Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3249

Appeal PA12-399

Ministry of Community Safety and Correctional Services

August 30, 2013

Summary: An individual sought access to information about an OPP investigation into an incident at his home. The ministry granted partial access to the responsive records, relying on section 49(b) (personal privacy) to deny access to the withheld information. In this order, the adjudicator partly upholds the ministry's decision under section 49(b), but orders disclosure of the appellant's own personal information to him, as well as certain information that falls within the application of the absurd result principle.

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

Orders and Investigation Reports Considered: Order MO-1449.

OVERVIEW:

[1] This order addresses the decision of the Ministry of Community Safety and Correctional Services (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an incident involving the requester that occurred at his home.

[2] The ministry located a one-page occurrence report and sent a decision letter to the requester, granting partial access. The ministry withheld portions of the record under section 49(a), with section 14(1)(l) (law enforcement) and section 49(b), together with the presumption against disclosure in section 21(3)(b) and the factor favouring privacy protection in section 21(2)(f). The ministry also withheld information in the occurrence report on the basis that the information was not responsive to the access request.

[3] The requester subsequently clarified that he was also seeking the officers' notes related to the occurrence. As a result, the ministry identified an additional four pages of officers' notes as responsive and issued a revised access decision to the requester. Partial access was granted to the officers' notes, with access to portions denied, based on the same personal privacy exemptions claimed with respect to the occurrence report. Information in the officers' notes was also withheld as non-responsive.

[4] The requester (now the appellant) appealed the ministry's decision to this office, and a mediator was appointed to explore resolution. During mediation, the appellant advised that he was not seeking access to information withheld under section 49(a), with section 14(1)(l), or to information withheld by the ministry as non-responsive. The information withheld for these reasons was thereby removed from the scope of the appeal.

[5] As it was not possible to fully resolve the appeal by mediation, it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts a written inquiry. During my inquiry, I sought representations from the ministry. Once I received the ministry's representations, I shared them with the appellant and received brief correspondence in reply.

[6] In this order, I find that section 49(b) applies to some of the personal information in the records, and I uphold the ministry's access decision, in part. I also find that the absurd result principle applies to other personal information, and I order that it be disclosed to the appellant.

RECORDS:

[7] Remaining at issue are portions of page 1 (the occurrence report) and pages 2, 3 and 5 (the police officers' notes).[1]

ISSUES:

A. Do the records contain "personal information?"

[1] The notes of the first involved officer are numbered pages 2 and 3 while the notes of the second officer are numbered pages 4 and 5.

B. Would disclosure result in an unjustified invasion of personal privacy under section 49(b)?

C. Should the ministry's exercise of discretion be upheld?

DISCUSSION:

A. Do the records contain "personal information?"

[8] I must first decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* 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;

[9] The list of examples of personal information under section 2(1) is not exhaustive; information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[2]

[10] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.[3] 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.[4]

[11] According to the ministry, the records contain personal information about the appellant and another individual that fits within paragraphs (a), (e), (g) and (h) of the definition in section 2(1) of the *Act.*

[12] The appellant's representations do not specifically address the issue of whether the records may contain personal information, as defined in the *Act.*

Analysis and findings

[13] Under section 2(1) of the *Act*, "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 the disclosure of the name would reveal other personal information about the individual.

[14] Based on my review of the records, I find that they contain the name, date of birth, and other details about another identifiable individual, which qualifies as that individual's personal information under paragraphs (a) and (h) of the definition of that term in section 2(1) of the *Act*.

[15] In addition, I find that the records contain information pertaining to the appellant, including his address, that qualifies as his personal information within the meaning of paragraphs (a), (d) and (h) of the definition in section 2(1) of the *Act.* I also find that some of the records contain personal information about the appellant as contemplated by paragraph (g) of the definition, since it includes the views or opinions of other individuals about the appellant.

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[2] Order 11.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

[16] I find, therefore, that all of the records contain the personal information of the appellant and another identifiable individual. Since the records contain both the personal information of the appellant and another individual, the relevant personal privacy exemption is the discretionary one found in section 49(b).[5]

B. Would disclosure result in an unjustified invasion of personal privacy under section 49(b)?

[17] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, subject to a number of exceptions to this general right of access.

[18] One such exception is section 49(b) which gives the ministry discretion to deny access if disclosure would constitute an unjustified invasion of another individual's personal privacy. Section 49(b) can only apply if the record contains the personal information of another identifiable individual, as well as the appellant. Further, if the information falls within the scope of section 49(b), that does not end the matter because the ministry is still obliged to exercise its discretion in deciding whether to disclose the information by weighing the requester's right of access to the requester's own personal information against the other individual's right to protection of his or her privacy.

[19] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In this appeal, the ministry relies on sections 21(3)(b) and 21(2)(f), which state:

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

[5] Order M-352.

[20] 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). However, in *Grant v. Cropley*,[6] the Divisional Court commented on the discretionary nature of the presumption under section 49(b), when it is reviewed in the context of a record containing the requester's personal information, as well as that of another individual. The Court stated that the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) in determining, under s.49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[21] In addition, where an appellant originally supplied the information, or 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.[7] This is referred to as the absurd result principle. During the inquiry, I asked the ministry to specifically address the possible application of the absurd result principle in the circumstances of this appeal.

Representations

[22] The ministry contends that section 49(b) applies because disclosure of the personal information remaining at issue would constitute an unjustified invasion of the privacy of the other individual identified in the records. In its decision, the ministry referred to the presumption against disclosure in section 21(3)(b) and the factor in section 21(2)(f) in claiming that section 49(b) applies.

[23] With regard to section 21(3)(b), the ministry submits that the personal information at issue "was compiled and is identifiable as part of an investigation into a possible violation of law in relation to a family dispute." The ministry notes that the application of section 21(3)(b) is not dependent on whether charges were actually laid following the police investigation. The ministry's only apparent allusion to the relevance of the factor favouring privacy protection in section 21(2)(f) of the *Act* is the reference to the records containing "highly sensitive personal information," without further elaboration. Regarding the absurd result principle, the ministry takes the position that it does not apply in "the particular and sensitive circumstances of the appellant's request … because disclosure would be inconsistent with the privacy exemption…".

[24] The appellant does not address the personal privacy exemption in section 49(b) in his representations.

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[6] [2001] O.J. 749.
[7] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

Analysis and findings

[25] I concluded, above, that the records contain the personal information of the appellant and of one other identifiable individual. My review of section 49(b), together with sections 21(3)(b) and 21(2)(f), is conducted in relation to the intertwined personal information of the appellant and the other individual.

[26] As a general consideration, the disclosure of the appellant's own personal information to him cannot result in an unjustified invasion of another individual's personal privacy. In particular, I find that the appellant's own address, where it appears in the officer's notes on page 2, cannot be withheld under section 49(b), and I will order it disclosed to him.

[27] In my view, however, the analysis under section 49(b) becomes somewhat more complex where the information at issue consists of the type of information fitting within paragraphs (e), (g) and (h) of the definition of personal information in section 2(1); that is, the views or opinions of individuals about the situation and/or other individuals. I will consider this point under my discussion of the absurd result principle, below.

[28] To begin the analysis, however, I note that past orders have established that the presumption in section 21(3)(b) may still apply even if no criminal proceedings were commenced against any individual. The presumption only requires that there be an investigation into a possible violation of law.[8] Based on the content of the records, I am satisfied that the personal information was compiled by the police and is identifiable as part of an investigation of a possible violation of the law. Although the matter was closed following attendance at the appellant's home by police officers at the time, and no charges were laid, this investigation is sufficient to bring the information within the ambit of the presumption in section 21(3)(b), and I find that it applies.

[29] In order for the factor in section 21(2)(f) of the *Act* to be accorded weight, I must be satisfied by the evidence that disclosure of the particular personal information at issue would result in "a reasonable expectation of 'significant' personal distress" to the subject individual.[9] In my view, the evidence is not persuasive. Although I accept that any family dispute requiring the attendance of police officers is distressing for family members, I am not satisfied by the ministry's representations that there is anything about the specific personal information at issue that is inherently *highly* sensitive. I am also not satisfied that the disclosure of this personal information could reasonably be expected to result in *significant* personal distress. On my view of the information that remains at issue, I find that the factor weighing against disclosure in section 21(2)(f) does not apply.

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[8] Orders P-242 and MO-2235.
[9] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[30] I concluded, above, that section 21(3)(b) applies to the undisclosed personal information of the other individual identified in the records, but that the factor weighing against disclosure in section 21(2)(f) does not. The appellant did not offer submissions on the application of any of the factors in section 21(2) that *favour* disclosure,[10] although given an opportunity to do so. My finding that section 21(3)(b) applies could end the analysis, resulting in a finding that the information is exempt under section 49(b). However, as previously suggested, certain personal information in these records about the appellant and the other individual is intertwined, and it is with respect to this information that I will consider the possible application of the absurd result principle.

[31] As stated above, where a requester originally supplied the information, or 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.[11] The absurd result principle has been applied where the requester sought access to his or her own witness statement;[12] where the requester was present when the information was provided to the institution;[13] and where the information in the record would clearly be known to the requester.[14] 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.[15]

[32] In Order MO-1449, Adjudicator Laurel Cropley reviewed the absurd result principle in the context of an access decision of the Toronto Police Service in response to a request for records related to the death of the requester's brother. I find the following passage relevant in the analysis of the circumstances before me:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.[16]

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[10] Sections 21(2)(a) to (d) weigh in favour of disclosing personal information.
[11] See footnote 7.
[12] Orders M-444 and M-451.
[13] Orders M-444, P-1414 and MO-2266.
[14] Orders MO-1196, PO-1679, PO-1679, MO-1755 and MO-2257-I.
[15] Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.
[16] More recently, in Order PO-3247, Adjudicator Cropley provided an in-depth review of Order MO-1449 and other orders that address the absurd result principle, including Orders M-444 and MO-1323.

[33] I agree with this reasoning and adopt it here. In my view, withholding certain portions of the occurrence report and the first set of officer's notes at pages 2 and 3 would result in an absurdity. I conclude that disclosure of these specific portions would not be inconsistent with the privacy-protecting purpose of the section 49(b) exemption, and I therefore find that section 49(b) does not apply to them.

[34] However, I have decided that the absurd result principle does not apply to certain other personal information about the other identifiable individual in the occurrence report at page 1 and the officers' notes at pages 2 and 5, based on the nature of it. In my view, any possible absurdity associated with withholding this other personal information, even though it may also be within the appellant's knowledge, is outweighed by the privacy protection principles inherent in section 49(b). Accordingly, I find that disclosure of the information would constitute an unjustified invasion of the personal privacy of the other identifiable individual, and I find that it is exempt under section 49(b), subject to my review of the ministry's exercise of discretion.

C. Should the ministry's exercise of discretion be upheld?

[35] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute her own discretion for that of the institution.

[36] As previously noted, section 49(b) is a discretionary exemption, and I have upheld the ministry's decision to apply it to deny access to brief portions of pages 1, 2 and 5. I must review the ministry's exercise of discretion in doing so. To be clear, my review of the ministry's exercise of discretion is limited to the information that I have not otherwise ordered disclosed pursuant to this order.

[37] The ministry submits that it gave careful consideration to the appellant's right of access to personal information in the records. The ministry refers to the fact that it issued two decision letters and released a "substantial amount of information" to him, and states that:

> By providing the appellant with partial access to the requested information, the ministry has tried to appropriately balance the appellant's right of access to personal information records against the privacy rights of another individual.

[38] The ministry maintains that it considered releasing the exempted information to the appellant notwithstanding that section 49(b) applied, but concluded that additional disclosure was not feasible due to the "highly sensitive nature of the matters reflected in the responsive records."

[39] The appellant's representations allude to a sympathetic or compelling need for access to the information to assist him in greater understanding of the situation, and in order to seek resolution of it. His representations do not otherwise address the ministry's exercise of discretion.

[40] Based on the representations received from the ministry and from the appellant, and my review of the personal information for which I have upheld the ministry's access decision under section 49(b), I am satisfied that the ministry considered relevant factors in exercising its discretion. I am also mindful of the additional disclosure the appellant will receive pursuant to this order. Accordingly, I find that the ministry exercised its discretion properly in the circumstances, and I will not interfere with it on appeal.

ORDER:

1. I order the ministry to disclose the non-exempt responsive portions of the records to the appellant by **October 7, 2013** but not before **September 30, 2013**. The personal information that is to be withheld pursuant to section 49(b) is highlighted in orange on the copy of the records sent to the ministry with this order.

2. To verify compliance with this provision, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant.

Original Signed By: August 30, 2013
Daphne Loukidelis
Adjudicator