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

ORDER PO-2524

Appeal PA-040347-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all records, notes and reports prepared by the Special Investigation Unit (SIU) in connection with events that occurred on a specified date. The request arises from the requester's allegation that he was assaulted while in police custody. The requester has commenced a civil lawsuit in relation to this allegation.

The Ministry identified records responsive to the request and granted partial access to them. The Ministry relied on section 49(a) in conjunction with 14(2)(a) (law enforcement report), and section 49(b) with special reference to 21(3)(b) (information compiled and identifiable as part of an investigation) of the *Act*, to deny access to all or parts of the responsive records it withheld.

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

The appellant was represented by counsel at all stages of this appeal. His counsel participated in mediation, and provided representations on his behalf when the appeal reached the adjudication stage. For the sake of clarity, I will now simply refer to the representations and positions of "the appellant" in describing the history of this appeal.

During mediation the Ministry provided the appellant with a detailed index of records. The index described each responsive record and identified the particular section(s) of the *Act* the Ministry was relying upon to deny access to the records, in part or in full. The appeal did not resolve at mediation and the matter was moved to the adjudication stage of the process.

I sent a Notice of Inquiry to the Ministry, initially. At the same time I sent a Notice of Inquiry to other identifiable individuals whose interests may be affected by disclosure of the withheld information (the affected persons).

The Ministry filed representations in response to the Notice of Inquiry. No other representations were received from the affected persons. A Notice of Inquiry, along with a complete copy of the Ministry's representations, was then sent to the appellant. The appellant also provided representations in response to the Notice. As the appellant's representations raised issues to which I determined the Ministry should be given an opportunity to reply, I sent the appellant's representations to the Ministry, inviting its reply representations. The Ministry filed additional submissions by way of reply.

RECORDS

The records relate to the SIU's investigation of the appellant's allegations and include the SIU Director's Report, officer's notes, investigator's notes, correspondence, medical records, audiotapes of police and witness interviews along with written synopses, and booking and cell video tapes. Remaining at issue is the information severed from Records 1, 2 to 2-1, 26 to 26-2, 30 to 30-8 and 47 to 47-1, as well as all of Records 5 to 5-6, 7 to 7-4, 8 to 8-2, 9 to 9-2, 10 to 10-2, 11 to 11-2, 12 to 12-3, 13 to 13-2, 14 to 14-1, 15 to 15-2, 16 to 16-1, 17 to 17-1, 18 to 18-3, 19 to 19-1, 21 to 21-2, 22 to 22-4 (incorrectly numbered 24-1), 23 to 23-1, 24, 25 to 25-1, 27, 28, 29, 31 to 45, 46 to 46-2, 47 to 47-1, 48, 49 to 49-10, 50 to 50-1, 51 to 51-18, 52 to 52-12, 53 to 53-16, 54 to 54-8, 55 to 55-7, 56 to 56-4, 57 to 57-6, 58 to 58-7, 59 to 59-7, 60 to 60-12, 61 to

61-1, 62 to 62-5, 63 to 63-9, 64 to 64-3, 65 to 65-9, 66 to 66-3, 67 to 67-7, 68 to 68-24, 69 to 69-10, 70, 71 to 71-2, 72 to 72-1, 73 to 73-1, 74, 75, 76, 77 to 77-1, 78 to 78-2, 79 to 79-3, 80 to 80-4, 81 to 81-20, 82 to 82-4, 83 to 83-6, 84 to 84-4, 85 to 85-2, 86 to 103, 107, 109 to 109-7, 112 to 129 and 131, which were withheld in their entirety.

DISCUSSION:

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;

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].

As set out earlier, all of the records and parts of the records at issue relate to the SIU investigation of the appellant's allegation that he was injured while in police custody. Some of the records contain information about the appellant that meets the definition of "personal information" in paragraphs (a) (age and sex), (b) (medical, criminal and employment history), (c) (address and telephone number), (g) (views of other individuals about the appellant) and (h) (the appellant's name along with other personal information relating to him). I also find that the officer's notes and the audiotapes of police and witness interviews along with written synopses of the interviews also describe the appellant and the views of other individuals about him (paragraphs (g) and (h)).

In addition, some records contain the personal information of witness and non-witness police officers and/or individuals (other than police officers) who were involved with the appellant or who witnessed events relating to the appellant. This information qualifies as the personal information of these individuals because it includes information about their age (paragraph (a)), medical, criminal and employment history (paragraph (b)), their addresses and telephone numbers (paragraph (c)) or their names along with other personal information about them (paragraph (h)).

The Ministry submits that some records also contain the personal information of the police officers who were the subject of the SIU investigation. It argues that because that information pertains to an examination of the conduct of the officers, it falls within the ambit of the definition of personal information as it relates to the officers in their personal, rather than their professional, capacities. I agree.

Although the information in certain records relates to an examination into the conduct of the subject officers while at their work, in my view, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, it has taken on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the individual officers. I find, therefore, that those records which include an examination of the manner in which the subject officers conducted themselves also contain the personal information of those officers under paragraph (h) of section 2(1). To that I would add any reference to the SIU file number, which I also find to be the personal information of the subject officers. That said, I find that the records at issue which simply provide a

chronology of events relating to the investigation or name the investigators and/or only contain non-personal information about witness or non-witness police officers, is information in relation to the activities of those identifiable individuals in a professional or employment capacity [see in this regard Order PO-2095].

Therefore, my findings on this issue are as follows:

1. All of the records, other than those that are set out below, contain the personal information of the appellant, along with other identifiable individuals, including civilian witnesses, a doctor who treated the appellant and subject and witness police officers.

2. Records 68-3 to 68-9 and 70 contain the personal information of the appellant only, and not of other identifiable individuals.

3. Records 50 to 50-1, 53 to 53-16, 61 to 61-1, 63, 64 to 64-3, 65 to 65-9, 67 to 67-7, 68-1, 68-10 to 68-24, 69 to 69-10**,** 71 to 71-2, 73 to 73-1, 74, 75, 78 to 78-2, 80 to 80-4, 88, 89, 95, 97, 98, 99, 101, 102, 107 and 109 to 109-7, contain only the personal information of identifiable individuals other than the appellant.

4. Records 81 to 81-20 do not contain any information that qualifies as "personal information" within the definition of that term in section 2(1) of the *Act*.

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 [emphasis added].

LAW ENFORCEMENT

In this appeal, the Ministry relies on section 49(a), in conjunction with section 14(2)(a) of the *Act*, which reads as follows:

> 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.

General Principals

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) of the *Act* 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 term "law enforcement" has been found to apply in the context of a police investigation into a possible violation of the *Criminal Code* and to investigations conducted by the SIU [Orders M-202 and PO-2215].

Section 14(2)(a)

The word "report" in section 14(2)(a) means "a formal statement or account of the results of the collation and consideration of information". Generally speaking, results would not include mere observations or recordings of fact [Order P-200]. In order for a record to qualify for exemption under section 14(2)(a), the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and

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

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

[Orders MO-1238, 200 and P-324]

The Ministry submits that section 113 of the *Police Services Act* (*PSA*) sets out the statutory scheme creating the SIU. Section 113(5) of the *PSA* charges the SIU with the conduct of the investigation of "the circumstances of serious injuries and death that may have resulted from criminal offences committed by police officers". Section 113(7) of the *PSA* provides for a referral by the Director (of the SIU) to the local Crown Attorney should the investigation give rise to a finding that charges ought to be laid. Section 113(8) requires that a Director's Report be submitted to the Attorney General of Ontario describing the outcome of any investigation.

Record 5 to 5-6 is the Director's Report prepared in accordance with section 113(8). The Ministry submits that it was prepared with a view to determining whether there were reasonable grounds to believe that any of the officers involved in the matter had committed a criminal offence and, consequently, whether criminal charge(s) should be laid. The Ministry submits that in preparing the report the Director reviewed the SIU's "investigative brief". The Ministry submits that this was comprised of all of the other records remaining at issue, except for the case closure/notification and Circulation of Director's Reports forms (Records 2 and 2-1, respectively). It argues that all of those records were generated and compiled during the SIU investigation. The Ministry submits therefore that, except for Records 2 and 2-1, all of the other records at issue, including the Director's Report, fall within the scope of section 14(2)(a). The Ministry contends that all of these records were prepared "in the course of a law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law, namely the criminal law". It adds that the records constitute a "formal statement or account of the results of the collation and consideration of information" since they "provide an overview of the incident and a description of the events prior to, during and subsequent to the incident that was investigated".

In support of its position, the Ministry cites Orders P-1315 and P-1418. The Ministry acknowledges that there are conflicting authorities in this area. This is addressed below.

The appellant submits that the records do not relate to "law enforcement", but rather to an internal investigation of the actions of police officers. This, the appellant says, is part of the SIU's obligation to ensure the proper administration of a "police facility".

In reply, the Ministry submits that the SIU is no way affiliated with police services and does not conduct internal investigation of the police. The Ministry repeats that the mandate of the SIU is set out in the excerpts of the *PSA* described above.

Analysis and Findings

Previous decisions of this office have addressed the application of section 14(2)(a) to records compiled by the SIU in the course of an investigation undertaken pursuant to section 113 of the *PSA* (Orders P-1315, P-1418, PO-1819, PO-1959 and PO-2414). In Orders PO-1959 and PO-2414, it was found that the Director's Reports to the Attorney General, the cover letter to that document and other investigative documents that consist of "a formal statement of the results of the collation and consideration of information", qualify for exemption under section 14(2)(a).

In Order PO-1959, Adjudicator Sherry Liang considered the Ministry's position in that appeal that the entire SIU file should be considered to qualify as a "report" for the purposes of section 14(2)(a). The Ministry makes the same argument in this appeal. In addressing that issue, Adjudicator Liang wrote:

> Essentially, the Ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to

accept this submission, and I find that section 14(2)(a) requires consideration of whether *each* record at issue falls within that exemption. The Ministry has enclosed copies of two prior orders of this office in support of its position. In Order P-1315, it appears that a group of records described as the SIU's final investigative report, and which included witness statements, expert reports, summaries of forensic testing and other evidence gathered in the course of the police investigation into an accident, was considered as one record and found as a whole to constitute a "report" for the purposes of section 14(2)(a). A similar approach was applied in Order P-1418. More recently, however, in PO-1819, section 14(2)(a) was applied to each record which formed part of the SIU investigation file.

On my reading of these orders, it is clear that even in P-1315, there were a large number of records in the SIU investigation file which were considered separately by the adjudicator for the purposes of section 14(2)(a). Some of these records, such as interview notes, a motor vehicle accident report and vehicle examination and damage report, are similar to those before me which the Ministry asserts form part of an overall SIU 'investigation brief'.

Order P-1418 is less easily reconciled with Order PO-1819, and with the approach I have taken in this order. I am satisfied that, if there is any inconsistency between the approaches in some of the orders in this area, the analysis in PO-1819 is more in keeping with the intent of this section of the *Act*. Although I find that Record 2 (the Report of the Director) meets the requirements of section 14(2)(a), it does not follow that all the material which may have been gathered together, placed before and considered by the Director before arriving at his conclusions is also exempt, without further analysis. In this respect, I agree with the appellant that section 14(2)(a) does not provide a 'blanket exemption' covering all records which the Ministry views as constituting part of the SIU's 'investigative brief.'

In the case before me, the SIU investigation file consists of numerous different records from diverse sources. As the representations of the Ministry describe, they are essentially a compilation of information obtained during the course of the SIU's investigation and the steps taken by SIU staff in the discharge of that investigative jurisdiction, and include documentary materials obtained by the SIU or generated by the SIU. The Director's decision is based upon a review of all the records, but his analysis and decision is contained in Record 2 (the Director's Report) alone.

I accept, and it is not seriously disputed by the appellant, that Record 2 qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that Record 4, the cover letter to Record 2, qualifies for exemption, as the

> two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director.
>
> . . .
>
> I find that none of the remaining records at issue meet the definition of a "report". To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. 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, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:
>
> > An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".
>
> On my review of the incident reports, supplementary reports and police officers' notes at issue in this appeal, I am satisfied that they also do not meet the definition of a "report" under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature.

I agree with Adjudicator Liang's reasoning and adopt it for the purposes of this appeal.

I find that the Director's Report (Record 5 to 5-6) consists of the required "formal statement of the results of the collation and consideration of information" and qualifies as a report under section 14(2)(a) of the *Act*.

I also find that the remaining responsive records do not qualify as "reports", under section 14(2)(a) because they simply consist of observations and recordings of fact rather than formal, evaluative accounts and/or were not prepared by the SIU (or, for that matter, by an agency which has the function of enforcing and regulating compliance with a law).

I therefore conclude that only Record 5 to 5-6 falls within section 14(2)(a), and is exempt under section 49(a) of the *Act*. That does not end the matter, however. Despite this finding, the Ministry may exercise its discretion under section 49(a) to disclose the information in Record 5 to 5-6 to the appellant. This is addressed in the section on "exercise of discretion", below.

INVASION OF PRIVACY

General principles

Where a record contains personal information only of an individual other than the appellant section 21(1) of the *Act* prohibits the Ministry from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of another individual's personal privacy.

If a record contains the personal information of the appellant along with the personal information of another individual, section 49(b) of the *Act* applies.

Section 49(b) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under section 49(b), the information in question must be the personal information of an individual or individuals other than the person requesting it. If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the Ministry may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy. This is addressed in the section on "exercise of discretion", below.

Under both sections 21(1)(f) and 49(b) the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 21(2) provides some criteria for the Ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated 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 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)) though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

As I have found that Records 68-3 to 68-9 and 70 contain the personal information of the appellant only, and not of other identifiable individuals, the disclosure of those records would not result in an unjustified invasion of another individual's personal privacy under either section 21(1) or 49(b). As I have found that section 14(2)(a) in conjunction with the section 49(a) exemption does not apply to these records, no other discretionary exemptions were claimed and no mandatory exemptions apply, I will order that these records be released to the appellant.

In my discussion of "personal information" above, I also concluded that Records 81 to 81-20 do not contain any information that qualifies as "personal information" within the definition of that term in section 2(1) of the *Act*. As I have found that section 14(2)(a), in conjunction with the section 49(a) exemption, does not apply to these records, no other discretionary exemptions were claimed and no mandatory exemptions apply, I will also order that these records be released to the appellant.

Sections 21(2) and 21(3)(b)

In the Notice of Appeal that commenced this proceeding the appellant referred to his civil action. The Notice of Appeal also indicated that disclosure of the records was necessary to ensure a fair hearing, referencing the factor favouring the disclosure of personal information that is found in section 21(2)(d) of the *Act*.

In his representations, however, the appellant makes no detailed submissions on any of the factors or presumptions in sections 21(2) and/or 21(3). Instead, the appellant focuses on the public interest override in section 23 of the *Act*, arguing that an investigation into the conduct of a police officer's dealings with a civilian, in the circumstances of this appeal, is of the "utmost public interest", and that section 23 should apply to override the application of any exemption claimed by the Ministry. This argument is addressed in more detail under "public interest in disclosure" below.

The Ministry submits that the disclosure of the personal information contained in the records would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

It submits that the personal information in the records, except for Records 2 and 2-1, was compiled and is clearly identifiable as "part of an investigation into a possible violation of law", particularly the *Criminal Code*. The Ministry argues that the SIU is empowered to investigate criminal wrong-doing on the part of police officers and, under section 113(7), "shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution." The Ministry argues that disclosure of the records would thereby constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

Analysis and Findings

In my view, the presumption in section 21(3)(b) applies to the balance of the records at issue in the appeal. This is because the information in the records, including some portions of Records 2 and 2-1, was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code* by the subject officers.

The fact that no criminal proceedings were commenced thereafter has no bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849). Because this presumption applies, in accordance with the ruling in *John Doe* cited above, I am precluded from considering the possible application of any of the factors or circumstances under section 21(2). This would include any consideration of the factor in section 21(2)(d) that was referred to by the appellant in the Notice of Appeal.

Records 50 to 50-1, 53 to 53-16, 61 to 61-1, 63, 64 to 64-3, 65 to 65-9, 67 to 67-7, 68-1, 68-10 to 68-24, 69 to 69-10**,** 71 to 71-2, 73 to 73-1, 74, 75, 78 to 78-2, 80 to 80-4, 88, 89, 95, 97, 98, 99, 101, 102, 107 and 109 to 109-7 only contain the personal information of identifiable individuals other than the appellant. As I have found that the information in these records falls within the section 21(3)(b) presumption, subject to the discussion of the public interest override, and the Ministry's exercise of discretion (all discussed below), they are all totally exempt from disclosure under section 21(1) of the *Act*.

The remaining records contain the personal information of the appellant and the personal information of other identifiable individuals. As I have found that the withheld information of those other identifiable individuals falls within the section 21(3)(b) presumption, subject to the discussion of the public interest override, "absurd result" and the Ministry's exercise of discretion (all discussed below), that information is also exempt from disclosure under section 49(b).

Absurd result

Previous orders have determined that, where a requester originally supplied the information, or a requester is otherwise aware of it, the information may be found not exempt under section 49(b) 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 [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO- 1755]

My review of the following pages of the records indicates that the information was supplied by the appellant or is clearly within his knowledge: a portion of the withheld portion of Record 1 and all of the information that appears on Record 68-2.

I cannot agree that in the circumstances of this appeal, the disclosure of the above-referenced information to the appellant would result in an unjustified invasion of another individual's personal privacy under section 49(b), whether or not any of the presumptions in section 21(3) apply. Rather, to decline to grant access to this information, under the circumstances, would lead to an absurd result. As a result, I will order that this information be disclosed.

Severance

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

The Ministry submits that in the event that some of the records are found to contain information which constitutes personal information related to the appellant in addition to persons other than the appellant, no reasonable severance is possible, given the "…intertwining, amalgamation and collation of information that constitutes the *personal information* of more than one individual" (Ministry's emphasis). The Ministry further states that this applies to the documentary portion of the records and, with more force, to the audiotapes and videotapes. The Ministry also submits

that in order to avoid disclosing information which is properly exempted from disclosure, any such attempt at severance would result in the disclosure of information which is substantially unintelligible and, therefore, meaningless.

I agree with the Ministry that no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.)]. With these principles in mind, I have arrived at the following conclusions.

Some of the personal information exempt from disclosure under section 49(b) is readily severable from non-exempt information in Records 1, 2 to 2-1, 7 to 7-4, 8 to 8-2, 9 to 9-2, 10 to 10-2, 11 to 11-2, 12 to 12-3, 13 to 13-2, 14 to 14-1, 15 to 15-2, 16 to 16-1, 17 to 17-1, 18 to 18-3, 19 to 19-1, 23 to 23-1, 26 to 26-2, 27, 29, 30 to 30-8, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 to 46-2, 47 to 47-1, 48, 49 to 49-10, 52 to 52-12, 54 to 54-8, 55 to 55-7, 56 to 56-4, 57 to 57-6, 58 to 58-7, 62 to 62-5, 63-1 to 63-9, 66 to 66-3, 68, 72 to 72-1, 76, 77 to 77-1, 79 to 79-3, 82 to 82-4, 83 to 83-6, 85 to 85-2, 86, 87, 90, 91, 92, 93, 94, 96, 100 and 103. Where this is the case, the remaining responsive information is either non-personal or about the appellant only.

In the circumstances, I find that it is not practicable to sever the exempt information in the videotapes and audiotapes (Records 112 to 129 and 131) or in Records 21 to 21-2, 22 to 22-4 (incorrectly numbered 24-1), 24, 25 to 25-1, 28, 51 to 51-18, 59 to 59-7, 60 to 60-12 and 84 to 84-4 from other information in those records. These records are, therefore, exempt in their entirety.

EXERCISE OF DISCRETION

Introduction

On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion in denying access to all or parts of the records that I have determined should be withheld, and, if so, to determine whether it erred in so doing.

I may find that the Ministry 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 these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

In Order PO-1959 Adjudicator Liang wrote the following:

> Turning to the balancing of interests under section 49(b), the Ministry has made representations as to its policy reasons for the protection of the personal information contained in the records. Among other things, it states that it is necessary that an investigative law enforcement agency be able to protect personal information compiled as a component of an investigation into potentially criminal conduct. Central in any such investigation is the willingness of witnesses to come forward and provide information that they may have which is relevant to an investigation. This type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is often of a very sensitive nature whose provision is often only forthcoming where confidentiality can be assured.
>
> The Ministry submits that the concern is shared equally between police officers and civilians. It states that in respect of the former, it should be noted that pursuant to section 113(9) of the *Police Services Act*, all members of police forces are required to cooperate fully with the SIU in the conduct of a SIU investigation. In order to ensure that cooperation from police officers in the course of SIU investigations continues to be fostered, it is necessary, it is submitted, that police officers retain a measure of confidence that their cooperation with the SIU, in the form of information they provide, will remain confidential and will not be disclosed to third parties.
>
> With respect to civilian witnesses, it has been the experience of the SIU that there are many occasions when they will only provide the SIU with a statement of their evidence if they believe that all communications will be kept in confidence. Many are fearful of police reprisal, whereas others are worried that what they say may at some point be used against them in a legal proceeding. Accordingly, it is said, it has historically been the policy of the SIU to retain information provided by witnesses in strict confidence and not to disclose such information to third parties in the absence of consent on the part of the witness who provided the information, except where such disclosure is compelled by judicial process.
>
> I am satisfied on the basis of the Ministry's submissions, that it has properly exercised its discretion under section 49(b) to deny access to the personal information in Records 1, 7, 15, 19, 21 – 26, 28 to 32, 34 to 37, 41, 43 and 50 to 53.

In the present appeal, the Ministry made nearly identical arguments to those addressed in Order PO-1959 with respect to the manner in which it exercised its discretion not to disclose the records to the appellant. I have reviewed those submissions and specifically find that the Ministry has properly exercised its discretion under sections 49(a) and 49(b) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that the "public interest override" provision in section 23 of the *Act* applies to those records that I have found to be exempt. The Ministry takes issue with the appellant's position.

General principles

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 14 is not listed as an exemption subject to section 23. As a result section 23 does not apply to the Director's Report that I have found to be exempt under section 14(2)(a). I will now consider the application of section 23 to the balance of the records that I have found to be exempt under sections 21(1) or 49(b).

For section 23 to apply two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, and P-1439]. However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

Based on my review of the contents of the records, I cannot agree that there exists any compelling public interest in their disclosure. I find that I have not been provided with sufficient evidence to substantiate the existence of a compelling public interest in the manner in which the SIU investigation was conducted or the conclusions which it reached. At no time was the SIU investigation itself the subject of public interest. In my view, the sole interest at stake is purely the appellant's private interest in obtaining the information in the records. Accordingly, in my view, there does not exist any public interest, compelling or otherwise, in their disclosure. As a result, I find that section 23 has no application in the present appeal.

ORDER:

1. I uphold the Ministry's decision to withhold Records 5 to 5-6, 21 to 21-2, 22 to 22-4, 24, 25 to 25-1, 28,50 to 50-1, 51 to 51-18, 53 to 53-16, 59 to 59-7, 60 to 60-12, 61 to 61-1, 63, 64 to 64-3, 65 to 65-9, 67 to 67-7, 68-1, 68-10 to 68-24, 69 to 69-10**,** 71 to 71-2, 73 to 73-1, 74, 75, 78 to 78-2, 80 to 80-4, 84 to 84-4, 88, 89, 95, 97, 98, 99, 101, 102, 107, 109 to 109-7, 112 to 129 and 131.

2. I order the Ministry to disclose to the appellant the non-highlighted portions of Records 1 (in the part the Ministry withheld), 2 to 2-1 (in the parts the Ministry withheld), 7 to 7-4, 8 to 8-2, 9 to 9-2, 10 to 10-2, 11 to 11-2, 12 to 12-3, 13 to 13-2, 14 to 14-1, 15 to 15-2, 16 to 16-1, 17 to 17-1, 18 to 18-3, 19 to 19-1, 23 to 23-1, 26 to 26-2 (in the parts the Ministry withheld), 27, 29, 30 to 30-8 (in the parts the Ministry withheld), 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 to 46-2, 47 to 47-1 (in the parts the Ministry withheld), 48, 49 to 49-10, 52 to 52-12, 54 to 54-8, 55 to 55-7, 56 to 56-4, 57 to 57-6, 58 to 58-7, 62 to 62-5, 63-1 to 63-9, 66 to 66-3, 68, 72 to 72-1, 76, 77 to 77-1, 79 to 79-3, 82 to 82-4, 83 to 83-6, 85 to 85-2, 86, 87, 90, 91, 92, 93, 94, 96, 100 and 103 that are highlighted on the copy of those pages provided to the Ministry with this order, and all of Records 68-2 to 68-9, 70 and 81 to 81-20, by sending him a copy of the records by **December 15, 2006** but not before **December 8, 2006**. The highlighted information is **not** to be disclosed.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant, upon request.

November 10, 2006

Steven Faughnan