



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

# **ORDER PO-2394**

**Appeal PA-040217-1**

**Ministry of Community Safety and Correctional Services**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7538  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Act* for access to a full copy of the OPP report relating to a 911 call made by the requester on a specified date.

The Ministry granted partial access to the requested OPP records, which included an Occurrence Summary and a General Occurrence report. Access to parts of the responsive records were denied in accordance with section 49(a), read in conjunction with sections 14(1)(l) and 14(2)(a), and 49(b), read in conjunction with section 21. In support of its section 49(b) claim, the Ministry cited the application of sections 21(2)(f) and 21(3)(b). In its decision letter, the Ministry also advised that information relating to the printing of the responsive records had been removed from the records, as being non-responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

Following discussion with the mediator, the Ministry notified an individual whose interests may be affected by the outcome of the appeal (affected person), seeking his views in regard to the disclosure of the records. The affected person did not respond to the Ministry's notice.

Also during mediation, the appellant confirmed that she was not pursuing access to the portions of the records identified by the Ministry as non-responsive.

No further mediation was possible and the file was moved to adjudication.

I initially sent a Notice of Inquiry to the Ministry and the affected person. I received representations from the Ministry. The Ministry also provided me with a copy of the letter it had received from the affected person.

The Ministry then issued a supplemental decision letter to the appellant claiming the discretionary exemption at section 14(1)(e) to withhold the remaining undisclosed parts of the responsive records in addition to those exemptions already claimed.

I then sent a Notice of Inquiry to the appellant also with a copy of the non-confidential portions of the Ministry's representations. I did not receive representations from the appellant. The appellant did not respond to phone messages and could not otherwise be contacted.

## **RECORDS:**

The records at issue consist of the withheld portions of the Occurrence Summary and the General Occurrence Report.

## **DISCUSSION:**

### **LATE RAISING OF DISCRETIONARY EXEMPTION**

As stated above, the Ministry issued a supplemental decision to the appellant after the inquiry process had commenced, claiming the application of the discretionary exemption at section 14(1)(e) of the *Act*.

The *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *Code*) sets out the basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

In an appeal from an access decision an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Section 14(1)(e) is a discretionary exemption and is therefore one of the exemptions covered by section 11 of the *Code*. In this case, the Confirmation of Appeal for this file is dated August 4, 2004. The Ministry was advised in the Confirmation of Appeal that it had until September 9, 2004 to raise any new discretionary exemption. The section 14(1)(e) exemption was raised by the Ministry after this deadline.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In support of its raising section 14(1)(e) after the 35-day period, the Ministry submits in its representations:

...the raising of a new discretionary exemption from disclosure in the circumstances of this particular appeal does not compromise the integrity of the appeals process and does not prejudice the interests of the appellant. The Ministry submits that circumstances that have recently come to the Ministry's attention have resulted in the necessity of claiming the additional discretionary exemption.

As the appellant has not yet been invited to submit written representations, the Ministry believes that the raising of a new additional discretionary exemption at this point in the appeals process should not result in delay arising from the necessity of re-notification of the appellant.

The appellant was provided with a copy of this portion of the Ministry's representations and invited to comment on the issue of the late raising of the section 14(1)(e) discretionary exemption. The appellant did not provide any representations.

I accept the Ministry's representations, that in the circumstances of this appeal, the integrity of the appeals process has not been compromised and the appellant's interests have not been prejudiced as the appellant has been provided with an opportunity to address the issue of the application of section 14(1)(e). Furthermore, I accept the Ministry's representations that only recently have circumstances come to its attention which warrant the Ministry claiming section 14(1)(e). Accordingly, I will consider the application of section 14(1)(e) to the information at issue.

## **PERSONAL INFORMATION**

In order to determine which sections 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) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The Ministry submits that the information remaining at issue contains the types of personal information listed above with respect to identifiable individuals. I agree. Based on my review of the undisclosed information, I find that some of the withheld information relates to the appellant, and qualifies as personal information on that basis, other portions include the personal information of other identifiable individuals.

#### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION**

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their 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 case, the Ministry relies on section 49(a) in conjunction with sections 14(1)(e), 14(1)(l) and 14(2)(a). In order to determine whether section 49(a) applies, I must first determine whether sections 14(1)(e) and (l) apply to the information remaining at issue. Due to the manner in which I dispose of the issues under section 14(1)(e) and (l), I will not be dealing with section 14(2)(a).

## LAW ENFORCEMENT

Sections 14(1)(e) and (l) read as follows:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

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)

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.)].

Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The Ministry submits that the OPP records remaining at issue fall within parts (a) and (b) of the definition of “law enforcement”. In particular, the Ministry states:

Part (a) Policing: encompasses the activities of police services. These activities include the investigation of offences, the collection and analysis of law enforcement information, the prevention of crime, the maintenance of law and order the provision of protective services.

Part (b) Investigations or inspections: encompasses the activities of police services to enforce compliance with standards, duties and responsibilities set out in statute or regulation.

### **Section 14(1)(e)**

In regard to section 14(1)(e), the Ministry identifies that the Ontario Court of Appeal has drawn a distinction between the requirements of establishing the harm in section 14(1)(e) and the requirement of establishing the harms in the other parts of section 14. As noted above, section 14(1)(e) requires that the Ministry must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure and that the reasons for resisting disclosure are not frivolous or exaggerated.

In support of the application of section 14(1)(e), the Ministry provided confidential representations and a confidential letter that it received from an affected person.

### **Section 14(1)(l)**

The Ministry applied section 14(1)(l) to police codes found on Occurrence Summary. The Ministry submits that release of these codes 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 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 that he/she is involved with at any given time would be a powerful aid to individuals involved with 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).

## **Findings**

From my review of the Ministry's confidential representations and the affected person's letter submitted by the Ministry, and my review of the personal information remaining at issue, I accept that in the circumstances of this appeal, the Ministry has provided a reasonable basis for believing that a person's safety could be endangered by disclosing the records. Accordingly, I find that this information is exempt under section 49(a), in conjunction with section 14(1)(e).

In regard to the OPP code information on the Occurrence Summary, while the codes contained on this record are not the "ten codes" which this office has protected in the past, I find that disclosure of this information could hamper the control of crime. As the Ministry states, these codes provide specific information to OPP officers and disclosure of these codes would disclose particular information to others regarding OPP operations. As such, disclosure of the OPP Code information could reasonably be expected to hamper the control of crime as set out in 14(1)(l).

Consequently, I find that section 49(a) in conjunction with sections 14(1)(e) and (l) apply to exempt the information remaining at issue from disclosure.

## **EXERCISE OF DISCRETION**

The section 49(a) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that it could withhold it. The Ministry must exercise its discretion. On appeal, the Commissioner may determine whether the Ministry failed to do so.

The Ministry provided extensive submissions in support of its exercise of discretion not to disclose the information which is exempt under section 49(a) including the following:

Given the highly sensitive nature of the incident in question, the Ministry was satisfied that release of additional information from the records at issue would cause personal distress to other individuals...

With respect to the non-disclosure of police codes, the Ministry carefully considered the potential harm to future law enforcement activities and the safety of OPP officers should the exempt police codes be publicly available. The Ministry is of the view that this potential harm is a significant factor.

The Ministry also took into consideration that the incident in question happened over two years [ago]. However, as evidenced by the fact that the appellant has requested to access this information on two separate occasions and appealed the Ministry's decision both times, the appellant has a continuing interest in accessing the withheld information. In the circumstances, the Ministry took into consideration the possible benefits to the appellant should the withheld information be released.



With respect to the late raising of the discretionary exemption contained in section 14(1)(e), the Ministry decided to claim this exemption only after very careful reflection. In this regard, the Ministry took into consideration the relationship between the affected party and another individual. It is the historic practice of the Ministry to protect confidential information that could reasonably be expected to endanger the physical safety of individuals.

In considering the circumstances of this appeal and the representations of the Ministry, I am satisfied that the Ministry has taken the appropriate factors into consideration in exercising its discretion, and has not erred in the exercise of its discretion not to disclose the withheld information under section 49(a) of the *Act*.

**ORDER:**

I uphold the Ministry's decision.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ May 24, 2005