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

ORDER PO-2416

Appeal PA-050057-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

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 access to the following record:

> …an email received by the Ontario Provincial Police Lambton Detachment with the timeframe of November 21 to 30, 2004 referencing [an organization the requester is involved in] and/or [the requester's name].

The Ministry located the record responsive to the request, and granted access to portions of it. In its decision letter, the Ministry stated that access to portions of the responsive record were denied on the basis of the following exemptions in the *Act*:

- section 14(1)(l) (facilitate commission of unlawful act),
- section 14(2)(a) (law enforcement),
- section 15(b) (relations with other governments),
- section 49(a) (discretion to refuse requester's own information), and
- section 49(b) (invasion of privacy) with reference to the presumption in section 21(3)(b) and the factor in section 21(2)(f).

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve the issues in this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. In its representations, the Ministry identified that it was no longer relying on the exemption in section 49(b), and that section is therefore no longer at issue in this appeal. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant, who also provided representations.

RECORDS:

The records remaining at issue consist of the following severed portions of a 2-page e-mail:

- the first severance on page 1 (an operational police code),
- the second severance on page one (certain introductory wording),
- the third severance on page one (an operational police code),
- the first severance on page two (a portion of the narrative of the officer),
- the second severance on page two (a portion of the narrative of the officer).

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether the exemption at section 49(a) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The definition states, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
>
> (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;

The Ministry submits that the information in the record contains the "personal information" of the appellant as that term is defined in the sections of the *Act* set out above. I agree, and find that the record contains the personal information of the appellant. The record does not contain the personal information of any other identifiable individual.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Under section 49(a), the Ministry has the discretion to deny the appellant access to her own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this appeal, the Ministry relies on section 49(a) in conjunction with sections 14(1)(l), 14(2)(a) and 15(b).

LAW ENFORCEMENT

Section 14(1)(l) – facilitate commission of unlawful act

The Ministry takes the position that the severed portions of the record fall within the scope of section 14(1)(l), which reads:

> 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.

As section 14(1)(l) uses the words "could reasonably be expected to", the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)]. However, it is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Operational police codes

The Ministry takes the position that the disclosure of the operational police codes found in the first and third severances would result in the harm contemplated by section 14(1)(l), and states that the release of that information:

> …would leave OPP officers more vulnerable and compromise their ability to provide effective policing services. For example, if individuals engaged in illegal activities were monitoring OPP radio communications and had access to the meanings of the various police codes it would be easier for them to carry out criminal activities and would jeopardize the safety of OPP officers. Intimate knowledge of the whereabouts of a given officer and of the activities he/she is involved with at any given time would be a powerful aid to individuals involved in criminal activities. The Ministry submits that the exempt police codes have an inherent operational sensitivity similar to police "ten" codes that have been found to be exempt from disclosure in a number of previous IPC orders (M-393, M-757, PO-1877 and PO-2209).

The appellant has provided a significant amount of information in support of her position that she should have access to the severed portions of the record. These representations relate largely to the appellant's concerns about the actions of officials from various ministries. The representations do not directly address access to the specific police codes at issue.

A number of previous orders have found that police codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm which may result from their release (see, for example, M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339). This includes codes which reveal identifiable zones from which officers are dispatched for patrol and other law enforcement activities. In the circumstances of this appeal, I am satisfied that the Ministry has provided sufficient evidence to establish that disclosure of the operational codes, found in the first and third severances on page one, could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

I therefore find that the section 49(a) exemption applies to these operational codes. I will now address the application of section 14(1)(l) to the balance of the severed information.

Other severed information

With respect to the remaining information that has been severed from the record, the Ministry states:

> …the remainder of the information contained on page 1, as well as the information on page 2, the Ministry submits that release of this confidential information may reasonably be expected to hamper the OPP in their efforts to respond to incidents involving allegations that unlicensed individuals have been illegally hunting.
>
> It is important to note that innocuous or irrelevant information may over time become sensitive or valuable as circumstances change in a law enforcement context. As evidenced by the content of the responsive record in its entirety, individuals, such as the appellant, may hold very strong views regarding hunting. In such circumstances, incidents can escalate leading to situations where the laying of charges is necessary for reasons of public safety. The management of such incidents can be quite challenging. Disclosure of the exempt information to the appellant would make the OPP's task of responding to such incidents more difficult. Disclosure of the exempt information would reveal to the appellant the OPP's assessment and analysis of the incident involving the appellant. The appellant could use this information to modify her behaviour and activities, etc. in order to avoid attracting undesired attention from law enforcement officials during the course of future related incidents.
>
> The Ministry relies upon the content of the withheld parts of the responsive record in support of its position in this regard.

The appellant has provided a significant amount of information in support of her position that she should have access to the severed portions of the records. Her representations focus on her concerns regarding the actions of officials from various ministries. In particular, she expresses concerns that misinformation about her and the organization to which she belongs is being shared or distributed amongst officials of the ministries. She also provides numerous attachments to her representations in support of her position that ministry officials are taking a "hostile and volatile" attitude towards her. She identifies her concern that, as a result of information-sharing, officials from various ministries have a biased view of her. With respect to the specific record at issue, she states:

> Therefore, it has become important to understand how the relationship between the OPP and other enforcement agencies are interrelated, and, from my

perspective, must be addressed to ensure all citizen's rights are protected.

The appellant also reviews the background to the incident reflected in the record, and identifies the reasons why she is interested in obtaining access.

Findings

I have carefully reviewed the severed portions of the records at issue, as well as the representations of the parties, to determine whether the exemption at section 14(1)(l) applies to the remaining severed information. In my view, the exemption does not apply to most of the remaining information severed from the record. It does, however, apply to the last sentence severed from page two of the record.

With respect to the second severance on the first page of the record, which is a brief introductory portion of the email message, I am not satisfied that the disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Other than the general statements set out above, the Ministry has not provided me with sufficiently "detailed and convincing" evidence that the identified harms under section 14(1)(l) would result from the disclosure of this information, nor do I find from my own review of this "introductory" information that such a harm could reasonably be expected.

Similarly, with respect to the severed information on the second page, most of this information does not meet the requirements of section 14(1)(l). The first severance on this page identifies the results of a further investigation into the incident resulting in the creation of the record, and the views of others involved in the incident. The first part of the second severance consists of information relating to the past actions of the appellant. I am not satisfied that the disclosure of any of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime under section 14(1)(l). Specifically, I find that the Ministry has not provided sufficiently "detailed and convincing evidence" to support its position. Although the Ministry's statement that the disclosure of the exempt information would "reveal to the appellant the OPP's assessment and analysis of the incident involving the appellant" may be true, it is not clear to me how revealing this information could lead to the harms described in section 14(1)(l).

However, with respect to the information contained in the last severed sentence on page two, I am satisfied that its disclosure could reasonably be expected to hamper the control of crime as contemplated by section 14(1)(l). The information contained in the last sentence of the record contains the author's views about how to deal with situations involving the appellant in the future. The Ministry states that the appellant could "use this information to modify her behaviour and activities, etc. in order to avoid attracting undesired attention from law enforcement officials during the course of future related incidents". In the circumstances, I am satisfied that the information contained in the last severed sentence on page two qualifies for exemption under section 14(1)(l). I make this finding on the basis of the information contained in the records, the representations of the Ministry, and with an awareness of the fact that the law

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

I have reviewed the appellant's representations in detail, including the video and audiotapes provided by her. It is clear from the material that the appellant has had numerous interactions with officials of various ministries, many of which appear to have been confrontational and frustrating for all of the participants. The appellant is interested in compiling information about the nature of the information that is shared about her between various ministries and government agencies. In most instances, information of this sort should be made available to a requester. However, in my view, and based on the comments made by the Divisional Court in *Ontario (Attorney General) v. Fineberg* set out above, different considerations apply in a law enforcement context. Accordingly, I uphold the exemption claim in section 14(1)(l) for the last sentence on page two of the record.

In summary, I find that the police codes in the first and third severances on page one, and the last sentence of page two, qualify for exemption under section 14(1)(l). Therefore, this information is exempt under section 49(a).

I will now review whether the other exemptions claimed by the Ministry apply to the remaining information.

Section 14(2)(a) - law enforcement report

The Ministry takes the position that the undisclosed information contained in the record qualifies for exemption under section 14(2)(a) which states:

> 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 Ministry must satisfy each part of the following three part test:

- the record must be a report; and
- the report must have been prepared in the course of law enforcement, inspections or investigations; and
- 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 term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
> > (c) the conduct of proceedings referred to in clause (b)

The Ministry takes the position that the record falls within parts (a) and (b) of the definition of "law enforcement" set out above, as the OPP is involved in both "policing" and with investigations or inspections which include enforcing compliance with statutes or regulations. I accept the Ministry's position that the OPP's activities qualify as "law enforcement" matters.

The Ministry also takes the position that the record qualifies as a "report" for the purpose of section 14(2)(a). Specifically, it refers to Order 37, in which former Commissioner Sidney Linden stated:

> The *Act* does not define the word "report". However, "report" is defined in the *Oxford Dictionary* as: "an account given or opinion formally expressed after investigation or consideration or collation of information..."

The Ministry also refers to the following portion of Order P-170, which examines the word "report":

> … the term "report" embraces a broad range of kinds of documents. In Order 37 (Appeal Number 880074) at page 6, the Commissioner derived assistance from the dictionary definition of the word "report" as "an account given or opinion formally expressed after investigation or consideration or correlation of information ...". Thus, the exemption is not limited in its coverage to documents which might formally be referred to by some such phrase as "Investigative Reports", but, rather, may include any one of a broad range of documents providing information or opinions that have been prepared in the course of law enforcement inspections or investigations.

In light of the above, the Ministry states:

> The e-mail at issue is a formal record of the investigation undertaken by the [OPP] as a result of the appellant's complaint to the OPP ….

> The OPP investigation was undertaken as a result of the appellant's complaint. The e-mail may be viewed as a formal, final report containing a synopsis of the investigation of the complaint and the findings of the responsible officer.

The Ministry also refers to the content of the e-mail in support of its position that it is a "report".

I have carefully reviewed the Ministry's representations and the record at issue in this appeal. In my view, the record does not meet the definition of a "report" for the purposes of section 14(2)(a).

The Ministry is correct in stating that the word "report" is not defined in the *Act*. However, in Order 200, former Assistant Commissioner Tom Mitchinson 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. Numerous subsequent orders have applied this test when determining whether a document qualifies as a "report" for the purpose of section 14(2)(a). I agree with this approach and will apply it to the record at issue in this appeal.

The record at issue is a two-page email message, a large portion of which contains the observations made by an officer who attended at the scene, and it records the actions of various parties, including statements made by them. A portion of the record also contains the views of the officer in regard to the incidents, while a small portion contains a reference to possible "next steps" or future actions. In my view, much of this record contains mere observations or recordings of fact and is similar to the type of information contained in a document such as a police occurrence report. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations (see Orders PO-1796, P-1618, M-1341, M-1141, and P-1959).

On my review of the email record at issue in this appeal, I am satisfied that it does not meet the definition of a "report" under the *Act*. It consists of observations and recordings of fact rather than formal, evaluative accounts. I find that the content of this record can be characterized as descriptive, and not evaluative, in nature.

Accordingly, the remaining severed portions of the record do not qualify for exemption under sections 14(2)(a) and 49(a).

RELATIONS WITH OTHER GOVERNMENTS

The Ministry takes the position that the record qualifies for exemption under section 15(b), which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

The words "could reasonably be expected to" appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". As identified above, in the case of most of these exemptions, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry submits that:

> …disclosure of the information contained in the second severance on page 1 of the record at issue would jeopardize the conduct of relations between the OPP and a municipal police service. The OPP's relationship with the municipal police service is an ongoing one. It could reasonably be expected that if the withheld information was released as a result of the appellant's [request under the *Act*], the municipal police service may be less willing to share information in the future with the OPP.

The Ministry then refers to the content of the information withheld in support of its position that section 15(b) applies.

The Ministry also takes the position that a municipal police service is a "government agency" for the purposes of section 15 of the *Act*. It refers to the powers granted to a municipal government under section 2 of the *Municipal Act* in support of its position.

Previous orders have addressed the issue of whether a municipality is a government for the purposes of section 15 of the *Act*. In Order 69, former Commissioner Sidney Linden held that a municipality is not a government for the purposes of section 15 of the *Act*. In that order the former Commissioner states:

> In my view, for an exemption under either subsection 15(a) or (b) to apply, I must first determine if a municipality is a government for the purposes of section 15 of

this *Act*. An examination of the meaning of the word "municipality" in the context of the *Act* itself is a necessary starting point to making this determination.

In subsection 2(1) of the *Act*, the definition of "institution" encompasses a municipality. In subsection 15(b), the pertinent phrase used is "another government". If a municipality is an institution for the purposes of the *Act*, it would be contrary to the wording of the Act to extend the meaning of "another government" to include "municipality" without specific statutory direction. A plain reading of subsection 15(b), taking into consideration the context of the *Act*, leads me to the conclusion that "another government" means the federal government, another provincial government, or a foreign government.

The institution relies on several court decisions as authority for the proposition that a municipality is a government. Specific reference is made in the institution's submissions to *McCutcheon v. Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.) and *McKinney v. University of Guelph* (1987), 46 D.L.R. (4th) 193(Ont. C.A.).

In my view, reliance on these decisions to determine the meaning of the word "government" in the context of this Act is problematic. I have an obligation to rely on the *Act*'s written expression in ascertaining legislative intent in the first instance. As Pierre A. Cote points out in *The Interpretation of Legislation in Canada* (1984 Les Editions Yvon Blais Inc., at p. 443), "there is a danger in taking the meaning given by one judge to a word in a specific context, and transposing it to another enactment for which a different context may suggest a different meaning for the same word."

With this in mind, I note that the legal authorities relied upon by the institution deal with entirely different statutory contexts. In *McCutcheon v. Toronto and McKinney v. University of Guelph*, the courts' comments with respect to the status of a "municipality" were made in the context of the application of the *Canadian Charter of Rights and Freedoms*.

The interpretation that a municipality is not a "government" for purposes of the *Freedom of Information and Protection of Privacy Act, 1987* is supported by the legislative history of section 15. Section 15 of the Act had its genesis in the recommendations contained in the *Report of the Williams Commission - Public Government for Private People* (*The Report of the Commission on Freedom of Information and Individual Privacy/1980* - Queen's Printer of Ontario). It is clear from a review of the Commission's discussion leading to the recommendation of a provision very similar to the present section 15 that the intent of such a provision was to exempt sensitive information that may be generated by "international relations or the relations of the province of Ontario with the governments of other jurisdictions". (See pages 304 to 307, Volume 2, *The Report of the Commission on Freedom of Information and Individual Privacy/1980*).

> In the clause-by-clause review of Bill 34 by the Standing Committee on the Legislative Assembly, the comments of the Attorney General with respect to the purpose of the section 15 exemption were unequivocal. The Attorney General stated that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". The Attorney General explicitly stated that a municipality was not intended to be a "government" for the purposes of section 15 (March 23, 1987, Comments made after second reading of the Bill.).
>
> Finally, if a municipality was considered to be a government for the purposes of section 15 of the *Act*, a letter from a local library board, for example, could be placed on the same footing, and qualify for the same exemption as a document received from the government of another nation. This would greatly expand the number of records that could be withheld from the public indefinitely, not just for the duration of a period of negotiations. In my view, this result would be contrary to the spirit and right of access to information as set forth in the *Act*. Clear statutory direction would be necessary to justify such a position, and as I have indicated, I see no such direction in the *Act*.
>
> In view of the above, I am not able to accept the institution's position that a municipality is a government for the purposes of the *Freedom of Information and Protection of Privacy Act, 1987*. Accordingly, I find that the exemptions claimed under section 15, do not apply.

Based on the above, I am satisfied that a municipal police service is not a "government" for the purpose of section 15 of the *Act*. In any event, in the circumstances, even if the municipal police service could be considered a "government", the Ministry has failed to establish that disclosure of the severed information could reasonably be expected to reveal information the Ministry received in confidence from the police. The Ministry has not provided me with the necessary detailed and convincing evidence to establish that disclosure of these records would reveal information the Ministry received "in confidence" from the police service, either expressly or by implication. Specifically, I am not satisfied that the introductory wording on page one of the record which the Ministry claims was received "in confidence" from the police is either very sensitive or inherently confidential.

Accordingly, I conclude that sections 15(b) and 49(a) do not apply to the remaining severed portions of the record.

ORDER:

1. I uphold the Ministry's decision to deny access to the first and third severances on page one, and to the last sentence on page two of the record.

2. I order the Ministry to disclose the remaining portions of the record at issue to the appellant by **October 18, 2005**.

3. To ensure compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of the record provided to the appellant, upon request.

Original signed by:

September 27, 2005

Frank DeVries
Adjudicator