

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4229

Appeal PA19-00191

Ministry of the Solicitor General

January 27, 2022

**Summary:** This order deals with an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry) for Ontario Provincial Police records relating to an incident that took place on a specified date. The ministry granted partial access to records that were responsive to the request. It withheld portions of the records, claiming the application of the personal privacy exemption in section 49(b) and also claiming that portions of the records were not responsive to the access request. During the inquiry, the appellant raised the issue of the scope of her request. In this order, the adjudicator finds that the withheld information is exempt from disclosure under section 49(b). The adjudicator upholds the ministry's exercise of discretion. She agrees with the ministry that portions of the records are not responsive to the request. Lastly, she finds that the appellant's access request clearly specified a particular time period and that the records at issue are within the scope of the access request.

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

### OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made to the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to a specific Ontario Provincial Police (OPP) occurrence that took place on a specified date. In particular, the requester sought access to information pertaining to an alleged incident of assault,

harassment, and intimidation involving herself.

[2] The ministry located records responsive to the request and issued an access decision, granting partial access to them. The ministry denied access to other information, claiming the discretionary exemptions in section 49(b) (personal privacy), with reference to sections 21(2)(f) and 21(3)(b), and section 49(a) (discretion to refuse access to the requester's own personal information), in conjunction with the law enforcement exemption in section 14(1)(l) of the *Act*. The ministry also denied access to portions that it identified as non-responsive to the request.

[3] The requester appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC), thereby becoming the appellant in this appeal.

[4] During the mediation of the appeal, the appellant confirmed that she is seeking access to all of the information withheld, including the portions identified as non-responsive. The ministry maintained its decision to withhold portions of the records for the reasons cited above.

[5] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. During the inquiry, the ministry issued a supplementary access decision, granting the appellant further access to the records. Both the ministry and the appellant provided representations.

[6] In her representations, the appellant stated that she was the victim of an assault during the incident that forms the subject matter of the records at issue and that, in particular, she is seeking the specific location of the assault. In addition, she noted that she was no longer seeking access to responsive police codes, non-responsive police codes or the WIN identifier. As a result, this information is no longer at issue and will not be disclosed to the appellant. Further, as the ministry claimed section 49(a) in conjunction with section 14(1)(l) to only the police codes, these sections are no longer at issue. The appellant also raised the issue of the scope of her request, which I address in Issue A, below.

[7] The file was then transferred to me to continue the inquiry.

[8] For the reasons that follow, I find that the withheld information is exempt from disclosure under section 49(b). I uphold the ministry's exercise of discretion. I agree with the ministry that portions of the records are not responsive to the request. Lastly, I find that the appellant's access request clearly specified a particular time period and that the records at issue are within the scope of the access request.

## **RECORDS:**

[9] The records at issue consist of documents titled Occurrence Summary (1 page), General Report (three pages), and three Supplemental Occurrence Reports (5 pages).

## **ISSUES:**

- A. What is the scope of the appellant's request? What records are responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 49(b) apply to the information at issue?
- D. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: What is the scope of the appellant's request? What records are responsive to the request?**

[10] The appellant is seeking access to the entirety of the records, including the portions that the ministry has identified as not responsive to the appellant's request, with the exception of the non-responsive police codes.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be

resolved in the requester's favour.<sup>1</sup> To be considered responsive to the request, records must "reasonably relate" to the request.<sup>2</sup>

[13] Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Pursuant to sections 10(2), 54(1) and 54(3) of the *Act*, the decision-maker may order the disclosure of any portions of records which are not found to be subject to an exemption.

### ***Representations***

[14] The ministry submits that it received a request for specified OPP records and that the appellant provided information which was sufficiently precise for staff to conduct a search. The ministry further submits that the information the appellant provided included the date of the incident, which meant that it did not require further clarification from the appellant.

[15] The ministry goes on to argue that the non-responsive information includes information that relates to the retrieval of the record in response to the request. For example, the ministry has withheld information at the bottom of the record which indicates when the pages were printed and by which computers. It further submits that Orders PO-1845 and PO-2254 have held that this type of information is non-responsive because it is distinct from the information that is part of the record.

[16] The appellant submits that her access request was for records created on a particular date, but also for records that were subsequently created three months later.

### ***Analysis and findings***

[17] I have reviewed the records at issue, and I agree with the ministry that the information that relates to the retrieval of the records, such as the date when the records were printed and by which computer, which is information that was created after the appellant's request, is not reasonably related to the request. As was the case in Order PO-2254, in which the adjudicator was satisfied that this type of information was not covered by the scope of the appellant's request, upheld the Ministry's decision to withhold this information, I make the same finding in the circumstances of this appeal. Consequently, I find that the information described above is not responsive to the appellant's access request.

[18] Turning to the appellant's position that her request was for not only records created on a specified date (the date of the incident), but also for records that were created three months later, I refer to the appellant's access request. Her request was for OPP reports of an incident that took place on a specified date. The appellant also

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<sup>1</sup> Orders P-134 and P-880.

<sup>2</sup> Orders P-880 and PO-2661.

indicates in her request that the incident was reported the following day. The access request is dated two days after the incident. In my view, the access request clearly specified the time period over which the request applied, which was the specified date of the incident and day following the incident. I find, therefore, that the scope of the request is limited to that time period. The appellant is, of course, free to make a second access request for the records she claims were created three months after the incident.

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

[19] In order to determine whether the exemption in section 49(b) of the *Act* may apply, 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;

[20] 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.<sup>3</sup>

[21] 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.<sup>4</sup>

[22] 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.<sup>5</sup>

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

### ***Representations***

[24] The ministry submits that the withheld information contains the personal information of third parties who were involved in the OPP investigation. In particular, the personal information includes their names, a date of birth, a home address and records of conversations with these individuals. The ministry further submits that given the interaction between the appellant and these third parties, it is reasonable to expect that they could be identified if any of the withheld personal information is disclosed.

[25] The appellant’s representations do not address this issue.

### ***Analysis and findings***

[26] I have reviewed the records at issue. I find that the records as a whole contain the personal information of the appellant and other individuals. However, , the withheld portions of the records contain the personal information of three identifiable individuals other than the appellant. All of the appellant’s personal information has already been disclosed to her. With respect to the first individual, I find that it contains this individual’s name and address, falling within paragraph (c) of the definition of personal information in section 2(1) of the *Act*. In addition, in the records, this individual’s name appears with other personal information about them, falling within paragraph (h) of the definition. Turning to the second individual, I find that this individual’s name appears with other personal information about them, falling within paragraph (h) of the definition. With respect to the third individual, I find that this individual’s name and

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<sup>3</sup> Order 11.

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

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

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

email address are contained in the records, which qualifies as personal information as defined in paragraph (d) of the definition.

[27] Having found that the withheld information contains the personal information of three identifiable individuals, I will now determine whether this personal information is exempt from disclosure under section 49(b).

**Issue C: Does the discretionary 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, 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.

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

[31] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[32] 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). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[33] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the IPC will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>7</sup>

**Section 21(3)(b)**

[34] 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). In its decision letter and representations, the ministry relies on the presumption in section 21(3)(b).

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<sup>7</sup> Order MO-2954.

[35] Section 21(3)(b) reads,

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

[36] 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.<sup>8</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>9</sup>

[37] The presumption can apply to a variety of investigations, including those relating to by-law enforcement<sup>10</sup> and violations of environmental laws or occupational health and safety laws.<sup>11</sup>

### **Section 21(2)**

[38] 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.<sup>12</sup>

[39] 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).<sup>13</sup>

[40] The ministry's decision letter and representations cites the factor at section 21(2)(f) (highly sensitive), in particular.

[41] Section 21(2)(f) 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.

[42] The ministry also relies on "other factors/relevant circumstances," described

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<sup>8</sup> Orders P-242 and MO-2235.

<sup>9</sup> Orders MO-2213, PO-1849 and PO-2608.

<sup>10</sup> Order MO-2147.

<sup>11</sup> Orders PO-1706 and PO-2716.

<sup>12</sup> Order P-239.

<sup>13</sup> Order P-99.



below. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>14</sup>

### **Other factors/considerations**

[43] In previous orders, considerations which have also been found relevant in determining whether the disclosure would be an unjustified invasion of personal privacy include:

- inherent fairness issues;<sup>15</sup>
- ensuring public confidence in an institution;<sup>16</sup>
- personal information about a deceased person;<sup>17</sup> and
- benefit to unknown heirs.<sup>18</sup>

[44] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[45] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.<sup>19</sup>

### **Representations**

[46] The ministry submits that to disclose the personal information at issue would constitute an unjustified invasion of the third parties' privacy under section 49(b)..

[47] The ministry further submits that the records were prepared by the OPP because they were requested to attend a location, which caused them to investigate whether an offence had occurred. The offence in this instance, the ministry submits, might have been related to trespass, which is an offence under the *Trespass to Property Act*. As a result, the ministry submits that the presumption in section 21(3)(b) (investigation into a possible violation of law) applies to the records, whether a charge was laid or not.<sup>20</sup>

[48] In the alternative, the ministry's position is that the factor in section 21(2)(f)

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<sup>14</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>15</sup> Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

<sup>16</sup> Orders M-129, P-237, P-1014 and PO-2657.

<sup>17</sup> Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

<sup>18</sup> Orders P-1493, PO-1717 and PO-2012-R.

<sup>19</sup> Orders M-444 and MO-1323.

<sup>20</sup> See, for example Order PO-3766.

(highly sensitive), which does not favour disclosure, applies for the following reasons:

- when police assistance is requested, there is a reasonable expectation that police records that are created will only be used for law enforcement purposes, and not in the manner contemplated by this appeal. The ministry argues that the circumstances in which the records were created, along with the expectation of privacy means that the personal information at issue is inherently “highly sensitive,”
- the third parties have not been notified of the appeal and would be significantly distressed if their personal information is disclosed in the absence of notification, and
- if the personal information of third parties is ordered disclosed, it will cease to be protected by the privacy provisions in the Act. Such disclosure, which in effect constitutes disclosure to the world could be expected to cause significant distress.

[49] In support of its position on the factor in section 21(2)(f), the ministry relies on Orders P-1618 and PO-3766.

[50] The ministry goes on to argue that there are other factors/relevant circumstances at issue, namely that the disclosure of third parties’ personal information would essentially create a chilling effect to the extent that the public would be hesitant to seek the assistance of the OPP out of concern that their personal information will be subsequently disclosed under the *Act*. Further, the ministry’s position is there is a duty of fairness to notify the third party individuals prior to a decision being made about the disclosure of their personal information.

[51] Turning to the absurd result principle, the ministry submits that it is not clear how much knowledge the appellant has of the contents of the information at issue. Regardless, the ministry submits that the absurd result principle does not apply because disclosure of third parties’ personal information would be inconsistent with the purpose of the personal privacy exemption.<sup>21</sup>

[52] The appellant submits that she was assaulted during the incident that is the subject matter of the records at issue and that the ministry appears to be more concerned about others’ significant personal distress of others, but not hers. She also argues that the ministry is using the term “highly sensitive” in order to protect the third party individuals implicated in the investigation, which is a unilateral, partial and unfair approach to the victim of an assault (the appellant). Lastly, the appellant submits that she is seeking the specific location of the assault, although she also submits that is aware of the “assault location” through other means.

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<sup>21</sup> See, for example, Order PO-3013.

### ***Analysis and findings***

[53] I have reviewed the personal information subject to the ministry's section 49(b) claim and I find that the presumption against disclosure in section 21(3)(b) applies to it. Upon my review of the records, it is clear that the personal information contained in them was compiled and is identifiable as part of an investigation into possible violations of law. The records were created by the police as part of their investigation into an incident relating to the appellant and allegations regarding possible violations of law. Based on my review, I find that section 21(3)(b) weighs in favour of non-disclosure of the personal information in the records that was compiled as part of an investigation into possible violations of law.

[54] The records contain the appellant's personal information. As such, I must consider and weigh any applicable factors in balancing the appellant's and affected parties' interests. Given the nature of the incident and the dynamics between the parties involved, I find it reasonable to expect that certain parties would experience significant personal distress if personal information relating to them was disclosed to the appellant.<sup>22</sup> Therefore, I find that the factor favouring non-disclosure in section 21(2)(f) applies to all of the personal information remaining at issue.

[55] I reviewed the remainder of the factors in section 21(2) and find that none apply.

[56] Finally, I consider the possible application of the absurd result principle to the personal information that remains at issue. The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. The absurd result principle has applied, for example, where the requester was present when the information was provided to the institution<sup>23</sup> or where the information is clearly within the requester's knowledge.<sup>24</sup>

[57] The ministry submits that it is unclear how much knowledge the appellant has of the contents of the responsive records. Regardless, the ministry claims that the absurd result principle does not apply because disclosure of the personal information that remains at issue would be inconsistent with the purpose of section 49(b).

[58] I reviewed the records at issue and it appears that some of the personal information that remains at issue may have been provided to the appellant or are within her knowledge. However, while this may be the case, this alone does not establish that denying the appellant access on the basis of section 49(b) would yield manifestly absurd or unjust results, or be inconsistent with the purposes of the exemption. In the circumstances of this appeal, I find that denying the appellant access to the discrete portions of the records she may be aware of would not yield manifestly absurd or

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<sup>22</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>23</sup> Orders M-444 and MO-1323.

<sup>24</sup> Orders M-444 and P-1414.

unjust results, and I also note that the appellant's personal information has already been disclosed to her. Accordingly, I find the absurd result principle does not apply in these circumstances.

[59] Weighing the factor at section 21(2)(f) and the presumption at section 21(3)(b) and balancing the interests of the parties, I find that disclosure of the personal information remaining at issue would be an unjustified invasion of personal privacy. Therefore, I find that, subject to my review of the ministry's exercise of discretion below, the personal information remaining at issue is exempt under section 49(b) because its disclosure would result in an unjustified invasion of the personal privacy of individuals other than the appellant.

**Issue D: Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?**

[60] 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.

[61] 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.

[62] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>25</sup> According to section 54(2), however, this office may not substitute its own discretion for that of the institution.

[63] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>26</sup>

- 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, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,

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<sup>25</sup> Order MO-1573.

<sup>26</sup> Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

### ***Representations***

[64] The ministry's position is that it acted appropriately in exercising its discretion to not release the personal information of third party individuals in the records. It argues that it acted in accordance with its long-standing practices by withholding highly sensitive personal information belonging to third party individuals collected during a law enforcement investigation, and that has predominantly guided its decision-making. The ministry also notes that it has provided the appellant with a broad right of access to her own personal information, and in doing so the ministry submits that achieved an appropriate balance consistent with the principles of the *Act*.

[65] The appellant reiterates that she is seeking the specific location of the assault, although she also submits that is aware of the "assault location" through other means. The appellant also submits that the OPP's failure to provide this information to her demonstrates a lack of integrity, unfairness and bad faith.

### ***Analysis and findings***

[66] Based on the ministry's representations, I am satisfied that it properly exercised its discretion because it took into account relevant considerations and did not take into account irrelevant considerations. I am satisfied that the ministry balanced the appellant's interests in the disclosure of the records with the privacy interests of the personal information of other individuals contained in the record. I also note that the ministry disclosed the majority of the information contained in the records to the appellant, including her own personal information, and in doing so, I find that the ministry took into consideration the purposes of the *Act*, including the principle that exemptions from the right of access should be limited and specific. Consequently, I uphold the ministry's exercise of discretion under section 49(b) to the information that I have found to be exempt from disclosure.

**ORDER:**

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

Original Signed By: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ January 27, 2022