, as opposed to providing a suggested course of action that could be accepted or rejected by the person being advised, in this case the investigation staff of the PISGB. The recipient of these communications was obliged to comply with the instructions provided by his superior and was not in a position to accept or reject the course of action mandated in the communications reflected in these emails [Orders P-363 upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner),* (March 25, 1994) Toronto Doc. 721/92 (Div. Ct.), MO-1765-I and PO-2087-I].

As a result, I conclude that section 13(1) has no application to the records for which it was claimed and they are not exempt from disclosure under section 49(a). As no other exemptions have been claimed for Records 166 to 176 and 324 and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant.

LAW ENFORCEMENT

The Ministry claims the application of the discretionary exemption in section 49(a), taken in conjunction with section 14(2)(a) of the *Act,* to the information in Records 68 to 71. I have found above that paragraphs 4 and 8-12 of Record 69 and all of Record 70-71 are exempt from disclosure under section 49(b). Accordingly, it is not necessary for me to consider whether these records also qualify for exemption under section 14(2)(a). The exemption at section 14(2)(a) 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 institution 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.

[Orders 200 and P-324]

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Orders MO-1238, MO-1337-I].

Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

Record 68-71 is a four-page document entitled "General Occurrence Report" prepared by an investigator, who is a seconded Ontario Provincial Police officer, with the Ministry's Private Investigator and Security Guard Investigations Unit. Many previous decisions of this office have determined that what is generally considered to be a police "occurrence report" is not exempt under section 14(2)(a) because these documents typically lack the kind of analysis and conclusions required by the test under this section. In the present case, however, Record 68-71 sets out in detail the nature of the appellant's complaint, the steps taken by the investigator to gather further information from the subject of the complaint and the conclusions which he reached in his investigation as to its merits. The vast majority of the contents of Record 68 and the top two-thirds of Record 69 were disclosed to the appellant.

As noted above in my discussion of the absurd result principle, the appellant provided the information contained in these two pages to the investigator. While the information in Records 68 and 69 which is not subject to section 49(b) qualifies for exemption under section 49(a) in conjunction with section 14(2)(a), I find that it would be an absurd result to withhold access to information which was clearly provided by the appellant to the investigator. For this reason, I will order that all of Record 68 and paragraphs 1, 2, 3, 5, 6 and 7 of Record 69 be disclosed to the appellant because to withhold this information would give rise to an absurd result.

I find support for this approach in Order MO-1288 decided under the municipal *Act* where former adjudicator Big Canoe made the following findings with respect to the application of the absurd result principle to records that were otherwise exempt from disclosure under section 9(1)(d) of the municipal *Act*:

> In Order M-444, former Inquiry Officer John Higgins found that the refusal of access to information which the appellant originally provided to the Police would be contrary to one of the purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure and would, applying the rules of statutory interpretation, lead to an "absurd result."
>
> In Order PO-1708, Assistant Commissioner Tom Mitchinson applied the same principles to find that any records provided to the appellant in that case approximately six years earlier during the course of an investigation under the *Police Services Act* into that appellant's complaint would also lead to an absurd result.
>
> Records 16, 17, 20-23, 27, 36, 59, 61, 62, 75, 89-91, 109, 198, 205, 207-209, 219, 221 and 228 were provided to the appellant three years ago during the investigation of his complaint, for valid public policy reasons. Applying section 9(1)(d), 14(1) or 38(b) to them when the appellant requests access to them in this scheme would, in my view, be contrary to one of the purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information, and therefore lead to an absurd result, despite the passage of time. Accordingly, I find that these sections cannot apply to these records and their application will not be considered further in this order. These records should be disclosed to the appellant.

Accordingly, I conclude that the information in Record 68 and paragraphs 1, 2, 3, 5, 6 and 7 of Record 69 does not qualify for exemption under section 14(2)(a) and it is not, therefore, exempt under section 49(a).

EXERCISE OF DISCRETION

General principles

The section 13(1) and 19 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 submits that it disclosed all of the responsive information contained in the records that is not subject to an exemption and made extraordinary efforts to contact possible affected parties in order to obtain their consent to the disclosure of their personal information to the appellant. The Ministry argues that it did not disclose those records which were compiled as part of its law enforcement investigation because to do so "could jeopardize the public's trust in the police and could cause third party individuals unnecessary distress." It also submits that it does

not generally waive solicitor-client privilege, for to do so would cause harm to the Ministry's mandate and the public interest, as well as lessen the likelihood that Ministry staff would seek legal advice when required.

The appellant objects generally to the decisions made by the Ministry respecting access to the subject records.

I have reviewed the submissions of the Ministry and considered the substantial amount of disclosure that the appellant received at the request and mediation stages, as well as the additional information that will be disclosed as a result of this order. In my view, the degree of disclosure that will result from this order will provide the appellant with substantially all of the records at issue which will enable her to understand the rationale for the Ministry's actions and allow her to scrutinize those actions with a high degree of acuity.

I find that the Ministry has exercised its discretion in a proper manner taking into account relevant circumstances, and not irrelevant ones, in making its decision to deny access to portions of the records.

ORDER:

1. I find that the records are not excluded from the operation of the *Act* under paragraphs 1 and 3 of section 65(6).

2. I order the Ministry to disclose to the appellant the non-highlighted portions of Record 6-10, Record 68, paragraphs 1, 2, 3, 5, 6 and 7 of Record 69 and Records 144-145, 166 to 176 and 324 in their entirety by providing her with copies by **January 28, 2011** but not before **January 24, 2011**.

3. I uphold the Ministry's decision to deny access to the remaining records and parts of records.

4. In order to verify compliance with order provision 2, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant.

Original Signed By: ______________________ December 21, 2010
Donald Hale
Adjudicator