

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3820-I

Appeal PA16-175

Ministry of the Attorney General

February 28, 2018

Summary: The appellant sought access to the Special Investigation Unit's Director's Report regarding a complaint made by her. This order finds that the record is a report within the meaning of section 14(2)(a), with section 49(a). This order requires the ministry to re-exercise its discretion.

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), 49(a), 14(2)(a); *Police Services Act*, section 113.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request for records under the Freedom of Information and Protection of Privacy Act (FIPPA or the Act) for the following:

SIU¹ investigation pertaining to [an assault]. Accused [name], all statements, video, audio, investigative documents/notes & decision.

[2] The ministry issued a decision granting partial access to the records pursuant to sections 14(2)(a) (law enforcement report) and 21(1) (personal privacy).

[3] The requester (now the appellant) appealed the ministry's decision.

¹ Special Investigation Unit.

[4] During mediation, the exemptions were clarified to be section 14(2)(a) in conjunction with section 49(a) (discretion to refuse requester's own information) and the discretionary personal privacy exemption in section 49(b), as the records contain the personal information of the appellant and other individuals.

[5] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry.

[6] I sought the representations of the ministry and the individuals whose personal information may be contained in the records (the affected persons) initially.

[7] In their representations, the ministry only provided submissions on the applicability of section 49(a), with section 14(2)(a), to the one record remaining at issue, the SIU Director's Report to the Attorney General (the report).

[8] The affected persons were represented by a law firm. Counsel for the affected persons objected to disclosure of their information in the record. The affected persons' representations were not shared with the other parties to this appeal due to confidentiality concerns.

[9] The appellant provided representations in response to the ministry's representations, however, she did not respond to the issues set out in the Notice of Inquiry. Instead, she stated that she is seeking "...investigators' notes and recommendations as well as the director's report."

[10] As all of the other records at issue have been disclosed to the appellant already, including the investigators' notes, at issue in this appeal is only the report.

[11] In this order, I find that the record at issue is a report within the meaning of section 14(2)(a) and I order the ministry to re-exercise its discretion under section 49(a).

RECORDS:

[12] The ministry provided an index of records listing the records that have been disclosed by the ministry through the SIU to the appellant.²

² According to the SIU's website:

Once the SIU has laid a charge against a police officer, the Unit refers the matter to Justice Prosecutions of the Criminal Law Division at the Ministry of the Attorney General, which prosecutes the charge. The SIU, as an investigative agency, is not involved in the prosecution, although it does participate by preparing the Crown brief and assisting the Crown.

See <https://www.siu.on.ca/en/faq.php>

[13] According to this index and the ministry's representations, the appellant has received disclosure of all of the records at issue in full (including the investigators' notes), except for the SIU Director's Report (at pages 7 to 17 of the records).

[14] Therefore, there is only one record at issue in this appeal, the SIU Director's Report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a) (right of access to one's own personal information), in conjunction with the section 14(2)(a) law enforcement report exemption, apply to the information at issue?
- C. Did the institution exercise its discretion under sections 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[15] 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;

[16] 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.³

[17] 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.⁴

[18] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁵

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

[20] The ministry did not provide direct representations as to whether the record contains personal information.

Analysis/Findings

[21] Based on my review of the information at issue in the record, I find that the

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

record contains the personal information of the affected persons in their personal capacity. Even though the information is associated with the affected persons in their official capacity, it reveals something of a personal nature about them, namely, the affected persons' non-work related interaction with the appellant.

[22] The record also contains the personal information of the appellant, including views and opinions about her.

[23] As the record contains the personal information of both the appellant and other individuals, I will consider whether section 49(a), in conjunction with section 14(2)(a), applies to it.

B. Does the discretionary exemption at section 49(a) (right of access to one's own personal information), in conjunction with the section 14(2)(a) law enforcement report exemption, apply to the information at issue?

[24] 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.

[25] Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[26] 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.⁷

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

[28] In this case, the institution relies on section 49(a) in conjunction with section 14(2)(a). Sections 14(2)(a) states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

⁷ Order M-352.

[29] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[30] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.⁸
- a police investigation into a possible violation of the *Criminal Code*.⁹
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings¹⁰
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.¹¹

[31] This office has stated that "law enforcement" does not apply to the following situations:

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.¹²
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.¹³

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

⁸ Orders M-16 and MO-1245.

⁹ Orders M-202 and PO-2085.

¹⁰ Order MO-1416.

¹¹ Order MO-1337-I.

¹² Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

¹³ Order P-1117.

context.¹⁴

[33] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁵ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶

[34] The ministry agrees that section 49(a) applies to the record, as it contains the personal information of the appellant.

[35] Concerning section 14(2)(a), the ministry submits that the SIU Director's Report to the Attorney General constitutes a "formal statement or account of the results of the collation and consideration of information" in that it provides an overview of the incident and a description of the pertinent facts.

[36] The ministry states that section 113(8) of the *Police Services Act* (the *PSA*) requires the Director of the SIU to provide the Attorney General with a report of the results of investigations. It states that the report serves to satisfy this reporting requirement and it reports the results of the investigation based upon the Director's review of the investigative brief. The ministry states:

Section 113 of the *PSA* ... charges the SIU with the investigation of "... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (see section 113(5)). In the event of these occurrences, an independent investigation into the incident is conducted by SIU investigators with a view to determining whether any police officer may have committed a criminal offence in the circumstances.

Once all reasonable steps have been taken to gather all of the relevant information surrounding the incident, the information obtained is compiled in final form into an investigative brief, which, in turn, is reviewed by the Director in determining whether there exist reasonable grounds to believe that a police officer has committed a criminal offence (see section 113(7)).

¹⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

In the event that the Director finds that reasonable grounds exist, he or she causes an Information to be laid against the officer or officers and refers the matter to the Crown Attorney for prosecution (see section 113(7)). Pursuant to section 113(8) of the *PSA*, the results of the investigation are reported to the Attorney General in the form of the Director's Report.

[37] The ministry relies on Orders P-1418, P-1315, PO-1959, and PO-2854 which its submits are consistent with the Director's Report properly falling within section 14(2)(a).

Analysis/Findings

[38] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.¹⁷

[39] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.¹⁸

[40] The title of a document does not determine whether it is a report, although it may be relevant to the issue.¹⁹

[41] Section 113(5) of the *PSA* reads:

The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.

[42] Considering the SIU's statutory regime and that the report was prepared in the discharge of the SIU mandate, I agree with the ministry that the record, the report, was prepared in the course of a law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

¹⁷ Orders 200 and P-324.

¹⁸ Orders P-200, MO-1238 and MO-1337-I.

¹⁹ Order MO-1337-I.

[43] As described by the ministry, the record constitutes a summary of the material information contained in the SIU's investigative brief together with the SIU Director's analysis of that information and ultimate decision in respect of whether a criminal charge should be laid.

[44] I agree with the ministry that the record is a law enforcement report within the meaning of section 14(2)(a) as it was prepared in the course of a law enforcement investigation into the allegations made by the appellant against a police officer. As well, the record was prepared by the SIU, which is an agency that has the function of enforcing and regulating compliance with a law.

[45] Relying on the orders cited above,²⁰ I find that the Director's Report is a report within the meaning of section 14(2)(a). Accordingly, I find that, subject to my review of the ministry's exercise of discretion, the record at issue in this appeal is exempt by reason of section 49(a), in conjunction with section 14(2)(a).

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

[46] The section 49(a) 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.

[47] 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.

[48] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[49] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

²⁰ Orders P-1418, P-1315, PO-1959, and PO-2854.

²¹ Order MO-1573.

²² Section 54(2).

²³ Orders P-344 and MO-1573.

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

[50] The ministry states that it exercised its discretion properly in that the record is replete with references to the personal information of various individuals other than the appellant. It also states that the record is a collation and consideration of the full body of evidence collected during the course of the investigation upon which a final determination regarding the potential criminal liability of the involved officers was based.

Analysis/Findings

[51] The record is a report that summarizes the investigative brief and concludes with the Director's reasons regarding the laying of charges. The appellant has received access to the documents that form the basis of the report, including all of the personal information of other individuals in the record.

[52] Specifically, from my review of the records disclosed to the appellant, other than the Director's determination as to whether to lay charges, all of the other information in

the record is information that originates from the appellant or is information that she would be aware of from the disclosure she has already received.

[53] The affected persons have directed me to “The Report of the Independent Police Oversight Review”,²⁴ also known as the Tulloch Report, and have indicated that its findings may be relevant to the determination made in this appeal. This report focuses on recommendations to improve the transparency, accountability, and effectiveness of Ontario’s three civilian police oversight bodies, including the SIU.²⁵

[54] Based on my review of the record at issue, the Director’s Report, and the representations of the ministry and the affected persons, I find that the ministry exercised its discretion in an improper manner and failed to take into account the following relevant considerations:

- the appellant is seeking her own personal information,
- the record is a compilation of the information obtained during the course of the investigation of the incident and that all of the investigative brief has been disclosed to the appellant,
- the applicable recommendations in favour of disclosure of SIU Director’s Reports in the Tulloch Report,
- whether disclosure will increase public confidence in the operation of the institution, and
- the nature of the information and the extent to which it is significant to the appellant.

[55] I find that the ministry did not exercise its decision in a proper manner under section 49(a). As such, I will order the ministry to re-exercise its discretion, taking into account the considerations listed above.

ORDER:

1. I order the ministry to re-exercise its discretion under section 49(a) in accordance with the analysis set out above.
2. I order the ministry to advise the appellant, the affected persons’ counsel and this office of the result of this re-exercise of discretion, in writing. If the ministry continues to withhold information from the Director’s Report, I also order it to

²⁴ See https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/

provide the appellant, the affected persons' counsel and this office with an explanation of the basis for re-exercising its discretion to do so.

3. The ministry is required to send to the appellant, the affected persons' counsel and this office the results of its re-exercise of discretion, and its explanation, by no later than **March 30, 2018**.
4. If the appellant and/or the affected persons' counsel wish to respond to the ministry's re-exercise of discretion, and/or its explanation for re-exercising its discretion to withhold information, they must do so within 21 days of the date of the ministry's correspondence by providing this office with written representations.

Original Signed by: _____

Diane Smith
Adjudicator

February 28, 2018 _____