Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2718

Appeal PA07-460

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a requester for access to copies of any trespassing warning placed against her by residents of an identified municipal address through a named police constable on a specified occurrence date. The requester also sought all the names and signatures that appeared on any trespassing warning, as well as the named police constable's badge number.

The Ministry located records that related to a police attendance and granted partial access to them. The Ministry relied on the discretionary exemption at section 49(a) of the *Act* (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate unlawful act) and 14(2)(a) (law enforcement report); and the discretionary exemption at section 49(b) (personal privacy), with reference to the factor at section 21(2)(f) (highly sensitive) and the presumption at section 21(3)(b) (compiled as part of an investigation), to deny access to certain portions of the records it withheld. The Ministry also advised that other withheld portions of the records were not responsive to the request.

The requester (now the appellant) appealed the decision.

During mediation, the Ministry advised the mediator that it did not have a copy of any trespass notice in its file. A subsequent search conducted by the Ministry revealed that none was issued. In its supplementary decision letter, the Ministry confirmed that no trespass notice was completed and that no additional responsive records exist.

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry, initially. The Ministry provided representations in response to the Notice. In its representations the Ministry advised that it was no longer relying on section 14(2)(a) to withhold access to the information at issue in the appeal. As a result, the application of that section is no longer at issue in the appeal. I then sent a Notice of Inquiry along with the complete representations of the Ministry to the appellant, who provided representations in response.

RECORDS:

The records consist of a two-page Occurrence Summary and four pages of the identified police officer's notes. At issue are the portions of the records that the Ministry withheld.

DISCUSSION:

RESPONSIVENESS OF THE RECORDS IDENTIFIED BY THE MINISTRY

The Ministry submits that there is non-responsive information in the records that consists of references to law enforcement matters unrelated to the appellant and information which appears when a record is printed that post-dates the request. The appellant does not address this issue.

Analysis and Findings

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. Past orders of this office have also established that administrative information relating to the date, time and by whom the report was printed is not reasonably responsive to a request [Orders PO-2315 and PO-2409]. Based on a careful review of certain of the severed portions of the subject records, I conclude that the following portions of the records are non-responsive to the request:

- other investigations or police matters in which the officers were involved on that day,
- information about shift duty times and/or shift preparation that is administrative in nature or,
- document printing information that post-dates the request.

In my view, none of the information identified by the Ministry as non-responsive reasonably relates to the request and is not, accordingly, responsive to it. I will not address this specific information further in this order.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (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 where they relate to another individual,
>
> (f) correspondence sent to an institution by an 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.

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.)].

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 [Orders P-257, P-427, P-1412, P-1621], but 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 [Orders P-1409, R-980015, PO-2225, PO-2435].

In my view, all of the records at issue contain the personal information of the appellant. This information qualifies as her personal information because it includes information about her address (paragraph (d)) and her name along with other personal information relating to her (paragraph (h)). I also find that these records contain the personal information of other identifiable individuals. This information qualifies as their personal information because it includes their address (paragraph (d)) or refers to their names, along with other personal information about them (paragraph (h)).

That said, certain withheld portions of the records contain information that qualifies as the personal information of the appellant, only. This information appears at the bottom of page one of the two-page Occurrence Summary, and the top of page four of the identified police officer's notes.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49(a) provides a number of exemptions from this right. It 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. [emphasis added]

LAW ENFORCEMENT

The Ministry relies on section 14(1)(l) to withhold the "ten" codes and other references to coding procedures contained in the records at issue.

Section 14(1)(l) of the *Act* reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 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 [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.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se*

fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above].

Under section 2(1) of the *Act*, "law enforcement" is defined to mean:

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

I am satisfied that the matter at issue relates to policing and qualifies as "law enforcement" under paragraph 2(1)(a).

Section 14(1)(l): facilitate the commission of an unlawful act

The Ministry submits that section 14(1)(l) was applied to the "ten" codes and other references to coding procedures in some of the withheld portions of the records at issue. The Ministry submits that:

> … these operational police codes are used by OPP officers in their radio communications with each other and their detachments and Provincial Communication Centres. … The other exempt information in part reveals identifiable zones from which OPP officers are dispatched for patrol and other law enforcement activities. Although a detachment may cover a large geographical region, the exempt information reveals a specific, identifiable zone and service location. …
>
> The Ministry submits that the public disclosure of these operational police codes would leave police officers more vulnerable and compromise their ability to provide effective policing services. For example, if individuals engaged in illegal activities were monitoring radio communications and had access to the meaning of the various police codes it would be easier for them to carry out criminal activities and would jeopardize the safety of police officers. Intimate knowledge of the whereabouts of a given officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activity.

Analysis and Finding

A number of decisions of this office have consistently found that police codes qualify for exemption under section 14(1)(l) of the *Act* (see for example Orders M-393, M-757 and PO-1665). These codes have been found to be exempt because of the existence of a reasonable

expectation of harm to an individual or individuals and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by previous orders of this office. I find that the Ministry has provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information. As a result, I find that section 14(1)(l) applies to this information.

Accordingly, subject to my discussion on the exercise of discretion below, I find that the section 49(a) exemption applies to this information.

PERSONAL PRIVACY

If a record contains the personal information of the appellant along with the personal information of another individual, section 49(b) of the *Act* applies to render the information exempt from disclosure, at the discretion of the Ministry.

Section 49(b) of the *Act* reads:

> 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.

Accordingly, under section 49(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would "constitute an unjustified invasion" of that other individual's personal privacy, the Ministry may refuse to disclose that information to the appellant.

That does not end the matter, however. Despite this finding, the Ministry may exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to her own personal information against the other individual's right to protection of their privacy.

Under section 49(b), the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

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

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 21(4) of the

Act, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [See Order PO-1764].

As I have found that certain withheld portions at the bottom of page one of the two-page Occurrence Summary and the top of page four of the identified police officer's notes contain information that qualifies as the personal information of the appellant, only, and not of other individuals, its disclosure would not result in an unjustified invasion of another individual's personal privacy under section 49(b). As no other discretionary exemptions have been claimed for this information and no mandatory exemptions would apply, I will order these portions be released to the appellant. I have highlighted this information on a copy of the pages that I have provided the Ministry along with this order.

Section 21(3)(b)

Section 21(3)(b) reads as follows:

> 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.

The Ministry submits that the remaining withheld information in records is the personal information of identifiable individuals other than the appellant that was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Trespass to Property Act*.

The appellant's representations do not specifically address the application of section 21(3)(b).

Analysis and Findings

I find that the presumption in section 21(3)(b) applies to the remaining withheld information because it is personal information of identifiable individuals other than the appellant that was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Trespass to Property Act*. The fact that charges are not laid does not affect the application of 21(3)(b) [Order PO-1849].

The presumed unjustified invasion of personal privacy at section 21(3)(b) therefore applies to this information. Section 21(4) does not apply and the appellant did not raise the possible application of the public interest override at section 23 of the *Act*. Accordingly, I conclude that the disclosure of the withheld personal information would constitute an unjustified invasion of other individuals' personal privacy, and it is exempt under section 49(b).

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the information they withheld. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

The appellant's submissions question, amongst other things, the accuracy of the information the Ministry disclosed and describes why she requires the information at issue.

In its representations, the Ministry explains that it weighed the appellant's right of access to her own personal information against the other individuals' right to protection of their privacy. Amongst the factors the Ministry considered was the sensitivity of the information and the relationship between the appellant and other identifiable individuals referred to in the records. In doing so, it considered the nature of the withheld information at issue and exercised its discretion not to disclose it.

I have carefully reviewed the information remaining at issue, all of which qualifies for exemption under section 49(b).

In the circumstances, I am satisfied that the Ministry did not err in exercising its discretion not to release this information to the appellant. In exercising its discretion, I also find that the Ministry applied section 10(2) of the *Act* in a proper manner and reasonably disclosed as much of the remaining withheld responsive portions of the records as possible without disclosing material which is exempt [See, in this regard the decision of the Divisional Court in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* [1997] 102 O.A.C. 71].

Therefore, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed was appropriate given the circumstances and nature of the information.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of page one of the two-page Occurrence Summary and page four of the identified police officer's notes that I have highlighted on the copy that I have provided to the Ministry with this order by sending it to the appellant by **November 3, 2008** but no earlier than **October 28, 2008**.

2. I uphold the decision of the Ministry to deny access to the other portions of the records it withheld.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of pages one and four of the records as disclosed to the appellant.

Original Signed by: September 26, 2008
Steven Faughnan
Adjudicator