Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3735

Appeal PA12-562

Ministry of Community and Social Services

May 25, 2017

Summary: The appellant made a request to the Ministry of Community and Social Services for a copy of his complete file with the Family Responsibility Office. The ministry granted access, in part. The ministry denied access to other records either in whole or in part, ultimately claiming the application of the discretionary exemptions in sections 49(a) in conjunction with sections 14(1)(a) (law enforcement matter), 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (confidential source of information), 14(1)(l) (facilitate commission of an unlawful act) and 19 (solicitor-client privilege), as well as 49(b) (personal privacy). Other issues include the late raising of a discretionary exemption and whether the ministry's search for records was reasonable. In this order, the adjudicator upholds the ministry's decision in part. She finds that the exemptions in sections 14(1)(a), (c) and (l) do not apply. She upholds the exemptions in section 49(a) in conjunction with section 14(1)(d) and in section 49(b). The ministry's exercise of discretion is upheld as well as its search for records. The ministry is ordered to disclose some of the records at issue to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 14(1)(a), 14(1)(c), 14(1)(d), 14(1)(l), 24, 49(a) and 49(b).

Orders and Investigation Reports Considered: MO-2070, PO-2518.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Community and Social Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester

sought access to his complete file within the Ontario Disability Support Program (ODSP) and the Family Responsibility Office (FRO), as well as correspondence sent to the past Minister, other government agencies, boards, commissions, ministries or other parties concerning him.

[2] With the appellant's agreement, the ministry divided the request into two request files. One request file relates to the ODSP. The second request file, which is the subject matter of this appeal relates to the appellant's file with the FRO.

[3] The ministry subsequently located responsive records and granted partial access to them. The ministry denied access to portions of records, claiming the application of the exclusion in section 65(6)3 (labour and employment records), as well as the discretionary exemptions in section 49(a) in conjunction with sections 14(1)(e) (endanger life or safety), 19 (solicitor-client privilege), 20 (danger to health or safety), and section 49(b) (personal privacy).

[4] The requester (now the appellant) appealed the ministry's decision to this office. During the mediation of the appeal, the ministry issued a revised index of records in which it added the discretionary exemptions in sections 14(1)(a) (law enforcement matter), 14(1)(b) (law enforcement investigation), 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (confidential source of information) and 14(1)(l) (facilitate commission of an unlawful act) to withhold portions of some records. In response, the appellant advised the mediator that he took issue with the late raising of these discretionary exemptions. Consequently, the late raising of a discretionary exemption was added as an issue in the appeal.

[5] The appellant also advised the mediator that he was of the view that further records exist. As a result, the ministry conducted a further search for responsive records, but found none. However, the ministry also noted that the appellant's original access request was for his complete FRO file and did not extend to any records the ministry has in its possession. As a result, the ministry advised, it considered the scope of the request to be limited to the FRO file.

[6] Also during mediation, the appellant advised the mediator that he was no longer pursuing access to the information that was withheld under section 19. Lastly, the appellant advised that he continues to seek access to the remaining records, including those identified as duplicates in the index of records.

[7] The appeal then moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I provided the ministry and the Ontario Public Service Employees Union (OPSEU)[1] with the opportunity to provide representations.

[8] Prior to the due date for the representations, I received a request to place this appeal on hold because of the ongoing judicial review of another IPC order, Order PO-2917, dealing with access to FRO records that raised similar issues to this appeal. I

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[1] OPSEU is the union that represents FRO employees.

subsequently advised the parties that I was placing this appeal on hold, pending the disposition of the judicial review of Order PO-2917.

[9] The Divisional Court subsequently upheld the adjudicator's decision in Order PO-2917 respecting the exclusion in section 65(6)3 and the exemptions in sections 14(1)(e) and 20. The Divisional Court's decision was upheld on appeal to the Ontario Court of Appeal.[2] Shortly thereafter, this office received confirmation that neither the ministry nor OPSEU would be seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

[10] The appeal was then re-activated and the ministry and OPSEU were once again provided with the opportunity to provide representations. The ministry provided representations and advised that it was no longer relying on the exclusion in section 65(6) or the exemptions in sections 14(1)(b), 14(1)(e) and 20 to deny access to certain information. Portions of the ministry's representations were not shared with the appellant and will not be referred to in this order because they meet this office's confidentiality criteria. OPSEU advised that it would not be submitting representations.

[11] Representations were then sought, and received from the appellant and an affected party (the support recipient). Both provided representations. The appellant advised in his representations that he is seeking access to all of the records, including those that were withheld under section 19 (solicitor-client privilege). This issue was removed from the scope of the appeal during mediation. Consequently, I will not consider the application of this exemption or the records for which it was claimed.

[12] The ministry subsequently issued a supplementary decision letter to the appellant, disclosing further records to him. The ministry withheld portions of these records, claiming the application of sections 49(a) in conjunction with section 14(1) and 49(b).

[13] For the reasons that follow, I uphold the ministry's decision in part. I find that the exemptions in sections 14(1)(a), (c) and (l) do not apply. I uphold the exemptions in section 49(a) in conjunction with section 14(1)(d) and in section 49(b). The ministry's exercise of discretion is upheld and I find that its search for records was reasonable. I order the ministry to disclose some of the records at issue to the appellant.

RECORDS:

[14] The records consist of case log reports and notes, account inquiries, court result forms, other court documents, correspondence and financial statements.

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[2] *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107.

ISSUES:

A. Should the ministry be permitted to raise discretionary exemptions late?

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

C. Does the discretionary exemption in 49(a) in conjunction with the section 14(1)(a), (c), (d) and (l) exemptions apply to the information at issue?

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

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

F. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A. Should the ministry be permitted to raise discretionary exemptions late?

[15] As previously stated, during the mediation of the appeal, the ministry issued a revised index of records in which it added the discretionary exemptions in sections 14(1)(a) (law enforcement matter), 14(1)(b),[3] 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (confidential source of information) and 14(1)(l) (facilitate commission of an unlawful act) to withhold portions of some records. In response, the appellant advised the mediator that he took issue with the late raising of these discretionary exemptions.

[16] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involve in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

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[3] In its representations, the ministry withdrew its reliance on section 14(1)(b).

[17] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[4]

[18] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant.[5] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[6]

[19] The parties were therefore asked to consider the following with respect to section 11.01:

- Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption;
- Whether the ministry would be prejudiced in any way by not allowing it to apply an additional discretionary exemption in the circumstances of this appeal; and
- By allowing the ministry to claim an additional discretionary exemption, would the integrity of the appeals process be compromised in any way.

[20] The ministry states that it identified that certain records contained information exempt from disclosure under section 14(1) after it had issued its decision letter to the appellant. However, the ministry notes that the additional exemptions were claimed during the mediation stage of the appeals process, thus giving the appellant ample time to address the application of the new exemptions. The ministry submits that the additional exemptions should be considered as they were claimed during the time when both parties were given the opportunity to reconsider their positions, exercise their discretion and make changes as appropriate.

[21] The ministry goes on to argue that it acknowledges the policy objectives sought to be achieved in the process of allowing additional discretionary exemptions to be claimed, which is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant are prejudiced. The ministry's position is that these policy objectives are satisfied in the circumstances of this appeal.

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

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[4] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[5] Order PO-1832.

[6] Orders PO-2113 and PO-2331.

[23] In Order MO-2070, Adjudicator Catherine Corban explained the purposes of this office's policy on the late raising of discretionary exemptions. In doing so, she stated:

> Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

[24] I adopt the approach taken by Adjudicator Corban and I have decided to permit the ministry to claim sections 14(1)(a), (c), (d) and (l) to the records for which it has claimed these exemptions. Given that the addition of these exemptions took place during the mediation of the appeal, I have concluded that the appellant will not be prejudiced by the late raising of section 14(1), as he was given an opportunity to address these claims during both mediation and the inquiry of this appeal, and no delay has resulted from the additional claim. Accordingly, I will allow the ministry to claim the discretionary exemptions in sections 14(1)(a), (c), (d) and (l) to the records it lists below and I will then determine whether the exemptions apply.

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

[25] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[7] Where the records contain the requester's own personal information, either alone or together with the personal information of other individuals, access to the records is addressed under Part III of the *Act*. Where the records contain only personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act*. Therefore, 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,

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[7] Orders PO-2113 and PO-2331.

> (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (g) the views or opinions of another individual about the individual, and
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> (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.

[26] Section 2(3) also relates to the definition of personal information and states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[27] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be about the individual.[8] Even if the 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.[9]

[28] The ministry submits that the records at issue contain the personal information of the affected party and that this personal information was provided to the FRO by the affected party for the purpose of enforcing a support order with the Director of the FRO. In particular, the ministry states that the records contain the following types of personal information about the affected party:

- An identifying number, symbol or other particular assigned to the individual (paragraph (c) of the definition of personal information);
- The address, telephone number, fingerprint or blood type of the individual (paragraph (d)); and

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

- Correspondence sent to the FRO 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 (paragraph (f)).

[29] The ministry also submits that the records contain the personal information of the appellant, as the access request was for his and the affected party's file at the FRO.

[30] The affected party submits that her personal information is contained in the records. The appellant's representations do not address this issue.

[31] I find that the records at issue contain mainly the personal information of the affected party, specifically: their name along with information about their marital status and finances, which falls within the ambit of paragraphs (a) and (b) of the definition of that term in section 2(1) of the *Act*; an identifying number assigned to the affected party (paragraph (c)); the address of the affected party (paragraph (d)); and correspondence sent to the FRO by the affected party that is explicitly of a confidential nature (paragraph (f)).

[32] I also find that some of the records at issue contain the personal information of the appellant, namely: his name along with information about his marital status and finances (paragraphs (a) and (b)); the address of the appellant (paragraph (d)); and the appellant's name where it appears with other personal information relating to him (paragraph (h)).

Issue C. Does the discretionary exemption in section 49(a) in conjunction with the section 14(1) exemptions apply to the information at issue?

[33] 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.

[34] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > where section 12, 13, 14, 14.1, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[35] Section 49(a) recognizes the special nature of the 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.[10] Where access is denied under section 49(a), the ministry 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.

[10] Order M-352.

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

Section 14(1)

[37] Section 14(1) states, in part:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;
> >
> > . . .
> >
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
> >
> > . . .
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[38] The term law enforcement is used is several parts of section 14 and is defined in section 2(1). The definition includes policing and investigations that lead or could lead to proceedings in a court or tribunal and has included investigation and enforcement proceedings under the *Family Responsibility and Support Arrears Enforcement Act, 1996* (*FRSAEA*).[11]

[39] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[12] Where section 14 uses the words *could reasonably be expected to,* the ministry must provide detailed and convincing evidence to establish a reasonable expectation of harm. Evidence amounting to speculation of possible harm is not sufficient.[13]

[40] 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

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[11] Order PO-2910.
[12] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[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.).

constitutes a *per se* fulfilment of the requirements of the exemption.[14]

[41] The ministry submits that the FRO is a program that collects and pays child and spousal support payments pursuant to a duty under section 5(1) of the *FRSAEA*. It also stated that the FRO is also a law enforcement program that enforces support provisions contained in court orders as well as private written agreements that are filed with the court. To that end, the ministry argues, the FRO has the legal authority to take a number of different enforcement actions against support payors who do not meet their support obligations.

Section 14(1)(a) – law enforcement matter

[42] In order for this exemption to apply, the matter must be ongoing or in existence.[15] The exemption does not apply where the matter is completed, or where the alleged interference is with potential law enforcement matters.[16] In accordance with the decision of the Divisional Court in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),*[17] the word *matter* may extend beyond a specific investigation or proceeding.

[43] The ministry applied this exemption to pages 8, 87, 89, 94, 97, 98, 103, 235-238, 262, 265, 266, 355 and 743.[18] The ministry states that pages 8, 103 and 743 reveal an investigative tool used by the FRO for the purposes of enforcement as well as the type of information that the FRO is able to access. This information should not be disclosed to the appellant, it argues, because it is reasonable to expect that he will delay or avoid updating his information if he is aware that the FRO has access to certain information, and if he is aware of the kinds of information to which the FRO has access. The ministry states that it is imperative that the FRO have up-to-date information in its files to properly enforce support orders. Accordingly, if the appellant does not update his information with the FRO, it would clearly interfere with the enforcement of this case.

[44] Turning to the remaining pages listed above, the ministry submits that they relate to an ongoing investigation by the FRO and this investigation is to determine the appellant’s ability to pay child support owed and to determine his annual income. The ministry advises that the appellant had obtained a stay of enforcement from the Ontario Court of Justice on the basis that he was receiving social assistance notwithstanding that he has historically hidden both income and employment information from the FRO.

[45] Disclosure of the records, the ministry argues, would reveal the kinds of information that the FRO collects, uses and discloses in order to investigate cases and initiate appropriate enforcement. The ministry goes on to submit that if the appellant is aware of the kind of information the FRO shares, it is reasonable to expect that the

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[14] Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[15] Order PO-2657.
[16] Orders PO-2085 and MO-1578.
[17] [2007] O.J. No. 4233.
[18] Pages 87, 89, 94 and 97 do not appear to have portions severed under section 14(1)(a).

appellant will not provide full and frank disclosure regarding his income. The ministry advises that the FRO was eventually able to obtain a court order, lifting the stay of enforcement and that it is important for the FRO to be apprised of the appellant's up-to-date income information in order to properly enforce this case.

[46] The ministry goes on to state:

> [I]f this information is released . . . it is possible for support payors to access such information through an FOI request. The disclosure could therefore reasonably be expected to interfere with a law enforcement matter in this and other FRO cases where the support payor is in default of his or her court-ordered support obligation.

[47] The appellant states that as a result of a matter heard in the Superior Court of Justice, and with the affected party's consent, he no longer owes any child support arrears and his obligation for ongoing child support has been reduced to zero.[19] The appellant argues that he is, therefore, no longer subject to an investigation by the FRO.

[48] As previously stated, the purpose of the exemption in section 14(1)(a) is to provide an institution with the discretion to deny access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing or existing law enforcement matter. In addition, the term matter may extend beyond a specific investigation or proceeding.

[49] For the section 14(1)(a) exemption to apply, I must be satisfied that: the FRO's activity in the circumstances of this appeal constitutes *law enforcement*; there is a *matter* in existence to which these records relate; and the disclosure of the records at issue in this appeal could reasonably be expected to interfere with a law enforcement matter.

[50] I find that the FRO's activities in the circumstances of this appeal pertain to law enforcement for the purposes of the definition of that term in section 2(1) of the *Act*. Respecting part two of the test, I am not satisfied that the information in the records relates to an existing law enforcement matter, as the appellant is no longer subject to support obligations and income source deductions, thus terminating the FRO's involvement and enforcement. In addition, the ministry referred to the FRO's investigation of the appellant, which is no longer ongoing.

[51] Even if I found that the matter at issue is the FRO's enforcement of support orders in general, I am not satisfied that part three of the test has been met. To meet the third part of the test for exemption under section 14(1)(a), I must be satisfied by the evidence that there is a reasonable expectation that disclosure of the specific information at issue would interfere with the identified law enforcement matters. In this case, the ministry has not provided sufficient evidence to establish a link between the withheld information and enforcement in this particular matter. The ministry's

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[19] The appellant provided a copy of the final order of the Superior Court of Justice, Family Court.

submissions are not sufficiently particularized in the circumstances of this appeal to establish such a connection. In addition, the techniques or tools referred to in the records appear to be specifically provided for in the *FRSAEA*, and are known to the public. Therefore, as the ministry has not established a reasonable expectation of harm under section 14(1)(a) resulting from the disclosure of the information at issue, I find that this exemption does not apply.

Section 14(1)(c) – reveal investigative techniques and procedures

[52] In order to meet the investigative technique or procedure test, the ministry 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.[20] The techniques or procedures must be investigative. The exemption will not apply to enforcement techniques or procedures.[21]

[53] The ministry is claiming the application of this exemption to pages 8, 103 and 743. It submits that these pages reveal an investigative technique and procedure which is used in law enforcement, namely the ability to locate the support payor. The records reveal the type of information that the FRO is able to access. In addition, the ministry argues, these pages reveal a procedure that the FRO follows to update case information for the purposes of enforcement.

[54] The appellant submits that, due to his occupational background, he is familiar with investigative techniques and that the disclosure of the records would not reveal any new techniques to him.

[55] As previously stated, this exemption does not apply to enforcement techniques or procedures. In my view, the information at issue consists of techniques the FRO uses to gain information for the purpose of enforcing support orders or agreements. Therefore, I find that this information is not exempt from disclosure under section 14(1)(c).

Section 14(1)(d) – confidential source of information

[56] In order for this exemption to apply, the ministry must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.[22]

[57] The ministry is claiming the application of this exemption to page 44. It states that disclosure of case log note 257 in combination with case log note 260 (both located on page 44) would reveal a confidential source of information regarding the appellant.

[58] I have reviewed the information that was withheld on page 44 of the records and

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[20] Orders P-170, P-1487, MO-2347-I and PO-2751.
[21] Orders PO-2034 and P-1340.
[22] Order MO-1416.

I am satisfied that disclosure of this information would reveal both a confidential source of information, as well as the information the confidential source supplied to the FRO. Consequently, I find that this information is exempt from disclosure under section 14(1)(d), subject to my findings regarding the ministry's exercise of discretion.

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

[59] The ministry is claiming the application of this exemption to pages 8, 87, 89, 94, 98, 103, 235-238, 262, 265, 266, 355 and 743.[23] With respect to pages 8, 103 and 743, the ministry submits that these pages reveal an investigative tool used by the FRO for the purposes of enforcement, as well as the type of information the FRO is able to access. If the appellant was aware of these investigative tools, that knowledge could reasonably be expected to facilitate the commission of an unlawful act, specifically the appellant's non-compliance with the court-ordered child support obligation.

[60] Turning to the remaining pages listed above, the ministry submits that they relate to an ongoing investigation by the FRO and this investigation is to determine the appellant's ability to pay child support owed and to determine his annual income. The ministry advises that the appellant had obtained a stay of enforcement from the Ontario Court of Justice on the basis that he was receiving social assistance notwithstanding that he has historically hidden both income and employment information from the FRO.

[61] Disclosure of the records, the ministry argues, would reveal the kinds of information that the FRO collects, uses and discloses in order to investigate cases and initiate appropriate enforcement. The ministry goes on to submit that if the appellant is aware of the kind of information the FRO shares, it is reasonable to expect that the appellant will not provide full and frank disclosure regarding his income. The ministry advises that the FRO was eventually able to obtain a court order, lifting the stay of enforcement and that it is important for the FRO to be apprised of the appellant's up-to-date income information in order to properly enforce this case.

[62] The ministry states:

> As shown above, disclosure of this information falls under section 14(1)(l) as it could reasonably be expected to facilitate the commission of an unlawful act, namely the non-compliance with the court-ordered child support obligation in which the appellant is currently over [dollar figure] in default, including the sheltering of income.
>
> Moreover, if this information is released it will have a chilling effect . . . if there is a chance that support payors could access such information through an FOI request. Disclosure could therefore reasonably be expected to facilitate the commission of an unlawful act in this and other FRO cases, specifically the non-compliance of court-ordered support obligation.

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[23] Pages 87, 89, 94 and 97 do not appear to have portions severed under section 14(1)(l).

[63] I find that the ministry's evidence is insufficient to establish a connection between the information at issue and a reasonable expectation of harm resulting from its disclosure to the extent that disclosure would facilitate the commission of an unlawful act or hamper the control of crime under section 14(1)(l). The *FRSAEA* sets out the powers the FRO has to enforce support obligations, including its powers to obtain information from other entities. Given the amount of information concerning the tools that the FRO has to enforce support orders that is already in the public domain, in my view, the disclosure of the information at issue would not facilitate the commission of an unlawful act. Consequently, I find that this exemption does not apply.

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

[64] As previously stated, 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. The ministry is claiming the application of the exemption in section 49(b) to the remaining information at issue.

[65] 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 ministry may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the ministry may also decide to disclose the information to the requester.

[66] 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.

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

[68] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[24] If any of the 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).

[69] Section 21(2) lists various factors that may be relevant in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.[25] The list of factors is not exhaustive. The ministry must consider any

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[24] Order MO-2954.

[25] Order P-239.

circumstances that are relevant, even if they are not listed under section 21(2).[26]

[70] 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.[27]

[71] The ministry submits that the FRO is a social justice program that provides valuable services while at the same time acting as a buffer between support payors and support recipients. The latter, it states, often have acrimonious and adversarial relationships. The ministry further submits that the disclosure of the affected party's personal information would constitute an unjustified invasion of their privacy. It argues that none of the exceptions in section 21(1)(a) to (e), the presumptions in section 21(3), or the limitations in section 21(4) apply to the records.

[72] Conversely, the ministry argues that some of the factors in section 21(2) apply and weigh against disclosure of the affected party's personal information. In particular, the ministry submits that the following factors in section 21(2) apply:

- Section 21(2)(e) – pecuniary or other harm. The ministry submits that given the overall sensitivity of the issues relating to support payors and recipients, the disclosure of the affected party's personal information may expose them to pecuniary or other harm;

- Section 21(2)(f) – highly sensitive. The ministry submits that the affected party's personal information should be treated as highly sensitive and the disclosure of it could reasonably be expected to cause significant personal distress to the affected party and/or their child(ren); and

- Section 21(2)(h) – supplied in confidence. The ministry submits that the affected party supplied their personal information to the FRO for the purposes of enforcing a support order. The ministry provided some examples of records for which this factor is relevant. For example, it states that pages 186-189 and 411 is the affected party's filing package (forms needed to open an FRO case) and that this office has already found that a support recipient's filing package is the support recipient's personal information even though it contains support payor information.[28]

[73] The ministry also submits that it makes every effort to disclose information that would not produce an absurd result, such as withholding information where it is clearly within the appellant's knowledge.

[74] The affected party states that they do not consent to the disclosure of their personal information.

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[26] Order P-99.
[27] Orders M-444 and MO-1323.
[28] Order PO-1750.

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

[76] The FRO relies on the factors in sections 21(2)(e), (f) and (h) in support of protecting the privacy of the affected party, which I will review. These sections 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,
>
> . . .
>
> (e) the information to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> . . .
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[77] Regarding the factor in section 21(2)(e), I find that the ministry has not provided sufficient evidence that the disclosure of the affected party's information, with the appellant's personal information could reasonably be expected to cause the affected party unfair pecuniary or other harm, as is required. Consequently, I find that this factor is not applicable in the circumstances of this appeal.

[78] Turning to the factor in section 21(2)(f), as previously set out, the FRO submits that given the relationship between support payors and support recipients, and given that the FRO acts as a buffer between them, the affected party's personal information should be considered highly sensitive, as the disclosure could reasonably be expected to cause significant personal distress to them. This point was also directly made by the affected party.

[79] I am satisfied that the disclosure of the personal information remaining at issue could reasonably be expected to result in significant personal distress to the affected party. In Order PO-2518, Adjudicator John Higgins considered the issue of what evidence is required to bring personal information within the ambit of section 21(2)(f). Noting that past orders had found that for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause *excessive* personal distress to the subject individual, he found instead that a reasonable expectation of *significant* personal distress is a more appropriate threshold in assessing whether information qualifies as *highly sensitive*.[29] In this appeal, I accept the FRO's argument that the information and the context in which it was gathered are inherently sensitive. I also take into consideration the affected party's statement that they do not consent to the disclosure of their personal

[29] See also Orders PO-2617, MO-2262 and MO-2344.

information. Therefore, I find that this factor weighs heavily in favour of the protection of the affected party's privacy.

[80] With respect to the factor in section 21(2)(h), I find that it too weighs heavily in favour of the non-disclosure of the personal information at issue. The personal information for which the ministry has claimed section 49(b) was supplied to the FRO by the affected party, and I am satisfied that it was supplied in confidence, with the expectation of both the FRO and the affected party that this information would be treated confidentially. I find that this expectation of confidentiality is reasonable in the circumstances.

[81] I also find that none of the factors in section 21(2) that favour the disclosure of personal information are applicable in these circumstances and were not raised by the appellant, in any event. Further, I find that the absurd result principle does not apply, as the information was not provided to the FRO by the appellant or in his presence, and is not clearly within the appellant's knowledge.[30]

[82] Having balanced the competing interests of the appellant's right to disclosure of personal information against the privacy rights of the affected party, I find, subject to the ministry's exercise of discretion, that the disclosure of the personal information at issue which is either highly sensitive or supplied in confidence would constitute an unjustified invasion of the affected party's personal privacy under section 49(b) of the *Act*. I also find that the personal information of the appellant that was withheld under this exemption is so intertwined with the affected party's personal information, that it is not possible to sever it.

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

[83] The sections 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, this office may determine whether the institution failed to do so.

[84] In addition, this office may find that the institution erred in exercising its discretion where for example:

- It does so in bad faith;
- It takes into account irrelevant considerations; or
- It fails to take into account relevant considerations.

[85] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] The office may not, however,

[30] See Orders MO-1196, PO-1676, PO-1679, MO-1755 and MO-2257-I.
[31] Order MO-1573.

substitute its own discretion for that of an institution.[32]

[86] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:[33]

- The purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right to their own personal information, exemptions from the right of access should be limited and specific, and 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 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;
- The relationship between the requester and any affected persons;
- 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 age of the information; and
- The historic practice of the institution with respect to similar information.

[87] The ministry submits that it properly exercised its discretion, as it considered all relevant factors in exercising its discretion and did not act in bad faith or for an improper purpose. In particular, the ministry states that it considered the following factors:

- The purposes of the *Act*. The ministry states that it disclosed information to the appellant that would not interfere with the program's ability to meet its statutory obligation to enforce support orders or which was not the personal information of another individual;
- The principle that the appellant should have access to his own personal information;

[32] See section 54(2).
[33] Orders P-244 and MO-1573.

- The exemptions from the right of access should be limited and specific to those records which would interfere with the program's ability to meet its statutory obligation to enforce support orders or contain the personal information of another individual;
- The highly sensitive nature of the personal information in the FRO files;
- The implications of disclosure of enforcement-related and other records on the Director's (of the FRO) ability to enforce support orders, including the decrease in the public's confidence in the protection of that information.

[88] The ministry also submits that there are many means by which information is provided to the FRO and although the ministry acts with due diligence to ensure that records are identified appropriately, it is not always possible to identify the origins of a record, especially where there are attachments. In this case, the request was processed resulting in an index of records. The index was then updated, resulting in the release of a number of records to the appellant. In addition, the ministry states that it performed an additional review of the records during this appeal and, as a result, disclosed further records to the appellant. Lastly, the ministry submits that it has disclosed as much of the records as possible to the appellant.

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

[90] Based on the ministry's representations, I am satisfied that it properly exercised its discretion because it took into account relevant considerations and did not take into account irrelevant considerations. I find that the ministry considered the appellant's position and circumstances, balanced against the importance of the affected party's personal privacy and law enforcement in weighing against disclosure of the information at issue. I am also satisfied that efforts were made by the ministry to maximize the amount of disclosure, while at the same time considering the nature and type of personal information contained in the withheld portions of these records. I also note on my review of the records and the index of records that the ministry disclosed as much of the appellant's personal information to him as possible.

[91] While I am sympathetic to the appellant's concerns, I accept that the ministry considered the particular and specific circumstances of this case and made decisions regarding disclosure based on a defensible balancing of rights. Therefore, under all the circumstances, I am satisfied that the ministry appropriately exercised its discretion under sections 49(a) and 49(b) to the portions of the records that I have found to be exempt from disclosure.

Issue F. Did the ministry conduct a reasonable search for records?

[92] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 24.[34] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[93] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[35] To be responsive, a record must be *reasonably related* to the request.[36]

[94] A reasonable search is one in which an experience employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[37] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable efforts to identify and locate all of the responsive records within its custody or control.[38]

[95] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[39]

[96] The ministry provided its evidence regarding its search by way of affidavit. The ministry states that all client case file information is maintained in a hard copy file and on the FRO internal computer system. Therefore, the ministry advises, a search for a client's records includes a search of the hard copy file and the internal computer system. The ministry submits that the FRO staff member who had knowledge of the FRO's paper and electronic systems conducted the search for responsive records. The ministry concludes that its search for records was reasonable.

[97] The appellant did not address this issue in his representations.

[98] On my review of the representations provided by the ministry, I am satisfied that it has conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. As previously stated, a reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request. The ministry has provided an explanation of the nature and extent of the search conducted in response to the request and also during the mediation of the appeal. In addition, because the appellant did not provide representations on this issue, I find that he has not provided sufficient evidence to establish a reasonable basis for concluding that the ministry's search was inadequate, or that further records exist. Consequently, I am satisfied that these searches were reasonable in the circumstances.

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[34] Orders P-85, P-221 and PO-1954-I.
[35] Orders P-624 and PO-2559.
[36] Order PO-2554.
[37] Orders M-909, PO-2469 and PO-2592.
[38] Order MO-2185.
[39] Order MO-2246.

[99] In sum, I uphold the ministry's decision in part. I find that the exemptions in sections 14(1)(a), (c) and (l) do not apply. I uphold the exemptions in section 49(a) in conjunction with section 14(1)(d) and in section 49(b). The ministry's exercise of discretion is upheld and I find that its search for records was reasonable.

ORDER:

1. I order the ministry to disclose the information it withheld under section 14(1) located on pages 8, 87, 89, 94, 98, 103, 235-238, 262, 265, 266, 355 and 743 to the appellant by **June 29, 2017** but not before **June 23, 2017**.

2. I reserve the right to require the ministry to provide this office with copies of the records it discloses to the appellant.

Original Signed by: May 25, 2017

Cathy Hamilton
Adjudicator