Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3341

Appeal PA12-465

Office of the Independent Police Review Director

May 14, 2014

Summary: The appellant sought access to records relating to his complaint about police officers to the Office of the Independent Police Review Director. The OIPRD claimed that the records were exempt under sections 49(a) (discretion to refuse to disclose requester's own information), in conjunction with section 14(2)(a) (law enforcement report) and 49(b) (personal privacy) of the *Act.* In this Order, the OIPRD's decision to withhold all except a portion of a one-page document is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss.2(1), 10(2), 14(2)(a), 49(a) and 49(b); *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11, section 7.

Orders Considered: M-757, PO-1706, PO-3112.

BACKGROUND:

[1] The Office of the Independent Police Review Director (OIPRD) manages and investigates complaints made by members of the public in relation to allegations of police misconduct. In its representations, the OIPRD explains:

> Complaints received by the OIPRD are either screened "in", in which case they are investigated fully, or are screened "out' in which case no investigation is undertaken. Where an investigation has been undertaken which concludes that there are reasonable grounds to believe misconduct has occurred, the complaint is "substantiated" and the matter proceeds to

> a hearing under Part V of the *Police Services Act* [*PSA*][1]. Conversely, for those complaints found to be "unsubstantiated" at the conclusion of an investigation, no further disciplinary action is taken in the majority of cases.

[2] The requester made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information relating to a complaint he made to the OIPRD. In particular, the requester sought access to the following:

- a copy of the audio recording of the GSPS (Greater Sudbury Police Service) during the OIPRD investigation
- any other submissions made by the GSPS during the OIPRD investigation
- the identity of who made submissions on behalf of the GSPS

[3] The OIPRD identified records responsive to the request and granted access to the requester's own statement to the OIPRD, recorded on a CD-ROM. The OIPRD relied on sections 14(2)(a) (law enforcement report) and 21(1) of the *Act* (invasion of privacy) to deny access to the portion of the responsive records it withheld.

[4] The requester (now the appellant) appealed the OIPRD's decision.

[5] During the course of mediation, the mediator noted that the records at issue in this appeal contained information that might qualify as the personal information of the appellant, thereby raising the potential application of sections 49(a) (discretion to refuse to disclose requester's own information) and 49(b) (personal privacy) of the *Act*.

[6] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the OIPRD. Based on the nature of the request and the records at issue, I decided to also raise in the Notice of Inquiry the possible application of the exclusion at section 65(6) of the *Act*. The OIPRD provided responding representations. In its representations, the OIPRD advised that it does not take the position that section 65(6) applies in the circumstances of this appeal. Accordingly, I will not consider the section 65(6) exclusion any further in this decision.

[8] I then sent a Notice of Inquiry along with the OIPRD's representations to the appellant. The appellant provided responding representations.

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[1] R.S.O. 1990, c. P.15.

RECORDS:

[9] The records at issue in this appeal consist of a one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and a CD-ROM containing recordings of interviews with various police officers who were the subject of the appellant's complaint.

ISSUES:

A. Does the one-page document fall within the scope of the request?
B. Do the records contain "personal information" as defined in section 2(1)?
C. Does the discretionary exemption at section 49(a), in conjunction with section 14(2)(a) apply to the one-page document?
D. Does the discretionary exemption at section 49(b) apply to all the records at issue?
E. Did the OIPRD properly exercise its discretion?
F. Can the records be reasonably severed without revealing exempt information?

DISCUSSION:

A. Does the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" fall within the scope of the request?

[10] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[11] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[12] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[13] When the OIPRD rendered its decision, and throughout intake, mediation and at the initial stages of the adjudication of this appeal, it identified the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" as being responsive to the request. When I requested a copy of the Case Coordination Analysis Form related to the appellant's complaint, the OIPRD took the position that the one-page document was not responsive to the request. In support of its position, the OIPRD submitted:

> Given the nature of the Record and upon further review, the OIPRD submits that the Record does not fall under the scope of the original Freedom of Information request and should not be considered in this appeal.
>
> The FOI request made by the Requester was very narrow in scope. The request specifically asked for 3 things: 1) copy of the audio recording of GSPS during the OIPRD investigation; 2) any other submissions made by GSPS during the OIPRD investigation; and 3) who made submissions on behalf of GSPS.
>
> At the time of the OIPRD's response (July 20, 2012), the Record was determined to be captured under the third prong of the request, that being "who made submissions on behalf of GSPS".
>
> Upon review, the OIPRD has concluded that the Record (Document #1) was mistakenly included in the response. The information in the Record does not fall under the proper purview of the FOI request. The request asks for <u>submissions made by the GSPS</u>.
>
> The Record under appeal was created by an OIPRD staff member, and not the GSPS. It is the personal notations of a case coordinator and his interpretation and recording of information provided during a conversation with the GSPS. It should not be treated as a record of a "submission" made by the GSPS. Therefore, it is not captured by the purview of the FOI request.

[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

> Further, to the extent that the Record may contain some information that may be considered "factual". It originates from the GSPS as it is taken from their records. The OIPRD submits the Requester should seek the information from the GSPS, as the GSPS is in a better position to provide accurate records of the facts contained in the document.
>
> Alternatively, if this record is considered to be captured by the scope of the request, the OIPRD continues to submit that the Record is protected under s. 14(2)(a) for the reasons mentioned above.

[14] I have considered the OIPRD's submissions and reviewed the content of the one-page document entitled "Additional information obtained by the OIPRD (Case Management)". Adopting a liberal interpretation of the request, in order to best serve the purpose and spirit of the *Act* and resolving any ambiguity in the request in the requester's favour, I find that this one-page document falls within the scope of the request. Specifically I find that, interpreted liberally, it falls within the scope of the appellant's request for "any other submissions made by the GSPS during the OIPRD investigation."

[15] I will now consider whether that one-page document falls within the purview of section 14(2)(a) of the *Act*.

B. Do the records contain "personal information" as defined in section 2(1)?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[17] 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.[4]

[18] 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.[5]

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

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

[20] The OIPRD explains:

> In the present case, [the appellant] filed a complaint with the OIPRD on [a specified date] alleging misconduct, namely deceit and neglect of duty against four officers from the Greater Sudbury Police Service (GSPS). The complaint was screened "in" and was retained by the OIPRD for an investigation. In the course of the OIPRD's investigation, the OIPRD Investigators conducted audiotaped interviews with [the appellant] and the four officers alleged to have committed the misconduct in question. On [a specified date], the investigation into the matter concluded that the complaint of deceit and neglect of duty against all four officers was unsubstantiated.

[21] The OIPRD submits that the records contain the appellant's and the subject officers' personal information.

[22] Having reviewed the records, I find that they contain the appellant's personal information which meets the definition of personal information as that term is defined in section 2(1) of the *Act*.

[23] I also find, for the following reasons, that the records at issue also contain the personal information of the officers that were the subject of the complaint. Information in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM interviews of the officers that were the subject of the complaint, relates to an examination into the conduct of the subject officers while at their work. However, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, the information in the records has thereby taken on a different, more personal, quality. In that regard, I am following a long line of orders of this office that have held that information in records relating to a complaint about the conduct of an individual, and an examination of that conduct contains that individual's personal information under the definition at section 2(1) of the *Act*.[7] Furthermore, I find that, except for the information discussed below, personal information of the subject officers contained in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM interviews is inextricably intertwined with the personal information of the appellant in those records.

[24] In my view, there is discrete information in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" that pertains to the appellant only, and does not contain the personal information of any other identifiable individual or of the officers who were the subject of the complaint. I have

[7] See, in this regard Orders M-757, P-165, P-448, P-1117, P-1180, PO-1912 and PO-2525.

highlighted this information in yellow on a copy of the one-page document that I have provided to the OIPRD along with a copy of this order.

C. Does the discretionary exemption at section 49(a), in conjunction with section 14(2)(a) apply to the one-page document?

[25] Section 47(1) 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. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[26] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[8]

[27] In this case, the OIPRD relies on section 49(a), in conjunction with section 14(2)(a). Section 14(2)(a) states:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[28] The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[8] Order M-352.

[29] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[9]

Section 14(2)(a): law enforcement report

[30] The OIPRD submits that supplementary records or attachments to the Case Coordination Analysis, such as the one-page document entitled "Additional information obtained by the OIPRD", are "reports" prepared in the course of law enforcement by an agency in a law enforcement matter that fall within the scope of section 14(2)(a) of the *Act*.

[31] The OIPRD submits, in particular:

> The "Additional information obtained by the OIPRD" document is a "Report". It consists of a formal account and collation of information for consideration. It formed part of the Case Coordinator Analysis and the review of the complaint, which resulted in a determination to screen "in" the complaint for an investigation.
>
> The Record … was prepared in the course of law enforcement, inspections or investigations. The review of a complaint, the gathering of additional information, the classification of the type of complaint and the ultimate decision to screen "in" the complaint for an investigation is a law enforcement matter that is conducted by the Case Coordinator. In short, the OIPRD's statutory jurisdiction and law enforcement function over public complaints commences once it is received by the OIPRD; and
>
> The OIPRD is an agency which has the function of enforcing and regulating compliance with a law, namely the *PSA*. …

[32] The OIPRD explains:

> When the OIPRD receives a complaint by a member of the public about a police officer or a police service, the complaint is assigned to a Case Coordinator. A file is opened and the Case Coordinator will generate a Case Coordination Analysis form, which is a standard form onto which the Case Coordinator records many of the various stages of the review and investigation that are detailed below.

[9] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

> The Case Coordinator will categorize the complaint as (i) a conduct complaint (an allegation of misconduct by one or more individual officers); (ii) a service complaint (an allegation of improper service by a Police Service); or (iii) a policy complaint (a complaint with respect to a particular police policy). The Case Coordinator will also review the complaint to determine whether further inquiries need to be made, either of the Complainant or of the relevant Police Service. As a part of this process, the Case Coordinator will also collect relevant information for consideration and may prepare supplementary notes or records for the purposes of screening and determining the next stage of the complaint.
>
> Once all of the relevant information is received, the Case Coordinator makes a determination as to whether the complaint falls within the criteria set out in sections 58 & 60 of the [*PSA*]. The Case Coordinator may screen the complaint "in" and will indicate on the Case Coordination Analysis which Code of Conduct section of the *PSA* is engaged. If the complaint is screened out, the Case Coordinator notes the basis on which this decision is made (e.g., complaint made outside a 6 month time limitation period, complaint is frivolous, etc.).
>
> When a complaint is screened "in", the complaint proceeds to an investigation to determine whether the allegation of misconduct is substantiated. That investigation is either conducted by the OIPRD or is referred back to the Police Service in question for investigation. On occasion, a complaint may even be referred to a different Police Service for investigation.
>
> Once the decision is made whether to screen a matter "in" or "out" that decision along with additional information collected is reviewed by the Case Coordinator Team Lead. The Team Lead reviews the complaint and documents prepared and either approves or disagrees with the recommendation found on the Case Coordination Analysis, on occasion with comments. The Team Lead may also request further inquiries be made or may vary the original recommendation. Similarly, on occasion, legal advice is sought and provided and may appear as handwritten comments on the Case Coordination Analysis.

[33] Relying on Order PO-3112, the OIPRD submits that the Case Coordination Analysis is a "report" within the meaning of section 14(2)(a) of the *Act*. The OIPRD submits that it:

> … represents a formal account of the results of the Case Coordinator's review and inquiry into the complaint. It includes any information gathered and possible follow up that is done in the consideration of

> various factors in the classification of the complaint and in the ultimate determination of whether a complaint will be screened "in" or "out".

[34] The OIPRD acknowledges that there is some factual information in the one-page document entitled "Additional information obtained by the OIPRD", but that access to it should still be denied "as the information does not purport to be comprehensive or detailed and it must be read in conjunction with the Case Coordination Analysis."

[35] The OIPRD explains further that:

> The Record is in no way solely reflective of the way in which the screening decision with respect to the complaint was made. The information is meant to be supplementary to the complaint and to the Case Coordination Analysis. It includes conclusions that form part of the subsequent analysis and determination of the complaint. It does not purport to detail a full account of the events related to the complaint but assists the Case Coordinators in focusing on various elements of the complaint, as in their discretion they deem appropriate.
>
> As background, although the Case Coordinator will make a decision on whether to screen the complaint "in" or "out"; the ultimate decision as to how a complaint is screened resides with the Independent Police Review Director (IPRD), a decision-making power which can be delegated. Accordingly, the decision by the Case Coordinator as to how to classify the complaint and whether it should be screened "in" or "out" is really the recommendation of an employee of the IPRD, who can accept or reject this determination and replace it with his own. Information collected, notes made, such as the record "Additional information obtained by the OIPRD" and other documents made by a Case Coordinator is one of the vehicles by which this recommendation is made.

[36] The OIPRD submits that the one-page document entitled "Additional information obtained by the OIPRD" was prepared in the course of law enforcement. It submits that the OIPRD's review or "investigation" of a complaint commences once it is received and that the decision to seek further information demonstrates that an "investigation" was conducted by the Case Coordinator. Relying on Order PO-3112, the OIPRD submits that it is an agency mandated with the authority to enforce and regulate compliance with Part V of the *PSA*, and as such is a "law enforcement" agency as defined by *FIPPA*.

[37] The appellant's representations describe in detail his concerns about his interactions with the police, including a "caution flag" or flags that were associated with his name, his arrest at a specified location and the execution of a search warrant at his home. He also submits that his complaints about the various police officers were found

to be unsubstantiated because the OIPRD "were misled by the police during their investigation".

[38] With respect to the application of section 14(2)(a), the appellant submits that:

> The public has a right to know the evidence and information that the state (the OIPRD and the police) have accumulated about an individual including flags and the reasons why. The police failed in their obligation to prove that there is some legitimate reason or concern which calls for the exercise of its discretion to control or restrict the disclosure of the record.

[39] Relying on *R v. Stinchcombe*[10] the appellant submits that "[t]he information held by a public institution is not protected by privilege", and that:

> … only when information is completely irrelevant or protected by privilege is the Crown (OIPRD) relieved of its burden of disclosure. The Crown (OIPRD) is not protected by privilege and the records at issue are entirely relevant to the best interest of society in that they may be used to prevent further police misconduct against the public.

[40] The appellant further submits that the discretion to release records should be exercised in a manner that is respectful of *Canadian Charter of Rights and Freedoms* (the *Charter*) values as reflected in section 7 of the *Charter*[11]. He submits that he should be provided with the records in order to make "full answer and defense". He submits:

> The rationale for this constitutional protection stems from the basic proposition that the right to make full answer and defense and face your accuser and the statements the [police] made to the OIPRD is "one of the pillars of criminal justice on which we depend to ensure that the innocent are not convicted" or harassed.

Analysis and Finding

The appellant's Charter arguments

[41] The rules governing the raising of constitutional questions in appeals are set out in section 12 of the IPC's *Code of Procedure* and *Practice Direction Number 9*. Section 12 of the *Code* states, in part:

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[10] [1991] 3 SCR 326.

[11] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11. Section 7 reads: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> 12.01 An appellant may raise a constitutional question in an appeal only within 35 days after giving the IPC notice of the appeal. Any other party may raise a constitutional question only within 35 days after the party is notified of the appeal.
>
> 12.02 A party raising a constitutional question shall notify the IPC and the Attorneys General of Canada and Ontario of the question within the applicable 35-day time period.

[42] Although the appellant has raised a constitutional issue, he has not provided any evidence to show that he has complied with the requirements in section 12 of the *Code* and *Practice Direction Number 9.* For example, it appears that he has not notified the Attorneys General of Canada and Ontario of the constitutional question he is raising, as required by section 12.02 of the *Code*.

[43] I accept that *Charter* values do inform administrative discretionary decision making.[12]

[44] That said, in Order PO-1706[13], Adjudicator Laurel Cropley wrote the following with respect to an argument in that appeal that failure to disclose the name of a complainant relating to a complaint of a contravention of the *Ontario Water Resources Act*[14], was an infringement of that appellant's rights under section 7 of the *Charter*:

> After considering the representations and the authorities cited by both parties, I do not accept the appellant's position that his section 7 *Charter* rights are infringed as a result of non-disclosure under the *Act*.
>
> In my view, the "right to disclosure" flows from the right to make full answer and defence in criminal, quasi-criminal, and arguably in regulatory proceedings, and only within the confines of those proceedings. I agree with the observations of former Adjudicator Hale in Order P-743. In my view, there are no proceedings against the appellant under this *Act*, or any other Act which would trigger any disclosure obligations in a manner similar to those cited by the appellant.

[45] I agree with her approach.

[46] The appellant did not allege that any relevant *FIPPA* provisions violate the *Charter*, did not provide a Notice of Constitutional Question nor provide the requisite factual or legal foundation for his allegation of a *Charter* breach or that *Charter* values

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[12] *Doré v. Barreau du Québec*, 2012 SCC 12 at paragraph 35.
[13] Upheld on judicial review in *Grant v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 749, 143 O.A.C. 131, Toronto Doc. 666/99 (Div. Ct.).
[14] R.S.O. 1990, c. O.40.

did not inform administrative discretionary decision making in the circumstances of this appeal. Accordingly, I am not satisfied that the appellant had established a *Charter* breach, nor am I satisfied that he has established that *Charter* values did not inform administrative discretionary decision making in the circumstances of this appeal.

Law enforcement report - section 14(2)(a)

[47] I now turn to the analysis of whether the one-page document qualifies as a law enforcement report under section 14(2)(a) of the *Act*.

[48] In order for a record to qualify for exemption under section 14(2)(a), the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[15]

Part 1 of the test

[49] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[16] I have carefully reviewed the record and I am not satisfied that the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" qualifies as a report for the purpose of section 14(2)(a). I find that this one-page document contains some analysis and information but does not go beyond merely recording observations or facts.

[50] I also am not satisfied that the one-page document can be integrated into the Case Coordinator's Analysis in such a way that it assumes the nature of a report under section 14(2)(a). There is no reference to this one-page document in the Case Coordination Analysis Form that the OIPRD provided to this office in the course of adjudication. Rather, it appears to me to be a stand-alone document. Accordingly, I find that part 1 of the test under section 14(2)(a) has not been met. As all three parts of the test must be met in order for a record to fall within the scope of section 14(2)(a), I find that section 14(2)(a) does not apply and it is not necessary for me to consider the other parts of the section 14(2)(a) test.

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[15] Orders 200 and P-324.
[16] Orders P-200, MO-1238, MO-1337-I.

[51] Accordingly, I find that the one-page document does not qualify for exemption under section 49(a), in conjunction with section 14(2)(a).

D. Does the discretionary exemption at section 49(b) apply to the personal information in the records?

[52] Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[53] Where a record contains personal information of the appellant 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 appellant. I found above that discrete information in one-page document entitled "Additional information obtained by the OIPRD (Case Management)" pertains to the appellant only, and does not contain the personal information of any other identifiable individual. Accordingly, disclosing that information to the appellant would not result in an unjustified invasion of another individual's personal privacy. As a result, I will order that this information, which I have highlighted in yellow on a copy of the one-page document provided to the OIPRD along with a copy of this order, be disclosed to the appellant. I now turn to consider the remainder of the information at issue in the one page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM.

[54] 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 appellant. This involves a weighing of the right of access to his own personal information against the other individual's right to protection of their privacy.

[55] 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.[17]

[56] Section 21(2) provides some criteria for the OIPRD to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion

[17] Order MO-2954.

of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b).

[57] Although the OIPRD submits that section 49(b) applies to the remaining withheld information, it does not refer to any specific factors or presumptions in sections 21(2) or 21(3) in support of its position. The appellant also does not raise any applicable presumptions or factors, but does refer to his right to full answer and defense in his *Charter* submissions. In my view, he thereby raises by inference the possible application of the factor favouring disclosure at section 21(2)(d) of the *Act*. In addition, as set out below, I am of the view that the presumption at section 21(3)(b) is a relevant consideration in the circumstances of this appeal.

[58] Section 21(2)(d) reads:

> 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,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request.

[59] Sections 21(3)(b) reads:

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

Section 21(3)(b)

[60] I will first address the section 21(3)(b) presumption. Even if no 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.[18] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[19]

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[18] Orders P-242 and MO-2235.
[19] Orders MO-2213 and PO-1849.

[61] It has been held in previous orders of this office[20] which predate the amendment of the *PSA*, that a public complaint investigation is a law enforcement investigation which can lead to charges against the subject officers. Accordingly, the information in records pertaining to the investigation can be subject to the presumption at section 21(3)(b). I come to the same conclusion with respect to the investigation at issue in the appeal before me. In my view, the public complaint investigation at issue in this appeal is an investigation that could lead to a penalty or sanction under part V of the *PSA*. I further find that the remaining personal information in the records was compiled and is identifiable as part of that investigation into a possible violation of law. I therefore find that the remaining personal information in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM is subject to the presumption at section 21(3)(b).

Section 21(2)(d)

[62] For section 21(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing[21]

[63] The appellant did not make specific representations on the application of section 21(2)(d). Furthermore, the appellant has provided nothing for me to conclude that the remaining personal information in the records is required in order to prepare for a proceeding or to ensure an impartial hearing within the meaning of section 21(2)(d). Therefore, I am not satisfied that section 21(2)(d) applies in the circumstances of this appeal.

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[20] For example, Order M-757, dealing with the municipal equivalent of section 21(3)(b).

[21] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

Conclusion

[64] I have found that the section 21(3)(b) presumption applies. The appellant did not satisfy me that section 21(2)(d) applies. The appellant did not raise any other factors or circumstances in section 21(2) that favour disclosure, and in my view none would apply. The remaining information is not the type of information that falls within section 21(4) of the *Act*. Therefore, I find that disclosure of the remaining personal information in the one page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM records would constitute an unjustified invasion of an identifiable individual's personal privacy. Accordingly, I find that the personal information that relates to those identifiable individuals is exempt from disclosure under section 49(b) of the *Act*.

E. Did the OIPRD properly exercise its discretion?

[65] 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.

[66] 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.

[67] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution.[23]

[68] The appellant asserts that the OIPRD exercised its discretion in bad faith and for an improper purpose. He further alleged that it overlooked relevant factors and "fabricated factors and events".

[69] Having reviewed the parties' submissions and the circumstances of the appeal, I am satisfied that the OIPRD properly exercised its discretion in not disclosing the information that I have ordered withheld, and in doing so, took into account relevant considerations. I am satisfied that the OIPRD has not erred in the exercise of its

[22] Order MO-1573.
[23] Section 54(2).

discretion not to disclose to the appellant the remaining withheld personal information of other identifiable individuals contained in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM, that I have found to qualify for exemption under section 49(b) of the *Act*.

F. Can the records be reasonably severed without revealing exempt information?

[70] Where a record contains exempt information, section 10(2) requires the OIPRD to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[24]

[71] Based upon my review of the information in the records that I have not ordered to be disclosed, in the circumstances of this case, in light of the manner in which the personal information of the subject officers is inextricably intertwined with that of the appellant, any possible severance would either reveal exempt information or result in disconnected snippets of information being revealed.

ORDER:

1. I order the OIPRD to disclose the highlighted portions of the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" that I have provided to the OIPRD along with a copy of this order, to the appellant by **June 18, 2014** but not before **June 12, 2014**.

2. I uphold the OIPRD's decision to withhold the balance of the information in the one-page document entitled "Additional information obtained by the OIPRD (Case Management)" and the CD-ROM at issue in this appeal.

3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the information disclosed by the OIPRD to be provided to me.

Original Signed By: May 14, 2014
Steven Faughnan
Adjudicator

[24] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).