Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3421

Appeal PA13-169

Ministry of Community Safety and Correctional Services

November 7, 2014

**Summary:** An individual sought access to information about an OPP investigation in which he was involved. The ministry granted partial access to the responsive records, relying on section 49(a), in conjunction with various law enforcement exemptions in section 14(1), as well as section 49(b), together with sections 21(3)(b) and 21(2)f), to deny access to the withheld information. The appellant appealed the ministry's access decision to this office. During the inquiry, the ministry issued a revised decision to the appellant in which additional records were disclosed and the exemption claims modified somewhat. In this order, the adjudicator partly upholds the ministry's decision respecting responsiveness and the application of the exemptions. The adjudicator orders disclosure of the appellant's own personal information to him, as well as certain withheld portions that do not qualify for exemption.

**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), 14(1)(c), (d), (e), (i), (k) and (l), 21(2)(f), 21(3)(b), 49(a) and 49(b).

**Orders and Investigation Reports Considered:** Orders M-352, MO-2954, P-1618, PO-2332, PO-2751, PO-3322-I, PO-3402-F and PO-3405.

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

## OVERVIEW:

[1] This order addresses the issues raised in the appeal of a decision issued by the Ministry of Community Safety and Correctional Services (the ministry) in response to an access request submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In his request, the individual who sought access to records related to an Ontario Provincial Police (OPP) matter stated:

> I believe I have a right to understand what information led the Ontario Police to arrest and imprison an innocent party for 10 hours. Therefore, I am making a formal request for disclosure:
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> - Of the grounds of the arrest in complete.
> - My cell block video recording.
> - My Interrogation video recording.
> - My [friend's] cell block video recording.
> - My [friend's] interrogation recording.
> - Any other related information.

[2] Initially, the ministry issued a decision letter denying access to the records identified as responsive to the request because "the records concern a matter that is currently under investigation." The ministry claimed the exemptions in sections 49(a) (discretion to refuse requester's information), together with sections 14(1)(a), (b) & (l) and 14(2)(a) (law enforcement), as well as section 49(b) (personal privacy), in conjunction with the presumption in section 21(3)(b) and the factor in section 21(2)(f) to deny access to the records. The ministry also withheld portions of the records on the basis that some information was not responsive to the request.

[3] The appellant filed an appeal of the ministry's decision. When the ministry provided the records to this office, it added two exemption claims: sections 14(1)(i) and 15(b) (relations with other governments). During mediation of the appeal, the ministry maintained its position that none of the records could be disclosed because there was an ongoing police investigation into the matter. As the appellant wished to continue his appeal, a mediated resolution of the appeal was not possible and the appeal was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry.

[4] I started my inquiry by seeking representations from the ministry. Several outstanding matters also required the ministry's attention and clarification, and I included an itemized list of them in the Notice of Inquiry.[1] While in the process of

[1] The items addressed were: 1. the addition of non-responsiveness and the possible application of sections 14(1)(i) and 15(b) as issues (omitted from Mediator's Report and not discussed with the appellant during mediation); 2. the preparation and provision of an index of records to this office; 3. the

addressing of those outstanding matters, the ministry issued a revised decision, disclosing additional records to the appellant, because the OPP investigation had been completed. The appeal was then placed on hold for a brief time to try to obtain the consent of the individual who had been arrested with the appellant (the affected party) to the disclosure of his personal information. Ultimately, the affected party's consent could not be obtained.

[5] While the appeal was on hold, the ministry addressed other administrative issues required to proceed with the inquiry, including correcting deficiencies in the copies of the records available to me for the purpose of adjudicating the ministry's exemption claims.[2] The appellant also confirmed that he wished to pursue access to the remaining information after reviewing the additional information disclosed to him by the revised decision. The ministry subsequently submitted representations that included further revisions to its access decision; some of the section 14(1) exemptions and section 15(b) were withdrawn as a basis for denying access. I then sent a copy of the ministry's representations and its index of records, along with a Notice of Inquiry, to the appellant to seek his representations.

[6] The appellant provided submissions that briefly addressed the personal privacy issue. He also expressed concerns about the quality and accessibility of the DVD records he received with the ministry's disclosure in this appeal. In particular, the appellant noted that there was no audio component to the "holding cell" footage of him and, further, that the video recording was poor in quality. The appellant was also of the view that there ought to be two DVDs relating to the affected party, not merely the one DVD identified by the ministry at that point. I had raised this issue earlier in the inquiry as well, since the ministry had initially sent two DVDs for that individual and then, when these were discovered to be blank by this office, sent only one DVD as replacement. Since the appellant's representations suggested concern with the adequacy of the searches for responsive records, I asked the ministry to also advise me what steps had been taken to identify the responsive DVDs relating to the affected party when I sought reply representations.

[7] I received the ministry's reply representations, which included a response to the appellant's concerns about the DVDs identified as responsive. The ministry provided an explanation regarding the audio component of the appellant's own DVD and a copy of a newly identified (second) DVD of the affected party, which the ministry denied under section 49(b). I provided the ministry's explanation to the appellant to offer him an opportunity to comment. I received brief sur-reply representations from the appellant.

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provision of legible copies of approximately 141 pages of records (numbered and marked with exemption claims); and 4. the provision of DVDs not yet sent to this office.

[2] I did not receive complete copies of the records at issue until December 2013, when the remaining copies of pages were provided so that a set of clean, unsevered and severed records was available for my review. On two pages (74 and 75), the severances differ between the copies initially provided by the ministry when the appeal was opened and when the same pages were provided in December 2013.

[8] In this order, I find that the ministry properly withheld information on the basis of non-responsiveness, with a few exceptions. I uphold the ministry's exemption claims, in part. In particular, I find that sections 21(1) or 49(b) apply, together with the presumption in section 21(3)(b) and the factor in section 21(2)(f), to some of the withheld information. I also find that section 49(a) applies, in conjunction with section 14(1)(d) or 14(1)(l), to other withheld information. Finally, I uphold the ministry's exercise of discretion in relation to the information that I have concluded is exempt under section 49(a) or section 49(b).

## RECORDS:

[9] According to the ministry's revised index of records, there are approximately 80 pages of records at issue, either in part or in their entirety. The records include occurrence summaries, supplementary occurrence reports, arrest reports, prisoner reports, officers' notes, and various other documents. There are also two DVDs withheld, in their entirety.

## ISSUES:

A. Did the ministry properly withhold information as not responsive to the request?

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

C. Would disclosure result in an unjustified invasion of personal privacy under the mandatory exemption in section 21(1) or the discretionary exemption in section 49(b)?

D. Do the records contain law enforcement information that is exempt under the discretionary exemption in section 49(a), in conjunction with sections 14(1)(c), (d), (e), (i), (k) or (l)?

E. Did the ministry properly exercise its discretion under sections 49(a) and 49(b)?

## DISCUSSION:

### A. Did the ministry properly withhold information as not responsive to the request?

[10] The ministry withheld portions of pages 1-11, 22-25, 28-29, 35-37, 39-53, 57, 60-62, 64-66, 72-75, 77-78, 80-82, and 84-87, based on the position that the severed information is not responsive to the appellant's request.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. A person seeking access to a record must make a request in writing to the institution that the person believes has custody or control of the record, and must provide sufficient detail to enable an experienced employee of the institution to identify the records that are responsive to the request. 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.[3]

[12] To be considered responsive to the request, the records (or information) must "reasonably relate" to the request.[4]

### *Representations*

[13] I invited the ministry to explain in its representations why certain information was withheld from the records at issue as non-responsive. Accordingly, the ministry clarified in its representations that the "unresponsive" portions of records include:

- Coded information that is unrelated to the request, such as information identifying when the record was printed, which is "routinely redacted as being non-responsive;" and

- Police officers' notes that are not about the investigation relating to the appellant. These severances can contain information about other investigations or about what the police officer did before or after working on the relevant investigation that day.

[14] The officer's notes of the lead investigator of the matter involving the appellant were accompanied by affidavit evidence. In this affidavit, the detective constable explains that at the same time, he was also investigating an unrelated matter under the *Controlled Drugs and Substances Act.* The officer submits that the severances to his notes include conversations with a confidential informant regarding the *CDSA* investigation. He states that all of his notes pertaining to the incident involving the appellant were provided without severances.

[15] The appellant's representations do not address this issue.

### *Analysis and findings*

[16] As I stated above, information must be reasonably related to the request to be considered responsive to it. The appellant's request for records related to his arrest and 10-hour detention by the OPP is clearly worded and is evidently motivated by a desire

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

to understand the grounds for his arrest. Based on the content of the information withheld as non-responsive, I am satisfied that the ministry has properly severed and withheld only information that is not related to the appellant's request, with a few minor exceptions described in the following paragraphs.

[17] Past orders of this office have upheld the severance of "administrative information," such as printing date information, as non-responsive because the information does not reasonably relate to the subject matter of the request or, alternately, the appellant's "interest."[5] In this appeal, I accept the ministry's position that some of the information withheld as non-responsive fits within this category.

[18] I note that there are also parts of the officers' notes withheld as non-responsive that consist of details about weather and road conditions, which are entered as standard information at the beginning of a shift. I agree with the ministry that this type of information is also unrelated to the appellant's request.

[19] Finally, I accept the ministry's submissions respecting information in the officers' notes that relates to other investigations or police matters. Based on my review of these officers' notes, I am satisfied that these larger portions of the records have also been properly withheld because they do not relate to the incident involving the appellant.

[20] I find that these three types of information are not responsive to the appellant's request and, I uphold the ministry's decision to sever the portions of pages 1-11, 22, 24-25, 28-29, 35-37, 39-53, 57, 60-62, 64-66, 72-75, 77-78, 80-82, and 84-87 marked as non-responsive.

[21] I note that the cover pages for the officers' notes contain a notation of the date and page ranges. Some of the officers' notebooks have this information on every page, while others do not. For several of the officers' notebooks, this information has been withheld as non-responsive. In other places, the same information is not severed on this basis. In my view, inconsistencies in the severance of this information may foster the wrong impression, notwithstanding that such information may not truly be related to the subject matter of a request. It is possible that the date ranges could be considered relevant in some instances; and, furthermore, the page range provides useful information for keeping the pages in order. Accordingly, while I uphold the severance of this particular information on pages 36, 44 and 48 as non-responsive, I urge the ministry to take a consistent position respecting it in future, and to consider simply disclosing it.

[22] However, I find that some portions of pages 52 and 85 that the ministry has withheld as non-responsive are, in fact, related to the incident involving the appellant.

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[5] For example, Orders MO-2877-I, PO-3228 and PO-3273.

On page 52, the entry appearing prior to another one that was apparently disclosed to the appellant also relates to the same matter in which the appellant was involved. I find that this additional entry is also responsive to the appellant's request. On page 85, a reference to a police officer's involvement with the appellant's incident has similarly been withheld as non-responsive. I find that this line is, in fact, responsive to the request. As no exemptions have been claimed to withhold the undisclosed responsive information on pages 52 and 85, I will order these portions disclosed to the appellant.

[23] As a result of my decision to uphold the ministry's decision respecting responsiveness, and the finding respecting pages 52 and 85, certain records need not be reviewed further in this order. The remaining (responsive) portions of pages 36, 44, 45, 48, 51, 53, 57, 77, 78, 81, 82 and 84 were previously disclosed to the appellant or, in the case of pages 52 and 85, will be disclosed to him pursuant to the terms of this order. These particular pages will not be addressed again.

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

[24] In order to determine if sections 49(a) or 49(b) apply, as claimed by the ministry, 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) as follows:

> "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,
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> (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;

[25] 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.[6]

[26] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[27] 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.[7]

[28] 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.[8] To qualify as personal information, it must

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[6] Order 11.
[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.

be reasonable to expect that an individual may be identified if the information is disclosed.[9]

### *Representations*

[29] The ministry submits that "as with most law enforcement investigations, the OPP collected a significant amount of personal information." According to the ministry, the personal information belongs to "a complainant" and "other third party affected individuals" and consists of their names, addresses and phone numbers, as well as "substantive and inherently sensitive personal information … and their opinions of others." The ministry notes that disclosure of the personal information in the records would identify some of the third parties, particularly as they are linked to the OPP investigation of this matter.

[30] The appellant submits that because the OPP investigation was about his own suspected criminal activity, not about the individual arrested with him, then it is not about the affected party in his personal capacity and cannot, therefore, be classified as personal information. However, in his sur-reply representations, the appellant acknowledges that there may be information of a personal nature about that individual in the recording of the affected party's interview.

### *Analysis and findings*

[31] Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual. This includes 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.

[32] I have reviewed the records at issue, and I find that they contain the personal information of the appellant and other individuals. Specifically, I find that the records contain the appellant's personal information, including his birthdate, age, employment, address, and telephone number, the views or opinions of other individuals about him, and his name along with other personal information relating to him, as contemplated by paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information in section 2(1).

[33] In addition, I find that some of the records contain the personal information of other identifiable individuals, according to the definition in section 2(1) of the *Act*. This information includes names, addresses, phone numbers, ages, birthdates, views or opinions and names together with other information of a personal nature, for the purpose of paragraphs (a), (b), (d), (e), (g) and (h) of the definition.

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

[34] Regarding the ministry's submission that the other individuals' "opinions of others" are their own personal information, I note that paragraph (e) of the definition in section 2(1) classifies this type of information as the personal information of the individuals to whom the opinions or views relate. In this appeal, therefore, many such views or opinions in the records at issue are *about* the appellant and constitute his personal information.

*[35]* The records also contain information related to individuals in their employment capacities, such as names, addresses and phone numbers of individuals who were consulted by the OPP during their investigation. Generally, under section 2(3) of the *Act,* this information would be considered to constitute the professional information of those individuals. However, in view of the fact that the information about these individuals is found in OPP records and relates to their contact with OPP officers, I conclude that some of it crosses the threshold, thereby revealing something of a personal nature about them. Accordingly, I find that the names and telephone numbers of those individuals providing assistance to the OPP in this investigation qualify as their personal information under section 2(1) of the *Act.*

[36] In giving effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the established approach of this office is to review the application of the personal privacy exemptions on a record-by-record basis.[10] In this appeal, I find that some records contain only the appellant's personal information, while some contain only the personal information of other identifiable individuals. I also find that the rest of the records contain the mixed personal information of the appellant and other individuals.

[37] Pages 7 and 11, two separate Supplementary Occurrence Reports, fit within the first category of records listed above because they contain only the appellant's personal information. Specifically, I find that the information about the other identifiable individuals in these records is their professional information according to section 2(3) of the *Act.* Since this information cannot qualify for exemption under the personal privacy exemption in section 49(b), I will only review whether those records are exempt under section 49(a).

[38] Pages 6 and 17-21, a supplementary occurrence report and various prisoner records relating to the affected party, as well as the video recording of the affected party in his cell, contain only the personal information of individuals other than the appellant. In the circumstances, I must review the possible exemption of these records under section 21(1). As suggested, however, for the remainder of the records subject to ministry's personal privacy exemption claim, including the second DVD (an audio

[10] See Order M-352 where Inquiry Officer John Higgins articulated this approach, stating that "the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record."

recording of the affected party's interview), the relevant exemption is the discretionary one in section 49(b).

[39] I will now review the possible application of the personal privacy exemptions to the relevant records.

## C. Would disclosure result in an unjustified invasion of personal privacy under the mandatory exemption in section 21(1) or the discretionary exemption in section 49(b)?

[40] 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.

[41] 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.

[42] However, where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[43] 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. None of the exceptions apply in this appeal, including section 21(1)(a) (disclosure with "prior written request or consent"), which I address below.

[44] The exception in section 21(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires 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.

[45] 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.[11] This approach to section 49(b) represents a shift away from the previous approach under both sections 49(b) and 21, under which a finding that a section 21(3) presumption applied could not be overcome 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 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.[12]

[46] 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.[13] This is referred to as the absurd result principle.

[47] In denying access to information on pages 1-6, 8-10, 12, 17-30, 32-35, 38-40, 42-43, 46-47, 50, 59-62, 64, 66-75, 79-80, 83, 86-87, and the two DVD recordings of the affected party,[14] the ministry relies on the presumption against disclosure in section 21(3)(b) and the factor favouring privacy protection in section 21(2)(f). 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,
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> > (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;

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[11] Order MO-2954.
[12] Page 24 at paragraph 74.
[13] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[14] This list accounts for my finding that pages 7 and 11 contain only the personal information of the appellant and cannot, therefore, be subject to exemption under section 49(b).

> (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***

[48] The ministry submits that the disclosure of the personal information at issue would link the identified individuals to a law enforcement investigation and would result in an unjustified invasion of personal privacy for the purpose of section 21(1)(f). The ministry also submits that disclosure is presumed to constitute an unjustified invasion of personal privacy under the "mandatory presumption" in section 21(3)(b) because the records were compiled by, and are identifiable, as part of an OPP investigation into a possible violation of law. The ministry notes that criminal proceedings need not be initiated for the presumption to apply and, further, that "if the OPP had discovered that criminal offences had in fact occurred, the OPP could have possibly commenced proceedings by laying charges under the *Criminal Code*."

[49] According to the ministry, the factor in section 21(2)(f), which relates to highly sensitive information, weighs in favour of privacy protection in this appeal because there is a reasonable expectation of significant distress if the personal information were to be ordered disclosed. The ministry relies on the following two reasons specifically:

> (a) Affected third party individuals have not consented to the disclosure of their personal information. The ministry submits that disclosure could be expected to cause significant distress were it to take place in such circumstances. The ministry submits that **if consent is to be meaningful, the ministry must act in accordance with the wishes of affected parties** [emphasis added to original]; and
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> (b) If the personal information in the records is ordered disclosed, it will cease to be protected by the protection of privacy provisions in the FOIPPA [sic]. The ministry contends that affected third party individuals will permanently lose control over personal information about themselves related to a law enforcement investigation, and that disclosure to the appellant therefore, in effect, constitutes disclosure to the world.

[50] The ministry relies on Order P-1618 in asserting that the personal information of individuals, who are "complainants, witnesses or suspects" in their contact with the OPP, is highly sensitive for the purpose of section 21(2)(f).

[51] Referring to other relevant factors or circumstances, the ministry submits that if the records in this appeal are ordered disclosed, "the public will cease to cooperate with

the OPP and other law enforcement agencies when they are conducting investigations." Further,

> The ministry questions why anyone would willingly cooperate with the police if they knew information about themselves and an investigation about them was later going to be disclosed in the manner contemplated by this appeal. The ministry submits that this outcome is contrary to the public policy goal of encouraging the public to report suspicious behaviour, to seek police assistance and to cooperate with police investigations, and it would compromise the ability of the police to carry out their statutory mandate to investigate potential crimes.

[52] As indicated in the discussion of the "personal information" issue, above, the appellant takes the view that the OPP were investigating his own involvement in suspected criminal activity, not any involvement of his co-arrestee, the affected party, and for this reason, disclosure of the information could not invade the affected party's personal privacy. The appellant states that because the affected party wants nothing to do with this process, he did not obtain written consent from him; however, the appellant expresses certainty that:

> … when the tapes are released, I am sure [he] would be more than delighted to view them with me. … I believe that there will be [zero] harm to the third party … in releasing these tapes to me, and there will be benefit to the appellant (myself) in obtaining these tapes. As I would like to see what transpired between a person accompanying me and the police as a result of this unlawful and unjust arrest.
>
> …
>
> As well disclosing the DVDs in my opinion would not be classified as "unjust invasion of privacy" as the topic being discussed is about [me] and [my] wrongfully suspected criminal activity.

[53] In his sur-reply representations, the appellant suggests that a "middle point" can be reached respecting disclosing of the affected party's information to him by "blacking out" his personal information. The appellant states that "if the subject matter is of personal nature … and has no ties to [me] at all then that part can be blacked out."

### *Analysis and findings*

[54] The records at issue in this appeal contain the personal information of the appellant and a number of other identifiable individuals. My review of sections 21(1) and 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,

particularly the individual who was arrested with the appellant on the day of the incident.

[55] As suggested in the introduction to this issue, the greater rights accorded to an individual who seeks access to a document containing his or her personal information is made clear by the different wording found in sections 21(1) and 49(b) of the *Act*.[15]

[56] Section 21(1), which is found in Part II of the *Act*, is mandatory; if disclosure of a record containing only the personal information of an individual or individuals other than the requester would be an unjustified invasion of personal privacy, it must not be disclosed unless certain limited exceptions apply. Conversely, section 49(b) (in Part III of the *Act*) is discretionary; if disclosure of a record containing the personal information of the requester and another individual or individuals would be an unjustified invasion of the personal privacy of that other individual or individuals, the institution may refuse disclosure. With section 49(b), in contrast to the absolute prohibition against disclosure in section 21, the ministry has the power to grant access in appropriate circumstances. This emphasizes the special nature of requests for one's own personal information.[16]

[57] Regarding the ministry's assertion that most of the records fit within the "mandatory presumption" in section 21(3)(b), I note that in the context of a review under section 49(b), this submission does not reflect the current approach of this office, as reflected in Order MO-2954. Order MO-2954 was issued in September 2013, several months prior to the inquiry into this appeal, and it expands upon the analysis conducted under section 49(b) that was acknowledged by the Divisional Court in *Grant v. Cropley* in 2001. I referred to the *Grant v. Cropley* decision in the Notice of Inquiry sent to the parties, emphasizing the discretionary nature of an institution's decision-making under section 49(b).[17] Following Order MO-2954, therefore, and for those records that contain the mixed personal information of the appellant and other identifiable individuals, I note that the application of any of the presumptions does not result in the mandatory application of the relevant person privacy exemption. Accordingly, I have reviewed the factors and presumptions in sections 21(2) and (3) to balance the interests of the parties in determining whether the disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy under section 49(b).

[58] In the circumstances of this appeal, I find that the presumption against disclosure at section 21(3)(b) applies. As the ministry correctly observes, 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

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[15] Order M-352.
[16] Order M-352.
[17] 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."

violation of law.[18] I accept that the personal information at issue was compiled by the OPP and is identifiable as part of an investigation to determine if an offence under the *Criminal Code* had taken place.

[59] In the case of the records in this appeal that contain *only* the personal information of other individuals, which are reviewed under the mandatory personal privacy exemption in section 21(1), the application of section 21(3)(b) results in a finding that disclosure of these records is presumed to constitute an unjustified invasion of the other individual's personal privacy. Therefore, I find that the mandatory exemption in section 21(1) applies to pages 6 and 17-21, and the DVD of the affected party's cell footage. These records are exempt under section 21(1) and the ministry is prohibited from disclosing them to the appellant.

[60] Here, I note that the appellant tried, albeit unsuccessfully, to obtain the consent of the affected party to the disclosure of his personal information. Although I have some sympathy for the (confidential) reasons conveyed by the appellant explaining why the affected party chose not to provide consent, the fact that he did not provide written consent for the purpose of section 21(1)(a) decides the issue under the *Act.*[19]

[61] As indicated above, however, most of the records at issue in this appeal are to be reviewed under section 49(b) because they contain the appellant's personal information. Accordingly, 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.[20] Based on the nature of the personal information about other identifiable individuals in these records, and the circumstances, of its collection, I conclude that the presumption in section 21(3)(b) weighs only moderately in favour of privacy protection for this information.

[62] The appellant did not specifically address the factors in section 21(2)(a)-(d) that favour disclosure. In this situation, there is no basis upon which I could conclude that any of the factors in sections 21(2)(a)-(d) apply to weigh in favour of his access to the personal information of other individuals in these records.

[63] Turning to the factor in section 21(2)(f), which favours non-disclosure, I note that in order for it to apply, I must be persuaded by the evidence 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.[21] It is not sufficient

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[18] Orders P-242 and MO-2235.
[19] See Order P-1466 which held that it is not possible under the *Act* to infer consent to disclosure in the absence of a written indication of consent.
[20] Order MO-2954.
[21] 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.[22]

[64] I note the ministry's reliance on Order P-1618 in arguing that the personal information of "complainants, witnesses or suspects" is highly sensitive in the sense contemplated by section 21(2)(f). In my view, however, different considerations apply in this appeal to the personal information of the "complainant," compared to the personal information of the other "suspect," the affected party. In this context, I find that section 21(2)(f) weighs more heavily against the disclosure of the personal information of the individual who reported what was believed to be suspicious activity to the OPP (the complainant). With regard for the information of other identifiable individuals that is contained in the records at issue under section 49(b), I accept that section 21(2)(f) applies to some of it and that it weighs moderately in favour of non-disclosure.

[65] For the records that have been withheld under section 49(b), I have balanced the appellant's access rights respecting this information against the competing privacy rights of other individuals. In the particular circumstances of this appeal, I find that the privacy interests in some of the withheld personal information to which sections 21(3)(b) and 21(2)(f) apply must yield to the appellant's right of access and that section 49(b) does not apply. However, upon balancing the competing interests for other personal information that is at issue, I find that its disclosure would indeed result in an unjustified invasion of the personal privacy of individuals other than the appellant and that it qualifies for exemption under section 49(b).

[66] With specific reference to the audiotape of the OPP interview of the affected party, I note that this recording contains the personal information of the affected party, his relatives, and the appellant. 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 appellant 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.[23] Based on the content of the audio recording, as well as its format, I conclude that it cannot reasonably be severed without disclosing the information that is exempt under section 49(b). Accordingly, I find that the audiotaped interview with the affected party is exempt under section 49(b). I address the disclosure of some of the information gathered during the affected party's interview below, under discussion of the absurd result principle.

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[22] Order P-1117.
[23] Orders 24, P-1107 and PO-2366-I.

[67] Finally, given the appellant's interest in finding out what transpired when he and the affected party were taken into custody by the OPP, I have also considered the possible application of 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 exemption.[24]

[68] One of the grounds upon which the absurd result principle has been applied in past orders is where the information is clearly within the requester's knowledge.[25] Some of the personal information relating to other identifiable individuals in these records was, in fact, provided to the OPP by the appellant. Furthermore, the appellant is "otherwise aware" of other information because it was disclosed to him in another form. For example, the records consisting of printed copies of text messages from the appellant's phone were disclosed to him, while the same content in the officers' notes was not. Additionally, some information that appears in the officers' notes that was obtained during the interviews with the affected party and the appellant is clearly within the appellant's knowledge. Regarding this information, I am satisfied that its disclosure would not be inconsistent with the purpose of the personal privacy exemption in section 49(b). Therefore, I find that the absurdity associated with not disclosing the personal information on pages 12, 34, 67, 68 69, 70, 71, 75, 79, 83 outweighs the privacy protection principles inherent in section 49(b).

[69] In summary, I uphold the ministry's decision under section 21(1) and I uphold, in part, the ministry's decision under section 49(b), subject to my review of the ministry's exercise of discretion. My specific findings under sections 21(1) and 49(b) are shown by the highlighting I have applied to the copy of the records provided to the ministry with this order.

[70] I will now review the application of section 49(a), together with the various law enforcement exemptions claimed by the ministry, to the information remaining at issue.

## D. Do the records contain law enforcement information that is exempt under the discretionary exemption in section 49(a), in conjunction with sections 14(1)(c), (d), (e), (i), (k) or (l)?

[71] As noted previously, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body, while section 49 provides a number of exceptions. Under section 49(a) of the *Act*, the ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. However, section 49(a)

[24] Orders M-444 and MO-1323.
[25] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

is intended to be applied with the recognition of 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.[26]

[72] One of the exemptions listed in section 49(a) is the law enforcement exemption in section 14 of the *Act.* The claims under the law enforcement exemption were somewhat fluid throughout the appeal, but at the inquiry stage, the ministry provided submissions only in support of the application of sections 14(1)(c), (d), (e), (i), (k) and (l). Although some of the records available to me for adjudication refer to the ministry's previous section 14(1) claims at earlier stages of the appeal, I will review only those current exemptions for which representations were provided.[27]

[73] Therefore, the relevant parts of section 14(1) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[26] Order M-352.

[27] For example, as noted in the introduction to this order, two severed versions of pages 74 and 75 were provided at the time the appeal was opened and when the same pages were provided in December 2013. For completeness, I will review the versions of pages 74 and 75 from which more information has been withheld, using the current exemption claim of the ministry, which is section 14(1)(l) only.

[74] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) of the *Act.* The term "law enforcement" has been found to apply to an investigation into a possible violation of the *Criminal Code*.[28] Accordingly, I am satisfied that the records at issue in this appeal were created in relation to law enforcement matters.

[75] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[29] Furthermore, although section 14(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.[30]

[76] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[31] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[32]

### ***Representations***

[77] The ministry submits that it has withheld the records on the basis of one or more of the law enforcement exemptions claimed to protect the integrity of law enforcement investigations and "out of concern for the safety of affected party individuals, including a complainant." The ministry's representations on the specific parts of section 14(1) are summarized as follows:[33]

- Section 14(1)(c) is claimed for pages 7, 11, 39-42 and 64 to protect the investigative techniques relating to the collection of information described in them, including the process by which the OPP searches for relevant evidence. The ministry submits that it is contrary to the public interest to reveal these investigative techniques and procedures because they "could be exploited by those wishing to thwart a law

[28] Orders M-202 and PO-2085.
[29] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[30] Orders P-900 and PO-2461.
[31] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[33] The pages listed in this section do not include records that have been removed from the scope of the appeal through findings in previous sections of the order. Additionally, the pages listed by the ministry in its representations and index also do not necessarily accord with those marked on the records in the version provided to this office earlier in the appeal.

enforcement investigation" who could modify their behaviour if they knew in advance what to expect from the police during their investigations.

- Section 14(1)(d) is applied to protect what the ministry claims is a confidential source whose identity, "address, telephone number and other personal information" would be revealed by disclosure of information withheld from pages 1, 2, 4-6, 22, 24, 25, 35, 38, 50, 64 and 66.[34] The ministry relies on Order MO-2043.

- Section 14(1)(e) is claimed for "most of the same pages as section 14(1)(d)" [1, 2, 4-6, 22-25, 38 and 50] because identifying the complainant "could reasonably be expected to endanger the complainant's life or physical safety." The ministry argues that "revealing identifying information about a complainant could have such an expectation in the circumstances." The ministry also denies access to statements on page 16 under section 14(1)(e) on the basis that disclosing them "could harm the life or physical safety of a law enforcement officer because they describe the procedures for opening a cell door in a detention facility." The ministry alleges that the information could be used by incarcerated individuals to harm law enforcement officers.

- Sections 14(1)(i) and (k) are claimed by the ministry for page 16 for reasons similar to the second rationale provided under section 14(1)(e): that disclosure of the withheld information in the appellant's guard sheet, a form that is used to record information about inmates, would discourage the candid communication required between law enforcement officers to maintain the safety and order in detention facilities.

- Section 14(1)(l) is claimed for information on pages 1-11, 16, 25, 26, 37-41, 47, 49, 50, 60, 64-75, 80 and 86 on the basis that disclosure of certain information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Included in this category of information are police codes, including ten-codes, which this office has previously found to fit within section 14(1)(l) due to the need to maintain confidentiality of communications between police officers in carrying out their law enforcement mandate. The ministry also submits that disclosure of these records would reveal to the appellant and potentially others "the analysis and assessment

[34] The ministry's listing of the pages in its representations differs slightly from its index of records. The representations leave out page 25 as noted in the index, while the index lists page 23 while the ministry's representations do not.

> employed by the OPP during [this] law enforcement investigation." More specifically, the ministry submits that disclosure may hamper the control of crime and thereby contribute to crime because:
>
> - Law enforcement officials will cease to be as candid with each other due to concerns about disclosure of "whatever is written down," which will result in less communication, which in turn could harm the mandate of law enforcement which requires the sharing of sensitive detailed information; and
>
> - The public will cease to cooperate with the OPP and other law enforcement agencies during investigations out of concern that their information will be disclosed. The ministry says this is contrary to the public policy goals of encouraging the public to report suspicious behaviour, to seek police assistance and to cooperate with police investigations, and it would compromise the ability of the police to carry out their statutory mandate.

[78] The appellant's representations do not address section 49(a) and the law enforcement exemptions in sections 14(1)(c), (d), (e), (i), (k) or (l).

### *Analysis and findings*

[79] The standard of proof under section 14 was recently reviewed and articulated by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner).*[35] In Order PO-3405, I summarized it as follows:

> Order 188 articulated the principle that establishing one of the exemptions in section 14 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason.[36] This requirement that the expectation of harm must be based on reason means that there must be some logical connection between disclosure and the potential harm which the ministry seeks to avoid by applying the exemption.[37] More recently, the Supreme Court of Canada has affirmed that the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure

[35] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[36] See also Order PO-2099.
[37] Orders 188 and P-948.

> will in fact result in such harm. The sufficiency of the evidence is context and consequence-dependent.[38]

[80] With this standard in mind, I conclude that the ministry has, with some exceptions, failed to provide the necessary "detailed and convincing evidence" to connect the disclosure of the information withheld under sections 14(1)(c), (d), (e), (i), (k) or (l) with the harms these law enforcement exemptions seek to avoid. The exceptions relate to the ministry's claim of section 49(a), together with sections 14(1)(d) and 14(1)(l). My reasons with respect to each individual exemption follow.

[81] I will begin my review of the ministry's law enforcement exemption claims with section 14(1)(l) because it is the part under which most of the information has been withheld.

*Section 14(1)(l): commission of an unlawful act or control of crime*

[82] Section 14(1)(l) may apply if disclosure of the withheld information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Since section 14(1)(l) contains the words "could reasonably be expected to," the ministry was therefore required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm."

[83] To begin, I agree with the ministry's submission that past orders of this office have found police codes to be exempt under section 49(a), together with the law enforcement exemption in section 14(1)(l) of the *Act.* In this category of information are "10-codes," which are codes that represent common phrases, particularly in radio transmissions and other communications between individuals employed in law enforcement. There are also patrol zone codes which identify the particular areas of a community being patrolled. In this appeal, I also accept that disclosure of such information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.[39] Consequently, I find that this information qualifies for exemption under section 49(a), in conjunction with section 14(1)(l).

[84] The ministry cites two other reasons for claiming section 14(1)(l), including disclosure of the records in this appeal allegedly impacting the candour of written communications between law enforcement officials and causing the public to cease cooperating with law enforcement investigations due to the disclosure of their information. These specific outcomes, the ministry suggests, will hamper the control of crime and potentially lead to more crime. I accept that both of these scenarios ought to be avoided. As noted, the possible application of section 14 generally requires careful review due to the difficulty of predicting future events in the law enforcement context.

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[38] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[39] Orders M-757, PO-2571, PO-2970 and MO-3083.

[85] In this appeal, I am satisfied that disclosure of certain parts of the records describing the investigating officers' analysis and assessment during the investigation could reasonably be expected to result in the harms section 14(1)(l) seeks to prevent in terms of hampering the control of crime.

[86] However, with respect to the information *about* individuals who cooperated with the OPP in this particular investigation, I found previously that any personal information that would identify them is exempt under section 49(b). In this context, any evidence respecting the information actually remaining at issue under section 14(1)(l) is not capable of demonstrating a risk of harm that is beyond the "merely possible."[40] In particular, for other information withheld under section 14(1)(l), I find that the ministry has not provided sufficiently persuasive evidence to establish a connection between its disclosure and a reasonable expectation that the specific section 14(1)(l) harms will result. In the absence of the requisite evidence that disclosure of information would facilitate the commission of an unlawful act or hamper the control of crime under section 14(1)(l), I find that this exemption does not apply to information other than police codes and the investigative assessment and analysis contained in the records.

*Section 14(1)(c): investigative techniques and procedures*

[87] In order to meet the requirements for exemption under section 14(1)(c), the ministry was required to show that disclosure of the technique or procedure to the public (as represented by the appellant) could reasonably be expected to hinder or compromise its effective utilization. Typically, the exemption will not apply where the technique or procedure is generally known to the public.[41] The techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures.[42]

[88] Former Senior Adjudicator John Higgins explained a key evidentiary requirement for section 14(1)(c) in Order PO-2751, as follows:

> The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c).

[89] In Order PO-2751, the records contained very detailed information about investigative methods used to investigate child pornography. The former Senior Adjudicator found that section 14(1)(c) applied to many of them, explaining that "any

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[40] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[41] Orders P-170, P-1487, MO-2347-I and PO-2751.
[42] Orders PO-2034 and P-1340.

information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*, falls under this exemption."[43]

[90] I agree with the former Senior Adjudicator that the *Mentuck* principles are relevant in a determination of the application of section 14(1)(c) of the *Act*. In this appeal, the ministry has not identified a technique or a procedure in the records that is anything other than "sufficiently obvious" or widely known, including the purported "process by which the OPP searches for relevant evidence." In any event, I have already concluded that section 14(1)(l) applies to some of the same information that the ministry argues is exempt under section 14(1)(c), namely the assessment and analysis components of the officers' notes. Accordingly, I am not satisfied that disclosure of the other information withheld under section 14(1)(c) could reasonably be expected to compromise the efficacy of any technique or procedure or prejudice its use by the police in future investigations. Therefore, I find that section 14(1)(c) does not apply.

*Section 14(1)(d): confidential source*

[91] To establish the application of section 14(1)(d), which is claimed in relation to pages 1, 2, 4-6, 22-25, 35, 38, 50, 64 and 66, the ministry must provide evidence to satisfy me that disclosure of the withheld information could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.[44] Further, the ministry is required to provide evidence of the circumstances in which the informant provided the information to the institution in order to establish confidentiality.[45]

[92] The only information the ministry claims, at least in its representations, to have withheld under section 14(1)(d) is the identity of, and contact information for, the individual who reported what was believed to be suspicious activity to the OPP. I have already upheld the ministry's exemption of the listed information under section 49(b), together with sections 21(3)(b) and 21(2)(b), and it is, therefore, unnecessary for me to review the application of section 14(1)(d) to this same information.

[93] Notably, some of the records contain information that was furnished by this confidential source. As stated above, the ministry was required to provide evidence of the circumstances in which the information was provided to the institution by the informant in order to establish confidentiality.[46] The ministry did not mention the

[43] See also Order PO-3228.
[44] Orders MO-1416 and PO-3052.
[45] Order MO-1383.
[46] Order 139.

circumstances of the information's provision to the OPP in its representations. I accept that the information was provided in the context of an existing law enforcement investigation and that there would be a reasonable expectation of confidentiality on the part of the "source" in the circumstances. However, the specific wording of the latter part of the exemption in section 14(1)(d) relates to disclosing information furnished *only* by the confidential source. Some of the information in the officers' notes does not meet this stipulation. Accordingly, I find that only some of the information provided by the confidential source meets the requirements of section 14(1)(d). This information is found on pages 4, 5, 22-25, and 50 and is highlighted on the copy of the records set to the ministry with this order.

*Section 14(1)(e): life or physical safety*

[94] The ministry claims that section 14(1)(e) applies to several of the records at issue and that section 49(a) therefore applies to exempt them. In particular, the ministry expresses concern about "the complainant's life or physical safety" because "revealing identifying information about a complainant could have such an expectation in the circumstances." The ministry's submissions also include concern about disclosure of statements on page 16 that purportedly describe security aspects of a detention facility because the information could be used to harm law enforcement officials.

[95] In order for section 14(1)(e) to apply, the ministry was required to provide evidence to establish a reasonable basis for believing that endangerment to the life or physical safety of a law enforcement officer or any other person will result from disclosure of the particular record or information at issue.[47] As noted above, information in the records that would identify the complainant has been found to be exempt under section 49(b) and pages 6 and 20 are exempt under section 21(1). That aside, the ministry's representations on the harms under this exemption are not sufficiently persuasive. As stated, although the ministry was not required to prove that disclosure will result in harm, it was obligated to demonstrate a risk of harm that is well beyond the merely possible or speculative. Accordingly, I find that the ministry has failed to establish a reasonable basis for believing that endangerment could result from disclosure of the other information withheld under section 14(1)(e), and I find that it does not apply.

*Section 14(1)(i) and (k): security of a building or centre for lawful detention*

[96] Sections 14(1)(i) and (k) are intended to prevent certain identified harms to the secure custody of individuals in the province's detention facilities.[48] In the case of section 14(1)(i), information may be withheld if disclosure could reasonably be expected to endanger the security of a system or procedure established for the protection of

[47] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.).
[48] Order PO-3405.

items, where such protection is reasonably required. The application of section 14(1)(i) is not limited to the law enforcement context and may be extended to any building, vehicle or system which reasonably requires protection. Section 14(1)(k) offers a similar exemption for information where disclosure could reasonably be expected to jeopardize the security of a centre for lawful detention.

[97] In this appeal, it is worth emphasizing that the only record remaining at issue under sections 14(1)(i) and (k) is page 16, which the ministry's index describes as the Guard Check Sheet for the appellant. The ministry withholds the record, in its entirety, on the basis that it purportedly contains important information about inmates that allows guards to take appropriate steps for protection and to maintain safety and order in detention facilities. On my reading of the record, including the questions listed, which are answered "yes" or "no," I am not persuaded that the minimal detail provided by it could reasonably be expected to endanger the security of a building or system, or jeopardize security. I conclude, rather, that this type of information is what would reasonably be expected as far as routine practices and procedures in detention facilities are concerned.[49] As I am not satisfied that page 16 is sufficiently connected with the protection of a building or its systems, such that its disclosure could reasonably be expected to result in the endangerment section 14(1)(i) or (k) seeks to prevent, I find that page 16 is not exempt under section 49(a), with either of sections 14(1)(i) or (k).

## E. Did the ministry properly exercise its discretion under sections 49(a) and 49(b)?

[98] 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 his or her own discretion for that of the institution.

[99] As previously noted, sections 49(a) and 49(b) are discretionary exemptions, and I have upheld the ministry's decision to apply them to deny access to certain records, or portions of records. I must now review the ministry's exercise of discretion in doing so.

[100] The onus of proof rested with the ministry to demonstrate that it properly exercised its discretion. Therefore, where the ministry denied access under either section 49(a) or section 49(b), it was required to show that, in exercising its discretion, it considered whether a record should be released to the appellant because the record

[49] In Order PO-2332, Adjudicator John Swaigen held that "it is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures … would be routine."

contains his personal information. I note here that my review of the ministry's exercise of discretion at this point is limited to the information that I have found to be exempt.

### *Representations*

[101] The ministry submits that it exercised its discretion in not disclosing the records with consideration of the following factors:

- the privacy and safety of affected third party individuals who are involved in an OPP investigation should be protected;
- the ministry wishes to protect the integrity of law enforcement matters, including investigative techniques and procedures used in law enforcement investigations; and
- the ministry has exercised it discretion in accordance with its usual practices.

[102] Regarding its "usual practices," I note that under its submissions respecting section 49(b), together with section 21(2)(f), the ministry submits that because "affected third party individuals have not consented to the disclosure of their personal information … the ministry must act in accordance with the wishes of affected parties."

[103] Although the appellant does not directly address the ministry's exercise of discretion in this appeal, his representations allude to a sympathetic and compelling need to receive sufficient information to enable him to better understand the nature of the events that led to his arrest, and that of the affected party.

### *Analysis and findings*

[104] My review of the exercise of discretion by the ministry relates only to the information in the records for which I have upheld the claim for exemption under section 49(a), together with sections 14(1)(d) and (l), and section 49(b), with reference to sections 21(3)(b) and 21(2)(f).

[105] However, I wish to preface my findings with a comment about the ministry's position regarding the effect of a lack of consent by third parties to the disclosure of their information. This position is troubling. There is no evidence regarding the seeking of consent from the other individuals identified in the records, other than the appellant's efforts to obtain the consent of the affected party. Their views are unknown. Furthermore, in the context of records that contain the appellant's personal information, the ministry's indication that "it must act in accordance with the wishes of affected parties" is suggestive of a fettering of its discretion under sections 49(a) and 49(b). The

discretion is the ministry's to exercise, not any third party.[50] At the very least, this submission suggests that the ministry considered an irrelevant factor in its exercise of discretion. Discretion must be exercised properly and based on appropriate principles, and this precludes determination of the issue based solely on the known, or imputed, wishes of affected parties.[51]

[106] Having said that, and reiterating that my review of the ministry's exercise of discretion is limited to the information that I have found to be exempt, I remain mindful of the competing interests in this appeal. In this respect, I am satisfied that ministry generally understood its obligation to balance the appellant's interests in seeking access to his personal information against protecting the privacy interests of other individuals and maintaining integrity and confidentiality in the law enforcement context.

[107] Overall, and in view of the disclosure of the non-exempt information to the appellant that is provided for by this order, I am satisfied that the other reasons given by the ministry for its exercise of discretion in denying access under sections 49(a) and 49(b) demonstrate that relevant factors were considered. In the circumstances, therefore, I find that the ministry did not exercise its discretion improperly, 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 **December 15, 2014** but not before **December 8, 2014**.

   The ministry will only be sent copies of those pages where the access decision has been varied by the terms of this order.

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[50] Order PO-3322-I, paragraph 32.

[51] Orders PO-3231-I, PO-3322-I and PO-3402-F. The Supreme Court of Canada, in the decision resulting from the reviews of Order PO-1779 (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23) held that the exemption claim under section 14 should be returned to this office for reconsideration of the ministry's exercise of discretion in denying access to a 318-page police report of an investigation into the potential misconduct of state officials during a murder trial. Acting Commissioner Brian Beamish did not uphold the ministry's re-exercise of discretion with respect to notes or summaries of interviews conducted during the investigation for which the interviewees either objected to disclosure or did not respond to the ministry's consultation letter. Acting Commissioner Beamish stated that "Discretion must be exercised properly and based on appropriate principles. The ministry has not done so for these two categories of information." In Order PO-3402-F, the third review of the ministry's revised decision, Acting Commissioner Brian Beamish found the further re-exercise of discretion flawed, in part because the ministry had effectively persisted in delegating its discretion to third parties.

The further information that is to be disclosed to the appellant from pages 12, 34, 67, 68 69, 70, 71, 75, 79, 83 pursuant to my absurd result finding is highlighted in green.

Additionally, the portions of the records that are exempt under section 49(b) are highlighted in orange on the copy of the records sent to the ministry with this order.

The information that is exempt under section 49(a), together with sections 14(1)(d) or 14(1)(l), is highlighted in blue.

Non-responsive information is highlighted in yellow. This highlighted information should not be disclosed.

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

Original Signed By: November 7, 2014
Daphne Loukidelis
Adjudicator