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

ORDER PO-2492

Appeal PA-050257-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

A Police Services Board (the Police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) for access to records relating to certain complaints that had been filed against the requester. Pursuant to the transfer provisions in section 18(3) of the municipal *Act*, the Police transferred part of the request to the Ministry of Community Safety and Correctional Services (the Ministry) as the Ontario Provincial Police (the OPP) had conducted an investigation into certain allegations against the requester and it appeared that the OPP had a "greater interest" in the subject matter of the records as defined in section 18(4) of the municipal *Act*.

The Ministry is an institution under the *Freedom of Information and Protection of Privacy Act* (the *Act*), and the Ministry dealt with the request under that statute, which therefore applies in this appeal. The Ministry located responsive records and granted partial access to them. Access to the undisclosed portions of the responsive records was denied on the basis that this information was exempt from disclosure under section 49(a) (discretion to refuse requester's information), in conjunction with sections 14(1)(l) and 14(2)(a) (law enforcement), as well as section 49(b) (invasion of privacy) of the *Act*, in conjunction with section 21(3)(a) and (b) and 21(2)(f). In addition, the Ministry argued that other records fell outside the ambit of the *Act* pursuant to section 65(6).

The requester, now the appellant, appealed this decision. During the mediation stage of the appeal, the appellant narrowed the scope of the issues under appeal. The appellant confirmed that the non-responsive portions of the records, the employment-related records in the officers' notes, to which access was denied under section 65(6) of the *Act*, were no longer at issue. The appellant indicated that he was only pursing access to the OPP records relating to the investigation of an alleged sexual assault by him against his daughter. In particular, he was only seeking access to the undisclosed portions of nine pages of records, specifically pages 2, 4, 5, 6, 7, 8, 9, 10 and 11 from an investigation report. Further mediation was not possible and the file was moved to the adjudication stage of the appeal process.

This office began the adjudication by sending a Notice of Inquiry to the Ministry, inviting it to provide representations. The Ministry responded with representations. At the same time, the Ministry provided the appellant with a revised copy of page 2 of the records with further information disclosed. A complete copy of the Ministry's representations, along with the Notice of Inquiry, was then sent to the appellant. The appellant provided representations in response, stating that he was seeking only information about or provided by his former wife and his minor daughter. The Ministry was asked to provide representations in reply to those submitted by the appellant, solely on the issue of Absurd Result. The Ministry submitted additional representations by way of reply. The appeal was subsequently assigned to me.

RECORD:

The information remaining at issue consists of the undisclosed portions of page 2 and pages 4 to 11 of an investigation report. The sections that are relied on by the Ministry in conjunction with sections 49(a) and (b) of the *Act* are set out in the chart below:

Page #	Exemptions
2	49(a), 14(2)(a); 49(b), 21(2)(f), 21(3)(b)
4 to 5	49(a), 14(2)(a); 49(b), 21(2)(f), 21(3)(a) and (b)
6 to 7	49(a), 14(2)(a); 49(b), 21(2)(f), 21(3)(b)
8	49(a), 14(2)(a); 49(b), 21(2)(f), 21(3)(a) and (b)
9 to 10	49(a), 14(2)(a); 49(b), 21(2)(f), 21(3)(b)
11	49(a), 14(2)(a); 49(b),21(2)(f), 21(3)(a) and (b)

DISCUSSION:

Right of Custodial Parent to Access Records of Minor Child

Section 66(c) of the *Act* provides that:

> any right or power conferred on an individual by this Act may be exercised,
>
> > where the individual is less than sixteen years of age, by a person who has lawful custody of the individual.

The appellant, along with his written submissions, provided one page of a copy of a final court order filed on June 21, 2005. This order was made on consent of the appellant and his former wife. It postdates the appellant's request for the information sought in this appeal, but predates the filing of the notice of appeal from the Ministry's decision. This order provides that the appellant was to have joint custody of his minor daughter. This order further provides that the appellant's daughter was to reside with his former wife. The appellant was entitled to access on specific days.

All of the record is claimed to be exempt from disclosure by reason of section 49(a) in conjunction with section 14(2)(a) (law enforcement report). If section 66(c) applies, it permits the appellant to exercise his daughter's rights under the *Act*, including any right she would have to access her own personal information. However, that right is subject to the possible application of exemptions, including section 49(a) in conjunction with section 14(2)(a). In view of the conclusions I have reached about these sections, below, the application of section 66(c) would not assist the appellant in the circumstances of this appeal.

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 if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Both the Ministry and the appellant agree that the record contains personal information of the appellant, his former wife and his daughter.

I have reviewed the contents of the record at issue and find that it contains the "personal information" of the appellant, his former wife and his daughter, along with other identifiable individuals. The personal information about the appellant's former wife and his daughter includes information relating to their age, sex, marital or family status (paragraph (a) of the definition), their education or medical or employment history (paragraph (b)), their personal opinions or views (paragraph (e)), the views or opinions of another individual about them (paragraph (g)), and their names where it appears with other personal information relating to them (paragraph h)).

The personal information about the appellant consists of information about his marital or family status (paragraph (a)), his medical or employment history (paragraph (b)), his personal opinions or views (paragraph (e)), and the views or opinions of another individual about the appellant (paragraph (g)).

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.

Section 14(2)(a): Law Enforcement exemption

In this case, the Ministry relies on section 49(a), in conjunction with section 14(2)(a).

Section 14(2)(a) 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;

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 word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

Representations of the Ministry

The Ministry submits that the withheld parts of the record fall within parts (a) and (b) of the definition of "law enforcement". The Ministry states:

> The term policing is neither defined in the *FIPPA* (the *Act*) nor in the *Police Services Act* [the *PSA*]. The *PSA* provides the primary statutory base for the existence of the OPP and provides for the police service's composition, authority, jurisdiction, discipline and other pertinent matters.
>
> Some insight as to what policing involves can be found in Sections 1 and 42 of the *PSA* which state:
>
> (Section 1) Police services shall be provided throughout Ontario in accordance with the following principles:
>
> 1. The need to ensure the safety and security of all persons and property in Ontario.
>
> 2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.

> (Section) 42. The duties of a police officer include,
>
> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
>
> (e) laying charges and participating in prosecutions;

It is submitted that the definitions above are part of what is included in the term policing found in the *FIPPA*.

In Order P-200, former Commissioner Tom A. Wright established the following three-part test which must be met to exempt a record under section 14(2)(a):

> 1. the record must be a report; and
>
> 2. the report must have been prepared in the course of law enforcement, investigations or inspections; and
>
> 3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

Former Commissioner Wright provided the following further insight into the three-part test in Order P-200:

> The word "report" is not defined in the [*FIPPA*]. 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.

The investigation report at issue was prepared by the OPP in the course of law enforcement. The report documents an investigation undertaken by the OPP into allegations of sexual assault involving the appellant. The report is a formal report containing background and factual information, an analysis by police of information relating to the sexual assault allegation, investigative opinions, a summary and a conclusion. The report contains sensitive information provided by sources, including witnesses, as well as references to the evidence obtained during the investigation. Page eleven of the investigation report contains the specific conclusion of the investigator in respect to the allegation of sexual assault. This part of the report was released to the appellant.

The Ministry further submits that following comments by Inquiry Officer John McCamus in Order P-170 are particularly relevant in the circumstances of this appeal and the application of section 14(2)(a):

> Subsection 14(2)(a) is unusual in the context of the [*FIPPA*], in that it exempts a type of document, a report. The exemption does not require that a report need additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.
>
> Further, subsection 14(2)(a) enables the head of the agency to refuse to disclose the entire "report". Thus, unlike other exempting provisions in the statute, there is no obligation to sever portions of the documents which do not contain sensitive material and disclose them to the requester.
>
> Finally, it might be noted that 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.

Notwithstanding the foregoing, the Ministry has released parts of the responsive investigation report to the appellant.

Representations of the Appellant

The appellant submits that since the investigation is concluded and since he has been cleared of any charges, he is entitled to the final disposition of the case which indicates that the complaint against him was unfounded. He submits that anything and everything can lead to a proceeding in a court or tribunal. Therefore, it would be impossible and futile to appeal anything because of section 14(2)(a). He claims that providing the information that he is requesting would not jeopardize the safety or security of any person in Ontario. Specifically, he claims to already have received copies of documents that show the name of the complainant in the report.

Findings

In my view, the withheld parts of the record satisfy the requirements set out in the three-part test for exemption from disclosure enunciated in Order P-200 by former Commissioner Wright.

Firstly, the record consists of a formal statement or account of the results of the collation and consideration of the information gathered during the investigation into the appellant's personal conduct, and includes findings, summaries, analyses and recommendations. Accordingly, I find

that the record qualifies as a "report" within the meaning of section 14(2)(a) [Orders P-200, MO-1238, MO-1337-I].

Secondly, this report was prepared by the OPP in connection with an investigation into whether the appellant, a police constable, had committed an offence in his personal capacity under the *Criminal Code*. The term "law enforcement" has been found to apply in the case of a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]. Therefore, I find that the report was prepared in the course of law enforcement.

Thirdly, the report was prepared by the OPP, an agency that has the function of enforcing and regulating compliance with the law, in this case the *Criminal Code*. Accordingly, I find that all three parts of the section 14(2)(a) test have been met.

Therefore, I find that the record qualifies for exemption under section 14(2)(a) of the *Act*, and they are exempt under section 49(a).

Public Interest Override

The appellant argues that the public interest override provisions of section 23 of the *Act* are relevant and should allow him access to the record.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not apply to records exempt under sections 12, **14**, 14.1, 14.2, 16, 19 or 22.

As the record is exempt under section 14, the public interest override provision does not apply.

Exercise of Discretion under Section 49

Section 49(a) provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information where section 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so [Orders PO-2129-F and MO-1629].

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations of Ministry

The Ministry states that:

> The *FIPPA* request the appellant has submitted to the Ministry is a request for access to his own personal information records. The Ministry is mindful of the fundamental principles underlying the *FIPPA* legislation. The Ministry considers each and every access request on an individual, case-by-case basis. The Ministry is cognizant of the fact that the law enforcement and privacy exemptions that apply to the records at issue are discretionary exemptions.
>
> The Ministry carefully weighed the appellant's right of access to records that contain his personal information against the other identified individuals' rights to privacy protection. The Ministry took into consideration that the appellant is an individual rather than an organization. The Ministry considered providing the appellant with total access to the information at issue notwithstanding that discretionary exemptions apply. The Ministry ultimately decided to provide the appellant with partial access to the requested information.
>
> Given the highly sensitive nature of the allegations that resulted in the creation of the responsive records, the Ministry was satisfied that release of additional information from the records at issue would cause personal distress to other identifiable individuals. The Ministry was also satisfied that the information remaining at issue contained medical information and information that was compiled and identifiable as part of an investigation into a potential violation of law.
>
> The Ministry also took into consideration that the records relate to a matter that was investigated by the OPP in the relatively recent past (2004). The Ministry also took into consideration the possible benefits to the appellant should the withheld information be released.
>
> It is the historic practice of the Ministry to provide individuals with access to as much information as possible from police records. The Ministry considered whether release of the records at issue could generally discourage parties from sharing information with the police regarding potential violations of law and undermine the ability of the OPP to provide policing services. The Ministry does

not believe that release of the records at issue would increase public confidence in the provision of policing services by the OPP.

The Ministry has considered the relationship between the appellant and other individuals referenced in the records at issue. The Ministry has also given careful consideration to the absurd results principle in this regard.

In view of the particular circumstances of the appellant's request, the Ministry in its exercise of discretion concluded that the level of disclosure being provided was appropriate. The Ministry has released two decision letters to the appellant providing him with a substantial portion of the investigation report at issue. The Ministry submits that release of the withheld information is not appropriate in the circumstances of the appellant's request.

Representations of the Appellant

The appellant submits that the non-release of the requested information is causing him excessive personal distress. He claims that because similar information was released to him during the *Police Services Act* hearing into his conduct as a policeman, disclosure would not result in personal distress to his former wife and his daughter.

The appellant submits that he should be entitled to have the information of his minor daughter, as he has joint custody of her. He claims to have the information already through other means. He has not been charged, however if he had been charged, he maintains that he would get the record in issue as part of disclosure to the accused. He claims that releasing the record would not hurt anyone or identify anyone not already known to the appellant.

Findings

In the circumstances of this appeal, I do not accept the appellant's argument that the nondisclosure of the information causing him excessive personal distress would require the Police to exercise their discretion by granting him access to sensitive information about other individuals. Nor do I accept his argument that disclosure of the information would not result in personal distress to the appellant's former wife and his daughter, given the highly sensitive contents of the record. I also do not accept the appellant's argument that the undisclosed information in the record, which forms part of a report to two supervisory OPP officers and to the Police, would necessarily have been disclosed if charges had been laid against him.

Moreover, I am not satisfied that the appellant has already received similar documents in the course of the *Police Services Act* proceedings. The appellant provided with his submissions the following documents:

- a transcript of a videotaped interview of his former wife taken during the course of the investigation of charges against the appellant under the *Police Services Act*;

- a general occurrence report prepared by the … Police Service as a result of a complaint made by the appellant against his former wife of public mischief, along with a witness statement of the appellant in support of this public mischief complaint; and,

- a copy of a supplementary occurrence report with the determination that the police would not be laying public mischief charges against his former wife.

Although there is some overlap in the requested information and the information provided by the appellant, the documents were not prepared in the course of the same investigation as the record in issue and do not contain the same information. I will also deal with the appellant's claim that he already has the information in the record through other means in my discussion of Absurd Result, below.

I find that in denying access to the record, the Ministry exercised its discretion under section 49(a) in a proper manner taking into account relevant factors.

Absurd Result

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, 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]

- the requester was present when the information was provided to the institution [Orders M-444, 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 principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The Ministry submits that the absurd results principle does not apply in the sensitive circumstances of the appellant's request. The Ministry maintains that the record contains highly sensitive information and relates to sensitive family matters.

The appellant submits that the absurd result principle applies as he has the information by reason of disclosure from his *Police Services Act* hearing. He submits that there is no invasion of

privacy issues because privacy did not exist from the moment he received disclosure for his *Police Services Act* hearing.

I have reviewed the documents provided by the appellant and, as outlined above, the content of the record is different than that of the documents received by the appellant in his *Police Services Act* hearing. This is fatal to the appellant's absurd result argument. Although there is some overlap, all the information in the record is clearly not within the appellant's knowledge. With respect to the information that does overlap, in the particular circumstances of this case, I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-1, where she stated that:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others. I also note that the Ministry has, in the course of this appeal, disclosed certain records to the appellant. I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The record in this case contains detailed medical, physical, behavioral and psychological information about the appellant's former wife and his daughter. The sensitivity of this information, therefore, in this case, constitutes a compelling reason for not applying the "absurd result" principle. Disclosure would be "inconsistent with the purpose of the exemption", which must include the protection of individuals in the law enforcement context.

I, therefore, find that the absurd result principle is inapplicable in this case.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 1, 2006
Diane Smith
Adjudicator