

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3081

Appeal PA11-287

Ministry of Community Safety and Correctional Services

May 30, 2012

Summary: The appellant sought access to three multiple-choice examination booklets, along with her answers sheets. The appellant took the exams during her enrollment in a Basic Constable Training Program. The ministry submits that the records are exempt under sections 14(1)(c), (e) and (l) in addition to sections 18(1)(a), 18(1)(c) and 18(1)(h). The records are found exempt under section 49(a), in conjunction with 18(1)(h) and the appeal is dismissed.

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", 18(1)(h) and 49(a).

Orders and Investigation Reports Considered: P-351, P-422, P-1107, PO-2366-I, PO-2386, PO-2413 and PO-2593.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for copies of all examinations and answers related to her enrollment and completion of the Basic Constable Training Program (BCTP). The appellant also requested a copy of her remedial learning plan and all notes created by Toronto Police Services Board staff.

[2] The ministry transferred the portion of the request relating to records created by Toronto Police Services Board to that institution under section 25(2) of the *Act*.

[3] With respect to the remainder of the request, the ministry located three examinations and three scantron cards containing the appellant's answers. The ministry issued an access decision to the appellant denying access to the responsive records. The ministry claims that the records qualify for exemption under section 49(a) (refusal to disclose one's own personal information), in conjunction with the law enforcement provisions at sections 14(1)(c), 14(1)(e) and 14(1)(l). The ministry also claims that the responsive records qualify for exemption under section 49(a), in conjunction with 18(1)(a), 18(1)(c) and 18(1)(h) (economic and other interests of Ontario).

[4] The appellant appealed the ministry's decision to this office and a mediator was assigned to the appeal to explore settlement with the parties.

[5] During mediation, the appellant confirmed that the reasonableness of the ministry's search efforts was not at issue. However, the parties were not able to resolve the remaining issues in dispute, which were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry of this appeal, I sought and received representations from the ministry and the appellant. The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[6] Throughout the inquiry process, the appellant maintains that disclosure of the scantron cards without the examination booklets would be meaningless. In this order, I find that the examination booklets and relevant scantron cards, together comprise of the examinations taken and requested by the appellant. I also find that each examination contains the appellant's personal information, but find that they are exempt under section 49(a), in conjunction with 18(1)(h).

[7] Should the appellant reconsider her position and wish to obtain copies of the scantron cards, she is entitled to file a new request for this information alone.

RECORDS:

[8] The records at issue are:

- Ontario Police College 2009 Final Examination - Examination One, dated November 30, 2009 and the appellant's answers on a scantron form
- Ontario Police College 2009 Final Examination - Examination Two, dated December 1, 2009 and the appellant's answers on a scantron form

- Ontario Police College 2009 Final Examination – Examination Three, dated December 2, 2009 and the appellant’s answers on a scantron form

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(a), in conjunction with 18(1)(h) apply to the records?
- C. Did the ministry properly exercise its discretion?

DISCUSSION:

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

[9] 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.

[10] The ministry submits that the scantron cards alone contain the appellant’s personal information, namely her name and identification number.

[11] The appellant submits that both the examination booklets and the scantron cards contain her personal information. The appellant’s representations, prepared by an agent, state:

Receipt of only her answers on ‘Scantron’ forms is illogical as such would serve no meaningful purpose. However, her answers given in context with the questions were borne out of the appellant’s intellectual capacity, comprehension, and reasoning, and accordingly forms elements of the appellant’s personal information which the appellant contends she is entitled to receive.

[12] In reply, the ministry’s representations state:

The Ministry reiterates that the examination is its intellectual property and the examination booklet contains the express statement: “*This Examination (including exam items) is the property of the Ontario Police College.*” The Appellant agreed to this in taking the examination.

[13] I have carefully considered the representations of the parties along with the records at issue and find that the records contain the appellant’s personal information.

In my view, the scantron cards combined with the examination booklets constitute the examinations the appellant wrote and requested. The scantron cards contain information relating to her education history [paragraph (b) of the definition of "personal information" in section 2(1)]. In addition, the appellant's name appears with other personal information relating to her [paragraph (h)], including an identifying number assigned to her [paragraph (c)]. Accordingly, I am satisfied that the records, taken as a whole, contain the appellant's personal information as defined in section 2(1) of the *Act*.

[14] In light of my finding, I will review the ministry's decision to withhold this information under section 49(a)(refusal to disclose one's own personal information), in conjunction with section 18(1)(h).

B. Does the discretionary exemption at section 49(a), in conjunction with 18(1)(h) apply to the records?

[15] Section 18(1)(h) states:

A head may refuse to disclose a record that contains,

information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

[16] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[17] For section 18(1)(h) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[18] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363]. Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

[19] In support of its position that examination booklets contain information relating to specific tests or testing procedures and are used for an educational purpose, the ministry made the following arguments:

- The examinations were created by Ontario Police College [OPC] specialists in policing, education and training and cover academic coursework.
- The BCTP is designed to provide recruits training required under the *Police Services Act* and Ontario Regulation 36/02. It offers training in substantive academic courses concerning the laws and procedures that frontline officers are required to apply in the performance of their duties, as well as practical courses.
- The examination booklets state: “*This examination (including exam items) is the property of the Ontario Police College and must be returned upon completion of the examination. Any reproduction or sharing of these exam items is strictly prohibited*”

[20] The ministry also submits that disclosure of the information at issue could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques. In support of this position, the ministry submits:

- The questions are used year after year in subsequent examinations as it would be “extremely costly and administratively and pedagogically prohibitive to generate a new exam” for each training program. In addition, “the very nature of the course work, the relevant information available, the information suitable for inclusion on the exam, and the number of the BCTP participants each year all underscore the need for the reusing [of] questions”.
- The college keeps the tests and the answers on a secure basis, and any distribution of test questions and answers is highly controlled. The only time questions and answers are shared occurs when the college provides a few sample questions in both the mid-term and final examination study guides. The guides are provided only to police recruits. The sample questions may or may not be used in the exams. The actual examinations written by police recruits are kept strictly confidential, and are only made available to applicants when they take the test.

- The appellant was afforded a unique opportunity to review the examination materials with an instructor at the college. However, the appellant declined the offer.

[21] Finally, the ministry refers to Orders P-1107 and PO-2386-F in support of its position.

[22] The appellant takes the position that section 18(1)(h) cannot apply to the circumstances of this appeal as there is "no commercial value" attached to the information at issue. In her appeal letter, the appellant refers to orders P-351, P-422, P-461, P-1107, PO-2386-F and PO-2387 in support of her position. In her representations, the appellant states:

The only ... educational value [of the requested information is for the sole] intellectual benefit of the appellant. There is no monetary value to the information requested by the appellant as the limited information is of no value to anyone but the appellant for the reasons herein. [Emphasis in the original]

[23] The appellant's submissions also appear to suggest that some of the information at issue is available in the public realm. The appellant states the following in her representations:

... as the subject study materials and instructional information were previously provided to the appellant during her enrollment at OPC and further, are generally available in the public domain/public access to the Kaufmann Report and other Commissions of Inquiry, the OPC Course Calendar, the Canadian Police Knowledge Network, public libraries, community college and university libraries, Internet resources, and police associations and organized and informal police fraternities.

[24] In reply, the ministry refers again to Order P-1107 and states:

In considering the application of section 18(1)(h) to the records, the Ministry submits that disclosure in this circumstance is not akin to general education tests where the number of individuals who will have seen, studied and answered the test questions, such as those set for elementary education in Ontario, is a high number... [A]pproximately 1200 BCTP police recruits per year sit the exam in question. The primary examination exposure is the province-wide group of police constable trainees [who] sit the examinations in order to comply with the strict hiring requirements set out in the *Police Services Act* and regulations thereunder. The exposure is limited and the questions have been, and are kept from disclosure.

The Ministry has not released the examination questions and answers thereto to the entities referred to by the appellant: colleges, the Canadian Police Knowledge Network, the OPC Course Calendar, public libraries, or police associations and so forth. Further, to its knowledge, the material is not generally available in the public domain. The Appellant has not provided any detailed information or reference material that would support that submission.

Decision and Analysis

[25] The orders the appellant and the ministry refer to were issued before the amendments to the wording of section 18(1)(h) came into effect. The former wording of section 18(1)(h) referred to the head's discretion to disclose a record that contains "questions that are to be used in an examination or test for an educational purpose". The amendment had the effect of broadening the scope of section 18(1)(h) to include "information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the test or testing procedures or techniques".

[26] The earlier orders cited by the appellant followed a line of reasoning which changed with the issuance of P-1107. In the orders cited by the appellant (Orders P-351 and P-422), this office found that evidence that test questions may be used in community college exams in the future was not sufficient on its own to satisfy the then requirements of section 18(1)(h). In P-1107, former Inquiry Officer Holly Big Canoe found that a final examination administered to police officers in the Centre of Forensic Sciences Breathalyzer Technician course qualified for exemption under the pre-amendment version of section 18(1)(h). In that order, she states:

In my view, the records at issue and the circumstances of this appeal are very different from those present in the orders cited by the appellant, which both involved students seeking access to community college course exams. Given the limited amount of relevant information available for inclusion in the exam and the importance of a very comprehensive exam to the Ministry's Breath Test Program, I accept that the Ministry has definite plans to use the questions found in the record in an examination for an educational purpose, and I find that section 18(1)(h) applies, despite the fact that the questions have already been used in the past.

[27] Subsequent decisions from this office have consistently applied the reasoning in P-1107 and found that the requirements of section 18(1)(h) were met where there was sufficient evidence that the steps taken to ensure the integrity of the testing questions demonstrated that there were definite plans to reuse the test questions in the future.¹

¹ See for example PO-2366-I, PO-2386, PO-2413 and PO-2593.

[28] In this appeal, the records at issue comprise three examination booklets and the scantron cards containing the appellant's answers. For section 18(1)(h) to apply to these records, the ministry must establish that:

1. The record contains information relating to,
 - (a) specific tests, or
 - (b) testing procedures, or
 - (c) techniquesthat are to be used for an educational purpose, and
2. The disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques.

[29] The amendments to section 18(1)(h) raise the question of whether the orders cited by the ministry and the appellant remain relevant or applicable in the circumstances of this appeal. In my view, the reasoning in the line of decisions post P-1107 are relevant and applicable in determining whether disclosure of the information at issue could reasonably be expected to result in the harms contemplated in section 18(1)(h). Accordingly, in determining whether the harm contemplated in section 18(1)(h) could reasonably be expected to occur, I will consider whether there is evidence that the ministry took steps to safeguard the examination questions. I will also consider whether the ministry has adduced sufficient evidence to establish that it has plans to reuse the examination questions in the future.

[30] With respect to the first part of the test, I am satisfied that the records contain information relating to specific tests, testing procedures or techniques. In making my decision, I accept the ministry's evidence that the examination booklets contain multi-choice questions which contain the correct answer or answers for each test question. I am also satisfied that tests, testing procedures or techniques were used for an educational purpose. In particular, I accept the ministry's evidence that the examination booklets comprise test questions and answers which were created by Ontario Police College's policing, education and training specialists for the purpose of testing and evaluating police constables' academic coursework.

[31] Turning to second part of the test, I find that disclosure of the examination booklets could reasonably be expected to prejudice the use of the tests or testing procedures or techniques used in the province's basic constable training program. Having regard to the ministry's evidence, I am satisfied that the ministry re-uses the test questions contained in the examination booklets in future examinations. In making my decision, I took into consideration the ministry's evidence regarding the steps it takes to safeguard disclosure of administrated tests, including the requirement that test takers must return examination booklets with their completed scantron cards. Having

regard to the above, I find that the records qualify for exemption under section 18(1)(h) and that they are, accordingly, exempt under section 49(a) subject to my finding as to whether the ministry properly exercised its discretion. In light of my finding, it is not necessary that I also review the ministry's decision to withhold the records under section 49(a), in conjunction with sections 14(1)(c), (e) and (l), 18(1)(a), and (c).

C. Did the ministry properly exercise its discretion?

[32] The section 49(a) exemption is discretionary, and permits 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.

[33] 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.

[34] 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)].

[35] The appellant takes the position that the ministry did not properly exercise its discretion. The appellant's representations state that the ministry acted in "bad faith" and "improperly" in "withholding the requested information to the detriment of the appellant by wrongfully blocking the appellant from acquiring the knowledge she needs to be deemed to have successfully completed the Basic Constable Training program".

[36] The ministry submits that it exercised its discretion properly. In support of its position, the ministry advises that it withheld the records on "their nature as technical records of financial value". The ministry goes on to state it withheld the records out of its concern that disclosure of the test questions and answers would "jeopardize public confidence in the statutorily mandated training of police constables through the BCTB undertaken by the OPC."

[37] Having regard to the ministry's representations, I am satisfied that the ministry properly exercised its discretion and, in doing so, took into account only relevant considerations, such as the confidential nature of the information I found exempt under

section 49(a) and the extent to which it is significant and/or sensitive to it. In addition, I note that the purpose of the exemption at section 18(1)(h) is to protect certain economic interests of institutions, and the wording of the exemption seeks to protect testing instruments that are used for an educational purpose where disclosure could reasonably be expected to prejudice the use of the test.

[38] In my view, the appellant has failed to adduce sufficient evidence to establish that the ministry acted in bad faith or acted improperly. The crux of the appellant's submission is that she should have access to the records because they contain her personal information. Though one of the purposes of the *Act* recognizes that individuals should have a right of access to their own personal information, I find that the confidential nature of the information I found exempt under section 49(a) and the significance of it outweighs this principle in the circumstances of this appeal.

[39] Having regard to the above, I find that the ministry did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations. Accordingly, I find that the ministry properly exercised its discretion to withhold the records under section 49(a).

ORDER:

I uphold the ministry's decision to withhold the examination booklets under section 49(a), in conjunction with section 18(1)(h), and dismiss the appeal.

Original Signed by:
Jennifer James
Adjudicator

May 30, 2012