Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3118

Appeal PA10-263

Ministry of Community Safety and Correctional Services

October 11, 2012

Summary: The appellant made a request to the ministry for copies of OPP records relating to a particular incident. The ministry granted partial access withholding information on the basis of the discretionary exemptions in section 49(a) and (b). The appellant also raised the issue of reasonable search with respect to two documents. The ministry's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "personal information"), 49(b), 21(3)(b), 21(2)(f), 24.

OVERVIEW:

[1] The appellant made 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 access to copies of the general occurrence report and officer's field notes for a specified police incident.

[2] The ministry granted partial access to the responsive record, withholding information pursuant to the discretionary exemptions in sections 49(a) and (b). The ministry also advised that some information was withheld as not responsive to the appellant's request.

[3] During mediation, the ministry issued a supplemental decision as a result of consents provided by the appellant to the ministry.

[4] The appellant advised the mediator that he does not wish to pursue the not responsive information or the police codes withheld pursuant to section 49(a) with reference to section 14(1)(l). The appellant did, however, raise the following issues:

- Reasonable search: The appellant submits that the responsive records should include a list of 38 people with their telephone numbers and an email dated October 1, 2007. This information was sent by the appellant to the officer.

- Absurd result: The appellant submits that he reviewed the contents of pages 2 – 9 of the responsive records during another process.

- Public interest override in section 23: The appellant submits this should apply to all information withheld pursuant to section 21 (personal privacy).

[5] During my inquiry, I sought representations from the ministry, the appellant and three affected persons. I received representations from the ministry and the three affected persons. The appellant was contacted for his representations and he was given a time extension to submit representations, but representations were not received from him.

[6] In this order, I uphold the ministry's decision.

RECORDS:

[7] The records at consist of the withheld portions of occurrence reports, victim report, witness statement and police officer notes.

ISSUES:

A. Do the records contain "personal information", and if so, to whom does it relate?
B. Does the discretionary exemption at section 49(b) apply to the information at issue?
C. Was the ministry's exercise of discretion proper in the circumstances?
D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(b) exemption?
E. Was the ministry's search for responsive records reasonable?

DISCUSSION:

A. Do the records contain "personal information", and if so, to whom does it relate?

[8] In order to determine which section of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[9] 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.[1]

[10] 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.[2]

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[12] The ministry submits that the records contain the personal information of the appellant and three affected persons, within the meaning of the definition of that term in section 2(1). The ministry submits that the information at issue contains the individuals' names along with the following information:

- Age, family and marital status (paragraph (a) of the definition of "personal information");
- Address and telephone number (paragraph (d) of the definition of "personal information");
- The personal views or opinions of the individual except where they relate to another individual (paragraph (e) of the definition of "personal information")
- The views or opinions of another individual about the individual; and
- The individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal

[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> information about the individual (paragraph (h) of the definition of "personal information").

[13] The ministry also notes that one individual may have been identified in his professional capacity in the records. However, the ministry states:

> [The individual's] actual communication with the police would, if disclosed, reveal personal information about him, namely that he cooperated with the police in an investigation and the nature of that cooperation.

[14] This individual's name, age, birthday, home address and phone number are set out in the record. Furthermore, the record contains a description of his actions in dealing with the police.

[15] Based on my review of the records at issue, I find that the record contains the personal information of the appellant and two of the three affected persons. I find that much of the appellant's personal information has been disclosed to him with the exception of statements made about the appellant by the affected persons. Accordingly, I will proceed to consider whether this information is exempt from disclosure under section 49(b).

[16] In regard to the information relating to the third affected person. I find that once this individual's personal information (address, phone number, sex, and birthday) is removed from the record (namely pages 1 and 11), the information remains relates to this individual in his business capacity. This individual's "cooperation with the police investigation" is not "personal information" for the purposes of section 2(1) of the *Act*. When the affected person communicated with the police about the event that transpired, he was doing so in his professional and business capacity and not personal capacity.

[17] I find that disclosure of this information would not disclose something of a personal nature of this individual and should be disclosed to the appellant. I will provide the ministry with a copy of relevant page of the records, with the information to be disclosed highlighted.

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

[18] 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.

[19] 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.

[20] 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.

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

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

[22] The ministry submits that the records that have been withheld are highly sensitive as the records were created because of a law enforcement investigation where the potential victim is identified. Furthermore, the ministry submits that the affected persons have not consented to the disclosure of their personal information and thus the factor in section 21(2)(f) is relevant to my determination.

[23] The ministry further submits that the presumption in section 21(3)(b) applies as the personal information at issue was compiled and is identifiable as part of an investigation into a possible violation of law. The ministry submits that the Ontario Provincial Police (OPP) investigation was into a possible violation of the *Criminal Code*.

[24] As stated above, the appellant did not make representations.

[25] I have reviewed the records at issue and I note that much of information has been disclosed to the appellant. As indicated above, all of the withheld portions contain the personal information of identifiable individuals or information of the appellant mixed with the personal information of these individuals. Furthermore, disclosure of the

severed portions of the records would reveal the identity of the affected persons to whom the information relates.

[26] It is evident that the information at issue was compiled by the OPP and is identifiable as an investigation into a matter involving the appellant and the affected persons. 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.[4] Thus, I am satisfied that the personal information remaining at issue falls within the presumption in section 21(3)(b). In addition, I am satisfied that disclosure of the personal information would cause the affected persons significant personal distress.

[27] As 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 at issue could constitute an unjustified invasion of the affected persons' personal privacy. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 49(b) of the *Act*, subject to my review of the ministry's exercise of discretion.

[28] As I have found that section 49(b) of the *Act* applies to the information at issue, I do not need to consider the application of section 49(a).

[29] Before I proceed I wish to address the appellant's position that the absurd result principle applies to the information he has previously reviewed in another setting.

[30] 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.[5]

[31] As the appellant did not provide representations to substantiate his claim that he has already seen the contents of pages 2 to 9 of the records, I am unable to find that the absurd result principle applies.

C. Was the ministry's exercise of discretion proper in the circumstances?

[32] The section 49(b) 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.

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[4] Orders P-242 and MO-2235.
[5] Orders M-444 and MO-1323.

[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.[6] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[35] In exercising its discretion to withhold the information under section 49(b), the ministry considered that much of the responsive records were disclosed to the appellant and it only withheld information on the basis of:

- The public policy interest in protecting the privacy of personal information belonging to [the affected persons], that is contained in law enforcement investigation records; and

- The concern that disclosure of the records would jeopardize public confidence in the OPP, especially in light of the public cooperation that the OPP depend upon when they conduct law enforcement investigations.

[36] Based on the ministry's representations, I find that the ministry properly exercised its discretion to withhold the information at issue. The ministry properly considered the appellant's right to his own personal information, the right of the affected persons to their personal privacy and the historic law enforcement practice of protecting this type of information. Accordingly, I uphold the ministry's exercise of discretion.

D. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 49(b) exemption?

[37] 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.

[6] Order MO-1573.

[38] 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.

[39] 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, the IPC 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.[7]

[40] 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.[8] 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.[9]

[41] A public interest does not exist where the interests being advanced are essentially private in nature.[10] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[11]

[42] A public interest is not automatically established where the requester is a member of the media.[12]

[43] The appellant did not provide representations. The ministry submits that the appellant's interest in the records is private in nature and there is no compelling public interest in disclosure of the information at issue. Further, the ministry argues that there is a public interest in not disclosing the information at issue as overriding the section 49(b) exemption could have a:

> …chilling, and therefore harmful effect on law enforcement investigations, by discouraging the public from cooperating with the police, knowing that whatever they provide is subject to such ready disclosure.

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[7] Order P-244.
[8] Orders P-984, PO-2607.
[9] Orders P-984 and PO-2556.
[10] Orders P-12, P-347 and P-1439.
[11] Order MO-1564.
[12] Orders M-773 and M-1074.

[44] I have reviewed information at issue. I find that the information at issue relates to a private matter between the appellant and the affected persons that was investigated by the OPP. I am unable to find that there is a compelling public interest in the disclosure of the information at issue and as such I find that section 23 does not apply.

E. Was the ministry's search for responsive records reasonable?

[45] 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.[13] 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.

[46] 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.[14] To be responsive, a record must be "reasonably related" to the request.[15]

[47] 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.[16]

[48] 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.[17]

[49] 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.[18]

[50] During mediation, the appellant alleged that additional responsive records should exist including:

- A list of 38 people complete with telephone numbers; and
- An email dated October 1, 2007.

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[13] Orders P-85, P-221 and PO-1954-I.
[14] Orders P-624 and PO-2559.
[15] Order PO-2554.
[16] Orders M-909, PO-2469, PO-2592.
[17] Order MO-2185.
[18] Order MO-2246.

[51] The ministry, in support of its search, provided an affidavit from the police constable who is the Freedom of Information Coordinator at OPP West Region Headquarters. The affiant states the following:

- He was sent a copy of the appellant's request. The initial request was for records relating to a specified OPP incident number and was limited to all reports and officer's field notes associated with the incident.

- He conducted a search for electronic records and located the incident in questioned the investigating detachment. He then sent a copy of the request to the detachment's [named individual] FOI Liaison for processing.

- He received a package containing the responsive records including: "Sign off", an occurrence summary, a general occurrence report, a supplementary occurrence report, a victim report, a witness statement and an officer's field notes.

- He reviewed the responsive records and forwarded them to the ministry.

- He received notice that appellant was looking for the two additional records. To that end, he sent an email to the investigating member for the incident in order to locate the two documents.

- He received back an email from the investigating member that he did not have a copy of the records. He conducted a further electronic search for the two additional records in question but did not find them.

[52] The appellant's basis for his belief that the two records exist stems from his knowledge that he sent this information to the officer.

[53] As stated above, the ministry is not required to prove with absolute certainty that further records do not exist. In the present appeal, and in the absence of representations from the appellant, I find that the ministry has satisfied me that it made a reasonable effort to locate responsive records including the two records identified by the appellant.

[54] Accordingly, I uphold the ministry's search as reasonable and dismiss the appeal on this issue.

ORDER:

1. I order the ministry to disclose the portions of page 2 of the records to the appellant by providing him with a copy of the record by **November 20, 2012** but not before **November 13, 2012**. For the sake of clarity, I have included a highlighted copy of page 2 with the portions to be disclosed identified.

2. I uphold the ministry's decision with respect to the rest of the records.

3. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the records sent to the appellant.

Original signed by: October 11, 2012
Stephanie Haly
Adjudicator