

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4020

Appeal PA17-519

Ministry of the Solicitor General

December 18, 2019

Summary: The appellant sought access to records relating to his involvement with the OPP. The ministry granted access to some records but denied access to portions of written records and to an audio recording of a 911 call on the basis of the personal privacy exemption in section 49(b), and section 49(a) read in conjunction with section 14(1)(l) (law enforcement). In this order, the adjudicator upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1)(l), 21(3(b), 21(2)(f), 49(a) and 49(b).

Orders Considered: Orders PO-1665, PO-3742 and PO-3813.

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

OVERVIEW:

[1] The Ministry of the Solicitor General¹ (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to contact between the requester and the Ontario Provincial Police (the OPP). Specifically, the request was for:

¹ At the time of the request and the decision under appeal, this institution was known as the Ministry of Community Safety and Correctional Services. This ministry is now the Ministry of the Solicitor General.

-Request for information related to incident on August 29, 2016 [specified OPP Occurrence Number] Assault at 2016/08/29 [specified time, police constables' names and badge numbers]

-Request for information from any other contact with authorities from 2016/08/29 – 2017/09/12.

[2] The ministry located responsive records consisting of police reports, officers' notes, and two 911 calls. It issued a decision granting partial access to the requester.

[3] The ministry denied access to certain information in the reports, notes and 911 calls, claiming the exemptions at sections 49(a) (discretion to refuse requester's own personal information), read together with sections 14(1)(l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement report), and section 49(b) (personal privacy) of the *Act*. The police removed references to other police matters and other information from the records that they disclosed on the basis that these portions were non-responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision. A mediator was assigned to explore the possibility of resolution.

[5] The mediator notified four parties whose interests might be affected by disclosure of the requested information. Of the four affected parties contacted, two did not consent to the disclosure of any of their personal information. One consented to the disclosure of his information, and a fourth gave partial consent to disclose the content of a 911 call but not to any of her other personal information.

[6] The ministry issued three revised decisions, successively granting access to additional information on the basis of the consents it received.

[7] The ministry partially disclosed one of the two 911 calls, based on the consent provided by the fourth affected party.² The ministry denied access to the remaining information in the reports and notes, and to the second 911 call pursuant to the same exemptions originally claimed, as well as to information determined to be non-responsive to the request.

[8] The appellant informed the mediator that he was not interested in pursuing access to the information the ministry withheld as non-responsive. As a result, the information severed as non-responsive is no longer at issue in this appeal.

[9] The appellant continued, however, to seek access to the withheld 911 call as well as to the information severed from pages 1, 3-7, 9-11 and 13 of the records.

² The ministry severed the caller's name and telephone number from the audio recording of the call.

[10] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process during which the parties, including the affected parties who did not consent to disclosure of their personal information, were given the opportunity to participate in a written inquiry.

[11] The ministry and one affected party made representations.³ Although it had initially applied section 14(2)(a) (law enforcement report) to withhold parts of the responsive records, the ministry wrote in its representations that it was no longer relying on this exemption to withhold information, so that the application of section 14(2)(a) is not an issue in this appeal.

[12] Although he received a copy of the ministry's representations and was invited to submit representations in support of his appeal, the appellant declined to do so. He informed this office that he wanted an inquiry to proceed, but that he would not participate in it.

RECORDS:

[13] The records consist of two occurrence summaries, two general occurrence reports, investigating officers' notes and an audio recording of a 911 call. The information at issue is contained on pages 1, 3, 4, 5, 6, 7, 9, 10, 11 and 13 of the written records. The audio recording of the 911 call is also at issue.

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 personal privacy exemption at section 49(b) apply to the information at issue?
- C. Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption (law enforcement) apply to the information at issue?
- D. Did the ministry exercise its discretion under section 49(a) and section 49(b)? If so, should this office uphold the exercise of discretion?

³ Representations were shared between the parties in accordance with IPC Practice Direction 7.

DISCUSSION:

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

[14] In order to determine which sections of the *Act* may apply, I must decide whether the records contain “personal information” and, if so, whose. “Personal information” is defined in section 2(1) as “recorded information about an identifiable individual.” Section (2)(1) sets out a non-exhaustive list of examples of “personal information.” These include:

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(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 where they relate to another individual,

(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;

[15] 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

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

Representations

[17] The ministry submits that the records contain the personal information of identifiable individuals within the meaning of the definition in section 2(1).

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

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

[18] The ministry says that all of the responsive information at issue belongs to affected parties. It says that the personal information in the written records includes the affected parties' names, addresses, telephone numbers, dates of birth, and related personal information that the OPP collected about them as part of their law enforcement investigation. The audio recording of the 911 call contains the caller's voice that the ministry also says was collected as part of the OPP's investigation.

[19] The ministry also submits that it withheld a Workplace Identification Number (WIN number) belonging to an OPP employee (a Computer Assisted Dispatch Operator) from the information at issue. It submits that this number qualifies as the employee's personal information because it is an assigned number which, when linked with the employee's name which the ministry has disclosed, would reveal something of a personal nature about the employee.

[20] Finally, the ministry submits that, with the exception of the WIN number, all of the personal information relates to the affected third party individuals acting in a personal capacity at the time the records were created. Additionally, due to the nature of the records – an OPP investigation – even if identifying information such as names were removed, it is reasonable to expect that the affected third party individuals could still be identified.

[21] Neither the responding affected parties nor the appellant provided any submissions that directly address the issue of whether there is "personal information" in the records.

Analysis and findings

[22] I have reviewed the records and I find that they contain the personal information of both the appellant and other identifiable individuals.

[23] I find that the withheld information that is at issue is personal information of the affected parties and it includes their names appearing with their addresses, telephone numbers, and dates of birth.

[24] The 911 audio recording contains the caller's voice but also other related personal information about the caller that the police collected as part of their investigation, such as her name, personal cellphone number, and her views regarding the events she witnessed. The recording also contains her voice, which reveals her tone and inflection. It is reasonable to conclude that she may be identified if the recording were disclosed, even if her name were withheld.⁶

[25] Therefore, I find that the withheld information contains biographical information

⁶ See Order MO-3699.

and also describes the affected third party individuals' actions and observations. I find that this information collectively falls within the definition of personal information in paragraphs (a), (d), (e), and (h) of section 2(1).

[26] I find that the WIN number belonging to an OPP employee, whose name the ministry already disclosed, also qualifies as that employee's personal information, although recorded in the course of the employee's work. I rely on Order PO-3742 in which the adjudicator found that disclosure of a WIN number, particularly when taken with the employee's name, would reveal something of a personal nature about the employee because it provides a link to other personal information, namely human resources information, about the employee.

[27] Because I have found that the records contain personal information belonging to both the appellant and affected parties, I must consider the application of the discretionary exemptions in sections 49(a) and 49(b) to the information that the ministry has not disclosed.

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

[28] 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.

[29] Under section 49(b), where a record contains personal information of both the requester and another individual (or other individuals, as is the case here), and disclosure of the information would be an "unjustified invasion" of the other individual's 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.⁷

[30] If the information falls within the scope of section 49(b), that does not end the matter. The institution may still exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individuals' right to protection of their privacy.

[31] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 49(b). If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of another individual's personal privacy and the information is not exempt under section 49(b). Also, section 21(4) lists circumstances that would

⁷ See below, in the "Exercise of Discretion" section, for a more detailed discussion of the institution's discretion under section 49(b).

not be an unjustified invasion of personal privacy. None of the section 21(1) or (4) paragraphs is relevant here.

[32] 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.⁸ If the information fits within any of paragraphs (a) to (h) of section 21(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[33] 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. The list of factors under section 21(2) is not exhaustive.

Ministry's representations

[34] The ministry relies on the presumption in section 21(3)(b). The ministry submits that the records were prepared by the OPP as part of an investigation arising out of an alleged assault which could have led to criminal charges.

[35] The ministry also submits that the factor at section 21(2)(f) applies to weigh against disclosure because the information is highly sensitive given that it was provided to the OPP by witnesses and a suspect in an alleged assault.

[36] The ministry argues that disclosure in contravention of the express wishes of the affected parties could be expected to cause them significant distress.

Analysis and findings

[37] As noted above, I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records will be an unjustified invasion of personal privacy.

[38] The information that was not disclosed by the ministry and which remains at issue in this appeal is the personal information of the affected parties. The affected parties have not consented to the release of their personal information.

[39] Under section 21(3)(b), the disclosure of personal information would be an unjustified invasion of the affected parties' personal privacy if the personal information:

⁸ Order MO-2954.

...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 of law or to continue the investigation.

[40] Even if no criminal proceedings were commenced against any individuals, as is the case here, section 21(3)(b) may still apply. The presumption only requires that there be an *investigation* into a possible violation of law.⁹ Based on information the affected parties provided to the police about the appellant's and another individual's involvement in a possible assault, the police initiated an investigation. That investigation could have resulted in charges under the *Criminal Code*.

[41] I have reviewed the records and find that the personal information in them was compiled and is identifiable as part of an investigation into a possible violation of law. My finding is not altered by the fact that no charges were laid, since the presumption, as noted above, only requires that there be an investigation into a possible violation of law. As a result, I find that the presumption against disclosure of the affected parties' personal information is presumed to be an unjustified invasion of personal privacy under section 21(3)(b) applies.

[42] I also find that the factor at section 21(2)(f) applies to weigh against disclosure of the withheld information. Section 21(2)(f) states that in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, the ministry shall consider if the personal information is highly sensitive. The ministry argues that disclosure in contravention of the express wishes of the affected parties could be expected to cause them significant distress.

[43] In support of its position that the information at issue is highly sensitive and that section 21(2)(f) applies to weigh against disclosure, the ministry relies on Order P-1618. In Order P-1618, the adjudicator found that the personal information of individuals who are complainants, witnesses or suspects as part of their contact with the OPP is highly sensitive for the purpose of section 21(2)(f). This reasoning has been more recently applied in orders of this office and I find that it applies in the circumstances of this appeal.¹⁰ I find that the personal information at issue relates to the affected parties' contact with the OPP as witnesses to and a suspect in an assault arising from an alleged incident of road rage and that, if disclosed, could reasonably be expected to cause them significant distress.

[44] Although the appellant made no submissions regarding any factors in section 21(2) that might support his claim and did not assert that any unlisted factors might apply to weigh in favour of disclosure, I have nevertheless considered the factors

⁹ Orders P-242 and MO-2235.

¹⁰ See Orders PO-3659, PO-3766 and PO-3897.

enumerated in section 21(2) as well as any unlisted factors. I find that, without any specific representations, none of them applies.

[45] In sum, I find that the presumption in section 21(3)(b) applies against disclosure because the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law. I also find that the factor at section 21(2)(f) weighs in favour of protecting the personal privacy of the affected parties, and that no factors in favour of disclosure apply. Weighing the factors in section 21(2) and balancing the interests of the parties, I conclude that the affected parties' interest in privacy protection outweighs the appellant's interest in disclosure and that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) of the *Act*.

[46] Therefore, subject to my discussion of the absurd result principle, below, and the ministry's exercise of discretion under Issue D, I find that the personal information at issue is exempt under section 49(b).

Absurd result

[47] In circumstances where a requester originally supplied information or is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.¹¹ I find that the absurd result principle does not apply in this appeal.

[48] The ministry relies on Order PO-3013 to submit that the absurd result principle does not apply, since there is particular sensitivity inherent in the records compiled in a law enforcement context. In Order PO-3013, the adjudicator found that the absurd result did not apply to disclosure of records that contain information that is inherently sensitive, and that such disclosure would be inconsistent with the fundamental purpose of the *Act*.

[49] In this case, it is not clear from the records whether the appellant was present when any of the affected parties provided their information to the OPP, or how much knowledge the appellant has of the information at issue. I have no basis on which to find that the appellant was present when any of the information at issue was collected from the affected parties by the OPP or that he is otherwise aware of any of the withheld information.

[50] I therefore find that the absurd result principle does not apply and the affected parties' personal information is exempt from disclosure under section 49(b).

¹¹ Orders M-444 and P-1414.

ISSUE C: Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption apply to the information at issue?

[51] Section 49(a) is another exemption from an individual's general right of access to his or her own personal information.

[52] Section 49(a) states that:

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, 20 of 22 would apply to the disclosure of that personal information.

[emphasis added]

[53] Section 49(a) 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.¹²

[54] 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.

[55] In this case, the ministry relies on section 49(a) read in conjunction with section 14(1)(l) (law enforcement) to withhold operational police codes.

[56] Section 14(1)(l) states:

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

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

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

"law enforcement" means,

(a) policing

¹² Order M-352.

(b) investigations or inspections that 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).

[58] The term “law enforcement” has been found to include police investigations into possible violations of the *Criminal Code*.¹³

[59] In *Ontario (Attorney General) v. Fineberg*,¹⁴ the Divisional Court held that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement setting.

[60] 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 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

Ministry’s representations

[61] The ministry submits that it applied the exemption in section 14(1)(l) to operational police codes because they are internal codes that are used as part of OPP operations.

[62] The ministry relies on orders from this office in which adjudicators have found that police codes qualify for exemption under section 14(1)(l) because of the reasonable expectation of harm associated with their release.¹⁷ The ministry says that disclosure of these codes could make it easier for individuals carrying out criminal activities to obtain internal knowledge of how systems within the OPP operate, and could jeopardize the security of law enforcement systems and the safety of the OPP staff identified by them.

¹³ Orders M-202 and PO-2085.

¹⁴ (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.

¹⁷ See Orders M-393, M-757, M-781, MO-1428, MO-3224, PO-1665, PO-1777, PO-1877, PO-2209 and PO-2339.

Analysis and findings

[63] This office has consistently found that section 14(1)(l) applies to exempt the release of internal police operational codes.

[64] In Order PO-3742, the adjudicator summarized this jurisprudence in stating that:

A long line of orders has found that police operational codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release.

[65] In Order PO-1665, the adjudicator wrote:

In my view, disclosure of the [police 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.

[66] I see no reason to depart from this reasoning in this appeal and find that the police operational codes are exempt from disclosure under section 49(a) read in conjunction with section 14(1)(l) of the *Act*.

[67] I now turn to the ministry's exercise of discretion in withholding the information at issue.

ISSUE D: Did the ministry exercise its discretion under section 49(a) and section 49(b)? If so, should this office uphold the exercise of discretion?

[68] The exemptions in sections 49(a) and 49(b) are discretionary and permit the ministry to disclose information, despite the fact that it could be withheld. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[69] 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

[70] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,¹⁸ it may not substitute its own discretion for that of the institution.¹⁹

[71] The ministry submits that it exercised its discretion properly in not releasing the withheld information in the records. The ministry says that, in exercising its discretion to withhold police codes, it considered that past orders of this office have consistently upheld as being properly exempt under section 14(1)(l). The ministry also submits that it provided the appellant with a broad right of access to most of the responsive records and, in so doing, has achieved an appropriate balance consistent with the principles of the *Act*.

[72] In considering all of the circumstances of this appeal, I am satisfied that the ministry has considered appropriate factors in exercising its discretion and that it has not erred in its exercise of discretion not to disclose the information at issue under sections 49(a) and 49(b) of the *Act*. I am satisfied that the ministry took into account relevant factors when exercising its discretion and did not consider irrelevant ones. I note that the ministry disclosed a significant portion of the records to the appellant, and took into account the appellant's right of access to his own information, the affected parties' right to privacy, the purpose of the law enforcement exemption to ensure that certain kinds of law enforcement activity are conducted under conditions of confidentiality, as well as the purposes of the *Act*, including that exemptions from the right of access should be limited and specific. I therefore uphold the ministry's exercise of discretion in choosing to withhold the information from the record at issue under sections 49(a) and 49(b).

ORDER:

I uphold the decision of the ministry and dismiss this appeal.

Original signed by: _____
Jessica Kowalski
Adjudicator

December 18, 2019 _____

¹⁸ Order MO-1573.

¹⁹ Section 54(2) of the *Act*.