Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4024

Appeal PA18-00547

Ministry of the Solicitor General

January 29, 2020

Summary: The Ministry of the Solicitor General received a request for access to information relating to a specified incident involving the requester and the Ontario Provincial Police. The ministry granted partial access to the records, which consisted of both written documents and audio recordings. The ministry withheld information pursuant to the exemptions at sections 49(a) (discretion to refuse requester's own information) in conjunction with section 14(1)(l) (law enforcement), and 49(b) (personal privacy) of the *Freedom of Information and Protection of Privacy Act*, and on the basis that some information was not responsive to the request. The requester appealed the ministry's decision to withhold responsive information, and also maintained that additional responsive records should exist.

In this order, the adjudicator upholds the reasonableness of the ministry's search and the ministry's decision to withhold an affected party's personal information under section 49(b). However, she finds that some of the information withheld by the ministry under section 49(b) is the appellant's own personal information, which is not exempt under section 49(b), and for which the ministry has not claimed any other exemption. Accordingly, she orders the ministry to disclose that information to the appellant.

The adjudicator also finds that the exemption in section 49(a) together with section 14(1)(l) does not apply to some of the information remaining at issue, and orders the ministry to disclose that information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, sections 2(1) (definition of "personal information"), 14(1)(l), 24, 49(a), and 49(b).

Orders and Investigation Reports Considered: Orders P-1618 and PO-3742.

OVERVIEW:

[1] The Ministry of the Solicitor General[1] (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information relating to a specified incident involving the Ontario Provincial Police (the OPP or police):

- Provincial Communications Call Taker audio file and ICAD entries
- Provincial Communications Dispatch audio file and ICAD entries
- Copy of incident report [incident number] and supplementary reports and any other reports linked to this incident
- Copy of [a named police officer's] notes for [incident number]

[2] The ministry issued a decision granting partial access to the responsive records with severances pursuant to section 49(a) (discretion to refuse requester's own information) in conjunction with section 14(1)(l) (law enforcement), and 49(b) (personal privacy) of the *Act*. In the decision, the ministry indicated that some additional information had been removed from the records prior to disclosure on the basis that it was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to this office and Appeal PA18-00547 was opened. A mediator was appointed to explore the possibility of resolving the issues in the appeal.

[4] During the mediation stage, the appellant advised the mediator that he was seeking access to the information withheld from the disclosed records and was of the view that Intergraph Computer Aided Dispatch (ICAD) reports should exist. The appellant confirmed he was not pursuing access to information that was withheld as non-responsive.

[5] The mediator notified an affected party about the appeal to determine if they would consent to the disclosure of their personal information to the appellant. The affected party did not provide consent.

[6] The ministry conducted a search for additional records and located an ICAD report of the dispatch call. The ministry issued a supplementary decision granting partial access to the ICAD report with severances pursuant to section 49(a) in conjunction with section 14(1)(l), and section 49(b) of the *Act*. The ministry confirmed that this was the only ICAD report that it located. The ministry also confirmed its

[1] Formerly the Ministry of Community Safety and Correctional Services.

original decision to deny access to the withheld information in the records.

[7] The appellant advised the mediator that he would like to proceed to the adjudication stage to pursue access to the withheld information. The appellant also confirmed his belief that additional ICAD reports should exist. As no further mediation was possible, the file was transferred to the adjudication stage.

[8] As the adjudicator, I conducted an inquiry by inviting and receiving representations from the ministry and the appellant. The parties' representations were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*. In particular, portions of the ministry's representations were withheld from the appellant, as they met the confidentiality criteria in *Practice Direction Number* 7. I also invited, but did not receive, representations from the affected party, although they confirmed that they do not consent to the disclosure of their personal information to the appellant.

[9] In addition to what I have summarized below, the appellant's submissions set out his concerns regarding a named ministry employee and the ministry's delay in responding to his request. I acknowledge the appellant's concerns, but these matters fall outside the scope of my inquiry under the *Act* and will not be considered in this order.

[10] In this appeal, I uphold the ministry's search for responsive records, as well as its decision to withhold the affected party's personal information under section 49(b). However, I find that some of the information withheld by the ministry under section 49(b) is the appellant's own personal information, which is not exempt under section 49(b), and for which the ministry has not claimed another exemption. Accordingly, I order the ministry to disclose that information to the appellant.

[11] I also find that section 49(a) together with section 14(1)(l) does not apply to all of the information that the ministry has withheld under the exemption. In particular, I find that portions of the ICAD report and two audio recordings should be disclosed to the appellant on the basis that they do not qualify for exemption under section 49(a).

RECORDS:

[12] The records at issue in this appeal are three audio recordings and four written records, consisting of an occurrence summary, a general report, an officer's handwritten notes, and an ICAD report. The ministry's access decision for each of the records was as follows:

Record	Disclosed?	Exemptions
Occurrence report	Partial	49(a), 49(b), NR[2]
General report	Partial	49(b), NR
Officer's notes	Partial	49(a), 49(b), NR
ICAD report	Partial	49(a), 49(b)
Audio recording #1 (Con13Radio)	Partial	49(a), 49(b)
Audio recording #2 (Con13Tel)	Withheld	49(a), NR
Audio record #3 (Con24Tel)	Withheld	49(b)

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(b) apply to the information at issue?

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

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

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

DISCUSSION:

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

[13] In order to determine which sections of the *Act* may apply to the records at

[2] "NR" indicates that the ministry withheld information on the basis that it was not responsive to the appellant's request.

issue, it is necessary to decide whether the records contain "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;

[14] 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]

[15] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

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[3] Order 11.

> (3) 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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] 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]

[17] 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]

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

Representations

[19] The ministry submits that the records contain the personal information of an affected party who was directly involved with the investigation, including that individual's name, phone number, address, and the particulars of the conversations they had with the police. The ministry maintains that although the personal information "was possibly provided to the [police] in the course of […] employment," it was not collected as part of the usual course of employment, but rather as a result of unusual circumstances, and is therefore not caught by section 2(3) of the *Act*.

[20] The ministry explains that because the appellant and affected party know each other, it is reasonable to expect that the affected party could be identified if their personal information is disclosed, even if some of that information, such as their name, is withheld. Accordingly, the ministry takes the position that none of the affected party's personal information should be disclosed to the appellant.

[21] In addition, the ministry advises that it withheld the WIN identifiers of police employees, namely, the Computer Aided Dispatch Operators. The ministry points out

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[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.).

that this information was withheld from the occurrence report and ICAD report. The ministry relies on Order PO-3742 in support of this decision.

[22] The appellant clarifies that he is only interested in obtaining access to "items spoken, written and discussed" about him in relation to the incident that occurred at the medical retail business that gave rise to the police's involvement. He confirms that he has "no interest" in obtaining access to other individual's personal information such as the affected party's address or telephone number, or police employees' WIN identifiers.

[23] The appellant explains that he has been a long-term customer of the medical retail business where the incident occurred. He maintains that the affected party is an employee of the medical retail business, and because their personal information is associated with them in a business, not personal, capacity, it should be disclosed.

Analysis and findings

[24] Based on my review of the records at issue and the parties' submissions, I find that each record contains the appellant's personal information as defined in the *Act*. In particular, I find that the records contain the appellant's name along with his address, telephone number, personal opinions or views, and information relating to his age, sex, and employment history, which, together, fall under paragraphs (a), (b), (d), (e), and (h) of the definition in section 2(1) of the *Act*. The records also contain other individuals' views or opinions of the appellant, which constitute his personal information under paragraph (g) of the definition, and not the other individuals' personal information under paragraph (e). While the majority of the above-mentioned personal information has been disclosed to the appellant, the information that constitutes the appellant's personal information under paragraph (g) of the definition (views or opinions of others about him) has, for the most part, been withheld.

[25] I also find that the occurrence report, general report, officer's notes, and ICAD report contain an affected party's personal information, as defined in paragraphs (a), (b), (d), (e) and (h) of the definition. The appellant submits that the affected party is an employee of the business where the incident occurred, and therefore their personal information in the records relates to them in a professional, not personal, capacity. However, in my view, the affected party did not provide their personal information to the police as part of their usual course of employment, but as a result of unusual circumstances which led to the police being involved. In the circumstances, I find that disclosure of this information would reveal something of a personal nature about the affected party. Accordingly, I find that the exceptions to the personal information definition in sections 2(3) and (4) do not apply to this information.[7]

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[7] Order PO-2225.

[26] With respect to the audio recordings, recordings #1 and #2 are recordings of calls between the police's communications centre and police officers. Both recordings contain the appellant's personal information, and audio recording #1 contains the affected party's personal information, as described above. While these records document conversations between officers and communications centre staff, I am satisfied that these conversations took place in the context of these individual's professional, not personal, capacity; therefore, I find that those conversations do not contain the personal information of officers or staff.

[27] Audio recording #3 is a recording of the call that the affected party made to the police. The recording contains the affected party's views or opinions of the appellant, which constitutes the appellant's personal information under paragraph (g) of the definition. The record also contains the affected party's personal information, including their name together with other personal information, such as their voice and their views or opinions of the situation in general. In my view, the recording reveals a personal element beyond the specific information that the affected party provided to the police when explaining the need for police assistance.

[28] The appellant has made it clear that he is not interested in obtaining access to certain personal information in the records, such as the police WIN identifiers, or the affected party's address or telephone number. Accordingly, this information is no longer at issue and it is not necessary for me to make a determination on whether the WIN identifiers are personal information.

[29] Having found that the records contain both the appellant and affected party's personal information, I will consider, below, whether the discretionary personal privacy exemption at section 49(b) of the *Act* applies to the affected party's personal information.

[30] Before doing so, however, my review of the severances applied to the records reveals that in some instances, the ministry has incorrectly treated the affected party's views or opinions about the appellant as the affected party's personal information. As mentioned above, paragraph (g) of the definition of "personal information" in section 2(1) provides that the appellant's personal information includes the views or opinions of other individuals about him. Moreover, paragraph (e) of the definition states that "the personal opinions or views of the individual" are an individual's personal information, "except if they relate to another individual." Therefore, the affected party's views or opinions about the appellant's behaviour or demeanour constitutes the appellant's personal information and not the affected party's. Accordingly, this information cannot be withheld based on the exemption in section 49(b). As the ministry relies on section 49(b) alone to withhold this type of information about the appellant in the occurrence report, general report, and officer's notes, I will order that information disclosed to the appellant.

[31] With respect to the ICAD report and audio recordings #1 and #2, however, the ministry relies on the exemption in section 49(a) together with section 14(1)(l), in

addition to section 49(b), to withhold the appellant's personal information. Although I have found that the appellant's personal information, where it appears alone, is not exempt under section 49(b), that particular information is still subject to the ministry's claim for exemption under section 49(a). Therefore, I consider the ministry's reliance on the exemption in section 49(a), in conjunction with section 14(1)(l), to withhold that information below.

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

[32] 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.

[33] 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.

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

[35] 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). Neither party's submissions addressed paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4); however, having reviewed the records, I am satisfied that they are not applicable in the circumstances of this appeal.

[36] Sections 21(2) and (3) also help in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). For records claimed to be exempt 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 in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[8]

[37] In this appeal, the ministry relies on section 49(b), with reference to the factor in section 21(2)(f) and the presumption in section 21(3)(b), to withhold portions of the occurrence report, general report, officer's notes, ICAD report, and audio recordings #1

[8] Order MO-2954.

and #3.

[38] Section 21(2)(f) states:

> 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.

[39] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[9]

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

> 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] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[10] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[11]

Representations

[42] The ministry submits that it withheld certain information in the records because disclosing it would be an unjustified invasion of the affected party's privacy. In support of its position, the ministry relies on section 21(3)(b), which, the ministry notes, is applicable where there has been an investigation into a possible violation of law. The ministry maintains that because the records were generated as part of a police investigation that could have resulted in charges under the *Criminal Code* or the *Trespass to Property Act*.

[43] The ministry also relies on the factor at section 21(2)(f), which weighs against disclosure of personal information where that information is highly sensitive. The ministry relies on Order P-1618, where an adjudicator found that the personal

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[9] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[10] Orders P-242 and MO-2235.
[11] Orders MO-2213, PO-1849 and PO-2608.

information of individuals who are "complainants, witnesses or suspects" in their contact with police is "highly sensitive" for the purpose of section 21(2)(f). The ministry maintains that disclosing the affected party's personal information without their consent could be expected to cause "significant personal distress."

[44] In his submissions, the appellant explains his version of the events. He identifies two individuals that he believes to be the affected parties whose personal information is contained in the records at issue, and explains that he knows these individuals because he has been a customer of the business where they are employed for the past 10 years. The appellant maintains that prior to the incident that required police involvement, the individuals had made "harassing phone calls" to him, asking that he pay in advance for a product that he had not yet received. The appellant says that these individuals "used the police" to intimidate him into paying for goods that he had not yet received, and in doing so, participated in an act of public mischief.

[45] The appellant goes on to say that upon hearing that he was the "unwanted person," the attending officer engaged in a breach of policy by advising the two dispatched officers to stand down on the call so that he could attend himself. The appellant maintains that the attending officer threatened him with a Taser on two occasions during their interaction, and prepared his reports in a prejudicial manner by intentionally omitting "pertinent information."

[46] In response to the ministry's reliance on section 21(3)(b), the appellant submits that if any charges should have been laid, they should not have been against him, but rather, laid against the affected parties for engaging in public mischief, or the attending officer for his threats about using his Taser.

[47] With respect to section 21(2), the appellant submits that the unlisted factors of inherent fairness and ensuring public confidence in the police are relevant and weigh in favour of disclosing the information at issue. He maintains that he has a "right to know why the police detained and questioned" him and, further, what the affected parties told the police to cause them to designate the call as an unwanted person occurrence.

[48] The appellant's submissions also allude to the factors under section 21(2)(b) and (d), which 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,
>
> > b. access to the personal information may promote public health and safety;
> >
> > d. the personal information is relevant to a fair determination of rights affecting the person who made the request.

[49] The appellant maintains that the attending police officer recognized that "it was a civil dispute [and] made [a] request of [him] to pay for the goods not yet received knowing that such a request was not only prejudicial but also offensive." The appellant also maintains that the attending officer's threats to use a Taser are "a public health and safety concern considering that in November 2018, one Niagara Regional Police officer shot another Niagara police officer."

[50] The appellant explains that he complained to the Office of the Independent Police Review Director (OIPRD) about the officer's Taser threats, but was told that because the officer had since retired, the OIPRD no longer had jurisdiction to investigate the issue. Accordingly, the appellant maintains that he requires the information at issue in this appeal to ensure that any future proceedings are impartial, and that all relevant facts are made available.

[51] The appellant also submits that his reputation has been unfairly damaged as a result of there being permanent police records regarding him as an unwanted person.

[52] Finally, the appellant takes the position that the absurd result principle should apply in this appeal, because of his past employment with the OPP and his knowledge of the individuals providing evidence for the ministry.

Analysis and findings

[53] For records claimed to be exempt 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 in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[12]

[54] Based on my review of the parties' submissions and records at issue, I agree with the ministry that the affected party's personal information is exempt from disclosure under section 49(b) of the *Act*.

[55] Specifically, I find that all of the records were created as a result of the police responding to a call for assistance. Therefore, I agree that the records, and any personal information contained therein, were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, I find that the presumption in section 21(3)(b) applies and weighs in favour of not disclosing the personal information of other identifiable individuals to the appellant.

[56] The factors that may be relevant in this balancing exercise are set out in paragraphs (a) to (i) of section 21(2), although this list is not exhaustive. Other relevant

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[12] Order MO-2954.

circumstances must be considered, even if they are not listed under section 21(2).[13] Generally speaking, the factors in paragraphs (a), (b), (c) and (d) weigh in favour of disclosure, while the factors in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.[14]

[57] The ministry relies on the factor weighing against disclosure at section 21(2)(f), while the appellant relies on the factors weighing in favour of disclosure at sections 21(2)(b) and (d). The appellant also relies on certain unlisted factors, namely inherent fairness[15] and ensuring public confidence in an institution.[16]

[58] For the personal information to be considered highly sensitive such that the factor at section 21(2)(f) applies, there must be a reasonable expectation of significant personal distress if the information is disclosed.[17] In this appeal, the affected party is the individual who requested police assistance for a matter involving the appellant. As noted by the ministry, in Order P-1618, the adjudicator determined that personal information collected as a result of a person's contact with the police as a complainant, a witness, or a suspect can be considered highly sensitive. Considering this, together with the fact that the parties are familiar with each other and the affected party has explicitly requested that their personal information not be disclosed, I am satisfied the factor in section 21(2)(f) applies and weighs against disclosing the affected party's personal information to the appellant. In my view, this factor is particularly relevant with regard to audio recording #3, which is the recording of the call that the affected party made to the police to request assistance.

[59] In his submission, the appellant takes issue with the affected party's business practices. He says that the affected party used his personal information to make "harassing" phone calls to him requesting payment for goods or services that he had not yet received. He also submits that the affected party "used" the police to intimidate him into paying for those goods or services, thereby committing public mischief. Accordingly, he maintains that the affected party is not entitled to any protection under the *Act*, and that their personal information should therefore be disclosed. In addition to the appellant's submissions regarding the affected party, much of his argument on the personal privacy exemption relates to the responding officer's conduct, and the appellant's desire to pursue a complaint against the officer.

[60] In my view, the appellant has not explained how obtaining access to the affected party's personal information would promote public health or safety as contemplated by section 21(2)(b). The appellant has also not provide sufficient evidence to establish that

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[13] Order P-99.
[14] Order PO-2265.
[15] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.
[16] Orders M-129, P-237, P-1014 and PO-2657.
[17] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

the affected party's personal information is relevant to a fair determination of his rights under section 21(2)(d) by, for example, demonstrating how the information is required in order to prepare for any proceeding that he would like to commence against the officer.[18] Finally, I am not persuaded that disclosing the affected party's personal information would ensure public confidence in the police, or that denying access to that information is an issue of inherent fairness. Accordingly, I find that the factors at sections 21(2)(b) and (d), and the unlisted factors relied upon by the appellant, are not applicable in this appeal.

[61] Furthermore, while the appellant refers to the "absurd result" principle in his representations, his arguments in this regard do not establish that the principle applies in these circumstances. Past orders of this office have found the principle to apply where the requester originally supplied the information at issue, or is otherwise aware of the information. In such cases, the information may not be exempt under section 49(b), because withholding it would be absurd and inconsistent with the purposes of the exemption.[19] While the appellant's submissions speak to his experience as a police officer, they do not demonstrate that he supplied or is otherwise aware of the information at issue in the records. Accordingly, I find that the absurd result principle has no application in this case.

[62] As both the presumption in section 21(3)(b) and the factor in section 21(2)(f) weigh against disclosing the affected party's personal information, and no factors favouring disclosure have been established, I find that the exemption in section 49(b) applies. Therefore, I find that the affected party's personal information is exempt from disclosure under section 49(b), subject only to my review of the ministry's exercise of discretion, below.

[63] For clarity, this finding covers the entirety of audio recording #3. Although this record contains the appellant's personal information, I am satisfied that it is inextricably intertwined with that of the affected party, whose voice is recorded, such that it cannot be severed for the purpose of providing access.

[64] In addition, with respect to audio recording #1 (a recording of a call between police officers and the police communications centre), I am upholding section 49(b) only in relation to the affected party's personal information (i.e. their name together with their views or opinions).

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[18] As noted in the records disclosed to the appellant, the police determined that the incident was not criminal in nature, and the appellant was not charged as a result.
[19] Orders M-444 and MO-1323.

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

[65] The ministry relies on the exemption in section 49(a) in conjunction with section 14(1)(l) to withhold information in the occurrence report, officer's notes, ICAD report, and audio recordings #1 and #2.

[66] 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.

[67] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[20]

[68] In this case, the ministry relies on section 49(a) in conjunction with the law enforcement exemption at section 14(1)(l), which states:

> 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.

[69] 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).

[70] The term "law enforcement" has been found to include a municipality's investigation into a possible violation of a municipal by-law that could lead to court

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[20] Order M-352.

proceedings;[21] a police investigation into a possible violation of the *Criminal Code*;[22] a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings;[23] and a Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[24]

[71] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[25]

[72] 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.[26] 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.[27]

Representations

[73] The ministry maintains that all of the records were created during an OPP law enforcement investigation, and that it has applied this exemption to protect the integrity and confidentiality of its law enforcement activities.

[74] The ministry relies on section 49(a) in conjunction with section 14(1)(l) to withhold patrol zone codes, ten-codes, and dispatch information in the occurrence report, officer's notes, ICAD report, and in audio recordings #1 and #2. The ministry says that it has done so in accordance with its usual practice and because disclosing these codes could "make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate." The ministry maintains that disclosing this information could jeopardize the security of law enforcement systems and the safety of OPP staff.

[75] The ministry also explains that it withheld dispatch information in the audio records, as disclosure could "reveal internal knowledge of how vehicles are identified, and how many were available to be dispatched at a given time."

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[21] Orders M-16 and MO-1245.
[22] Orders M-202 and PO-2085.
[23] Order MO-1416.
[24] Order MO-1337-I.
[25] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[26] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[27] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[76] In response to the ministry's submissions, the appellant submits that, as a former police officer, he has "extensive knowledge" of police codes and procedures, but he reiterates that he is not interested in obtaining access to any of this information. What he seeks is any information that would reveal why the police designated the call as an "unwanted person" incident, and why the responding officer allegedly threatened him with a Taser.

Analysis and findings

[77] Based on my review of the records at issue, I confirm that the occurrence report, officer's notes, and ICAD report contain police zone codes, ten codes, and/or dispatch information that the ministry has withheld under section 49(a) together with section 14(1)(l). According to the appellant's submissions, he is not interested in receiving this information. Therefore, it is not necessary for me to consider the ministry's reliance on section 49(a) together with section 14(1)(l), as it pertains to those portions of the records.

[78] With respect to the ICAD report in particular, the ministry has withheld portions of the log notes that contain the appellant's personal information, including his name, gender, date of birth, and descriptions of his behaviour. The copy of the records provided to this office indicates that this information has been withheld under sections 49(a) and 49(b). I have already found that the appellant's personal information, where it appears alone, is not exempt under section 49(b), and I also find that this information is not exempt under section 49(a). I have considered the ministry's submissions on this issue, but they are not sufficiently detailed to establish how disclosing this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, which are the harms contemplated by section 14(1)(l). I find that section 49(a), in conjunction with section 14(1)(l), does not apply to this information in the ICAD report.

[79] Audio recording #1 also contains police zone codes, ten codes, and dispatch information. As the appellant is not interested in obtaining access to that information, it is not at issue under sections 49(a) and 14(1)(l). However, the various codes and dispatch information accounts for only a small amount of the withheld portions of the audio recording. The ministry has not specified what additional information, if any, it withheld from audio recording #1 based on section 49(a) in conjunction with section 14(1)(l). Moreover, other than saying that it seeks to protect the integrity and confidentiality of the OPP's law enforcement activities, the ministry has not explained how disclosing the remaining information in the recording could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, as required for section 14(1)(l) to apply.

[80] For audio recording #2, the ministry relies on the section 49(a) exemption, together with section 14(1)(l), to withhold the responsive portions of the record.[28] However, again, it has not explained why the recording, in its entirety, falls under the exemption.

[81] In my view, the ministry has not provided a sufficient basis for finding that section 49(a) together with section 14(1)(l) applies to the remainder of the information in audio recordings #1 and #2, beyond the various police codes and dispatch information, which the appellant is not interested in receiving. In particular, I am not satisfied that the ministry has established that disclosing the remainder of the two audio recordings could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, as required by the exemption. Accordingly, I find that the exemption does not apply, and I will order the ministry to disclose the responsive and non-exempt[29] portions of these audio recordings to the appellant, as detailed in the order provisions below.

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

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

[83] 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, or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] Pursuant to section 54(2), however, this office may not substitute its own discretion for that of the institution.

[84] Given that I have partly upheld the ministry's decision under section 49(b), I must review its exercise of discretion with regard to that exemption.

Representations

[85] The ministry submits that it has acted appropriately in exercising its discretion

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[28] The ministry also withheld parts of audio recording #2 on the basis that those portions are not responsive to the appellant's request. As the appellant is not interested in obtaining access to non-responsive information, those portions of the record are not at issue.
[29] I have already found that the affected party's personal information in audio recording #1 is exempt under section 49(b).
[30] Order MO-1573.

not to release the personal information in the records at issue. The ministry explains that it has acted in accordance with its "usual long-standing practices, including withholding highly sensitive personal information […] collected during a law enforcement investigation." The ministry also maintains that it has provided the appellant with a broad right of access to his own personal information, and in doing so has achieved an appropriate balance consistent with the principles of the *Act*.

[86] The appellant submits that the ministry erred in exercising its discretion on the basis that it withheld information in bad faith and for an improper purpose, and took into consideration irrelevant factors. The appellant maintains that the affected parties manufactured a situation and used the police to coerce and intimidate him into paying for good or services that had not been provided. He also maintains that the ministry failed to take into consideration the responding officer's "deviation from established policing protocol for responding to unwanted persons calls."

Analysis and finding

[87] I have considered the parties' representations, as well as the broader circumstances of this appeal, in order to assist me in making a determination about the ministry's exercise of discretion under section 49(b).

[88] Notably, this review of the ministry's exercise of discretion is only in relation to the information for which I have upheld the exemption under section 49(b). The appellant will receive access to the non-exempt information that is responsive to his request.

[89] In light of the parties' submissions and the particular personal information to which I have found section 49(b) to apply, I am satisfied that the evidence supports a proper exercise of discretion by the ministry under section 49(b). Accordingly, I see no basis to interfere with the ministry's exercise of discretion on appeal.

Issue E: Did the ministry conduct a reasonable search for records?

[90] The appellant believes that an additional ICAD report exists which has not yet been located by the ministry.

[91] 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.[31] 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.

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[31] Orders P-85, P-221 and PO-1954-I.

[92] 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.[32] To be responsive, a record must be "reasonably related" to the request.[33]

[93] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[34]

[94] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[35]

[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.[36]

[96] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[37]

Representations

[97] The ministry maintains that its search efforts were comprehensive and conducted in accordance with the requirements of the *Act*. In support of this position, the ministry provided an affidavit, sworn by an individual who has been employed by the OPP as a Freedom of Information Coordinator (FOIC) since 2013.

[98] The FOIC attests to coordinating a search of the two locations where she expected responsive records to be located. She advises that at her request, a records clerk at a local police detachment used the occurrence number assigned to the incident to conduct a search of Niche, the shared database where OPP records are electronically stored. The FOIC advises that this search located records that were not generated by the OPP 911 Provincial Communications Centre, such as police officer's notes.

[99] In addition to the local detachment search, the FOIC asked a communications operator employed by the OPP 911 Communications Centre to conduct a separate

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[32] Orders P-624 and PO-2559.
[33] Order PO-2554.
[34] Orders M-909, PO-2469 and PO-2592.
[35] Order MO-2185.
[36] Order MO-2246.
[37] Order MO-2213.

search for records held by the centre, which included audio recordings and ICAD reports. This search was also conducted using the occurrence number associated with the incident involving the appellant.

[100] The FOIC advises that once she received records from the local detachment and OPP 911 Communications Centre, she forwarded the records to the ministry's Freedom of Information Analyst, who proceeded to issue the access decision at issue in this appeal. She also advises that as the incident at issue was relatively recent, she does not believe that any records responsive to the request have been destroyed.

[101] The ministry says that it is unclear why the appellant believes there to be an additional ICAD report given that there was only one incident. The ministry explains that because there was only one incident, "it stands to reason that a single ICAD report would be created. There would be no reason for there to be more than one report."

[102] The appellant explains that he seeks access to "the written notes associated to each communication between the call taker, dispatcher, affected parties and police officers that have been redacted from the ICAD event details log that was provided to [him]." He says that the record that was provided to him was "absent of all written notes of communication between dispatcher and officers other than time stamped entries when these communications were made."

Analysis and findings

[103] To begin, I note that the appellant's submissions focus on the information that the ministry withheld from an ICAD report that has already been located and partially disclosed to the appellant. As a result of this order, additional portions of the ICAD report will be disclosed to the appellant. The appellant has not suggested that any additional ICAD reports exist, nor has he provided evidence to this effect. Accordingly, I find that the appellant has not provided a reasonable basis for concluding that *additional* responsive records exist that have not yet been located by the ministry.

[104] In addition, I accept, based on the ministry's representations and affidavit evidence, that the ministry's search for responsive records was coordinated by an experienced employee knowledgeable in the subject matter of the request. I also accept that a reasonable effort was made in searching for records that are reasonably related to the appellant's request.

[105] For these reasons, I am satisfied and I find that the ministry has conducted a reasonable search in accordance with the requirements of the *Act*.

ORDER:

1. I uphold the ministry's decision to withhold the affected party's personal information in the records, including the entirety of audio recording #3, under section 49(b).

2. With respect to the occurrence report, general report, officer's notes, and ICAD report, I order the ministry to disclose the appellant's personal information to the appellant in accordance with the enclosed highlighted copy of records by **March 5, 2020** but not before **February 29, 2020**. To be clear, the highlighted portions of the records must be disclosed to the appellant.

3. With respect to audio recordings #1 and #2, I order the ministry to disclose the following segments of each recording to the appellant by **March 5, 2020** but not before **February 29, 2020**.

   Audio recording #1: 00:00-00:08, 00:12-00:19, 00:22- 00:29, 00:34-00:37, 00:49-00:56, 00:57-00:58, 1:03-01:11, 01:14-01:16, 01:25-01:36, 01:40-01:47, 01:49, 01:52- 02:00, 02:01, 03:03-03:19, 04:13-04:41.[38]

   Audio recording #2: 00:00-00:40, 00:59-01:10, 01:13- 01:19, 01:22-01:37, 01:46-02:15.

4. I uphold the ministry's search as reasonable.

5. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed pursuant to order provisions 2 and 3.

Original signed by
Jaime Cardy
Adjudicator

January 29, 2020

[38] The ministry previously disclosed some of these portions of audio recording #1 to the appellant.