Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-2095

## Appeal PA-010169-1

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of the Attorney General (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to information in connection with an investigation carried out by the Special Investigations Unit (SIU) of members of the Guelph Police Service (GPS) and Hamilton-Wentworth Regional Police Service (now the Hamilton Police Service) (HPS). By way of background, the SIU is responsible for investigating the circumstances surrounding serious injuries or deaths that occur in situations involving the police. The focus of this investigation was the circumstances surrounding a heart attack suffered by the appellant while in the custody of the police. Subsequent to the completion of the investigation, the Director of the SIU decided that criminal charges were not warranted in this case.

The Ministry granted partial access to the responsive records, but denied access to other parts of the records pursuant to sections 21 (invasion of privacy) and 14(2)(a) (law enforcement report) of the *Act*.

The appellant appealed the Ministry's decision.

During the course of mediation, the Ministry provided the appellant with an index of records that provided a description of and the exemptions claimed for each record. In total, the Ministry identified 35 responsive records.

After reviewing the index, the appellant advised that he was no longer seeking access to Records 1 to 4, 7 and 19. Accordingly, these records are no longer at issue. In its initial decision, the Ministry granted access to Record 26, in its entirety, and so this record is also not at issue.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

This office sent a Notice of Inquiry initially to the Ministry regarding the possible application of sections 21 and 14(2)(a). The Ministry did not raise the application of section 49 in its decision. However, in light of the fact that the records appeared to contain the appellant's personal information, the Ministry was asked to comment on the application of section 49(b) read in conjunction with section 21 and section 49(a) read in conjunction with section 14(2)(a). The Ministry submitted representations in response. This office then sent a Notice of Inquiry along with the Ministry's representations to the appellant, who submitted representations in response. I then sought representations from 13 police officers and three doctors who are affected parties in this appeal and I included with my Notice of Inquiry a copy of the appellant's representations. I received representations from the Hamilton Police Service (HPS) on behalf of six police officers, the Guelph Police Service (GPS) on behalf of seven police officers, and one doctor. I then sought reply representations from the appellant and the Ministry regarding a new issue raised by the HPS [section 65(6) (application of the *Act*)], the submissions of the HPS and the doctor regarding section 21, and the submissions of the GPS regarding section 14(1)(h) (confiscation by a peace officer). In its representations, the Ministry also raised the application of section 14(2)(c) (exposure to civil liability).

## RECORDS:

The following records are at issue: 5-1, 6-1, 8-1 to 8-5, 9-1 to 9-3, 10-1 to 10-2, 11-1 to 11-2, 12-1, 13-1, 14-1, 15-1 to 15-2, 16-1 to 16-9, 17-1 to 17-5, 18-1 to 18-4, 20-1 to 20-3, 21-1 to 21-2, 22-1 to 22-3, 23-1 to 23-2, 24-1 to 24-4, 25-1 to 25-23 and 27 to 35. All but Records 27 through 35 are in printed form and consist of administrative forms, witness statements, correspondence, police officer's notes and SIU reports. The use of the word "report" is based on the terminology used in these records themselves and in the index provided by the Ministry and does not reflect a conclusion by me that these records constitute "reports" within the meaning of section 14(2)(a) of the *Act* (see discussion below). Records 27 through 35 are audiotaped witness interviews conducted by the SIU.

## CONCLUSION:

I uphold the Ministry's decision to withhold Records 8-5, 9-3, 10-2, 11-2, 13-1, 14-1, 20-2 to 20-3, 21-2, 22-1 to 22-3, 23-1 to 23-3, 24-1 to 24-4 and 25-2 to 25-23 in their entirety.

I order disclosure of Records 5-1, 15-1 to 15-2, 16-2, 16-4, 16-6, 16-8 to 16-9, 17-2, 17-5, 18-2, 18-4, 20-1, 21-1 and 25-1 in their entirety.

I order disclosure of Records 6-1, 8-1 to 8-4, 9-1 to 9-2, 10-1, 11-1, 12-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1 and 18-3 with the exception of exempt portions which shall be severed from the records.

## DISCUSSION:

### APPLICATION OF THE *ACT*

The HPS officers take the position that the *Act* does not apply to the records that relate to them, by virtue of section 65(6)1 and 3 of the *Act*.

#### Introduction

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, section 65(6) has the effect of excluding the records from the scope of the *Act*.

#### Section 65(6)1

##### *Introduction*

Section 65(6)1 states:

> Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

In order for a record to fall within the scope of section 65(6)1, the institution must establish that:

> 1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**
>
> 2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
>
> 3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

***Representations***

The HPS officers state:

> The records were collected, prepared, maintained or used by the Institution in relation to proceedings before a tribunal relating to the employment of a person by the Institution.
>
> The records at issue form part of an S.I.U. Investigation. When the [SIU] launches an investigation the [HPS] has a mandate that we must assist in the investigation. The S.I.U. investigates and only deals with criminal charges. The [HPS] also launches a Professional Standards Branch Investigation that parallels the S.I.U. Investigation and investigates any provincial offences pursuant to the *Police Services Act* and breaches in internal Policies and Procedures. Two of the Policies and Procedures that relate to SIU investigation are the Hamilton Police Service Discipline Procedure and the Special Investigations Unit Procedure.
>
> In this case the information contained about the officers in the SIU Investigation was collected pursuant to the *Police Services Act*. Disciplinary hearings are conducted under Part V of the current *Police Services Act* (enacted October 10, 1997) consequent to an investigation into a "complaint". Complaints relating to the conduct of a police officer may be initiated by a member of the public or by the chief of police, and must be "employment related" in the sense that an officer cannot be found guilty of misconduct if there is no connection between the conduct complained of and the occupational requirements for a police officer or

> the reputation of the police force. (reference: s.74(2) *Police Services Act*). This parallel investigation also provides the S.I.U. investigators with required information.
>
> It is the submission of the officers that the information sought was collected, prepared, maintained and used by the Institution in carrying out its statutory disciplinary/administrative responsibilities under the *Police Services Act*. The proceedings by the S.I.U. and the penalties both clearly relate to the employment of the officers by the Institution, the former being based on employment related behaviour and the latter involving, among other things, criminal code charges.

The Ministry states in response:

> [T]he Ministry rejects the proposition that the records in question were collected, prepared, maintained or used by or on behalf of the SIU in relation to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the Ministry. […T]he SIU is a law enforcement agency that conducts criminal investigations surrounding the circumstances of incidents that fall within its statutory jurisdiction in order to determine whether a criminal charge or charges is warranted against a subject police officer or officers. The records herein question were collected, prepared, maintained or used, as in all SIU cases, for the exclusive purpose of discharging that investigative mandate. Whatever employment or labour relations implications may arise in relation to the affected parties with respect to the SIU's collection, preparation, maintenance or use of these records occur in forums outside of the SIU's jurisdictional sphere and are irrelevant to the SIU's statutory mandate.
>
> The HPS […] asserts in the fourth paragraph of its representations concerning the section 65(6)1 issue that it "is the submission of the officers that the information sought was collected, prepared, maintained and used by the Institution in carrying out its statutory disciplinary/administrative responsibilities under the *Police Services Act*." Again, with respect to the use of the word "Institution" in this paragraph, the Ministry makes the same commentary as in paragraph 2 of these reply representations.
>
> The HPS [...] further asserts in the fourth paragraph of its representations concerning the section 65(6)1 issue that the "proceedings by the S.I.U. and the penalties both clearly relate to the employment of the officers by the Institution, the former being based on employment related behaviour and the latter, among other things, criminal code charges." Firstly, the SIU conducts investigations of incidents that fall within its statutory jurisdiction. Charges are laid by the SIU where, in the opinion of the SIU's Director, there are reasonable grounds to believe that an officer or officers have committed a criminal offence or offences in relation to the incident investigated. In the event a charge is laid by the SIU,

> the matter is referred to the Crown Attorney for prosecution. Whatever employment or labour relations implications may arise in relation to the affected parties with respect to the SIU's collection, preparation, maintenance or use of these records, or in the event a criminal charge is laid by the SIU, occur in forums outside of the SIU's jurisdictional sphere and are irrelevant to the SIU's statutory mandate. Secondly, it would appear in this instance that the use of the word "Institution" denotes the HPS. Of course, it bears only noting that the records in question relate to individuals who are employed officers of the HPS, not the SIU. Finally, the SIU's investigative jurisdiction is not expressly limited to on-duty conduct. In fact, the SIU does investigate off-duty conduct of officers in certain circumstances, such as where an officer has invoked his or her police officer status or used police equipment during the course of an incident.

The appellant also submitted representations regarding section 65(6)1. The appellant states that section 65(6)1 cannot apply if the "institution" in question is the Ministry since the affected persons are not employed by the Ministry.

### *Findings*

I accept the Ministry's submissions. The records at issue that concern the HPS officers were collected, prepared, maintained or used by the SIU for the exclusive purpose of discharging its investigative mandate in order to determine whether criminal charges are warranted against a subject police officer or officers. I agree that whatever employment or labour relations implications may arise in relation to the police officers as a result of the SIU's collection, preparation, maintenance or use of these records occur in forums outside of the SIU's jurisdictional sphere and are irrelevant to the SIU's statutory mandate. While it may be possible for records created or compiled by the SIU to be later collected, maintained, used or disclosed by the employer police force in relation to *PSA* disciplinary proceedings, the vague assertions of the HPS officers in this regard, without specific facts relating to this case, fall short of the requirements of section 65(6)1. Accordingly, I find that section 65(6)1 does not apply to remove the records from the application of the *Act*.

## Section 65(6)3

### *Introduction*

Section 65(6)3 of the *Act* states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order to fall within the scope of paragraph 3 of section 65(6), the institution must establish that:

1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

***Representations***

The HPS officers state:

> It is the position of the officers that for the reasons described [in the officer's submissions regarding section 65(6)1], the information requested was clearly collected, prepared, maintained and used by the Institution in relation to communications about employment-related matters in which the Institution has an interest.
>
> Furthermore, the Police Service, as employer, as well as the officers have an inherent interest in internal discipline and in the results thereof. A finding of guilt in relation to a disciplinary misconduct has the potential to subject the Institution to significant legal consequences, both civilly and otherwise. For example, a finding of misconduct may form the basis for a civil lawsuit or a Human Rights claim against the officer and the Institution. In fact the appellant has launched a civil suit against the Police Service and the involved officers.

The Ministry states in response:

> The HPS […] asserts in […] its representations concerning the section 65(6)3 issue that "the information requested was clearly collected, prepared, maintained and used by the Institution in relation to communications about employment-related matters in which the Institution has an interest." With respect to the use of the word "Institution" in this paragraph, the Ministry makes the same commentary as in [its representations pertaining to section 65(6)1]. [I]n the event the word "Institution" is being used to denote the SIU, the Ministry denies that the records in question were collected, prepared, maintained or used by or on behalf of the SIU in relation to communications about employment-related matters in which the SIU has an interest.

The appellant states that section 65(6)3 cannot apply since the records at issue were not collected, prepared, maintained or used by the HPS but rather by the SIU.

***Findings***

Similar to my findings above under section 65(6)1, I conclude that section 65(6)3 does not apply. The SIU collected, prepared, maintained or used the records in relation to its investigation into possible criminal offences, and not for an employment-related purpose. In addition, the generalized assertions of the HPS officers fall short of establishing that the HPS collected, prepared, maintained or used the records in relation to any employment-related matter.

**PERSONAL INFORMATION**

**Introduction**

In order to assess whether section 49(b) in conjunction with section 21 applies to deny the appellant access to the records at issue, I must first determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

Previous decisions of this office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position (see Reconsideration Order R-980015 and Order PO-1663). However, where information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's personal information (see Orders P-721, P-939, P-1318 and PO-1772). In Order PO-1912, information about OPP and other police officers in records originally created in the course of these officers' professional duties was found to constitute their personal information where the conduct of the officers was later called into question by a lawsuit.

**Representations**

The Ministry submits that the records at issue contain the personal information of persons other than the appellant including a number of police officers who had interaction with the appellant during the time in question, a number of civilian witnesses with information regarding the incident investigated by the SIU, and other persons involved in the investigation. The Ministry further states that the personal information contained in the records includes information that falls under the following subsections of section 2(1) of the *Act*: age, sex, marital and family status [section 2(1)(a)], medical history [section 2(1)(b)], identifying numbers [section 2(1)(c)],

addresses and telephone numbers [section 2(1)(d)], the personal opinions or views of witnesses other than the appellant [section 2(1)(e)], and the names of individuals together with other personal information about them or in circumstances where the disclosure of the name would reveal other personal information about the individual [section 2(1)(h)].

The Ministry submits that some of the records also contain information that may constitute the personal information of the appellant.

With respect to the distinction between an individual's personal information and information associated with a person in his or her professional capacity, the Ministry relies on the reasoning in Reconsideration Order R-980015. This order draws a distinction between information or opinions that are personal to the individual with information and opinions of the individual in expressing the position of the organization he or she represents. With respect to the circumstances of this case, the Ministry states:

> This information […] does not represent the views or opinions of an organization, be it public or private. It is not associated with these witnesses in their employment or professional capacity. Rather, this information is more appropriately characterized as being associated with individuals in their personal capacity and, accordingly, constitutes personal information within the meaning [of] section 2(1) of the *Act*.

The appellant states, in response, that the information relating to the police officers, whether contained in notes, reports or other documents, is not personal information since the appellant "… is not seeking documentation relating to the evaluation of the performance of the police officers, but rather notes generated by the police officers."

The HPS officers submit:

> The information covered by this request is clearly personal information […], in that it is information relating to the named officers. It also includes statements made by these officers when they were ordered to provide the statements. The names of the officers appear in conjunction with highly sensitive information provided by them.
>
> Although the information starts as the information provided in an investigation by the [SIU] and is provided in their professional capacity, it goes beyond that. Previous orders held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. However, where information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's personal information (Orders P-721, P939, P-1318 and P0-1772).

The GPS officers did not provide representations on this issue.

Legal counsel for the affected party doctor submits:

> The statement [provided by the doctor] contains recorded information about [him], including his name and his professional standing and his personal opinions and/or views.
>
> [The doctor] further submits that the information gathered from him was in his personal capacity, rather than in a professional or official government capacity.

Based on my review of the records and the parties' representations, there is no doubt that the records contain the personal information of the appellant and several civilian witnesses. As well, applying the principles in the series of cases decided by this office (Orders P-721, P-939, P-1318, PO-1772 and PO-1912), I am satisfied that the information about the HPS and GPS officers, and the doctor, is their personal information. However, applying the same principles distinguishing personal and professional information to other identifiable individuals in Records 5-1, 15-2, 16-2, 16-4, 16-6, 16-8, 16-9, 17-2, 17-4, 17-5, 18-2, 18-4, 20-1 and 21-1, I find that these records do not contain the personal information of these other identifiable individuals. Record 5-1, for example, provides a chronology of events pertaining to the SIU investigation and names the lead investigator. Records 15-2, 16-9, 17-5, 20-1 and 21-1 are facsimile transmission cover sheets for SIU correspondence related to the investigation. Records 16-2, 16-4, 16-6, 16-8, 17-2, 17-4, 18-2 and 18-4 are portions of cover letters sent by SIU officials regarding the investigation. Any information about these individuals is only in relation to their activities in a professional or employment capacity.

Therefore, my findings on this issue are as follows:

1. Records 6-1, 8-1 to 8-5, 9-1 to 9-3, 10-1 to 10-2, 11-1 to 11-2, 12-1, 13-1, 14-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3, 20-2 to 20-3, 21-2, 22-1 to 22-3, 23-1 to 23-2, 24-2 to 24-4, 25-2 to 25-15, 25-17 to 25-20, 25-22 to 25-23 and 27 to 35 contain the personal information of the appellant, along with other identifiable individuals including civilian witnesses, witness police officers and witness doctors.

2. Record 15-1, 25-1, 25-16 and 25-21 contain the personal information of the appellant only, and not of other individuals.

3. Records 23-3 and 24-1 contain the personal information of other identifiable individuals only.

4. Records 5-1, 15-2, 16-2, 16-4, 16-6, 16-8 to 16-9, 17-2, 17-4, 17-5, 18-2, 18-4, 20-1 and 21-1 do not contain any information that qualifies as "personal information" within the definition of that term in section 2(1) of the *Act*.

## INVASION OF PRIVACY

### Introduction

Section 47(1) of the *Act* gives individuals a right of access to their own personal information. Section 49 provides certain exceptions to the section 47(1) right of access. Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals, the Ministry has the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Accordingly, in this appeal I will consider whether the disclosure of the personal information in Records 6-1, 8-1 to 8-5, 9-1 to 9-3, 10-1 to 10-2, 11-1 to 11-2, 12-1, 13-1, 14-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3, 20-2 to 20-3, 21-2, 22-1 to 22-3, 23-1 to 23-2, 24-2 to 24-4, 25-2 to 25-15, 25-17 to 25-20, 25-22 to 25-23 and 27 to 35 would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21 of the *Act* prohibits an institution from releasing this information, unless one of the exemptions set out in that section applies. Accordingly, I will also consider whether the disclosure of Records 23-3 and 24-1 would be an unjustified invasion of personal privacy under section 21.

In both these situations (where the record contains the personal information of the appellant and of others, and where the record contains the personal information of others only), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

As I have found that Records 15-1, 25-1, 25-16 and 25-21 contain the personal information of the appellant only, and not of other individuals, their disclosure would not result in an unjustified invasion of another individual's personal privacy under either section 21(1) or 49(b). These records shall, therefore, be disclosed to the appellant, subject to the application of section 49(a) read in conjunction with section 14 (see discussion below).

In addition, as Records 5-1, 15-2, 16-2, 16-4, 16-6, 16-8 - 16-9, 17-2, 17-4, 17-5, 18-2, 18-4, 20-1 and 21-1 do not contain any personal information, they too do not qualify for exemption under either section 21(1) or 49(b), and shall also be disclosed to the appellant, subject, as well, to the application of section 49(a) read in conjunction with section 14 (see discussion below).

**Section 21(3)(b) and 49(b)**

For all of the records under consideration, the Ministry has submitted that the presumption in section 21(3)(b) applies. 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;

The Ministry submits that the personal information in the records was compiled by the SIU as part of an investigation into a possible violation of law, specifically the *Criminal Code*. In his representations the appellant does not specifically disagree with the Ministry's submissions regarding the SIU's role. The appellant states that the information sought relates to events surrounding his arrest, his detention in custody in both Guelph and Hamilton and his attendance at two hospitals. The appellant further states that he is not looking for the personal information of other individuals but, rather, is looking for his own personal information relating to how he was detained and the manner in which his medical care was handled.

***Records containing the personal information of individuals other than the appellant and not of the appellant - section 21(1)***

Based on the submissions of the Ministry and my review of the records, I find that the personal information contained in Records 23-3 and 24-1 was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. The fact that no

criminal proceedings were commenced thereafter has no bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849). Therefore, I find that the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies and, therefore, these records are exempt under section 21.

In my discussion above, I referred to the decision in *John Doe*. While the appellant has not specifically raised the application of any of the factors in section 21(2), he does allude to the application of section 21(2)(f), indicating that obtaining the consent of the affected persons to the release of their personal information would be difficult due its sensitive nature. I am, however, precluded from considering any of the factors weighing for or against disclosure under section 21(2), because of the *John Doe* decision and having found that section 21(3)(b) applies.

***Records containing the personal information of the appellant as well as of individuals other than the appellant – sections 21(1) and 49(b)***

I also find that the personal information in Records 6-1, 8-1 to 8-5, 9-1 to 9-3, 10-1 to 10-2, 11-1 to 11-2, 12-1, 13-1, 14-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3, 20-2 to 20-3, 21-2, 22-1 to 22-3, 23-1 to 23-2, 24-2 to 24-4, 25-2 to 25-15, 25-17 to 25-20, 25-22 to 25-23 and 27 to 35 was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. Under section 21(3)(b), the disclosure of this personal information is, therefore, deemed to constitute an unjustified invasion of the personal privacy of the individuals to whom that information relates. As a result, these records qualify for exemption under section 49(b) of the *Act*.

Again, having regard to this finding, I am precluded from considering the application of the factors under section 21(2) referred to by the appellant.

***Exercise of discretion***

As indicated above, section 49(b) is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under section 49(b), the Ministry must exercise its discretion in deciding whether or not to disclose it.

The Ministry has made representations as to its policy reasons for protecting the personal information contained in the records. Among other things, it states that it is necessary that an investigative law enforcement agency be able to protect personal information compiled as a component of an investigation into possible criminal conduct. Central in any such investigation is the willingness of witnesses to come forward and provide information that they may have which is relevant to an investigation. According to the Ministry, this type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is often of a very sensitive nature whose provision is often only forthcoming where confidentiality can be assured.

The Ministry submits that the concern is shared equally between police officers and civilians. It states that in respect of the former, it should be noted that pursuant to section 113(9) of the *PSA*,

all members of police forces are required to cooperate fully with the SIU in the conduct of an SIU investigation. In order to ensure that cooperation from police officers in the course of SIU investigations continues to be fostered, it is necessary, it is submitted, that police officers retain a measure of confidence that their cooperation with the SIU, in the form of information they provide, will remain confidential and will not be disclosed to third parties.

The Ministry states that with respect to civilian witnesses, it has been the experience of the SIU that there are many occasions when they will only provide the SIU with a statement of their evidence if they believe that all communications will be kept in confidence. Many are fearful of police reprisal, whereas others are worried that what they say may at some point be used against them in a legal proceeding. Accordingly, the Ministry submits that it has historically been the policy of the SIU to retain information provided by witnesses in strict confidence and not to disclose such information to third parties in the absence of consent on the part of the witness who provided the information, except where such disclosure is compelled by judicial process.

I am satisfied on the basis of the Ministry's submissions that it has properly exercised its discretion under section 49(b) in denying access to the personal information in Records 6-1, 8-1 to 8-5, 9-1 to 9-3, 10-1 to 10-2, 11-1 to 11-2, 12-1, 13-1, 14-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3, 20-2 to 20-3, 21-2, 22-1 to 22-3, 23-1 to 23-2, 24-2 to 24-4, 25-2 to 25-15, 25-17 to 25-20, 25-22 to 25-23 and 27 to 35.

***Severance***

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

The Ministry submits that in the event that some of the records are found to contain information which constitutes personal information related to the appellant in addition to persons other than the appellant, no reasonable severance is possible, given the "…intertwining, amalgamation and collation of information that constitutes the *personal information* of more than one individual" (Ministry's emphasis). The Ministry further states that this applies to the documentary portion of the records and, with more force, to the audiotapes. The Ministry also submits that in order to avoid disclosing information which is properly exempted from disclosure, any such attempt at severance would result in the disclosure of information which is substantially unintelligible and, therefore, meaningless.

The appellant submits that most of the personal information would relate to him and to the extent that it relates to other persons, the personal identifiers could be severed under section 10(2). With respect to the audiotapes, the appellant suggests that the portions of the audiotapes that reveal the identity of the witnesses could be severed with the remaining portions released to him.

I agree with the Ministry that no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much

of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)]. With these principles in mind, I have arrived at the following conclusions.

Some of the personal information exempt from disclosure under sections 21 and 49(b) is readily severable from non-exempt information in Records 6-1, 8-1 to 8-4, 9-1 to 9-2, 10-1, 11-1, 12-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1 and 18-3. Where this is the case, the remaining information is either non-personal or about the appellant only.

In addition, portions of Records 8-1 and 8-2 contain statements made by the appellant to the SIU regarding his treatment by police officers and hospital staff. Although these portions include the personal information of both the appellant and other individuals, they "came out of the appellant's mouth". On an application of the "absurd result" principle (see Orders PO-1708 and PO-1819), they should be disclosed to the appellant.

In the circumstances, I find that it is not practicable to sever the exempt information in the audiotapes (Records 27 to 35) or in Records 8-5, 9-3, 10-2, 11-2, 13-1, 14-1, 20-2, 20-3, 21-2, 22-2, 22-3, 23-1, 23-2, 24-2 to 24-4, 25-2, 25-3, 25-4, 25-5 to 25-15, 25-17 to 25-20, 25-22 to 25-23 from other information in those records. These records are, therefore, exempt in their entirety.

## LAW ENFORCEMENT

### Introduction

In addition to section 49(b) of the *Act*, another exemption to the general right of access is found in section 49(a) of the *Act*, under which the institution has the discretion to deny an individual access to his or her own personal information in instances where the exemptions in sections 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the GPS officers rely on section 14(1)(h), and the Ministry has relied on 14(2)(a) and 14(2)(c), in relation to the records at issue, in exercising its discretion under section 49(a). However, I have found that the section 21 exemption applies to Records 23-3 and 24-1 in their entirety and that the section 49(b) exemption applies to Records 8-5, 9-3, 10-2, 11-2, 13-1, 14-1, 20-2, 20-3, 21-2, 22-2, 22-3, 23-1 to 23-2, 24-2 to 24-4, 25-2, 25-3, 25-4, 25-5 to 25-15, 25-17 to 25-20, 25-22 to 25-23 and 27 to 35 in their entirety. I have also found that Records 5-1, 15-2, 16-2, 16-4, 16-6, 16-8, 16-9, 17-2, 17-4, 17-5, 18-2, 18-4, 20-1 and 21-1 do not contain personal information and that portions of Records 8-1 to 8-4, 9-1 to 9-2, 10-1, 11-1, 12-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3, 25-1, 25-16 and 25-21 contain only the appellant's personal information and/or information that does not qualify as personal information. Therefore, I will consider the applicability of section 49(a) read in conjunction with sections 14(1)(h), 14(2)(a) or

14(2)(c) only to Records 5-1, 6-1, 8-1 to 8-4, 9-1 to 9-2, 10-1, 11-1, 12-1, 15-1 to 15-2, 16-1 to 16-9, 17-1 to 17-5, 18-1 to 18-4, 20-1, 21-1, 22-1, 25-1, 25-16 and 25-21.

**Section 14(1(h): Confiscation by a peace officer**

***Introduction***

As stated above, the GPS officers have raised the application of section 14(1)(h) to records relating to them. I note that of the records that remain at issue Records 11-1, 12-1, 15-1 to 15-2, 17-1 to 17-5, 18-1 to 18-4, 25-1, 25-16 and 25-21 do not relate to them.

It is questionable whether, even if section 14(1)(h) applies, this exemption may validly be claimed by affected parties where the institution with custody of the records, in this case the Ministry, does not claim the exemption. In the circumstances, it is not necessary for me to decide whether this exemption is validly claimed, since it would not apply in any event for the reasons set out below.

Section 14(1)(h) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

An institution relying on the section 14 exemption must establish that it is reasonable to expect that the harms set out in these sections will ensue if the information in the records is disclosed.

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the words "could reasonably be expected to" in the law enforcement exemption:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In Order M-610, former Adjudicator Officer Holly Big Canoe stated:

> In my view, section 8(1)(h) [municipal equivalent to section 14(1)(h)] allows the Police to deny a requester access to a record where either the record at issue is itself a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation, or where the disclosure of the record could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer, in accordance with an Act or regulation.

***Representations***

The GPS officers provided brief representations regarding the application of section 14(1)(h) to all of the records at issue in this appeal. The GPS officers submit that they oppose the release of these records because they were obtained from "these persons" pursuant to the provisions of the *PSA* and applicable regulations. The GPS officers further state that the SIU investigators are deemed to be peace officers pursuant to section 113(4) of the *PSA*.

The Ministry submits:

> Whether in the form of copies of their duty notes or during the course of interviews with SIU investigators, the witness police officer information contained in the records in question were provided pursuant to the legal obligations set out in section 113 of the [*PSA*…] and Ontario Regulation 673/98 […]. Section 113(9) of the [*PSA*] provides that "members of police forces shall co-operate fully" with the SIU in the conduct of investigations. OR 673/98, enacted under the [*PSA*], details the conduct and duties of police officers and police services during the course of SIU investigations.
>
> Section 9(1) of OR 673/98 provides, in part, that a "witness officer shall complete in full the notes on the incident in accordance with his or her duty and shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU." Section 9(2) provides, in part, that "the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours upon request." On the question of "confiscation", the Ministry submits that duty notes of the nature herein […] are the property of the police service, not the officers. Moreover, as was the case in this instance, what is provided to the SIU further to these legal obligations are "copies" of the notes in question; the originals are retained in the custody of the police service.
>
> Section 8(1) of OR 673/98 provides, in part, that "immediately upon being requested to be interviewed by the SIU, and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions." On the question of "confiscation", the Ministry notes that the records relating to these interviews, such as the audiotapes herein question, are records generated by the SIU.

The appellant states:

> If the notes and statements of police officers are not protected from disclosure in the first place as they were obtained in the course of the execution of their duties as a police officer, then there would be no reason for this discretionary exemption to be invoked even if there were a confiscation of such records. Such an interpretation would negate the other provisions of the Act.

***Findings***

Previous orders have established that the intent of this section is to exempt from disclosure records that have been confiscated or "seized" through the use of a search warrant (see, for example, P-460 and PO-2033-I). In the circumstances of this case, the records remaining at issue that relate to the seven GPS police officers were, generated by the SIU as a result and through the course of interviews with the seven GPS police officers under the authority of section 113 of the *PSA* and Ontario Regulation 673/98. Therefore, it cannot be said that these records were "confiscated" by the SIU from the police officers or the GPS, nor would their disclosure reveal confiscated records.

To conclude, section 14(1)(h) in conjunction with section 49(a) does not apply to the records remaining at issue.

**Section 14(2)(a): Report prepared in the course of law enforcement**

***Introduction***

As stated above, the Ministry initially raised the application of the section 49(a)/14(2)(a) exemption to all of the records at issue in this appeal.

Section 14(2)(a) reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

(See Order 200 and Order P-324)

The word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

***Representations***

The Ministry submits:

> […T]he records at issue, except for records 5 and 6, are part of the SIU's *investigative brief* and exempt from disclosure pursuant to section 14(2)(a) of the *Act* […].
>
> In Order 221, part I of the test was commented on by Commissioner Tom Wright as follows:
>
> The word "report" is not defined in the *Act*. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.
>
> It is submitted that each of these records that are part of the *investigative brief* constitute a "formal statement or account of the results of the collation and consideration of information" in that they provide an overview of the incident and a description of the events prior to, during and subsequent to the occurrence which was investigated. As indicated above, under the heading "II. DESCRIPTION OF THE RECORD", the materials which comprise the *investigative brief*, in this and other SIU investigations, forms an integral part of the Director's Report in that it is these materials which are reviewed by the Director in arriving at an ultimate disposition of the case, which is then formally articulated in the Director's Report. The materials that comprise the *investigative brief*, it is submitted, are indeed more than "mere observations or recordings of fact." Rather, the *investigative brief*, in the language of Commissioner Wright, is a formal statement of the results of the investigation, as well as an account of the results of the collation and consideration of information.
>
> It should also be noted that section 113(8) of the *PSA* requires the Director of the SIU to provide the Attorney General with a Report of the results of investigations. The Director's Report satisfies this reporting requirement. It reports the results of the investigation based upon the Director's review of the *investigative brief*. Accordingly, it is submitted that the Director's Report and *investigative brief*

> considered together comprise a formal statement of the results of the collation and consideration of information and that, consequently, the information contained in these records constitutes a "report" for the purposes of part I of the section 14(2)(a) test.

The affected party doctor states generally that sections 49(a) and 14(2)(a) apply to his witness statement as it is a report prepared in the course of law enforcement and investigations by the SIU, which has the function of enforcing and regulating compliance with the law. The affected party doctor also submits that his statement to the SIU "…qualifies as a "report" under the Act, as it is a formal statement of the collation and consideration of information."

The appellant states in his representations that the records do not qualify as reports as they do not consist of a formal statement or account of the results of the collation and consideration of information (PO-1959) and that, in order to qualify, the results must be more than mere observations or recordings of fact (Order 200).

***Findings***

Following the reasoning in Order 200, I am not persuaded that the records that remain at issue qualify as "reports". At best, some of these records make general reference to actions taken and to be taken with respect to the SIU investigation, others are merely administrative documents and facsimile cover sheets, while others contain the statements of interviewed witnesses. And, while the Ministry alludes to the requirement under section 113(8) of the *PSA* for the Director of the SIU to provide the Attorney General with a report of the results of investigations, no such record is before me in this appeal. In the present circumstances, I am not satisfied that any of the records that remain at issue meet the standard of a formal statement or account of the results of the collation and consideration of information. Accordingly, part one of the three-part test has not been met and I find that the section 14(2)(a) exemption in conjunction with section 49(a) does not apply.

**Section 14(2)(c): Exposure to civil liability**

As stated above, the HPS officers raise the application of section 14(2)(c). The application of this exemption is not addressed by any of the other parties to this appeal.

Section 14(2)(c) reads:

> A head may refuse to disclose a record,
>
> that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

The HPS officers state "… there is currently a civil law suit pending and therefore the officers feel that section 14(2)(c) would apply." With one exception, the portions of the records that

remain at issue do not contain information that has been quoted or paraphrased from one or more of the six HPS police officers. They contain administrative and procedural information regarding the SIU investigation along with limited personal information of the appellant. The exceptions are statements made by the appellant contained in Records 8-1 and 8-2, and 24-2. I found above that this information was not exempt under section 49(b) due to the "absurd result" principle. Again, based on the same principle, I find that section 14(2)(c) in conjunction with section 49(a) does not apply to these records. In addition, sections 14(2)(c)/49(b) do not apply to any of the other records remaining at issue.

## ORDER:

1. I uphold the Ministry's decision to withhold Records 8-5, 9-3, 10-2, 11-2, 13-1, 14-1, 20-2 to 20-3, 21-2, 22-2 to 22-3, 23-1 to 23-3, 24-1 to 24-4 and 25-2 to 25-23.

2. I order the Ministry to disclose all of Records 5-1, 15-1 to 15-2, 16-2, 16-4, 16-6, 16-8 to 16-9, 17-2, 17-5, 18-2, 18-4, 20-1, 21-1 and 25-1 no later than February 7, 2003, but no earlier than January 31, 2003.

3. I order the Ministry to disclose portions of Records 6-1, 8-1 to 8-4, 9-1 to 9-2, 10-1, 11-1, 12-1, 16-1, 16-3, 16-5, 16-7, 17-1, 17-3, 18-1, 18-3 and 22-1 no later than February 7, 2003, in accordance with the highlighted versions of these records included with the Ministry's copy of this order. To be clear, the Ministry should **not** disclose the highlighted portions of these records.

4. In order to verify compliance with provisions 2 and 3 of this order, I reserve the right to require the Ministry to provide me with a copy of the records it discloses to the appellant.

Original signed by: January 3, 2003
Bernard Morrow
Adjudicator