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

ORDER PO-2316

Appeal PA-030244-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to an incident which occurred on an identified date and involved the requester and his brother. The request identified the Ontario Provincial Police (OPP) officer involved in the matter, and was for "any reports … from that day … and anything else [the Ministry] may have".

The Ministry issued a decision to grant partial access to the records requested, and denied access to portions of the records on the basis of the following exemptions: sections 14(2)(a) (law enforcement), 49(a) (discretion to refuse requester's own information), and 49(b) (invasion of privacy), with reference to the factor in section 21(2)(f) and the presumption in section 21(3)(b) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to deny access, and also claimed that additional records should exist.

During mediation, the appellant and his brother (who also made a request for his own personal information and has a separate appeal with this office; appeal number PA-030243-1) provided signed consent forms, consenting to the disclosure of information to each other. They also indicated that they are not pursuing access to each other's information. As a result, the severed portions of the records relating to the appellant in PA-030243-1 are not at issue in this appeal. In addition, the mediator notified an individual who may be affected by this appeal (the affected person) to determine whether that individual consented to the disclosure of their personal information to the appellant. The affected person objected to the release of personal information.

Also during mediation, the appellant maintained that additional records relating to the incident should exist, including records such as a search warrant, an inspection report, records relating to the briefing that took place prior to the incident, and/or police officers' notes.

Furthermore, during mediation the Ministry advised the mediator that it had located some additional records and would be issuing a revised decision to the appellant. The Ministry subsequently provided the appellant with a further decision letter, and also provided additional records to the appellant. In the cover letter the Ministry stated:

> ... the Ministry has located the attached additional records (pages 4 to 18) consisting of the notes of seven Ontario Provincial Police (OPP) Officers.

The Ministry also identified that access to portions of these records was denied on the basis of section 49(b), with reference to the factor in section 21(2)(f) and the presumption in section 21(3)(b) of the *Act*. Furthermore, the Ministry referred to section 14(1)(l) (facilitate commission of an unlawful act) in conjunction with section 49(a), to deny access to portions of these records.

Following receipt of a copy of the further decision letter provided by the Ministry to the appellant, this office contacted the appellant. The appellant indicated that he continued to seek

access to the undisclosed portions of all of the identified records, and that he maintained his position that there should be additional records relating to this incident, such as a search warrant, an inspection report, and/or records relating to the briefing that took place prior to the incident.

In light of the above, I decided to include the newly-located records within the scope of this appeal. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry, initially, and the Ministry provided representations in response. In its representations the Ministry identified that it was no longer relying on the exemption in section 14(2)(a). Furthermore, the Ministry raised a preliminary issue concerning the responsiveness of certain portions of the records.

I then sent a modified Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant. I received representations from the appellant, and subsequently received further representations from him.

RECORDS:

The records at issue consist of:

1) the severed portions of two pages of a General Occurrence Report (pages 1 and 2); and

2) the severed portions of the notes of seven OPP Officers (pages 4 to 18).

DISCUSSION:

PRELIMINARY MATTER: RESPONSIVENESS OF THE RECORDS

The Ministry submits that certain severed information concerning other law enforcement matters (not relating to the appellant), as well as the administrative information relating to the printing of the occurrence report, is not reasonably responsive to the substance of the appellant's request. Concerning the administrative information the Ministry states:

> The administrative information reflects the date and time when the OPP computer reports at issue were printed and by whom. The administrative information was created after [the request was] received.

The appellant did not address this issue in his representations.

Previous orders have identified that, to be considered responsive to a request, the records must "reasonably relate" to the request [See Order P-880]. I adopt the approach taken in Order P-880 and find that the portions of the records severed by the Ministry as "non-responsive" do not reasonably relate to the request, and are therefore not responsive to the appellant's request.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the individual's age or gender (paragraph (a)), address or telephone number (paragraph (d)), the personal opinions or views of that individual except where they relate to another individual (paragraph (e)), the views or opinions of another individual about the individual (paragraph (g)) or 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 (paragraph (h)).

The Ministry submits that the information remaining at issue contains the types of personal information set out in paragraphs (a), (d), (e), (g) and (h). The appellant does not address this issue directly.

In my view, the records at issue in this appeal contain information relating to the incident involving the appellant, and therefore contain the personal information of the appellant. I also find that certain severances from the police officer's' notes on pages 7, 13, 15 and 16 also contain the personal information of other identifiable individuals as defined in paragraphs (a), (d) and (h). Furthermore, the undisclosed portions of the General Occurrence Report (pages 1 and 2) also contain the personal information of other identifiable individuals, with one exception.

The one exception is the first full sentence on page 2 of the General Occurrence Report. In my view, this sentence does not contain the personal information of an identifiable individual other than the appellant. It does contain the name of an individual; however, that individual is acting in her professional capacity, and this is not her "personal information" (See PO-2054-I). As this sentence does not contain the personal information of an identifiable individual other than the appellant, and no other exemption claims are made for this information, I will order that it be disclosed to the appellant.

INVASION OF PRIVACY

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 disclosure that limit this general right.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester. I will review the Ministry's exercise of discretion under section 49(b) later in this order, after I have decided whether the exemption applies.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections

21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the records which contain the personal information of the appellant and other identifiable individuals, consisting of certain undisclosed portions of the police officer''s notes on pages 7, 13, 15 and 16, and the remaining information contained on pages 1 and 2 of the General Occurrence Report. More specifically, the Ministry relies on the factors favouring privacy protection at sections 21(2)(f) and (h) of the *Act*. In its representations, the Ministry advises that it is no longer relying on the presumption of an unjustified invasion found in section 21(3)(b) of the *Act*.

Sections 21(2)(f) and (h) read:

> 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,
>
> (f) the personal information is highly sensitive;
>
> ….
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

With respect to the factor in section 21(2)(f), the Ministry submits:

> The Ministry is of the view that the undisclosed personal information may be viewed as highly sensitive…. In view of the circumstances that resulted in the creation of the responsive records, the Ministry is of the opinion that the release of the undisclosed information would cause the affected party personal distress.

Concerning the factor in section 21(2)(h), the Ministry states:

> The Ministry submits that the undisclosed personal information relating to the … incident was supplied implicitly in confidence to the OPP by the affected party. In the circumstances, the affected party would have reasonably expected that the supplied personal information would be kept confidential.

The Ministry then refers to Order MO-1384 issued by Assistant Commissioner Mitchinson in which the factor in the municipal equivalent of section 21(2)(h) applied to similar information.

The Ministry's representations were shared with the appellant.

Although the appellant does not refer directly to the factors listed under section 21(2), he has provided a significant amount of information in his representations. This information includes background information relating to the appellant's dealings with a range of corporations and institutions, as well as detailed information identifying the adverse impact that the incidents referred to in the records have had on him, and continue to have on him. Furthermore, the appellant has provided me with additional information that suggests that portions of the information remaining at issue may be known to the appellant.

As noted above, the remaining records for which the section 49(b) claim is made consist of portions of the General Occurrence Report (pages 1 and 2) and certain severances from the police officer's' notes (portions of pages 7, 13, 15 and 16).

I find that the remaining portions of the records for which the section 49(b) claim is made contain the personal information of identifiable individuals other than the appellant which can be considered "highly sensitive" for the purpose of section 21(2)(f). I am also satisfied, based on the Ministry's representations, that the severed information on pages 1 and 2 of the General Incident Report, and on pages 13, 15 and 16 of the Police Officer's notes, was supplied by the individuals to whom the information relates in confidence. As a result, disclosing these portions of the records would constitute an unjustified invasion of personal privacy under section 49(b).

Absurd result

The appellant has provided me with information relevant to this appeal which indirectly raises the "absurd result" principle. Based on this principle, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b) and/or 21, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]

- the requester was present when the information was provided to the institution [Order P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

Although the appellant may be aware of some portions of the information at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the appellant. As stated by Senior Adjudicator Goodis in Order MO-1378, which dealt with a request for photographs:

> In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, [the exemption] may still apply. In similar circumstances, this office stated in Order M-757:
>
> > Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to [the exemption].
>
> In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

As in Order MO-1378, I find that there is particular sensitivity inherent in the records at issue in this appeal, and that disclosure would not be consistent with the purpose of the exemption. The absurd result principle therefore does not apply, and I find that the portions of the records for which section 49(b) is claimed are exempt under that section.

Exercise of Discretion

The section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

Upon review of all of the circumstances surrounding this appeal and the Ministry's representations on the manner in which it exercised its discretion, I am satisfied that the Ministry

has not erred in the exercise of its discretion not to disclose portions of the records under section 49(b).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/FACILITATE COMMISSION OF AN UNLAWFUL ACT

As set out above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

The Ministry has relied on section 49(a) to deny access to certain undisclosed portions of the records (the severances found on pages 6, 7, 8, 11, 12, 15, 17 and 18 of the police officers' notes). Under section 49(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemption in section 14 would apply to the disclosure of that personal information.

The Ministry claims that section 14(1)(l) applies to the "ten-codes" in the OPP officers' notes. Section 14(1)(l) 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.

The Ministry states that "ten-codes" are used by OPP officers in their radio communications with each other and the Detachments and Communications Centres. The Ministry submits that release of the "ten-codes" would compromise the effectiveness of police communications and possibly jeopardize the safety and security of OPP officers. The Ministry relies on previous orders of this office which have upheld the application of section 14(1)(l) or its municipal equivalent to "ten-codes", including Orders M-393 and M-757.

The appellant does not address this issue in his representations.

Having reviewed the Ministry's representations and the previous orders, I find that the "ten-codes" are properly exempt under section 14(1)(l). As Adjudicator Laurel Cropley stated in Order PO-1665:

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

Therefore, I find that the Ministry has properly applied section 14(1)(l) to this information. I am also satisfied that the Ministry has not erred in the exercise of its discretion not to disclose these portions of the records under section 49(a) of the *Act*.

REASONABLE SEARCH

As identified above, the appellant takes the position that additional records should exist relating to this incident such as a search warrant, an inspection report, and/or records relating to the briefing that took place prior to the incident.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, the Ministry must establish, however, that it has made a reasonable effort to identify and locate records responsive to the request.

The Ministry submitted representations along with an affidavit in support of its position. It states:

> While the Ministry originally believed that the [appellant's request was] for access only to police reports, once the [appellant] confirmed that [he was] interested in additional records, including officer's notes, the Ministry made arrangements for a supplemental records search to be conducted.
>
> As a result of the records searches, the [identified] detachment of the OPP located 18 pages of records as responsive to the appellant's request. [An identified detective], the officer in charge in regard to the [identified] incident involving the [appellant], has provided the attached affidavit outlining the search activities relating to the… [request]. [The] affidavit also responds to the [appellant's] inquiries regarding the possible existence of additional responsive records such as: a search warrant, an inspection report and records relating to the police briefing that took place before the incident.

The affidavit provided by the Ministry and sworn by the detective in charge in regard to the incident describes the searches of the NICHE Records Management System for reports involving the appellant, and the subsequent searches for officer's notes or other records pertaining to the incident.

After identifying the nature of the searches conducted, and the results of those searches, the affidavit addresses some of the specific questions raised by the appellant.

Concerning the appellant's contention that a search warrant should exist, the affidavit identifies that no search of the appellant's premises was conducted, and states:

> The affiant is familiar with this investigation and knows that no search warrant ever existed for this occurrence.

With regard to the appellant's position that additional records relating to the briefing should exist, the affidavit states:

> The only briefing notes in existence for this occurrence are those contained in the notes of [the affiant], who was the officer in charge of this incident.

The affidavit also identifies that other officers present at the briefing may have made personal notes regarding the briefing as recorded in their notebooks. These officers are identified by name, and the relevant excerpts of their notebooks form part of the records at issue in this appeal.

In answer to the appellant's concerns regarding whether an inspection report exists, the affidavit states:

> The Ontario Provincial Police do not complete inspection reports in their course of business, and no such reports are known to exist. The relevant General Occurrence Report is the record of the incident completed by the Ontario Provincial Police.

The Ministry's representations on the search conducted for records, and the detective's affidavit, were shared with the appellant. In his representations the appellant does not question the specific results of the searches conducted, but raises a number of questions concerning matters related to the search.

The appellant identifies a number of statements which were made to him and which, in his view, suggest that additional responsive records may exist. A number of these statements were made by third parties, and some of them seem to refer to incidents occurring after the date of the incident in question. Some of them also refer to statements which the appellant says were made to third parties by OPP officers; however, even if I were to accept that these statements, as set out in the appellant's representations, were made, they do not support the view that records reflecting these statements necessarily exist. The issue in this appeal is whether the search for responsive records conducted by the Ministry was reasonable.

Finally, the appellant refers to an apparent discrepancy in certain background information provided by the affiant in his affidavit (specifically, a reference made in paragraph 11 of the affidavit). He raises the issue of whether this suggests that additional records exist, as the discrepancy seems to relate to a signature on an identified document.

I have reviewed the issue raised by the appellant. Paragraph 11 of the affidavit refers to a document and identifies it as one which the affiant had reference to, but which was returned to an identified hospital and is no longer in the custody or control of the Ministry. I understand the

appellant's confusion at the apparent discrepancy in the description of this document; however, I am satisfied that it does not affect the reasonableness of the search conducted by the Ministry.

In all the circumstances, I find that the Ministry has made a reasonable search for records responsive to this request.

ORDER:

1. I order the Ministry to disclose to the appellant the first full sentence on page 2 of the General Occurrence Report by **September 22, 2004**.

2. I uphold the Ministry's decision to withhold the remaining severed portions of the records.

3. I find that the Ministry has made a reasonable search for records responsive to the request.

4. I reserve the right to require the Ministry to provide me with a copy of the portion of the record which is disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: August 31, 2004
Frank DeVries
Adjudicator