Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3600

Appeal PA14-171

Ministry of Community Safety and Correctional Services

April 28, 2016

Summary: The appellant and his former wife (the affected party) are involved in a family court case relating to issues of custody and access. The appellant requested access to OPP investigation records concerning a domestic matter between himself and the affected party. No charges resulted from the investigation. The ministry denied access to portions of the records under section 49(a), in conjunction with sections 14(1)(c) (investigative techniques and procedures) and 14(1)(l) (facilitate commission of an unlawful act or hamper control of crime), and under section 49(b) (personal privacy). This order finds that, to the extent that the records contain personal information of individuals other than the appellant, they are exempt under section 49(b). Section 49(a), in conjunction with sections 14(1)(c) and (l), does not apply to the remaining information. The non-exempt portion of one of the records at issue is ordered disclosed.

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), 14(1)(c), 14(1)(l), 21(1)(d), 21(2)(d) and (f), 21(3)(b), 49(a) and 49(b); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20(5); *Divorce Act*, R.S.C 1985 c. 3 (2nd Supp.), ss. 16(5).

Orders and Investigation Reports Considered: P-1618, PO-2285, PO-2751 and PO-3599.

Cases Considered: *R. v. Mentuck*, [2001] 3 S.C.R. 442.

OVERVIEW:

[1] The records at issue in this order relate to an investigation by the Ontario Provincial Police (OPP) of a domestic matter between the appellant and his former wife (the affected party). No charges have resulted from the investigation.

[2] As noted in Order PO-3599, issued concurrently with this order, the appellant is divorced from the affected party. There are three children of the marriage. Neither of the two court orders provided to this office during the inquiry awarded custody to either the appellant or the affected party, and accordingly both remain custodial parents.

[3] The appellant made an access request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). He sought access to two specified incident reports and all related notes, and a Children's Aid Society report relating to one of the specified incident reports.

[4] After locating responsive records, the ministry issued a decision granting the appellant partial access to them. The ministry advised that access to the withheld portions of the records was denied under the discretionary exemptions in sections 49(a), read with sections 14(1)(c) (investigative techniques and procedures), 14(1)(l) (facilitate commission of an unlawful act or hamper control of crime) and 14(2)(a) (law enforcement report); and 49(b) (personal privacy) of the *Act*.

[5] In support of its section 49(b) claim, the ministry raised the application of the presumption in section 21(3)(b) (investigation into violation of law) and the factor in section 21(2)(f) (highly sensitive). The ministry advised the appellant that it denied access to other portions of the records on the basis that are not responsive to his request.

[6] In addition, the ministry confirmed that the second report requested relates to an investigation by a municipal police force, and that municipal police records are not accessible through the ministry.

[7] The appellant filed an appeal of the ministry's decision.

[8] The appeal was assigned to a mediator under section 51 of the *Act*. During mediation, the appellant advised the mediator that he seeks records relating to alleged incidents involving himself that are the subject of the occurrence report identified in his request. The appellant also advised the mediator that he does not seek access to the parts of the records that were identified by the ministry as not responsive to his request or to the police code information that was withheld under section 14(1)(l) of the *Act*. Accordingly, the police code information withheld under section 14(1)(l), and information identified as not responsive to the request, are no longer at issue. The appellant confirmed that he seeks access to all of the remaining information withheld

from disclosure.

[9] As mediation did not resolve all of the issues in this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[10] During the inquiry, this office invited representations from the ministry, two affected parties and the appellant. Representations were received from the ministry, one affected party and the appellant. Non-confidential portions of the representations were shared in accordance with *Practice Direction 7*, issued by this office. The affected party's representations were not shared with the appellant due to confidentiality concerns.

[11] In its representations, the ministry states that while it claimed the exemption in section 14(2)(a) for pages 2 to 5 of the records initially, it now submits that the exemption in section 14(1)(l) applies to withhold this information. In addition, while the ministry claimed section 14(1)(l) to exempt the information on the bottom of page 3, it submits that the exemption in section 14(1)(c) applies to withhold that information. In summary, the ministry no longer relies on section 14(2)(a) in this appeal, and seeks to apply section 14(1)(c) and (l), both of which were referred to in its decision letter, to additional information. In particular, the ministry claims that section 49(a) in conjunction with sections 14(1)(c) and (l), apply to the records in their entirety.

[12] The records contain the names and ages of the children of the marriage and one other piece of information about them. Section 66(c) of the *Act* states that "[a]ny power conferred on an individual by this Act may be exercised . . . where the individual is less than sixteen years of age, by a person who has lawful custody of the individual." I adopt the reasoning and conclusions set out in Order PO-3599, issued concurrently with this order, to the effect that the appellant may not rely on section 66(c) to either: (1) exercise the children's right of access to their own personal information, or (2) consent to the disclosure of the children's personal information to himself.

[13] The order finds that the personal information of individuals other than the appellant is exempt under section 49(b). Section 49(a), in conjunction with sections 14(1)(c) and (l), does not apply. The non-exempt portion of one of the records at issue is ordered disclosed.

RECORDS:

[14] The records at issue consist of the withheld portions of an occurrence summary, occurrence report, supplementary occurrence report and officers' notes, to which the appellant continues to seek access.

ISSUES:

[15] The issues addressed in this order are:

A. Do the records contain personal information within the meaning of the definition in section 2 of the *Act* and if so, to whom does it pertain?

B. Does the discretionary exemption in section 49(b) apply?

C. Does the discretionary exemption in section 49(a), in conjunction with sections 14(1)(c) and 14(1)(l), apply?

D. Should the ministry's exercise of discretion be upheld?

DISCUSSION:

Issue A. Do the records contain personal information within the meaning of the definition in section 2 of the *Act* and if so, to whom does it pertain?

[16] 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. 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.[1]

[18] The ministry submits that the records contain personal information, including ". . . names, an address, a phone number, and a statement that an affected party supplied to the OPP." The ministry states further that this information ". . . is what police would typically gather in the course of conducting an investigation into a possible violation of law."

[19] The appellant states that he believes the records contain personal information, including his own personal information, and states further that "[t]his information has come to my knowledge . . ." through a variety of means. He also refers to the "statement" he gave to the police in connection with the investigation in this appeal. Having reviewed the records, I conclude that the portions dealing with communications between the appellant and the police have been disclosed, subject to minor severances.

[20] I find that the undisclosed portions of the records contain personal information about the appellant and the affected party. They also contain the names and birth dates of the children of the marriage and one other item that qualifies as their personal information. In addition, the records contain information about another identifiable individual, which is that individual's personal information. In some withheld portions of the records, information about the appellant is intertwined with information about other individuals. That information could not be severed and disclosed without also disclosing personal information of others.

[21] However, there is one withheld portion of the records that consists only of the personal information of the appellant, which could be severed and disclosed without disclosing the personal information of others. Because only the personal information of other individuals can be exempt under section 49(b), this portion is not exempt under that section. Nevertheless, the ministry claims that it is exempt under section 49(a) in conjunction with sections 14(1)(c) and/or (l). I will consider this exemption claim under Issue C, below.

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[1] Order 11.

Issue B. Does the discretionary exemption in section 49(b) apply?

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

[23] 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.

[24] 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;

[25] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

Section 21(1)

[26] 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). In this case, it is necessary to consider the possible application of sections 21(1)(a) and (d).

[27] These sections state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
> >
> > (d) under an Act of Ontario or Canada that authorizes the disclosure;

Section 21(1)(a) - consent

[28] This section applies if the individual to whom the information relates consents in writing to its disclosure. No individual (other than the appellant) whose personal information appears in the records has consented to disclosure. As noted above, section 66(c) does not apply to allow the appellant to consent on behalf of his children under 16 years of age. Section 21(1)(a) therefore does not apply.

Section 21(1)(d): another Act

[29] The appellant submits that section 21(1)(d) applies on the basis of section 20(5) of the *Children's Law Reform Act* and section 16(5) of the *Divorce Act*.

[30] Section 20(5) of the *Children's Law Reform Act* states:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child. [Emphasis added.]

[31] Section 16(5) of the *Divorce Act* contains similar wording about access to information. It states:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child. [Emphasis added.]

[32] The records at issue in this appeal relate to a domestic matter between the appellant and the affected party. This matter does not directly involve the children, and having reviewed the records, I conclude that they do not contain information as to the children's health, education and welfare. Accordingly, sections 20(5) of the *Children's Law Reform Act* and section 16(5) of the *Divorce Act* do not "authorize the disclosure" of any information contained in the records.

[33] I therefore find that section 21(1)(d) does not apply.

Sections 21(2) and (3)

[34] 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. [2]

[35] I will begin by considering section 21(3), which lists circumstances where disclosure is presumed to be an unjustified invasion of personal privacy. The ministry relies on section 21(3)(b).

21(3)(b): investigation into violation of law

[36] Section 21(3)(b) states:

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[2] Order MO-2954.

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

[37] 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 violation of law.[3]

[38] The ministry states:

> These records were created pursuant to a law enforcement investigation. If the evidence gathered during the investigation had pointed in a different direction, charges could have been laid by the OPP, most likely pursuant to the *Criminal Code*. As a result, the Ministry submits that the records fall squarely within the presumption in section 21(3)(b).

[39] The appellant submits that the presumption does not apply because he is the party being investigated. I note, however, that section 49(b) (which is the exemption currently under consideration, informed by the provisions of section 21) applies if disclosure "would constitute an unjustified invasion of another individual's personal privacy." [Emphasis added.]

[40] Both section 49(b) and section 21(3)(b) aim to protect the privacy of individuals other than the requester (the appellant in this case). Section 21(3)(b) is therefore relevant despite the fact that the appellant is the individual who was under investigation. This approach is consistent with previous decisions of this office such as Order PO-2285, which applied section 21(3)(b) to police records relating to an investigation of the requester in that case, who was ultimately charged with uttering threats.

[41] I accept the submission of the ministry that the records were compiled and are identifiable as part of an investigation into a possible violation of law. I therefore find that the presumed unjustified invasion of privacy in section 21(3)(b) applies to the personal information of individuals other than the appellant in the records.

[42] As no other provision in section 21(3) applies, I will now consider section 21(2).

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[3] Orders P-242 and MO-2235.

Section 21(2)

[43] Section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy. The ministry relies on section 21(2)(f) (highly sensitive) as a factor favouring non-disclosure. The appellant disputes the application of section 21(2)(f) and relies on the factor favouring disclosure in section 21(2)(d) (fair determination of rights).

[44] Sections 21(2)(d) and (f) state:

> 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;

Section 21(2)(d) – fair determination of rights

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

1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing [4]

[46] The appellant and affected party have provided documentation demonstrating the existence of Family Court proceedings relating to custody and access, meeting the first two requirements for the application of section 21(2)(d).

[47] The appellant submits that "[t]he information in this report may be relevant in determining my rights in family court." He states that "[d]isclosing the report is the only

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

way to have the facts available to the court before and during the trial."

[48] In Order PO-3599, issued concurrently with this order, I found that this factor applied and I afforded it moderate weight. However, in that case, the records dealt with allegations against the appellant which involved his daughter. The records here pertain to a domestic matter between the appellant and the affected party that does not directly involve the children. The only issues before the family court pertain to custody of, and access to, the children. The relevance of the records to these issues may be determined by the Family Court as part of the affected party's application, and I am not making a definitive finding on that issue. I would observe, however, that the relationship between these records and the issues before the Family Court are not self-evident, and in the absence of further evidence and argument on this point, I find that this factor is not established.

Section 21(2)(f) – highly sensitive

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

[50] The ministry and the affected party submit that the undisclosed information in the records is highly sensitive. The ministry refers to Order P-1618, in which former Assistant Commissioner Tom Mitchinson found that personal information about the affected parties' contacts with the OPP as complainants, witnesses or suspects qualified as "highly sensitive."

[51] The appellant submits that ". . . the report should not cause any of the involved parties any level of personal distress and therefore the information disclosed should not be considered 'highly sensitive.'"

[52] Police investigations delve into highly personal matters, and this case is no exception. It is clear that, under the circumstances, disclosure of the records could reasonably be expected to cause significant personal distress to the affected party and the children, who are mentioned in the records. Regardless of what the appellant knows or does not know about the contents of the records, I find that the factor in section 21(1)(f) applies, and I accord it significant weight.

Conclusions under sections 21(2) and (3)

[53] I have found that the presumed unjustified invasion of personal privacy under section 21(3)(b) is established in this case. As well, I have found that the factor favouring non-disclosure in section 21(2)(f) (highly sensitive) applies, and have given it significant weight. The factor favouring disclosure in section 21(2)(d) (fair determination of rights) does not apply.

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[5] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[54] Absent any factor favouring disclosure, the application of a presumption [section 21(3)(b)] is a sufficient basis for finding that disclosure would be an unjustified invasion of personal privacy under section 49(b). In this case, I have also found the information to be highly sensitive [section 21(2)(f)]. Accordingly, subject to the discussion of the absurd result principle and the exercise of discretion, below, I find that disclosure of the withheld portions of the records at issue would constitute an unjustified invasion of personal privacy (except the portion that I have found to contain only the appellant's personal information), and section 49(b) therefore applies.

Absurd result

[55] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[6]

[56] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[7]
- the requester was present when the information was provided to the institution[8]
- the information is clearly within the requester's knowledge[9]

[57] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[10]

[58] The appellant submits that the absurd result principle applies because ". . . there is little to no invasion of privacy in the disclosing of this report."

[59] The ministry submits that the absurd result principle should not apply in this case ". . . because disclosure would be inconsistent with the purpose of the exemption, to protect the privacy of affected parties whose personal information has been collected as part of a police investigation."

[60] In Order PO-2285, Assistant Commissioner David Goodis dealt with the absurd result principle in a case where the appellant had requested police records relating to an investigation into whether he had uttered threats against his wife. Referring to several previous orders, he stated:

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[6] Orders M-444 and MO-1323.
[7] Orders M-444 and M-451.
[8] Orders M-444 and P-1414.
[9] Orders MO-1196, PO-1679 and MO-1755.
[10] Orders M-757, MO-1323 and MO-1378.

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted:
>
> > The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
> >
> > In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply. In similar circumstances, this office stated in Order M-757:
> >
> > > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) of the Act.
> >
> > In my view, this approach recognizes one of the two fundamental purposes of the Act, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.
>
> As in this previous case, I find that there is particular sensitivity inherent in these records, and that disclosure would not be consistent with the purpose of the exemption, and the absurd result principle therefore does not apply.

[61] This reasoning applies equally in this appeal, given that the records relate to alleged harassment of the affected party by the appellant. I find that the absurd result principle does not apply.

[62] Accordingly, subject to the discussion of the exercise of discretion, below, I find that, other than personal information pertaining only to the appellant, the withheld information in the records at issue is exempt under section 49(b).

[63] The non-exempt information consists of a passage near the bottom of page 3

pertaining to the outcome of a check done by the OPP.

Issue C. Does the discretionary exemption in section 49(a), in conjunction with sections 14(1)(c) and 14(1)(l), apply?

[64] I will now consider whether these sections apply to the withheld information in the records at issue that I have not found to be exempt under section 49(b).

[65] As already noted, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[66] Section 49(a) states:

> 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.]

[67] 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.

[68] In this case, the ministry relies on section 49(a) in conjunction with sections 14(1)(c) and (l).

[69] These sections state:

> 14 (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;
> >
> > . . .
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[70] It is not enough for an institution to take the position that the harms under section 14(c) or (l) are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter. The institution 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. [11]

[71] I will consider each of these sections in turn, in relation to information I have not found exempt under section 49(b).

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

[72] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[12]

[73] The Ministry's representations on this exemption refer to the "detailed checklist that the OPP uses during law enforcement investigations to evaluate risk factors associated with domestic violence." I have already exempted this checklist under section 49(b) and will therefore not consider it here.

[74] The ministry's representations also refer to information on page 3 that "contains the results of a check that the police would have performed prior to commencing the investigation." This is the information I have found not to be exempt under section 49(b). With respect to this information, the ministry submits that:

- it applied the exemption out of concern that disclosure of the results of the check, which is used exclusively for investigative purposes, could hinder or compromise their effective utilization;
- if it were known about the kinds of checks that were conducted by law enforcement officials prior to an investigation, efforts could be made to evaded law enforcement;
- the check at issue is a technique used by law enforcement to prepare for an investigation, and one that the ministry does not believe to be widely known.

[75] Previous orders[13] have recognized that, in assessing whether a technique or procedure is generally known to the public, guidance is provided by the Supreme Court of Canada's decision in *R. v Mentuck*,[14] where the Supreme Court of Canada held:

> ... that the publication of elaborate undercover "operational methods" undertaken by police to gather evidence regarding a murder suspect would not seriously compromise the effectiveness of similar operations, as

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[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[12] Orders P-170, P-1487, MO-2347-I and PO-2751.
[13] e.g. Orders PO-2751 and PO-3421.
[14] [2001] 3 S.C.R. 442.

> "there are a limited number of ways in which undercover operations can run" and most of these are known to the public through "common sense perceptions" or "similar situations depicted in popular films and books."

[76] As I noted in Order PO-2751, *Mentuck* was a case involving a proposed publication ban under the *Criminal Code*. The Crown had argued that the "hallmarks of the operation" must be kept from general knowledge. As summarized by the Court, the "hallmarks" included, for example, the fact the accused was given "...the opportunity to join a criminal organization that would provide him with the potential to earn large sums of money so long as he showed his loyalty by confessing any past criminal activity," among others. In rejecting the ban sought by the Crown concerning this type of information, the Court stated:

> The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. . . .

[77] In my view, the type of check whose results are outlined on page 3, to which the ministry seeks to apply section 14(1)(c), is a clear example of an investigative technique that is so obvious that it would be a "common sense perception" as referenced in *Mentuck*. I find that this information does not qualify for exemption under section 14(1)(c).

[78] To summarize, I find that section 49(a), in conjunction with section 14(1)(c), does not apply to the withheld information in the records that I have not found exempt under section 49(b).

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

[79] The ministry's representations on this section state its concern that ". . . the disclosure of the records could discourage members of the public from seeking police assistance out of concern that the confidentiality of their information will not be safeguarded." The ministry submits that such an outcome could be expected to either facilitate the commission of crime or hamper its control.

[80] However, the only information I am considering under this section is the result of the check on page 3. This is the appellant's personal information, and is not the personal information of any other party. The appellant is the party under investigation, not a witness or other party voluntarily coming to police in search of assistance. I therefore conclude that the ministry's concern about individuals not contacting police, for fear that the confidentiality of their information will not be protected, is not engaged with respect to the information under consideration here.

[81] The ministry also states that it withheld the results of the check on page 3 "for the same reasons it has claimed under section 14(1)(c). The Ministry submits that disclosure could harm law enforcement investigations, which could be expected to hamper police efforts to control crime."

[82] Under section 14(1)(c), I found that the type of check whose results are outlined on page 3 "is a clear example of an investigative technique that is so obvious that it would be a 'common sense perception' as referenced in Mentuck." On this same basis, I am not satisfied that the ministry has established a reasonable expectation that disclosure would facilitate the commission of crime or hamper its control. Accordingly, I conclude that section 14(1)(l) does not apply to this information.

[83] I therefore find that section 49(a), in conjunction with section 14(1)(l), does not apply to the withheld information in the records that I have not found exempt under section 49(b).

Conclusion under section 49(a)

[84] In summary, I find that section 49(a) does not apply.

Issue D. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[85] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[86] 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.

[87] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[88] The ministry submits that its exercise of discretion to withhold information under section 49(b) was proper. The ministry notes that it did disclose information to the

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[15] Order MO-1573.
[16] Section 54(2).

appellant, and that it decided to withhold the undisclosed information based on the following considerations:

- the public policy interest in protecting the privacy of personal information belonging to affected parties that is contained in law enforcement records;
- the public policy interest in safeguarding the privacy of individuals who seek out the protection of law enforcement; and
- the concern that the disclosure of records would jeopardize public confidence in the OPP, especially in light of the public co-operation that the OPP depend upon when they conduct law enforcement investigations.

[89] The appellant submits that the police did not exercise their discretion. He also submits that non-disclosure is not in the best interests of the children.

[90] As I have already noted, however, the records at issue in this appeal (unlike Appeal PA14-170, addressed in Order PO-3599 issued concurrently with this order) do not directly relate to the children. Disclosure would not reveal information about the children's health, education or welfare. In my view, the appellant's argument relating to the children does not establish that this is a factor that the ministry should have considered in exercising its discretion in this appeal.

[91] It is evident from the overall submissions of the police that they were aware of the sensitivity of the information in the records and the need to protect the privacy interests of the individuals other than the appellant who are mentioned.

[92] In the circumstances of this appeal, I find that the ministry's exercise of discretion took relevant factors into account, and was proper.

ORDER:

1. Subject to Order Provision 2, I uphold the ministry's decision to deny access to the undisclosed information in the records at issue under section 49(b) of the *Act*.

2. I order the ministry to disclose the results of the check on page 3 of the records by sending this information to the appellant not later than **May 19, 2016**. I have found that the claimed exemptions do not apply to this information. For greater certainty, with the copy of this order that is being sent to the ministry, I will enclose a copy of this page that shows this information with highlighting. The highlighted information is to be disclosed.

Original Signed by: April 28, 2016

John Higgins
Adjudicator