Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3588

Appeal PA14-234

Ministry of Community Safety and Correctional Services

March 18, 2016

Summary: This appeal arises out of a request to the ministry for records relating to the OPP's debriefing process with respect to the investigation of a highly publicized criminal case. The ministry withheld the information, in part, on the basis of the mandatory personal privacy exemption in section 21(1) and the discretionary exemptions in sections 14 (law enforcement) and 19 (solicitor-client privilege). In this decision, the adjudicator upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(3)(b), 21(2)(f), 14(1)(c), 19.

OVERVIEW:

[1] The appellant made 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 records relating to the Ontario Provincial Police's (OPP's) debriefing process with respect to the investigation of a criminal case that has received significant public attention.

[2] After locating responsive records, the ministry issued a decision to the appellant granting access to them, in part. The ministry advised that it withheld portions of the

records pursuant to the discretionary exemptions in sections 14(1)(a) (law enforcement matters), (c) (investigative techniques or procedures), (i) (endanger the security) and (l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report) and 19 (solicitor-client privilege). The ministry also advised the appellant that it applied the mandatory personal privacy exemption in section 21(1) to withhold other portions of the records. Finally, the ministry advised the appellant that some portions of the records were withheld as not responsive to his request.

[3] During mediation, the appellant specified the portions of the records that he wishes to pursue on appeal. Accordingly, only those portions of the records are at issue in this appeal. In addition, the appellant raised the possible application of the public interest override in section 23 of the *Act*.

[4] During the inquiry into this appeal, the adjudicator sought representations from both the ministry and the appellant. Only the ministry provided representations which were shared with the appellant in accordance with this office's *Code of Procedure*. The ministry indicated in its representations that it was no longer relying on the exemption in section 14(1)(i) for pages 58 – 60 of the records. Since these are the only pages for which the ministry claimed this exemption, I will not be considering this exemption in this order.

[5] The appeal was then transferred to me to dispose of the issues.

[6] In this order, I uphold the ministry's decision.

RECORDS:

The records at issue all relate to the OPP's debriefing process and consist of the following:

- Page 21 (top portion only) - Email dated January 24, 2011
- Pages 28 and 29 – Email dated January 31, 2014
- Pages 43 – 48 – Executive Summary of the Investigation
- Pages 51 – 62 – OPP Officer Notebook Disclosure
- Pages 64 and 68 – Key Messages of Review

ISSUES:

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

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

C. Does the discretionary exemption at section 14(1)(c) apply to the records for which it is claimed?

D. Does the discretionary exemption at section 19 apply to the records for which it was claimed?

E. Was the ministry's exercise of discretion proper in the circumstances?

F. Does the public interest override in section 23 apply to the information withheld under section 21(1)?

DISCUSSION:

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

[7] 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. Personal information means recorded information about an identifiable individual including an 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 (paragraph (h) of the definition of that term).

[8] The ministry submits that pages 21, 64 and 68 contain personal information of three individuals, including the victims of crime, and their involvement with an Ontario Provincial Police (OPP) law enforcement investigation. The ministry further submits that severing the names of the individuals would not render them unidentifiable due to the significant publicity of this investigation and this case.

[9] I find that pages 21, 64 and 68 contain information which qualifies as "personal information" of the individuals within the meaning of that term as defined in section 2(1) of the *Act*. I agree with the ministry that it is not possible to sever the names to only disclose the information. I further find that the records do not contain any information relating to the appellant and thus I will consider the application of the personal privacy exemption to the information in section 21(1).

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[10] Where a requester seeks the 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. In this case, it appears that only paragraph (f) applies, which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> If the disclosure does not constitute an unjustified invasion of personal privacy.

[11] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[12] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. 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 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[1] In the present appeal, none of the exceptions in section 21(4) apply and the appellant did not claim the application of section 23.

[13] The ministry submits that the presumption in section 21(3)(b) applies to the personal information in the records which 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;

[14] The ministry submits that the records were compiled as part of an OPP law enforcement investigation which resulted in charges, and subsequent convictions. The ministry notes that page 21 is an email from a member of the OPP referring to the interview of a named individual and pages 64 and 68 contain the names of identified victims in an OPP Investigation Review. The ministry submits that the law enforcement investigation and the subsequent judicial proceedings were widely reported in the media, making the individuals and victims associated with the investigation, highly identifiable.

[15] The records at issue relate to the OPP's debriefing process following a recent investigation and are not records that were created during the investigation itself. This office has established in past decisions that the presumption can only apply when the personal information at issue is contained in records that were compiled during the investigation.[2] Based on my review, the personal information in pages 21, 64 and 68 was not compiled during the investigation of the possible violation of law although it relates to identifiable individuals including the victims of the crime. The context in which the personal information of these individuals was compiled in the records was the discussion following the conclusion of the investigation. Accordingly, I find that the

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[1] *John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).
[2] Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

disclosure of this personal information is not subject to the presumption in section 21(3)(b).

[16] If no section 21(3) presumption applies, 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.[3] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more of the factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[4]

[17] The ministry submits that the factor weighing against disclosure in section 21(2)(f) also applies to the personal information. This section reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> the personal information is highly sensitive;

[18] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[5]

[19] The ministry submits that as the affected persons or their families have not been notified of the request or the appeal, disclosure of the personal information in the records would result in significant personal distress to these individuals. I agree. The personal information in the records relates to individuals who were either investigated by the OPP or who were the victims of crime. I find that the personal information on pages 21, 64 and 68 is highly sensitive and the factor against disclosure in section 21(2)(f) applies to my consideration of whether disclosure of this information would be an unjustified invasion of personal privacy.

[20] The appellant did not submit representations and I find that there are no factors favouring disclosure of the personal information. Accordingly, I find that the personal information is exempt under section 21(1) of the *Act*.

Issue C: Does the discretionary exemption at section 14(1)(c) apply to the records for which it is claimed?

[21] While the ministry also claimed the exemptions at sections 14(1)(a), (l) and 14(2)(a) for the information at issue, due to my finding below, I do not need to consider the application of these exemptions.

[22] Section 14(1)(c) states:

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[3] Order P-239.
[4] Orders PO-2267 and PO-2733.
[5] Orders PO-2518, PO-2617, MO-2262 and MO-2344

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

[23] The term law enforcement is used in section 14, and is defined in section 2(1) to include policing.

[24] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[25] 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.[7] 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 the seriousness of the consequences.[8]

[26] The ministry submits that it has applied section 14(1)(c) to withhold portions of the Executive Summary Report and the supporting Notebook Disclosure records. The ministry submits that the OPP is a police service and as a result of a law enforcement investigation that required the OPP to work jointly with other police services, the information at issue was created. The ministry further states:

> As a result of the joint investigation, the OPP and another police service met as part of a debriefing review, and to potentially amend existing practices for joint law enforcement operations. The ministry submits that it has applied the [section 14(1)(c) exemption] to an Executive Summary and supporting Notebook Disclosure records prepared during or after the debriefing, in order to protect the integrity of joint law enforcement operations, and the working relationships the OPP has with other police services.
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> In applying section 14, the ministry considered the principle cited in *Ontario (Attorney General)* v. *Fineberg* (1994), 19 O.R. (3d) (Div. Ct.), which is that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a

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[6] *Ontario (Attorney General)* v. *Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[7] Order PO-2040 and *Ontario (Attorney General)* v. *Fineberg*, cited above.
[8] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

> law enforcement context. The records at issue were prepared with a view to potentially amending future joint operation practices involving the OPP and other police services. The part of the Executive Summary report that was released states: The following executive summary highlights the commitment to review our practices and to consider best practices from our experience." The ministry submits that the specific context in which the records were created, which was oriented towards future policing operations, is a significant factor in applying [the section 14(1)(c) exemption].

[27] The ministry submits that section 14(1)(c) applies for the following specific reasons:

- The records describe techniques and procedures used during joint law enforcement investigations, including with respect to communications, information sharing, case management, and logistics.

- Since the records focus on reviewing best practices, it can be expected that the techniques and procedures described in the records are not only currently in use, but are also likely to be used in future joint law enforcement operations;

- The techniques and procedures described in the records reveal how police forces work together to prevent serious crimes from occurring. It is our position that disclosing these records could hinder or compromise their effective utilization, by giving would-be offenders insight into joint police operations, thereby allowing these operations to be thwarted, and to allow offenders to evade detection; and

- There is no reason to believe that the information in the records is currently known to the public, especially in the detail described in the records.

[28] Based on my review of the records, I find that they consist of a review of the successful and unsuccessful practices and techniques used by the OPP and other police services in the law enforcement investigation. I accept the ministry's representations that the records describe techniques and procedures used during the joint law enforcement investigation with respect to communication, information sharing and logistics. The information at issue does recognize the techniques and procedures that were successful and also areas for improvement. I find that, in this vein, the techniques and procedures would not be publicly known. Furthermore, I find that both the withheld information and the ministry's representations establish that disclosure of this information could potentially compromise their effective use in future investigations.

[29] Accordingly, I find that section 14(1)(c) applies to the withheld information in the Executive Summary and the Notebook Disclosure, subject to my review of the ministry's exercise of discretion.

Issue D: Does the discretionary exemption at section 19 apply to the records for which it is claimed?

[30] The ministry claims that section 19 applies to information withheld on pages 28 and 29 of the records. Section 19 states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[31] Section 19 contains two branches. Branch 1 (*subject to solicitor-client privilege*) is based on the common law. Branch 2 (*prepared by or for Crown counsel*) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[32] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[9] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[10] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[11]

[33] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[12] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[13]

[34] The ministry submits that Branch 1 applies and states that these pages of record contain email communications between members of the OPP and specific Crown Attorneys, inviting the Crown Attorneys to a debriefing, where their input was encouraged. The ministry further submits:

> Both records were created so that the OPP could initiate obtaining legal advice from Crown Attorneys. Solicitor-client privilege protects direct communications of a confidential nature between a solicitor and client. The privilege applies to a *continuum of communications*, as in this instance, the records document the beginning of this continuum, which

[9] *Descoteaux* v.*Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[12] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R.(3d) 321 (C.A.); Order MO-2936.
[13] *Kitchener (City)* v. *Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

was to invite Crown Attorneys to the debriefing where they could provide advice as required.

[35] The ministry submits that this office has recognized a solicitor-client relationship between the police and Crown Attorneys in the past and cites Order PO-2532-R in support of this.

[36] The ministry submits that the email communications were confidential and that the privilege asserted for the emails has at no point been waived.

[37] The ministry has withheld a series of emails between the OPP and various Crown Attorneys on pages 28 and 29. Based on my review of this information, I find that they are exempt under the solicitor-client communication privilege in section 19.

[38] I accept that, for the purposes of this appeal, there is a solicitor-client relationship between the OPP and the Crown Attorney office. Furthermore, it is evident from the content of the emails that the OPP sought the presence of the Crown attorneys at the debriefing session in order to seek legal advice. I find that the confidential email exchange represents part of the continuum of communications between the solicitor (the Crown Attorneys) and the client (the OPP) for the purposes of keeping the Crown Attorneys informed of the information arising from the debriefing. I further accept the ministry's submission that the OPP has not waived its privilege in the records. Accordingly, subject to my finding on the ministry's exercise of discretion, I find that pages 28 and 29 of the record are exempt under Branch 1 of section 19.

Issue E: Was the ministry's exercise of discretion proper in the circumstances?

[39] The section 14(1)(c) and 19 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.

[40] 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

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

[14] Order MO-1573.

substitute its own discretion for that of the institution.[15]

[42] The ministry submits that it properly exercised its discretion in not disclosing the information at issue and in doing so considered all of the factors including the following:

> The public policy interest in encouraging police forces to work with other police services on a confidential basis, in order to exchange sensitive law enforcement information, and to promote best practices with respect to joint operations, with the objective of protecting public safety.
>
> The public policy interest in encouraging police forces to approach Crown Attorneys in order to obtain and to receive legal advice on a confidential basis.

[43] I found that the withheld information consists of the practices and techniques used by the OPP and the police in the investigation and the exchange of emails between the OPP and Crown Attorneys for the purpose of seeking the Crown Attorneys attendance at the debriefing I accept the ministry's submissions that a proper factor for consideration is the public policy interest in non-disclosure. I find that the ministry has disclosed information to the appellant and only withheld information that was properly exempt under sections 14(1)(c) and 19. I further find the ministry did not consider any improper factors in exercising its discretion to withhold the information under these exemptions Accordingly, I find the ministry's exercise of discretion was proper in the circumstances.

Issue F: Does the public interest override in section 23 apply to the information withheld under section 21(1)?

[44] Lastly, the appellant raised the issue of the possible application of the public interest override in section 23 to any records that I found to be exempt under the *Act*. Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[45] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[46] The *Act* is silent as to who bears the burden of proof in respect of section 23. The onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her content that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest

[15] Section 43(2).

in disclosure which clearly outweighs the purpose of the exemption.[16]

[47] In considering whether there is a *public interest* in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.[17] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[18]

[48] I have found that information is exempt from disclosure under sections 14(1)(c), 19 and 21(1). Section 23 does not apply to information withheld under sections 14 and 19 and thus I will not be considering its application to this information. The information I have found exempt under section 21(1) is the names of various individuals and recorded information about them. The appellant did not submit representations in support of his claim that section 23 applied to the withheld information. Based on my review of the information exempt under section 21(1), I find that disclosure of this information would not shed light on the operations of the police or OPP. The information relates to both individuals investigated by the police and the victims of crime and disclosure of this information would not serve the purpose of informing the citizenry about the police or OPP's activities.

[49] Accordingly, I find that section 23 does not apply as there is no compelling public interest in the disclosure of the withheld information.

ORDER:

I uphold the ministry's decision.

Original Signed By: March 18, 2016
Stephanie Haly
Adjudicator

[16] Order P-244.
[17] Orders P-984 and PO-2607.
[18] Orders P-984 and PO-2556.