

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3443

Appeal PA13-428

Ministry of Community Safety and Correctional Services

December 31, 2014

Summary: The appellants sought access to police records relating to an investigation of them at their home. The ministry issued a decision granting partial access to the records responsive to the request. The ministry relied on the exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with section 14(1)(l) (facilitate commission of unlawful act), and section 49(b) (invasion of privacy), with reference to the presumption in section 21(3)(b), to withhold portions of the records. It also withheld some information in the records on the basis that it was not responsive to the request. The appellants appealed the decision. During the adjudication of the appeal, the ministry claimed that certain records were excluded from the application of the Act under the ongoing prosecution exclusion in section 65(5.2). The ministry's decision is upheld in part; some records are found to be excluded from the application of the Act under section 65(5.2); some records are found to be exempt under sections 49(a) and 14(1)(l); and the remaining withheld information in the records, the fictitious information provided by an individual who called 911 and made a false report about the appellants, is found not to qualify as personal information under the Act and is ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, definition of "personal information" in section 2(1) and sections 14(1)(l), 49(a), 49(b) and 65(5.2).

Orders and Investigation Reports Considered: Order PO-3342.

OVERVIEW:

[1] The appellants submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to their detention and the search of their home following a 911 telephone call that falsely reported a domestic incident at their address. In their request, the appellants sought access to a complete copy of the Ontario Provincial Police (OPP) report of the incident, the notes of all officers in attendance during the incident, an audio copy of the 911 telephone call that initiated the incident, and any documents related to the investigation of the false claims made in the 911 call.

[2] The ministry located records that were responsive to the request and issued a decision granting the appellants partial access to them. The ministry relied on the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement), and section 49(b) (invasion of privacy), with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f), to withhold some of the information in the records. The ministry also withheld some information which it claimed was not responsive to the request.

[3] The appellants appealed the ministry's decision to this office. During the mediation stage of the appeal, the appellants confirmed they wished to pursue access to the withheld portions of the records, including those portions withheld as not responsive to the request. A mediated resolution of the appeal was not possible and the appeal was moved to the adjudication stage of the appeals process for a written inquiry under the *Act*.

[4] I began my inquiry by inviting the representations of the ministry on the issues set out below. The ministry provided representations and agreed to share them, in their entirety, with the appellants. In its representations, the ministry asserted for the first time that some records at issue are excluded from the application of the *Act* by virtue of the ongoing prosecution exclusion in section 65(5.2); specifically, the audio recording of the 911 call and the non-responsive parts of pages 8, 9, 11, 13, 15 and 16 of the records. The ministry also withdrew its claim that the section 14(2)(a) exemption applies to the records. Accordingly, I included the section 65(5.2) ongoing prosecution exclusion as an issue in this appeal and removed the section 14(2)(a) exemption from my inquiry. I then sought and received representations from the appellants.

[5] In this order, I uphold the ministry's decision, in part, and order disclosure of some withheld information to the appellants.

RECORDS:

[6] The records at issue are the audio recording of the 911 call and the withheld portions of an occurrence summary (page 1), a general occurrence report (pages 2 and 3) and various handwritten police officers' notes (pages 4, 5, 7, 8, 9, 11, 13 to 20 and 22 to 26).

[7] Pages 6, 10, 12 and 21 of the records, which contain police officers' notes, are not at issue, as the ministry has granted the appellants complete access to them.

ISSUES:

- A. Does section 65(5.2) apply to exclude the audio recording and the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16 of the records from the application of the *Act*?
- B. Do the records to which the *Act* applies contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 49(b) apply to the information at issue?
- D. Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption apply to the police operational codes and ten codes on pages 1 and 13?
- E. Are the portions of the records remaining at issue that the police have withheld as non-responsive in fact responsive to the request?
- F. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does section 65(5.2) apply to exclude the audio recording of the 911 call and the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16 of the records from the application of the *Act*?

[8] Section 65(5.2) states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[9] The purposes of section 65(5.2) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.¹ The term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.² The words "relating to" require some connection between "a record" and "a prosecution". The words "in respect of" require some connection between "a proceeding" and "a prosecution".³ Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed.

Representations

[10] In its representations, the ministry states that the audio recording of the 911 call and the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16 of the records are being used for the purpose of a pending prosecution of armed robbery and other lesser offences against a specified number of individuals in a specified court district. The ministry adds that there is a criminal trial scheduled for May 2015. As a result of this ongoing prosecution, the ministry asserts that the audio recording of the 911 call and the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16 of the records are excluded from the application of the *Act* by virtue of the exclusion in section 65(5.2).

[11] The ministry asks that I accept its claim that the section 65(5.2) exclusion applies despite the fact that it raised this exclusion for the first time in its representations. The ministry states that there are important public policy reasons for excluding records that are the subject of a prosecution; namely, maintaining the integrity of the criminal justice system by ensuring that the accused's and the Crown's right to a fair trial is not infringed by the publication of records relating to an ongoing prosecution.

[12] In their representations, the appellants assert that the ministry has failed to discharge its burden of establishing that the audio recording of the 911 call and the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16 of the records qualify for exclusion under section 65(5.2). They also submit, in the alternative, that if I am satisfied on the evidentiary record that the information sought to be excluded under

¹ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

² Order PO-2703.

³ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

section 65(5.2) does in fact qualify for exclusion, I should not deny disclosure but rather, suspend disclosure until the completion of the criminal proceedings.

Analysis and findings

[13] Having heard the audio recording of the 911 call and reviewed the non-responsive portions of pages 8, 9, 11 (last line), 13, 15 and 16, I accept the evidence of the ministry that these records relate to a criminal prosecution scheduled to take place in May 2015. The records consist of handwritten police officers' notes that relate to the armed robbery and other alleged criminal activity that took place concurrently with the incident involving the appellants. The evidence before me, including the information in the records themselves, also establishes that the audio recording of the 911 call is connected to the prosecution of the armed robbery. As the armed robbery trial is set for May 2015, the prosecution of the individuals who were charged is ongoing. I am satisfied that the audio recording of the 911 call and the non-responsive portions of pages 8, 9, 11 (last line only), 13, 15 and 16 of the records relate to an ongoing prosecution. I find, therefore, that the *Act* does not apply to them by virtue of the exclusion in section 65(5.2).

[14] I note that there are two other pages in the records that contain information related to the armed robbery that will be the subject of the May 2015 proceedings. These are the handwritten police officers' notes found at pages 19 and 20. The ministry does not assert that these pages are excluded from the application of the *Act* by virtue of section 65(5.2); it only submits that these parts of the records are non-responsive. However, based on my review of these records, I find that the information they contain is similar to that contained in the excluded records as it relates to the armed robbery and describes the actions of the police following the report of the armed robbery. Comparing these records, which directly relate to the armed robbery that the ministry submits is being prosecuted, to those I have found above are excluded from the application of the *Act* under section 65(5.2), I conclude that the ministry overlooked them and neglected to assert the section 65(5.2) exclusion which should apply. Acknowledging the ministry's oversight, I nonetheless conclude that the information in pages 19 and 20 relating to the armed robbery, must be excluded from the application of the *Act* under section 65(5.2) based on the same reasoning I set out above. I find therefore, that the *Act* does not apply to these pages of the records by virtue of section 65(5.2) of the *Act*.

[15] As the *Act* does not apply to the above records, I have no jurisdiction to "suspend disclosure" as the appellants ask me to. Nor do I have the jurisdiction to determine at this time whether the portions of the police officers' handwritten notes that the ministry has claimed are not responsive to the request fall within the scope of the appeal. However, I note that the section 65(5.2) exclusion applies to these records only as long as proceedings in respect of the prosecution are ongoing. Accordingly, once the criminal trial of the armed robbery is concluded and any appeal period related

to it has expired, these records will be subject to the *Act*. The appellants will then be able to make a request for access to these specific records. At that time, this office will, in turn, be able to address them in an appeal should the appellants not be satisfied with the ministry's decision in response to such an access request.

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

[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. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] 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.⁴ To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[18] In its representations, the ministry states that the records contain the personal information of the individual who made the telephone call to 911 that initiated the incident at issue. The ministry states that this personal information consists of this individual's name, date of birth, age, gender, information that the individual provided to the OPP, and comments that members of the OPP made about the individual, all of which would link the individual to the investigation. Both the representations of the ministry and the appellants imply that the personal information of the appellants is contained in the records.

Analysis and findings

[19] The records contain details of the police investigation into an alleged domestic assault at the appellants' home, including the initial report of the alleged incident by an individual and an explanation of the investigative steps taken by the police at the appellants' home. I find that all of the records at issue contain the personal information of the appellants as that term is defined in paragraphs (a), (d), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[20] I reject the ministry's assertion that the records also contain the personal information of the individual who made the 911 call. Although the records contain a name, date of birth, telephone number and address, the evidence before me establishes that this personal information is fictitious and does not relate to an identifiable individual. Both the ministry and this office were unable to locate or contact anyone matching this individual based on the "personal information" contained in the records. The ministry did not provide the actual name of the person who made this call and there is no evidence before me that this individual can be identified.

⁴ Order 11.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] As the ministry was relying on the personal privacy exemption, during my inquiry, I specifically asked it to address the issue of the authenticity of the 911 caller's identity as set out in the records by providing the individual's contact information so that this office could notify her. In response, the ministry advised that the street address provided by the individual is invalid and the telephone number provided by the individual is not a local area code. This office also attempted to contact the individual relying on the information contained in the records; however, the information was not valid and did not lead to the identification of any individual. Put simply, the evidence before me establishes that the name used by the individual who placed the 911 call is a pseudonym and the "personal information" (date of birth, telephone number and address) provided by the individual is fictitious. There is no information on the true identity of the caller. This office has found that a pseudonym used by an individual that does not relate to an identifiable individual cannot qualify as personal information.⁶ Similarly, I conclude that fictitious personal information that does not relate to an identifiable individual does not fall within the meaning of "personal information" under the *Act*. Accordingly, I find that the records do not contain the personal information of an identifiable individual other than the appellants.

[22] I find that all of the records at issue contain only the personal information of the appellants, and I will consider whether they are exempt under section 49(a) or (b) of the *Act*.

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

[23] Section 49 provides a number of exemptions from individuals' general right of access under section 47(1) to their own personal information held by an institution. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. 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

[24] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

⁶ Order PO-3342.

[25] 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.⁷ If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). In this appeal, the ministry asserts that the presumption at paragraph (b) applies. This presumption states:

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;

[26] The presumption only requires that there be an investigation into a possible violation of law.⁸ Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

Representations

[27] The ministry's representations on this issue focus on the information relating to the individual who made the 911 telephone call. The ministry submits that it has withheld some of the information in the records on the basis that disclosure would be an unjustified invasion of this individual's privacy. The ministry asserts that the information relating to this individual falls within the presumption in section 21(3)(b) because the records at issue were compiled and are identifiable as part of an OPP investigation into a suspected domestic assault. The ministry acknowledges that the OPP investigation concluded there was no domestic assault. However, it adds that when the records were compiled, the allegation made by the individual prompted an investigation into a possible violation of law; thus, the records fall within the presumption notwithstanding the particular facts of the incident and the absence of any criminal proceedings.

[28] The ministry also submits that the factor in section 21(2)(f) applies in this appeal. The ministry asserts that disclosure of the individual's information would be an unjustified invasion of personal privacy because the personal information of the

⁷ Order MO-2954.

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

individual is highly sensitive and could reasonably be expected to cause significant personal distress. It argues that the personal information of the individual who called in a false complaint to the OPP is highly sensitive for the purposes of section 21(2)(f), and it relies on Order P-1618 to support its submission. The ministry states that this individual is not aware that her personal information is subject to disclosure and should be consulted prior to any of it being disclosed. The ministry asserts that disclosure of the individual's information in this appeal would be a breach of the procedural fairness the individual is owed. It cites the decisions of *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*¹⁰ and *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*¹¹ in support of its contention that the individual has a right to be heard prior to a determination being made about disclosure of that individual's personal information.

[29] Finally, the ministry expresses its concern that the public will cease to cooperate with the OPP and other law enforcement agencies during investigations if the records are ordered disclosed. It submits that it is important to safeguard the privacy of individuals who communicate with the police and that not doing so will jeopardize the public policy goal of encouraging the public to report to and seek assistance from the police, and to cooperate with police investigations.

[30] The appellants argue that there is no valid privacy interest in the false information provided by the individual to the police reporting they were engaged in a domestic assault. They state that the police arrested one of them for allegedly perpetrating a domestic assault. They add that the police subsequently acknowledged the domestic assault allegation was entirely false. The appellants submit that the purpose of the *Act* is to protect legitimate communications, not false ones leveled against innocent people as in this case. They state that the ministry has not provided evidence in support of its proposition that disclosure of the false information at issue may cause the law abiding public that does not put forth false information to cease cooperating with the OPP or other law enforcement agencies. Finally, on the issue of notice to the individual and procedural fairness, the appellants assert that if the individual should be notified prior to disclosure and given the opportunity to make submissions in this appeal, it is the ministry's responsibility to initiate communication with the individual; however, they state that the ministry has taken no steps to do so.

Analysis and findings

[31] I accept the ministry's arguments that the records at issue were compiled and are identifiable as part of an investigation into a possible violation of law. However, I reject the ministry's remaining arguments on this issue because they are premised on the incorrect assumption that the fictitious information provided by the 911 caller qualifies as "personal information" under the *Act*. As I found above, the seemingly

¹⁰ 2011 ONSC 2956.

¹¹ 2014 ONSC 3295.

"personal information" provided by the caller is fictitious. There is no personal information relating to any identifiable individual other than the appellants contained in the records. The pseudonym and the fictitious personal information provided by the individual who called 911 do not qualify as the personal information of that individual, when that individual is not identifiable.

[32] As I have found that the information relating to the individual in the records does not qualify as personal information for the purposes of the *Act*, section 49(b), with reference to the presumption in section 21(3)(b), cannot apply to it. The ministry has claimed the section 49(b) exemption only for the information in the records relating to the individual who made the 911 call. As no other exemptions have been claimed for this information, I will order it disclosed.

D. Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption apply to the police operational codes and ten codes on pages 1 and 13?

[33] As noted above, section 49 provides a number of exemptions from individuals' general right of access under section 47(1) to their own personal information held by an institution. 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.

[34] 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.¹² Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[35] In this case, the institution relies on section 49(a) in conjunction with section 14(1)(l), which state:

¹² Order M-352.

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

[36] Where section 14(1)(l) uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹³

[37] The ministry argues that the withheld codes reveal zones from which OPP officers are dispatched for patrol and other law enforcement activities. It asserts that if these codes were disclosed, they could be used to track the activities of OPP officers carrying out law enforcement activities. It adds that disclosure of the ten codes, which are used by OPP officers in their radio communications with each other, could compromise the effectiveness of OPP communications. The ministry continues that disclosure of these codes would leave police officers vulnerable, particularly if these codes were to become known to would-be criminals. The ministry relies on previous orders of this office, including Order PO-2700, which have held that police operational and ten codes qualify for exemption under section 14(1)(l) because of the reasonable expectation of harm from their release.

[38] The appellants submit that the ministry has not provided sufficient evidence to establish that disclosure of these codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The appellants assert that the ministry’s argument is merely a bald assertion.

[39] Having reviewed the records and the submissions of the parties, I accept that the withheld codes that reveal OPP zones, locations and communications could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. This office has repeatedly found such codes to be exempt from disclosure under section 14(1)(l) and I adopt the same reasoning in finding the codes at issue in this appeal similarly qualify for exemption under section 14(1)(l).

E. Are the portions of the records remaining at issue that the police have withheld as non-responsive in fact responsive to the request?

[40] The ministry denied access to the following portions of the records on the basis that they are not responsive to the appellants’ request: discrete lines in pages 1 to 3, a

¹³ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

paragraph in each of pages 2, 4 and 7, page 11 (except for the last line), and pages 14, 17 and 22 to 26.

[41] In determining whether a record or portion of a record is responsive to a request, section 24 of the *Act* is instructive. Section 24 imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records, and it 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).

[42] 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.¹⁴ To be considered responsive to the request, records must "reasonably relate" to the request.¹⁵

[43] The ministry states that the appellants are seeking access to police officers' notes that contain information about other unrelated activities that the officers dealt with during their shift. The ministry notes that this kind of unrelated information can be found on the same pages as those that contain information responsive to the request. The ministry asserts that pages 4, 7, 11, 14, 17 and 22 to 26 contain non-responsive information that relates to officers' activities that are unrelated to the incident in question. The ministry adds that it has withheld some information in pages 1 to 3 as non-responsive because it reveals when the records were printed and other information that is not responsive to the appellants' request. The ministry states that as a matter of practice, it always treats this type of information as being non-responsive.

[44] The appellants assert that the ministry has not described the nature of the information it claims is non-responsive; nor has it clearly indicated that the information does not relate to the false arrest of one of them. In the alternative, the appellants

¹⁴ Orders P-134 and P-880.

¹⁵ Orders P-880 and PO-2661.

submit that if I am satisfied that the information is in fact non-responsive, I should suspend rather than deny its disclosure until the completion of the criminal proceedings raised by the ministry.

Analysis and findings

[45] Having reviewed the relevant parts of the records and the representations of the parties, I find that some pages and portions of the records that have been withheld by the police as non-responsive do not contain information that reasonably relates to the appellants' request. Specifically, I accept the submissions of the ministry that the information relating to when the records at pages 1 to 3 were printed and other internal administrative information withheld from those pages, is not responsive to the appellants' request as it does not relate to the incident or the investigation of the false claims made about them. I also agree with the ministry that the withheld portions of the records at pages 4, 7 (top portion), 11 (except the last line), 14, 17, and 22 to 26 relate to incidents that have nothing to do with the appellants and their request and therefore, are not responsive to the request.

[46] Conversely, I do not agree with the ministry's assertion that the last paragraph of page 2 that was withheld as non-responsive is in fact non-responsive. Page 2 of the records is the first page of the general occurrence report of the police's attendance at the appellants' home during the incident at issue. The appellants specifically requested a copy of the complete OPP report of the incident at their home and all records related to the investigation of the false claims made in the 911 telephone call. The general occurrence report is the complete OPP report the appellants requested. I find that as a whole, it is a responsive record and cannot be said to be non-responsive in part. The information contained in the general occurrence report relates to the appellants, their detention and the police's investigation of the false claims made about them. The paragraph that the ministry has withheld as non-responsive contains information the police received during the incident about concurrent criminal activity at another location, which is connected to the incident involving the appellants. In this context, I further find that the information the police received during their investigation of false allegations about the appellants and recorded in the general occurrence report relating to the appellants, falls squarely within the scope of the appellants' request for all records relating to the investigation of the false claims made in the 911 call.

[47] As I have found that the last paragraph of page 2 of the records falls within the scope of the request, and no exemptions have been claimed for it, I will order it disclosed.

F. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

[48] The section 49(a) and (b) exemptions are discretionary, and permit 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. 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.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant¹⁸:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

¹⁶ Order MO-1573.

¹⁷ Section 54(2).

¹⁸ Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

[50] The ministry submits that it exercised its discretion in not disclosing the records. It further submits that it exercised its discretion taking into consideration its usual practices, the fact that the appellants have been provided with their own personal information in the records, and the principle that the privacy of affected third party individuals named in law enforcement records should be protected.

[51] The appellants submit that the ministry did not exercise its discretion appropriately and they take issue with the ministry's considerations. The appellants state that the privacy of the alleged third party individual who provided false information is not worthy of the privacy protection afforded by the *Act*. They add that disclosure of only their personal information to them in the circumstances does nothing to advance their legitimate concerns about the conduct of the police in falsely arresting one of them. Finally, the appellants criticize the ministry's assertion that it exercised its discretion in accordance with its usual practice on the basis that the ministry has failed to address whether that exercise was in accordance with the law.

[52] I find that the ministry exercised its discretion under sections 49(a) and (b) in denying access to parts of the records. I am satisfied that the ministry took relevant factors into consideration including the principles that exemptions from individuals' right of access to their own information should be limited and specific, and that the privacy of individuals should be protected. I have not found that the section 49(b) exemption applies as claimed by the ministry and have ordered the information withheld under that section disclosed. However, I accepted the ministry's claim of the section 49(a) exemption and I note that this exemption has been applied to a minimal amount of information in the records that does not encompass any of the appellant's personal information. In the circumstances, I uphold the ministry's exercise of discretion in this appeal.

ORDER:

1. I uphold the ministry's decision to withhold the following records from the appellants because they are excluded from the application of the *Act* under section 65(5.2): the audio recording of the 911 call and the portions of pages 8, 9, 11 (last line), 13, 15 and 16 which the ministry initially withheld as non-responsive to the request.
2. I also uphold the ministry's decision not to disclose pages 19 and 20 of the records to the appellants, however, I do so based on my finding that these records are excluded from the application of the *Act* under section 65(5.2), and not on the basis that they are not-responsive, as claimed by the ministry.
3. I uphold the ministry's decision to withhold the codes in pages 1 and 3 as exempt under section 49(a) in conjunction with section 14(1)(l).
4. I order the ministry to disclose to the appellants by **February 6, 2015** but not before **February 2, 2015**, the following:
 - the information the ministry withheld under section 49(b) in pages 1, 2, 3, 5, 7, 13, 14 and 18, and
 - the last paragraph of page 2 that the ministry withheld as non-responsive.

For clarity, I am providing along with this order, a copy of these pages with the portions to be disclosed highlighted.

5. To verify compliance with order provision 4, I reserve the right to require the ministry to provide me with a copy of the disclosure it makes to the appellants.

Original Signed By: _____
Stella Ball
Adjudicator

_____ December 31, 2014