

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4017

Appeal PA19-00144

Ministry of the Solicitor General

December 13, 2019

Summary: The Ministry of the Solicitor General, (the ministry) received a request under the *Freedom of Information and Protection of Privacy* for information about a specific Ontario Provincial Police (OPP) occurrence related to an allegation of sexual assault against the requester. The ministry denied access to the police operational codes under the discretionary exemptions in section 49(a) (discretion to refuse access to requester's own personal information), in conjunction with the section 14(1)(l) (facilitate commission of an unlawful act), and also denied access to personal information under section 49(b) (personal privacy).

In this order, the adjudicator finds that the police operational codes in the records are exempt under section 49(a) and the remaining information at issue in the records is exempt under section 49(b).

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)(l), 21(3)(b), 21(2)(f), 49(a) and 49(b).

Orders Considered: Orders MO-2871 and PO-3742.

OVERVIEW:

[1] The Ministry of the Solicitor General, (the ministry) received a request under the

Freedom of Information and Protection of Privacy Act (FIPPA or the Act) for information about a specific Ontario Provincial Police (OPP)¹ occurrence related to an allegation of sexual assault against the requester.

[2] In response, the ministry provided partial access to the records identified as responsive to the request. Access was denied to portions of the records in accordance with the discretionary exemptions in section 49(a) (discretion to refuse access to requester's own personal information), in conjunction with the section 14(1)(l) (facilitate commission of an unlawful act), and section 49(b) (personal privacy).

[3] The requester, now the appellant, appealed that decision.

[4] As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. I sought the representations of the ministry initially, which I sent to the appellant to invite his representations. The appellant provided representations in response.

[5] In this order, I find that the police operational codes in the records are exempt under section 49(a), in conjunction with section 14(1)(l), and the remaining information at issue in the records is exempt under section 49(b).

RECORDS:

[6] The records at issue consist of an occurrence summary, a general report, a victim report, witness statements, and police officers' notes.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a) (discretion to refuse access to requester's own personal information) in conjunction with the section 14(1)(l) (facilitate commission of an unlawful act) exemption apply to the information at issue?
- C. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

¹ The OPP is part of the ministry.

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

DISCUSSION:

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

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the 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;

[8] 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.²

[9] 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.³

[10] 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.⁴

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[12] The ministry submits that the personal information in the records belongs primarily to an alleged victim of sexual assault; however, there is also a significant amount of personal information belonging to an individual who is identified as a witness. The personal information includes the names, addresses, telephone numbers, and statements collected by the OPP investigators belonging to these individuals, as well as related personal information about other individuals.

[13] The ministry states that the records involve an OPP investigation where the appellant knows most of the individuals identified in the records, including an alleged victim of sexual assault. The ministry submits that due to the nature of the records, even if identifying information such as names were removed from the records, it would be reasonable to expect that the affected individuals would still be identifiable.

[14] The ministry has also protected workplace identification numbers (WIN) identifiers belonging to OPP employees on pages 1, 2 and 16 of the records. The ministry relies on Order PO-3742, which found that a WIN identifier qualifies as an employee's personal information, because it is an assigned number, which when linked to the name of the employee, which in this instance has been disclosed, would reveal something of a personal nature about the employee.

[15] The appellant did not address this issue other than indicating that the individuals

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

listed in the records are identifiable as he is aware of the names of the alleged victim of the sexual assault and the witness's name.

Analysis/Findings

[16] The records concern an OPP investigation in response to an allegation of sexual assault made against the appellant. I find that the records contain the personal information of the appellant and of other identifiable individuals, including that of the alleged victim and witness.

[17] The personal information includes these individuals' names, along with their addresses, telephone numbers, and their statements collected by the OPP investigators. Therefore, the records include personal information in accordance with paragraphs (d), (e) and (g) of the definition of that term in section 2(1).

[18] I also agree with the ministry that the workplace identification numbers of the police employees whose names have been disclosed are these individuals' personal information. In Order PO-3742, Adjudicator Steven Faughnan found that these numbers, when disclosed with the names of the employee, constitutes personal information. He stated:

I recognize that the information was recorded in the course of the execution of the police employee's professional, rather than their personal, responsibilities. However, I find that disclosure of the WIN number, particularly when taken with the employee's name (which has already been disclosed to the appellant) reveals something of a personal nature about the employee. I find that the undisclosed information represents an identifying number that has been assigned to the employee, who is also identified in the record by name. I also note that the number provides a link to other personal information of the employee, i.e., human resources information. Accordingly, I find that the employee number qualifies as the employee's personal information within the meaning of paragraph (c) of the definition.

[19] I adopt this reasoning of Adjudicator Faughnan in Order PO-3742 and find that the WIN numbers in the records are personal information in accordance with paragraph (c) of the definition of personal information in section 2(1).

[20] As the records contain the personal information of the appellant and other identifiable individuals, I will consider whether the discretionary exemptions in sections 49(a) and 49(b) apply to this information.

Issue B: Does the discretionary exemption at section 49(a) (discretion to refuse access to requester's own personal information) in conjunction with the section 14(1)(l) (facilitate commission of an unlawful act) exemption apply to the information at issue?

[21] 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.

[22] 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.

[23] 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.⁶

[24] 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.

[25] In this case, the institution relies on section 49(a) in conjunction with section 14(1)(l).

[26] Section 14(1)(l) reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁷

[28] It is not enough for an institution to take the position that the harms under

⁶ Order M-352.

⁷ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁸ The institution must provide detailed 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.⁹

Representations

[29] The ministry states that it has applied the exemption in section 14(1)(l) to protect police codes. It states that the OPP is a law enforcement agency, and the records at issue are operational records that were created as part of an OPP law enforcement investigation.

[30] The appellant did not address this issue.

Analysis/Findings

[31] Numerous orders issued by this office have considered the application of section 14(1)(l) to police operational code information. In Order MO-2871, I found that the disclosure of police codes, also known as ten-codes, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I stated:

This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l)¹⁰ applies to "10-codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space...

[32] I adopt these previous findings that police ten-code information is subject to the

⁸ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁰ Section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act* is the municipal equivalent to section 14(1)(l) of *FIPPA*.

law enforcement exemption at section 14(1)(l) of the *Act*.

[33] The information that the police have severed from the record at issue pursuant to section 49(a), read in conjunction section 14(1)(l), consists of police operational code information. I accept that disclosure of this type of information has consistently been found to reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I also accept that the disclosure of this information could reasonably be expected to compromise the ability of officers to provide effective policing services by enabling individuals engaged in illegal activities to conduct such activities. Subject to my review of the police's exercise of discretion, I find that this information is exempt under section 49(a), read in conjunction with section 14(1)(l) of the *Act*.

Issue C: Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

[34] 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.

[35] 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. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[36] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information at issue does not fit within these paragraphs.

[37] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). In addition, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[38] 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.¹¹

[39] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[40] The ministry relies on the presumption in section 21(3)(b), which reads:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[41] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹²

[42] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹³

[43] The ministry relies on the factor in section 21(2)(f), which reads:

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

the personal information is highly sensitive.

Representations

[44] Concerning section 21(3)(b), the ministry states that the records were prepared by the OPP as part of their investigation into an allegation of sexual assault. It states that the records easily reveal that the investigation could have led to one or more charges under the *Criminal Code*.

[45] The ministry also claims section 21(2)(f) in withholding access to portions of the records because the individuals in the records includes complainants or witnesses and

¹¹ Order MO-2954.

¹² Order P-239.

¹³ Order P-99.

their contact with the OPP is highly sensitive within the meaning of section 21(2)(f).

[46] The ministry has also withheld personal information consisting of WIN identifiers. The ministry relies on the reasoning in Order PO-3742, which concluded that these WIN identifiers should be exempted on privacy grounds where, as in this instance, the names of employees have also been disclosed.

[47] The appellant did not address this issue directly, but did state that he wanted access to the information as the unknown allegations have damaged his reputation. In that regard, he appears to be relying on the unlisted factor favouring disclosure about the inherent fairness of knowing the details of allegations made against him.

Analysis/Findings

[48] I agree with the ministry that the presumption in section 21(3)(b) applies to the information at issue in the records because it was compiled and is identifiable as part of an investigation into a possible violation of law related to an allegation of sexual assault contrary to the *Criminal Code*. In this case, although allegations were made against the appellant, no charges were laid by the OPP in respect of these allegations.

[49] Even if no criminal proceedings were commenced against any individuals, as is the case in this appeal, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.¹⁴ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁵

[50] I also agree that the factor favouring privacy protection in section 21(2)(f) applies as the personal information in the records, concerning an allegation of sexual assault, is highly sensitive. To be considered highly sensitive there must be a reasonable expectation of significant personal distress to the alleged victim if the information is disclosed.¹⁶

[51] As stated above, 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.¹⁷ The purpose of that exercise is to determine whether disclosing that information would be an unjustified invasion of the personal privacy of the identifiable individuals (other than the appellant) to whom the records relate.

¹⁴ Orders P-242 and MO-2235.

¹⁵ Orders MO-2213, PO-1849 and PO-2608.

¹⁶ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁷ Order MO-2954.

[52] In this appeal, I have weighed the presumption against disclosure in section 21(3)(b) and the factor in section 21(2)(f), both of which weigh against disclosure of the withheld personal information, against the inherent fairness factor favouring disclosure. Weighing these factors and the presumption and weighing the interests of the parties, I find that the presumption and factor favouring privacy protection outweighs that of the factor raised by the appellant favouring disclosure.

[53] In making this finding, I have considered that although the appellant may be aware of the parties involved, he is not aware of exactly what these parties have told the police about him as set out in the records. In previous orders, the unlisted factor of inherent fairness has been considered to be a relevant consideration.¹⁸ This unlisted factor that favours disclosure has been specifically applied where one individual provides detailed personal information about another individual to a government body.¹⁹

[54] However, the concern that the appellant has set out in his representations is not about what the police have been told. The appellant was not charged by the police in relation to the incident set out in the records.

[55] The appellant is concerned about what specific individuals other than the police have been told about the allegation of sexual assault made against him. This information is not reflected in the records. The records contain the information that the police have been told about the alleged sexual assault by the alleged victim and witness. The records are not about what these other specific individuals have been directly told about allegations made against the appellant. Therefore, the inherent fairness factor does not weigh significantly in favour of disclosure in the circumstances of this appeal.

[56] Accordingly, subject to my review of the ministry's exercise of discretion, the information at issue in the records is exempt under section 49(b). Disclosure of this information would be an unjustified invasion of the personal privacy of the other individuals whose personal information is in the records.

Issue D: Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[57] The sections 49(a) and 49(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, the Commissioner may determine whether the institution failed to do so.

¹⁸ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

¹⁹ See for example, Orders PO-1750 and PO-1767.

[58] 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.

[59] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution.²¹

[60] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²²

- 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

²⁰ Order MO-1573.

²¹ Section 54(2).

²² Orders P-344 and MO-1573.

- 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.

Representations

[61] The ministry states that it acted in accordance with its usual practices in withholding police codes which past orders have consistently upheld as being properly exempted under section 14(1)(l). It also states that the records overwhelmingly contain personal information belonging to affected third party individuals which is subject to the presumption against disclosure in section 21(3)(b).

Analysis/Findings

[62] Taking into account the records at issue and the ministry's and the appellant's representations in their entirety, I am satisfied that the ministry has not erred in the exercise of its discretion with respect to sections 49(a) and 49(b) of the *Act*. I am satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose. The ministry considered the sensitivity of the information in the specific circumstances of this appeal.

[63] Accordingly, I find that the ministry took into account relevant factors. I uphold its exercise of discretion in this appeal and find that the police codes and the personal information in the records are exempt under sections 49(a) and 49(b), respectively.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

December 13, 2019 _____