Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3340

Appeal PA13-49

Ministry of Community Safety and Correctional Services

May 13, 2014

Summary: An individual sought access to OPP records related to 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 upholds the ministry's decision under section 49(b). The absurd result principle does not apply and the records cannot reasonably be severed under section 10(2).

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"), 10(2), 21(2)(f), 21(3)(b), and 49(b).

Orders and Investigation Reports Considered: Orders MO-1449, MO-2954 and P-1107.

OVERVIEW:

[1] This order addresses the decision of the Ministry of Community Safety and Correctional Services (the ministry) in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a particular incident.

[2] After identifying the records that were responsive to the request, the ministry issued a decision granting partial access to them. Portions were withheld, pursuant to section 49(a), together with sections 14(1)(l) (hamper control of crime) and 14(2)(a)

(law enforcement report), and section 49(b) (discretion to refuse access to requester's personal information), in conjunction with the presumption against disclosure in section 21(3)(b) and the factor in section 21(2)(f). The ministry also withheld some information on the basis that it was not responsive to the access request.

[3] The requester appealed the ministry's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant advised that he did not wish to pursue access to the information withheld under sections 49(a) and 14(1)(l) and that he is not challenging the non-responsive severances. Accordingly, this information and the related exemptions were removed from the scope of the appeal.

[4] As it was not possible to completely resolve the appeal, it was transferred to the adjudication stage of the appeals process and assigned to me to conduct an inquiry. I sought submissions from the ministry, first. In these representations, the ministry withdrew its claim that section 14(2)(a) applied to the occurrence reports. The ministry's representations were then shared with the appellant to provide him with an opportunity to submit representations on the issues. The appellant sent a brief letter in response, asking me to consider comments he had previously submitted to this office, rather than submitting representations.

[5] In this order, I find that section 49(b) applies to the undisclosed personal information in the records, and I uphold the ministry's access decision.

RECORDS:

[6] The 11 pages remaining at issue consist of an occurrence summary (page 1), general occurrence report (page 2), supplementary occurrence report (pages 3-9) and police officers' notes (pages 12 and 14).[1]

ISSUES:

A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

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

C. Did the ministry properly exercise its discretion under section 49(b)?

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[1] The records relate to an incident that took place in October 2012. The appellant also submitted a request to the ministry for records related to an incident that occurred in May 2012. The issues related to access to the May 2012 records were addressed in Order PO-3249.

DISCUSSION:

A. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

[7] The first issue to be addressed is whether the records contain "personal information" and, if so, to whom it relates. As defined in section 2(1) of the *Act,*

> "personal information" means recorded information about an identifiable individual, including,
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> (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;

[8] 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]

[9] 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]

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

[11] The appellant does not address the issue of whether the records contain personal information as defined in the *Act.*

Analysis and findings

[12] In order to determine if section 49(b) applies, together with section 21, as claimed by the ministry, I must first decide whether the records contain "personal information" and, if so, to whom it relates. 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.

[13] Based on my review of the records, I find that they contain the names, dates of birth, addresses, medical history, views and other details about five identifiable individuals, which qualifies as the personal information of those individuals under paragraphs (a), (b), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*.

[14] Additionally, I find that the records contain information pertaining to the appellant, including his address, views and the views of others about him that qualifies as his personal information within the meaning of paragraphs (a), (d), (g) and (h) of the definition in section 2(1) of the *Act.*

[15] Therefore, I find that all of the records contain the mixed personal information of the appellant and other identifiable individuals.

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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.

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

[16] 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 that are found in section 49.

[17] 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. This approach 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.

[18] Whether the relevant exemption is section 21(1) or section 49(b), sections 21(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold is met. The exceptions in sections 21(1)(a) to (e) are relatively straightforward; however, none of them apply in this appeal. Section 21(1)(a) is addressed in my reasons, below.

[19] The exception in section 21(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires a consideration of additional parts of section 21. Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[20] For records claimed to be exempt under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[5] This represents a shift away from the previous approach under both sections 49(b) and 21, whereby a finding that a section 21(3) presumption applied could not be rebutted by any combination of factors under section 21(2). As explained by Adjudicator Laurel Cropley in Order MO-2954:

> … [I]t is apparent that the mandatory and prohibitive nature of section 14(1) [the equivalent of section 21(1) in MFIPPA] is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the

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[5] Order MO-2954.

> requester's own information. On the other hand, section 38(b) [section 49(b) in FIPPA] is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information.[6]

[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.

[22] In this appeal, the ministry relies on the presumption against disclosure in section 21(3)(b) and the factor favouring privacy protection in section 21(2)(f) to deny access to pages 1-9, 12 and 14 under section 49(b). These parts of section 21 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;

Representations

[23] Beginning with the exception in section 21(1)(a), the ministry was specifically asked whether it had sought the consent of any of the other individuals identified in the records, including one particular family member. The ministry advised that it did not notify these individuals to try to obtain consent, due to it being fairly certain that consent would not be provided in the circumstances. The ministry also notes that although in some situations a requester provides a written consent from other family members for access to their personal information, no consent was provided by the appellant in this matter.

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[6] Page 24 at paragraph 74.

[7] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

[24] 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 individuals identified in the records. Respecting section 21(3)(b), the ministry submits that as the content of the records makes clear, the personal information at issue was compiled and is identifiable as part of a police investigation into a possible violation of law in relation to a family dispute involving the appellant and other individuals. Referring to past orders, including Orders P-223 and P-1225, the ministry submits that the application of section 21(3)(b) is not dependent on whether charges were actually laid in relation to a given incident investigated by the police.

[25] Regarding the factor favouring privacy protection in section 21(2)(f), the ministry submits that disclosure of the withheld personal information relating to this family dispute involving the appellant and other individuals "would cause these other individuals excessive personal distress."

[26] I asked the ministry to address the possible application of the absurd result principle in this appeal, since the appellant was present during the incident that resulted in the creation of the records. In response, the ministry argues that the absurd result principle does not apply in "the particular and sensitive circumstances of the appellant's request" because disclosure of the withheld information "would be inconsistent with the privacy exemption…"

[27] As stated, I did not receive representations from the appellant that directly address the issues in this appeal.

Analysis and findings

[28] The records at issue in this appeal contain the personal information of the appellant and of a number of other identifiable individuals. 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 these other individuals.

[29] As outlined above, this office's approach to reviewing the possible application of the discretionary personal privacy exemption in section 49(b) follows the more nuanced approach explained in Order MO-2954. Order MO-2954 post-dates the inquiry into this appeal, but it incorporates and expands upon the analysis conducted under section 49(b) that was acknowledged by the Divisional Court in *Grant v. Cropley* in 2001, which was referred to in the Notice of Inquiry sent to the ministry and the appellant.[8] This view acknowledges the special nature of requests for one's own personal information under section 49(b). Following Order MO-2954, therefore, I reviewed the factors and presumptions in sections 21(2) and (3) to balance the interests of the parties in

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[8] As set out in the Notice of Inquiry: In *Grant v. Cropley* ([2001] O.J. 749), the Divisional Court said 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 personal privacy."

determining whether the disclosure of the personal information in the records *would* constitute an unjustified invasion of personal privacy under section 49(b).

[30] Upon consideration of the circumstances of this appeal, I find that the presumption against disclosure at section 21(3)(b) applies. Section 21(3)(b) states:

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

[31] The presumption at section 21(3)(b) can apply to a variety of investigations.[9] 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.[10] In this appeal, I accept that the personal information at issue was compiled by the police and is identifiable as part of an investigation to determine if an offence under the *Criminal Code* had taken place. On this basis, I find that section 21(3)(b) applies to the records.

[32] The next determination is what weight to afford this presumption, recognizing that the types of information set out in section 21(3) are generally regarded as particularly sensitive.[11] Based on the nature of the personal information about other identifiable individuals in these records, and the surrounding circumstances, I conclude that the presumption in section 21(3)(b) weighs heavily in favour of privacy protection for this information.

[33] Citing several older IPC decisions, the ministry submits that disclosure of the personal information would result in "excessive personal distress." However, this statement reflects an outmoded approach to the factor in section 21(2)(f) of the *Act*. In Order PO-2518, former Senior Adjudicator John Higgins observed that an interpretation of the factor relying on the term "excessive" was unduly restrictive, and he modified the approach for determining if the factor in section 21(2)(f) should apply. Instead, the former senior adjudicator concluded that a reasonable expectation of "significant" personal distress is a more appropriate threshold in assessing whether information qualifies as "highly sensitive." Therefore, I must be persuaded that disclosure of the particular personal information at issue would result in "a reasonable expectation of significant personal distress" to the individual to whom it relates.[12] It is not sufficient

[9] Order MO-2147.
[10] Orders P-242 and MO-2235.
[11] Order MO-2954.
[12] Orders PO-2518, PO-2617, MO-2344 and PO-2998.

that release of the information might cause some level of embarrassment or discomfort to those affected by the disclosure.[13]

[34] I accept the ministry's position that disclosure of the personal information of the other individuals identified in these records could reasonably be expected to result in significant personal distress to them, particularly given the evidence provided by the records about the family dynamic. Further, I find that there is a great deal of personal information about one of the individuals that is inherently sensitive, relating as it does to medical and health matters. Therefore, I find that the factor favouring privacy protection in section 21(2)(f) applies and weighs heavily in favour of non-disclosure.

[35] The appellant did not provide representations and did not otherwise address the personal privacy exemption in his past comments. There is no basis upon which I could conclude that any of the factors in sections 21(2)(a)-(d) apply, thereby weighing in favour of his access to the personal information of other individuals in these records. Therefore, I find that there are no factors weighing in favour of the disclosure of the personal information of other individuals that is contained in these records.

[36] Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I find that the disclosure of the withheld personal information to which sections 21(3)(b) and 21(2)(f) apply would result in an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information qualifies for exemption under section 49(b).

[37] Section 10(2) of the *Act* requires the head to disclose as much of a responsive record as can reasonably be severed without disclosing information that falls under one of the exemptions. The key question raised by section 10(2) is one of reasonableness. A valid section 10(2) severance must provide the requester with information which is responsive to the request, while at the same time protecting the portions of the record covered by an exemption. Past orders have held that it would not be reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value.[14] Based on the nature and content of these records, I find that they cannot reasonably be severed without disclosing the information that falls under section 49(b).

[38] I have also considered whether there is any basis in the circumstances of this appeal to apply the absurd result principle. According to this principle, whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, 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

[13] Order P-1117.
[14] Orders 24, P-1107 and PO-2366-I.

exemption.[15] One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.[16]

[39] However, where (as here) the information at issue consists of the type of information fitting within paragraphs (e) and (g) of the definition of personal information in section 2(1) - the views or opinions of individuals about the situation and/or other individuals – it is less clear that the information is "clearly within the requester's knowledge." Additionally, in this appeal, I agree with the ministry that disclosure of the withheld information would be inconsistent with the purpose of the personal privacy exemption in section 49(b). Therefore, I find that any absurdity associated with not disclosing this personal information, even though it may generally be within the appellant's knowledge, is outweighed by the privacy protection principles inherent in section 49(b).

[40] Accordingly, I find that disclosure of the withheld personal information would constitute an unjustified invasion of personal privacy, and I find that it is exempt under section 49(b), subject to my review of the ministry's exercise of discretion.

C. Did the ministry properly exercise its discretion under section 49(b)?

[41] 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, I may determine whether the institution erred in exercising its discretion under section 49(b), and whether it considered irrelevant factors or failed to consider relevant ones. In reviewing the exercise of discretion by the ministry, however, I cannot substitute my own discretion for that of the ministry.

[42] The ministry submits that by granting partial access to the information sought by the appellant, it has tried to appropriately balance his right of access against the privacy rights of other individuals involved in the family dispute that is reflected in the records at issue. The ministry states that in seeking this balance, it considered the nature of the relationship between the parties. Additionally, the ministry claims that it made its decision with the purposes and objects of the *Act* in mind, and maintains that while it considered releasing the "remaining exempted information," it decided not to do so because of the highly sensitive nature of the family dispute reflected in the records. Finally, the ministry indicates that it also considered whether it would be possible to disclose more information, but concluded that it would not be appropriate in this situation.

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[15] Orders M-444 and MO-1323.

[16] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

[43] As stated, the appellant did not submit representations in this appeal. However, his earlier comments allude to a sympathetic or compelling need for access to the information to assist him in greater understanding of the situation between family members.

Analysis and findings

[44] In considering the ministry's exercise of discretion in denying access to information under section 49(b), with reference to sections 21(3)(b) and 21(2)(f), I am mindful of the competing interests in this appeal. In this respect, I am satisfied that the ministry understood its obligation to balance the appellant's interests in seeking access to his own personal information against protecting the privacy interests of other individuals whose personal information was gathered in this particular law enforcement context.

[45] Overall, I am satisfied that the reasons given by the ministry for its exercise of discretion in denying access under sections 49(b) demonstrate that relevant factors were considered. In the circumstances, I find that the ministry exercised its discretion properly, and I uphold it.

ORDER:

I uphold the ministry's decision, and I dismiss this appeal.

Original signed by: May 13, 2014
Daphne Loukidelis
Adjudicator