Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3301

Appeal PA13-282

Ministry of Community Safety and Correctional Services

January 30, 2014

**Summary:** The appellant sought access to information relating to a specified police occurrence report. The ministry located the occurrence report and the investigating officers' handwritten notes that were responsive to the request. It granted partial access to the records, relying on the discretionary exemption in section 49(b) (invasion of privacy), with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f) to deny access to a number of severances. The decision of the ministry is upheld, with the exception of the severances on pages 8, 9 and 10, which are ordered disclosed under 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), 21(2)(f), 21(3)(b), and 49(b).

## OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a specified police occurrence report.

[2] The ministry located records responsive to the request and issued a decision granting the requester partial access to them. The ministry relied on the discretionary exemption at section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement), and the discretionary exemption at section 49(b) (invasion of

privacy), with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f). The ministry also withheld parts of the records that are non-responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision.

[4] During mediation, the appellant specified that he wants to pursue access to the withheld names of the individuals (the affected parties) who complained to the police about him. The appellant confirmed that he is not interested in pursuing access to the portions of the records that were withheld as being non-responsive and the police code information withheld under sections 49(a) and 14(1)(l). Accordingly, these portions of the records and the section 14(1)(l) exemption are no longer at issue in this appeal.

[5] Further mediation was not possible and the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[6] I began my inquiry by inviting the representations of the ministry, as well as those of the affected parties. The ministry provided representations that were shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction Number 7.* All of the affected parties advised that they did not consent to the disclosure of their personal information.

[7] Although I invited the representations of the appellant, he did not provide any during my inquiry.

[8] In this order, I order the ministry to disclose the severances in pages 8, 9 and 10 of the records, under the absurd result principle, and I uphold the ministry's decision with respect to the remaining records.

## RECORDS:

[9] The records at issue consist of the withheld portions and pages of an occurrence summary (page 1), a general occurrence report (pages 2 – 4), and handwritten officers' notes (pages 5 – 12).

## ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## DISCUSSION:

### A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, 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,
>
> . . .
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> . . .
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[12] 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.[2]

[13] In its representations, the ministry states that the records contain the names, telephone numbers and addresses of the affected parties who provided information to the investigating officers. It continues that the affected parties will be identified if the withheld portions of the records containing their personal information are disclosed.

[14] I agree with the ministry that the records contain the personal information of the affected parties. I find that the information relating to the affected parties qualifies as their personal information under paragraphs (a), (b), (d), (e) and (h) of the definition of "personal information" in section 2(1) of the *Act.*

[15] I also find that the records contain the personal information of the appellant as that term is defined in paragraphs (a), (b), (d), (e), (g) and (h) of the definition in section 2(1).

[16] Accordingly, I will consider the appellant's right to access the information in the records under section 49(b) below, and balance this against the affected parties' right to have their personal privacy protected.

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

[17] Section 49 provides a number of exemptions from the general right of access individuals have under section 47(1) of the *Act* to their own personal information held by an institution.

[18] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

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[1] Order 11.
[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[19] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[20] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[21] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy 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.[3]

[22] 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).

[23] In this appeal, the ministry claims that the presumption at section 21(3)(b) and the factor favouring privacy protection at section 21(2)(f) apply.

[24] 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] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[5]

[25] 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 under section 49(b).[6]

[26] To be considered highly sensitive under the factor in section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[7]

[27] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[8]

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[3] Order MO-2954.
[4] Orders P-242 and MO-2235.
[5] Orders MO-2213, PO-1849 and PO-2608.
[6] Order P-239.
[7] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[8] Order P-99.

[28] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

### *Absurd result*

[29] Where the requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[9]

[30] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[10]
- the requester was present when the information was provided to the institution[11]
- the information is clearly within the requester's knowledge[12]

[31] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[13]

### *The ministry's representations*

[32] In its representations, the ministry states that the records were compiled by the Ontario Provincial Police (OPP) as part of an investigation of the appellant after concerns were reported by one of the affected parties. The ministry states that the OPP investigated the appellant's alleged mental state and well-being; whether he had uttered a threat against a named individual; and whether he had access to firearms and, if so, whether they were stored in accordance with firearms legislation. The ministry asserts that the records were compiled by the OPP and are identifiable as part of a police investigation into the health and safety of an individual which included an assessment of whether or not there were any concerns in relation to the *Mental Health Act*, as well as potential *Criminal Code* offences such as uttering threats, and potentially unsafe or improper storage of a firearm. As such, the ministry argues that the records fit squarely within the presumption in section 21(3)(b) of the *Act* and that disclosure of

[9] Orders M-444 and MO-1323.
[10] Orders M-444 and M-451.
[11] Orders M-444 and P-1414.
[12] Orders MO-1196, PO-1679 and MO-1755.
[13] Orders M-757, MO-1323 and MO-1378.

the personal information of the affected parties presumptively constitutes an unjustified invasion of their personal privacy.

[33] The ministry adds that the affected parties have not consented to disclosure of their personal information. Because they are witnesses that provided information to the OPP during a police investigation that included a criminal and mental health component, their personal information can be considered highly sensitive such that the factor in section 21(2)(f) applies to the records as well. The ministry concludes by asserting that the absurd result principle does not apply to the records because the appellant does not have any knowledge of what information the OPP obtained.

[34] As noted above, the appellant did not submit representations.

### *Analysis and findings*

[35] I agree with the position of the ministry that the records at issue were compiled and are identifiable as part of the OPP's investigation of a possible violation of law, namely, an assessment of concerns regarding the appellant under the *Mental Health Act* and the *Criminal Code*. I find, therefore, that the records fall within the ambit of the presumption in section 21(3)(b) of the *Act*, and disclosure of the withheld portions of the records is presumed to constitute an unjustified invasion of the affected parties' privacy. I also agree that the factor in section 21(2)(f) applies to the records. The affected parties provided their personal information to the OPP in the course of a police investigation and they refused to consent to disclosure of it during the appeal process. In the circumstances of the OPP's police investigation of highly sensitive issues relating to the appellant, I find that disclosure of the personal information of the affected parties could be expected to cause them significant personal distress. Accordingly, I find that the only factor applicable in this appeal, section 21(2)(f), weighs in favour of privacy protection.

[36] While I accept most of the representations of the ministry, I disagree with its position that the absurd result principle does not apply to the severed portions of the records. I note that pages 8, 9, and 10 of the records, which consist of an officer's handwritten notes, contain a summary of the statement that the appellant provided to the OPP during its investigation. There are portions of the appellant's statement that have not been disclosed to him, despite the fact that he provided the information in these severances to the OPP. As the appellant was the source of the severed information in pages 8, 9 and 10, I find that it would be absurd to withhold this information from him. I will order the severances on these pages disclosed below.

[37] As for the remaining severances, I find that the presumption in section 21(3)(b) applies, as does the factor in section 21(2)(f) which weighs against disclosure. I find that no factors weighing in favour of disclosure apply, and none of the paragraphs in section 21(4) apply. Accordingly, subject to my consideration of the ministry's exercise

of discretion below, I find that the remaining severances qualify for exemption under section 49(b) of the *Act.*

## C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[38] 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.

[39] 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.

[40] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the institution.[15]

[41] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[16]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

[14] Order MO-1573.
[15] Section 54(2).
[16] Orders P-344 and MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

[42] In its representations, the ministry asserts that it balanced the concerns and interests of the appellant and the affected parties, and it exercised its discretion appropriately. The ministry considered the following factors:

- The personal information of both the appellant and the affected parties is at issue, and while the appellant has a right of access to his personal information, the affected parties' personal information should be protected.
- The information was collected for a law enforcement purpose in order for the OPP to conduct investigations under the *Criminal Code.*
- Police investigations into the conduct of citizens are confidential and privileged to the investigative body in order to maintain fairness and a presumption of innocence.
- The ministry disclosed as much of the appellant's personal information as it could under the *Act.*
- When notified about the appeal, the affected parties declined to consent to the disclosure of their personal information.
- At mediation, the appellant indicated he did not want the affected parties to be notified of his request. He also indicated he believed they should be held accountable for making false statements. This could suggest that the appellant could be considering confronting the affected parties, which could in turn, potentially subject the affected parties to harassment. Disclosure in the circumstances could have a chilling effect on police investigations going forward as citizens may be less willing to provide information to the police for fear of reprisals.

- In circumstances where individuals provide information to the police, these citizens expect the information to be kept confidential.

[43] Based on the ministry's representations in their entirety, I find that it properly exercised its discretion under section 49(b) in denying the appellant access to parts of the records. I further find that the ministry considered only relevant factors in exercising its discretion, including the purposes of the *Act* and the principles set out above; the wording of the exemption and the interests it seeks to protect; and the nature and sensitivity of the information. The ministry disclosed most of the appellant's personal information in the records. The severances contain the personal information of the affected parties and I have found that disclosure of these, with the exception of the personal information received from the appellant that is located in pages 8, 9 and 10, is presumed to be an unjustified invasion of the affected parties' personal privacy under section 21(3)(b). Accordingly, I uphold the ministry's exercise of discretion.

## ORDER:

1. I order the ministry to disclose the severances in pages 8, 9 and 10 to the appellant by **March 7, 2014** but not before **March 3, 2014.** I am attaching to this order a copy of these pages with the severances to be disclosed highlighted.

2. I uphold the ministry's decision with respect to the remaining severances.

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

Original Signed by: January 30, 2014
Stella Ball
Adjudicator