

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3023

Appeal PA10-36

Ministry of Community Safety and Correctional Services

December 14, 2011

Summary: The appellant made a request to the ministry for all the records about her from a specified OPP detachment. The ministry provided partial disclosure denying access to portions of the records based on the section 49(a) exemption in conjunction with section 14(1)(l), 14(2)(a) and 19 and the section 49(b) exemption. The appellant appealed the ministry's decision and alleged that additional responsive records exist. The ministry is ordered to disclose the appellant's personal information to her, but its decision to withhold the remaining information is upheld. The ministry is also ordered to conduct a further search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 49(a), 14(1)(l), 49(b), 21(2)(f), 21(3)(b).

OVERVIEW:

[1] The appellant made 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 the following information:

...from the [specified] OPP detachment any and all filed notes, incident and occurrence reports, etc. that they have on file pertaining to [the

appellants¹]. These are to be any documents initiated by us or others about us. You can extend this request to the Professional Standards Bureau of the OPP². Therefore, all documents from both organizations from 2004 ongoing until the completion of this matter are requested.

[2] The ministry located the responsive records and granted partial access to police records from the specified OPP detachment for the time period of February 20, 2009 to November 20, 2009. The ministry cited the discretionary exemptions in section 49(a) with reference to section 14(1)(l) (law enforcement), 14(2)(a) and 19 (solicitor-client privilege) and section 49(b) with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f) to partially withhold information from the records. The ministry also identified some information as not responsive to the request.

[3] The appellant appealed the ministry's decision. During mediation, the ministry provided a supplemental decision letter disclosing additional records. After receiving this decision, the appellant advised the mediator that she believed that an additional five records should exist and thus reasonable search was added as an issue in this appeal. The appellant also removed the non-responsive information from the scope of the appeal.

[4] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry I sought representations from the ministry and the appellant. The ministry's representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* number 7.

[5] In this decision, I order the appellant's personal information disclosed to her and uphold the ministry's decision for the remaining records. I further order the ministry to conduct a further search for responsive records.

RECORDS:

[6] The records remaining at issue consist of police reports, officer's notes and correspondence. The ministry notes in its representations that it has determined that it will release pages 51, 52 and 53 of the records to the appellant and thus these records are no longer at issue.

Document Number	Page Number at issue	Description	Exemption(s) claimed
3 - 5	4 and 5	Police Reports	49(a), 14(1)(l),

¹I use the word "appellant" in this order to refer to both the husband and wife appellant.

² The appellant's request for records from the Professional Standards Bureau was the subject of appeal PA09-381 and Order PO-2982. I will not be addressing access to these records in this order.

		(Occurrence Summary)	14(2)(a), 49(b)
6 – 8	7 and 8	Officer's notes	49(a), 14(1)(l)
9 – 14	9, 10, 11, 12, 14	Officer's notes	49(a), 14(1)(l), 49(b)
15 - 18	15, 17	Supplementary occurrence report and Officer's notes	49(a), 14(1)(l), 14(2)(a), 49(b)
19 – 21	20	General occurrence report	49(b)
51 – 56	55 and 56	Witness statements, supplementary occurrence report,	49(a), 14(1)(l), 14(2)(a), 49(b)
57	57	Supplementary occurrence report	49(a), 14(1)(l), 49(b)
58 – 59	58 and 59	Supplementary occurrence report	49(a), 14(1)(l), 14(2)(a), 49(b)
60 – 66	60, 61, 62, 66	Supplementary occurrence report, police officer's notes	49(a), 14(1)(l), 14(2)(a), 49(b)
67 – 69	67, 68, 69	Police officer's notes	49(a), 14(1)(l), 19, 49(b)
70 – 72	72	Police officer's notes	49(a), 14(1)(l)
73 – 74	73 and 74	Police officer's notes	49(a), 14(1)(l), 19, 49(b)
75 -76	76	Police officer's notes	49(a), 14(1)(l), 19, 49(b)
77 – 80	77, 78, 79, 80	Police officer's notes	49(a), 19, 49(b)

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption in section 49(b) apply to the information at issue?
- C. Does the discretionary exemption in section 49(a) apply to the information at issue?
- D. Was the ministry's exercise of discretion proper?
- E. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions?
- F. Was the ministry's search for responsive records reasonable?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) ?

[7] 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,
- (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;

[8] The ministry submits that the records contain the personal information of individuals who are involved in a property dispute and includes their contact information (names, addresses and phone numbers) as well as more sensitive information provided by them or about them to the police. The appellant submits that she knows the identity of the other individuals mentioned in the records as well as their birth dates, phone numbers and addresses.

[9] Based on my review of the records, I find that they contain the personal information of the appellant and other identifiable individuals. The appellant's personal information has been disclosed to her with the exception of information on pages 4 and 5 of the record. In particular, this information is the police's opinion of the appellant and is her personal information within the meaning of paragraph (g) of the definition of that term in section 2(1) of the *Act*. As disclosure of this information to the appellant cannot be an unjustified invasion of privacy, I will order this information to be disclosed to the appellant.

[10] The rest of the appellant's personal information is inextricably intertwined with that of other identifiable individuals and cannot be severed from the record. I find that the police officer's view of the incidents between the appellant and these other individuals to be their joint personal information within the meaning of paragraph (g) of the definition of that term in section 2(1).

[11] Finally, I find the remaining information relates to other identifiable individuals only and is their personal information within the meaning of paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of that term in section 2(1).

[12] As the records contain the personal information of the appellant and other identifiable individuals, I will proceed to consider whether the exemptions in sections 49(a) and/or (b) apply.

B. Does the discretionary exemption in section 49(b) apply to the information at issue?

[13] 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, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the ministry must look at the information and weigh the appellant's right of access to her own personal information against the other individual's right to the protection of their privacy. If the ministry determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the ministry the discretion to deny access to the appellant's personal information.

[14] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the individual's personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion

of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b).

[15] In this appeal, section 21(4) does not apply and the information does not fit within any of paragraphs (a) to (e) of section 21(1).

Section 49(b)

[16] Section 49(b) states:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[17] The ministry submits that section 49(b) applies to the information at issue and refer to the factor in section 21(2)(f) and the presumption in section 21(3)(b) to support their decision.

[18] Section 21(2)(f) reads:

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,

the personal information is highly sensitive;

[19] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

[20] The ministry submits that this factor applies due to the highly sensitive information remaining at issue in the records as well as the context of the information, a contentious property dispute between neighbours. Further, the ministry notes that the individuals whose personal information is at issue have not consented to the disclosure of their personal information to the appellants.

[21] The appellant submits that she is aware of all of the identifiable individuals in the records and that she is entitled to the information said about her.

[22] Section 21(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[23] 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].

[24] The ministry submits that the withheld personal information was compiled and is identifiable as part of an OPP investigation into a possible violation of law, either the *Criminal Code* or the *Highway Traffic Act*, or both. The ministry notes that charges were never laid.

[25] The personal information remaining at issue in the records relates solely to other individuals or to both the appellant and other identifiable individuals. All of the information relating solely to the appellant has been disclosed to her. As stated above, the appellant's personal information remaining at issue is intertwined with that of other individuals.

[26] Based on my review of the records, I accept that the personal information at issue was compiled and is identifiable as part of the OPP's investigation into a possible violation of law such that the presumption in section 21(3)(b) applies. Further, I am satisfied, that disclosure of the personal information could reasonably be expected to cause the individuals to whom the information relates, significant personal distress, based on their relationship with the appellant.

[27] As I have found that the factor in section 21(2)(f) and the presumption in section 21(3)(b) apply to the withheld information, I am satisfied that disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the other individuals. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 49(b), subject to my finding on the ministry's exercise of discretion.

Absurd Result

[28] Before I consider the application of section 49(a), the appellant has asked that I consider the application of the absurd result principle in the circumstances of this appeal.

[29] 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 and MO-1323].

[30] 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 and P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679 and MO-1755]

[31] 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 and MO-1378].

[32] The appellant submits that she either supplied or is intimately aware of the details contained in the documents and the ministry's decision to continually withhold this information is absurd.

[33] Based on my review of the withheld information, I find that the appellant has not established that this information is clearly within her knowledge or that she was present when that information was provided to the OPP officer. Further, as most of the information relates to other individuals, it is evident that the appellant did not provide this information to the OPP herself. Accordingly, I find that the absurd result principle does not apply in the circumstances of this appeal.

C. Does the discretionary exemption in section 49(a) apply to the information at issue?

[34] The ministry claims that section 49(a) applies to exempt the information at issue on pages: 7, 8, and 72 of the records. As stated above, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49(a) is another exemption from this right and it 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.

[35] 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].

[36] 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.

[37] The ministry submits that the withheld information on pages 7, 8, and 72 is exempted under section 49(a) as section 14(1)(l) applies to this information.

Law Enforcement

[38] Section 14(1)(l) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

[39] 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.)].

[40] The ministry has claimed the section 49(a) exemption for the police code information on pages 7, 8 and 72. The ministry submits that this office has confirmed in numerous orders that police codes qualify for exemption under section 14(1)(l) as there is a reasonable expectation of harm that would result from disclosure of this information³. The appellant did not make representations on this issue.

³ The ministry quotes from Order PO-2571 in particular.

[41] The only information remaining at issue on these three pages are the police code information. In the circumstances of this appeal, I accept that disclosure of this police code information could reasonably be expected to either facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 14(1)(l) applies and the information exempt under section 49(a) subject to my finding on the ministry's exercise of discretion.

D. Was the ministry's exercise of discretion proper?

[42] The sections 49(a) and (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.

[43] 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.

[44] 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)].

[45] In exercising its discretion to withhold the records, the ministry considered the following:

- The appellant's request was for her own personal information and she has received access to almost all of it.
- The information remaining at issue consists of third party personal information and disclosure of this information would be an invasion of their personal privacy.
- Disclosure would affect the OPP's ability to perform its duties as individuals would be less likely to speak openly and frankly with the police
- The law enforcement exemptions and the interests they serve to protect.

[46] The appellant submits that the ministry failed to take into consideration her greater right of access to her own personal information, and in particular, she has a right to know the statements made about her by other individuals.

[47] Based on my review of the records, the remaining information relates to other individuals. The appellant has received almost all of the information relating to her including the statements made about her. I find that the ministry's exercise of discretion to withhold the information was proper. The ministry properly considered the appellant's right to her own personal information, the privacy interests of the other individuals and the purpose of the law enforcement exemption. I uphold the ministry's exercise of discretion.

E. Is there a compelling public interest in the disclosure of the records that outweighs the exemptions?

[48] The appellant submits that there is a compelling public interest in the disclosure of the records that outweighs the section 49(a) and (b) exemptions. Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[49] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[50] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, I will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

[51] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the

means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

[52] A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

[53] The appellant submits that the OPP maintains incorrect or inaccurate files and statements about her in the records. The appellant claims that the OPP fabricated statements about her which are untruths or unsubstantiated by supporting evidence. The appellant submits that there is a compelling public interest that the OPP be required to maintain accurate information and not fabricate statements about members of the public within their records. The appellant states:

...there is a compelling interest to the citizens and visitors to Ontario that the OPP be required to only produce and maintain accurate files at all times in order to achieve a fair democratic process in the Province of Ontario.

[54] I have carefully reviewed the records at issue in this appeal and I am unable to find a compelling public interest in the disclosure of the records that outweighs the section 49(a) and/or (b) exemptions. The information at issue relates almost exclusively to other identifiable individuals. The appellant has received all of her personal information with the exception of their personal information that is intertwined with the other individuals' personal information. However, even if this had not been the case, I find the appellant's interest in the records to be a private one. The appellant is concerned about statements made by other individuals about her and the opinions of police officers that are contained in the records about her. The appellant has been provided with most of this information. Based on the information at issue, specifically the personal information of other individuals, I am unable to conclude that there is a compelling public interest in disclosure of the records at issue.

[55] In any event, even if a compelling public interest in the disclosure of the remaining information at issue were to exist, for the section 23 override provisions to apply, the compelling public interest must clearly outweigh the purpose of the personal privacy provision of the *Act*. In this case, the purpose of the exemption at section 49(b) is the protection of the privacy of individuals. In my view, the issues raised by the appellant do not clearly outweigh these privacy interests.

[56] Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

F. Was the ministry's search for records reasonable?

[57] The appellant submit that the ministry's search for records was not reasonable as the ministry has not identified responsive records that the appellant knows should exist. The appellant knows that the records should exist because she provided these records to the ministry or has evidence that references the existence of the records.

[58] 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 and 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.

[59] 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[60] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[61] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[62] 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 [Order MO-2246].

[63] The appellant provided a number of letters to the mediator setting out the records she alleges have not been located by the ministry's searches. The records that the appellant submits should exist are:

- Photographs provided by the appellant to the OPP documenting a blockage on the road⁴.
- Occurrence report dealing with a theft of driftwood from the appellant's property.
- Plan written by the Superintendent of the OPP detachment to deal with the appellant's issues.

⁴ It appears that the appellant has these photographs but questions why they have not been identified by the ministry's search.

- Correspondence between the town and the OPP regarding the jurisdiction over the roadway.
- Letters from the appellant to OPP dated April 5 and April 9, 2009.
- Third party affidavit sent from the appellant to the OPP regarding property line.

[64] During the inquiry stage of this appeal, the ministry was asked to provide a summary of steps taken in response to the request. In support of its search, the ministry provided two affidavits. The first affidavit is from the Freedom of Information Liaison Officer who received the request and sent the request on to the responsible OPP detachment. The affiant also conducted a preliminary search for the responsive records on the RMS database that the OPP uses to store investigative records. The Liaison Officer sent the request to the responsible OPP detachment and eventually received the responsive records that were sent to the ministry. The Liaison Officer affirms that two additional searches were conducted and finally, the ministry provided him with a list of an additional 12 items to be searched for. The affiant notes that he received some additional records that were sent to the ministry.

[65] The second affidavit was provided by an OPP officer who is the responsible detachment Administration Clerk. The Administration Clerk affirmed the searches set out above and stated the following in conclusion:

Between the 7th and 10th of February 2011, I conducted another search of the RMS database, a search of our deferred files and spoke to involved officers to ascertain if this Detachment holds any other responsive records that have not been provided in past submissions. This search has provided negative results.

[66] Based on my review of the parties' submissions, I find that the ministry's search for the records listed by the appellant above to be unreasonable. While I accept that the ministry has conducted a number of searches for the responsive records, the affidavits do not provide the level of detail necessary to establish that the ministry's search for responsive records was reasonable. It is insufficient for the affiants only to affirm that they conducted searches without providing any context or information about the locations searched, the people questioned and the detailed results of those searches. I examined the appeal file in great detail to determine whether the ministry searched for the records set out in the appellant's representations but was unable to find the results of the additional searches conducted at mediation.

[67] Accordingly, as the ministry has not provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control, I will order the ministry to conduct a further search for the records listed above.

ORDER:

1. I order the ministry to disclose the appellant's personal information to her which I have identified on pages 4 and 5 by providing her with a copy of this information by **January 10, 2012**. For the sake of clarity, I have provided the ministry with a copy of these pages of the record with the information to be disclosed highlighted.
2. I uphold the ministry's decision to withhold the remaining records.
3. I order the ministry to conduct a search for the following records and to provide the appellant with the results of its search and a decision letter, treating the date of this order as the date of the request:
 - Photographs provided by appellant to the OPP documenting a blockage on the road.
 - Occurrence report dealing with the theft of driftwood from the appellant's property.
 - Plan written by the superintendent of the OPP detachment dealing with the appellant's issues.
 - Correspondence between the town and the OPP regarding the jurisdiction over the roadway.
 - Letters from the appellant to the OPP dated April 5 and April 9, 2009.
 - Third party affidavit sent from the appellant to the OPP regarding the property line.
4. I reserve the right to require the ministry to provide me with a copy of the records sent to the appellants in accordance with Order Provision 1.

Original Signed By: _____

December 14, 2011 _____

Stephanie Haly
Adjudicator