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

ORDER PO-2563

Appeal PA06-332

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a domestic dispute involving the requester that occurred on two specified dates.

The Ministry located four records and denied access to them in full on the basis that the matter is currently before the courts. Access was denied pursuant to the exemptions in sections 14(1)(a), 14(1)(b), 14(1)(f) 14(1)(l), 14(2)(a) (law enforcement), 19 (solicitor-client privilege), 21(1) (invasion of privacy), 49(a)and 49(b) (discretion to refuse requester's own information) of the *Act*. In addition, the Ministry indicated in its decision that certain portions of the records were withheld as they were not responsive to the request.

The requester, now the appellant, appealed that decision. He indicated that he required the information to assist in his defence in a court action against him and thus raised the possible application of the factor in section 21(2)(d) as an issue.

No issues were resolved during mediation. Accordingly, the file was referred to the adjudication stage of the process. I sought representations from the Ministry, initially.

The Ministry submitted representations in response and I shared them with the appellant, in their entirety. In its representations, the Ministry withdrew its reliance on sections 14(1)(b), 14(1)(f) and 19 and these exemptions are, therefore, no longer at issue in this appeal. The appellant was invited to submit representations on the remaining issues. After reviewing the appellant's representations, I am prepared to issue my decision.

RECORDS:

The records at issue comprise two Occurrence Summaries and two General Occurrence Reports prepared by the Ontario Provincial Police (OPP).

DISCUSSION:

RESPONSIVENESS

The Ministry takes the position that some of the information in the records comprising faxing and printing information is "administrative information" and is accordingly not responsive to the request. The appellant does not specifically address this issue. To be considered responsive to the request, records must "reasonably relate" to the request (Order P-880). I have reviewed the information at issue, and I agree with the Ministry's submission. The information in these portions of the records reflect when the record was printed and by whom, and was created after the appellant's request, as part of the retrieval process. Consistent with previous orders of this office (for example, Order PO-2254), I am satisfied that this information is not covered by the scope of the appellant's request, and I uphold the Ministry's decision to withhold this information.

PERSONAL INFORMATION/UNJUSTIFIED INVASION OF PERSONAL PRIVACY

In order to determine which sections of the *Act* apply, it is necessary to decide whether the record contains personal information, and if so, to whom that information relates. The term "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (paragraph (h) of the definition of personal information in section 2(1) of the *Act*).

The Ministry submits, and I agree, that the records contain the personal information of the appellant as well as of two other identifiable individuals.

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

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution 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.

In this appeal, the Ministry submits that the presumption in section 21(3)(b) applies. That section states:

> 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

The Ministry submits that the personal information in the records was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The records document the investigation undertaken by the OPP in response to an alleged domestic dispute. The Police indicate further that subsequent to the initiation of the investigation into the domestic dispute, the appellant was charged under section 86(2) of the *Criminal Code* with Unsafe Storage of Firearms.

The appellant confirms that he has been charged with Unsafe Storage of Firearms and that he seeks the information at issue to assist in his defence.

Based on my review of the submissions and the records at issue, I find that the personal information in the records was compiled and is identifiable as part of an OPP investigation into an alleged domestic dispute, which resulted in charges under the *Criminal Code*. Accordingly, I conclude that the presumption in section 21(3)(b) applies to the personal information contained in the records.

As I have found that the presumption at section 21(3)(b) applies, the factors in section 21(2) cannot rebut this presumption (see the Divisional Court decision in *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767). I am therefore satisfied that disclosure of the personal information in the record is presumed to constitute an unjustified invasion of the personal privacy of the individuals to whom it relates.

Severance

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.)).

I find that significant portions of the personal information of the other identifiable individuals contained in the records cannot be reasonably severed as it is intertwined with that of the appellant. However, I also conclude that certain portions of the records are written in such a way that the personal information of the other individuals contained in them can be easily separated from that pertaining solely to the appellant or to administrative information, and can, therefore, be severed out. The remaining portions cannot be described as "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Moreover, I find that the presumption at section 21(3)(b) cannot apply to the portions of the records that pertain solely to the appellant or to the administrative information contained in them.

Discretion

As I have indicated above, section 49(b) gives an institution the discretion to refuse a requester's own personal information where it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. This discretion may be exercised in favour of disclosure, or in favour of withholding the information. In this appeal, the Ministry has provided submissions on the reasons why it chose to withhold the information. I find no error in its exercise of discretion under section 49(b).

Accordingly, with the exception of the portions of the records that can be severed, I uphold the Ministry's decision to withhold the remaining personal information from disclosure pursuant to section 49(b). The Ministry has also claimed the application of the discretionary exemptions at sections 14 and 49(a) for the records. Because of the nature of the records, I will consider these exemptions with respect to the records in their entirety, rather than only to the portions of the records not exempt under section 49(b).

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their personal information held by a government body. Section 49 provides a number of exceptions to this general right of access, including section 49(a), which reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) if 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; [emphasis added]

In this appeal, the Ministry relies on section 49(a) in conjunction with section 14(1)(a) to withhold all of the information in the records, and 14(1)(l) to deny the appellant access to the ten-codes, alerts, location and zone codes contained in the records. Sections 14(1)(a) and 14(1)(l) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry also relies on section 49(a) in conjunction with section 14(2)(a) to deny access to the records. Section 14(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> > (a) 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 term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code* (Orders M-202, PO-2085). 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.)).

Consistent with previous orders of this office, I find that the OPP investigation into a possible violation of and subsequent charge under, the *Criminal Code*, qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*. Accordingly, I find that the records at issue in this appeal relate to "law enforcement", as defined in section 2(1).

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 this appeal, the "detailed and convincing" standard applies in respect of sections 14(1)(a) and (l).

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption (Order PO-2040; *Ontario (Attorney General) v. Fineberg*).

I will begin by reviewing the possible application of section 14(1)(l).

Section 14(1)(l)

The Ministry states that section 14(1)(l) was used to remove the ten-codes, alerts, location and zone codes from the records. Citing Orders M-393, M-757, PO-1877, PO-2209 and PO-2394, the Ministry states:

> [R]elease of these operational police codes would leave OPP officers more vulnerable and compromise their ability to provide effective policing services…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.

This office has issued many orders regarding the release of Police codes and has consistently found that section 14(1)(l) applies to ten-codes (for example, see Orders M-93, M-757, MO-1715 and PO-1665) as well as other coded information such as 900 codes (see Order MO-2014). These orders adopted the reasoning in Order PO-1665, where I found:

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

I find that the rationale and conclusions in that order continue to be applicable. Moreover, given the difficulty of predicting future events in the law enforcement context and the nature of the information at issue, I find that the Ministry provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" with respect to the ten-codes, alerts, location and zone codes. The Ministry has also cogently explained its exercise of discretion in withholding this information. I therefore find that the ten-codes, alerts, location and zone codes contained in the records qualify for the exemption under section 49(a) in conjunction with section 14(1)(l) of the *Act*.

I will now turn to whether section 14(1)(a) applies to the remaining information.

Section 14(1)(a) – law enforcement matter

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the

Act. As I noted above, I am satisfied that in these circumstances the criminal case and the preceding investigations constitute a "law enforcement matter" for the purpose of section 14(1)(a).

Furthermore, the use of the word "interfere" contemplates that the particular law enforcement matter is still ongoing (see Orders M-258, M-302, M-420 and M-433). The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters (Orders PO-2085 and MO-1578). The purpose of the exemption contained in section 14(1)(a) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing, and second that disclosure of the records could reasonably be expected to interfere with the matter (Order M-1067).

The Ministry indicates that the appellant is scheduled to go to trial regarding the *Criminal Code* charges in May, 2007. The appellant also refers to the ongoing nature of this matter. Accordingly, I am satisfied that the criminal proceeding currently underway is an ongoing "law enforcement" matter within the meaning of the legislation.

The Ministry states further that disclosure of the records to the appellant at this time may reasonably be expected to reveal the extent and nature of the anticipated evidence in regard to the criminal prosecution that is before the court. The Ministry submits that disclosure of the information at issue could potentially lead to harms such as the influencing or tainting of witness' evidence and inhibition of witnesses and could interfere with the administration of justice.

The appellant indicates that he is seeking this information as he believes that it will be of importance in the case currently before the courts as well as in another case also currently before a court. He submits that disclosure of the information in the records will assist him in determining whom he should request as a potential witness and otherwise use in his own defence. In this regard, the appellant notes that he is unrepresented by counsel in the criminal matter and that he has been refused legal aid and is, therefore, preparing his own defence.

With respect to whether the disclosure of the records could reasonably be expected to interfere with the law enforcement matter, as contemplated by section 14(1)(a), I am satisfied that the Ministry has provided sufficient evidence to establish that the disclosure could reasonably be expected to interfere with the identified law enforcement matter. The records contain information pertaining to the incidents, statements and observations of others about the appellant and the incidents themselves. The Ministry specifically states that the records at issue in this appeal constitute evidence which will be relied upon in criminal proceedings.

The Ministry also identifies concerns that the release of the information (presumably outside of the court disclosure process) could have an injurious effect on the prosecution. In my view, having regard to the nature of the record and the fact that the record relates directly to an ongoing law enforcement matter, I am satisfied that the disclosure of the record could reasonably be

expected to interfere with that matter. Accordingly, I am satisfied that the exemption in section 49(a), in conjunction with section 14(1)(a), applies to the remaining information in the records. Furthermore, as I noted above, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the record withheld under section 49(a).

The appellant is legitimately concerned about having sufficient information regarding the basis for the charges brought against him to defend himself in the court action. In arriving at my decision, I note that section 64 of the *Act* provides:

> (1) This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This *Act* does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449). In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section (under the Municipal *Act*) as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
>
> Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:
>
> > This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations.

> The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. In this case, the fact that information may be withheld under the *Act* does not impinge on the appellant's ability to obtain relevant information through Crown disclosure which should enable him to prepare his defence.

Although I have determined that the records at issue are exempt under either section 49(a) and/or 49(b), for the sake of completeness, I have also decided to determine whether the records qualify for exemption under section 49(a) in conjunction with section 14(2)(a) of the *Act*.

Section 14(2)(a)

The Ministry submits that the occurrence summaries and reports are law enforcement reports and thus are exempt from disclosure. In this regard, the Ministry states that:

> The reports document the background of the investigation, the conduct of the investigation and the subsequent *Criminal Code of Canada* Unsafe Storage of firearms charge that was laid subsequent to the OPP investigation into an ongoing domestic dispute involving the appellant.

This part of the law enforcement exemption permits an institution to refuse to disclose a record if it is "a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law".

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three-part test:

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. (Order 200 and Order P-324)

There is no dispute in the present appeal that the OPP is an agency charged with enforcing and regulating compliance with the law and that the record was prepared in the course of the investigation of a complaint. Accordingly, the key determination in evaluating the application of section 14(2)(a) in the circumstances of this appeal is whether the record constitutes a "report" as contemplated by the provision. I note that previous orders of this office have held that the word "report" means "a formal statement or account of the results of the collation and consideration of information" and that, generally, results would not include mere observations or recordings of fact (Orders P-200, MO-1238, MO-1337-I). Further, it has been held by this office that the title of a document is not determinative of whether it is a report, although it may be relevant to the issue (Order MO-1337-I).

Having reviewed the records, I do not agree with the Ministry's claim that the occurrence summaries and reports go beyond a "mere reporting of the facts". The fact that the records indicate that the appellant was ultimately charged does not, in itself, amount to a "formal statement or account of the results of the collation and consideration of information".

I find, therefore, that the records are not reports within the meaning of section 14(2)(a) of the *Act* and the records are not exempt under section 49(a), in conjunction with this section.

Summary of Findings

I have found that the ten-codes, alerts, location and zone codes contained in the record satisfy the requirements for exemption under section 14(1)(l) and, for that reason, they are exempt under section 49(a) of the *Act*. I also found that the much of the record is exempt under section 49(b) as disclosure of the personal information in the record would constitute an unjustified invasion of the other individuals referred to in the records. Although I found that section 14(2)(a) was not applicable in the circumstances, I found that the Ministry has properly exempted the records under sections 14(1)(a) and 49(a) as disclosure could reasonably be expected to interfere with an **on-going** law enforcement matter. Once the law enforcement matter arising from the incidents referred to in the records is completed, the appellant may wish to seek those portions of the records to which sections 14(1)(a) and 49(a) only have been found to apply.

ORDER:

I uphold the Ministry's decision to withhold the records in their entirety.

Original Signed by: April 16, 2007
Laurel Cropley
Adjudicator