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

ORDER PO-2647

Appeal PA06-227

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request from an individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the police reports of four identified police officers relating to the delivery of a banker's box of documents to the Commissioner of the Ontario Provincial Police (OPP). The request included any anti-racketeering or other investigation by the Niagara Regional Police, the Ontario Provincial Police (OPP) and/or the Royal Canadian Mounted Police (RCMP) in relation to the delivery of the documentation.

In response, the Ministry wrote to the requester asking for clarification of the request. The requester identified the detachment of the OPP where the banker's box of documents was delivered and clarified that he was requesting access to any reports relating to the delivery of the documents as well as the investigative reports completed by two named police officers. The requester further advised the Ministry that he is, or was, involved with an investigation by the Niagara Regional Police (NRP) as a representative of the OPP and the RCMP. He stated that the OPP in Orillia had "opened an anti-racketeering file in the past that might have crossed over into the NRP investigation."

The Ministry then identified records responsive to the request and granted partial access to them. The Ministry relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information) of the *Act*, in conjunction with sections 14(1)(c) (reveal law enforcement investigative techniques) and (l) (facilitate unlawful act), 14(2)(a) (law enforcement report) and 15(b) (information received in confidence from another government or its agencies); and the discretionary exemption in section 49(b) (personal privacy), with reference to the consideration in section 21(2)(f) (highly sensitive) and the presumption at section 21(3)(b) (investigation into a possible violation of law), to deny access to parts of the responsive information it withheld. The Ministry also indicated that some of the information in the records was not responsive to the request.

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

At mediation, the appellant took the position that the scope of his request encompasses:

- all records, including any non-responsive portions, relating to the investigation of an alleged anti-racketeering matter from the date of the delivery of the banker's box to the present day, as well as

- any copies the OPP made of any of the contents of the banker's box.

The Ministry's position was that the request was only for records, including any investigative records, relating to the *delivery* of the box. As a result, the scope of the request became an issue in the appeal.

The matter did not resolve at mediation and it was moved to the adjudication phase of the appeal process.

I commenced the adjudication phase by sending a Notice of Inquiry to the Ministry outlining the facts and issues in the appeal and inviting representations. The Ministry provided representations in response to the Notice. The Ministry advised that it was no longer relying on section 14(2)(a) as the basis for denying access to certain information. As a result, the application of that section is no longer at issue in this appeal. The Ministry further advised that it had reviewed the application of certain exemptions. It set out in an included revised index the exemptions it now claimed were applicable. In addition, along with its representations, the Ministry provided this office with a copy of a supplementary decision letter releasing additional information to the appellant. Shortly thereafter, but prior to my seeking representations from the appellant, the Ministry provided this office with a copy of a further supplementary decision letter sent to the appellant pertaining to its search for records. I then sent a Notice of Inquiry, along with a copy of the non-confidential representations of the Ministry, to the appellant. The appellant provided representations in response.

RECORDS:

The records that the Ministry identified as responsive to the request consist of a General Occurrence Report (consisting of three pages) and the handwritten notes of two identified police officers (consisting of ten pages). Remaining at issue are the portions of those records which the Ministry withheld.

DISCUSSION

SCOPE OF THE REQUEST

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As identified above, the scope of the request was raised as an issue in this appeal because the appellant took the position that his request included records relating to an investigation of an alleged anti-racketeering matter as well as any photocopies of the contents of the box made by the OPP.

After receiving the Notice of Inquiry, the Ministry agreed to include any records relating to the alleged anti-racketeering matter, as well as any photocopies of the contents of the box made by the OPP, as within the scope of the request. The Ministry then identified in its representations, as well as its supplementary decision letters, the results of those searches. Accordingly, as a result of the steps taken by the Ministry to address the appellant's position, the scope of the request is no longer an issue in the appeal.

RESPONSIVENESS OF THE RECORDS IDENTIFIED BY THE MINISTRY

The Ministry submits that the non-responsive information consists of references to law enforcement matters unrelated to the appellant, police officer duty times, shift preparation references, and fax and document printing information that post-dates the request. The appellant does not address this issue.

Analysis and Findings

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. Past orders of this office have also established that administrative information relating to the date, time and by whom the report was printed is not reasonably responsive to a request [Orders PO-2315 and PO-2409]. Based on a careful review of certain of the severed portions of the subject records, I conclude that the portions of the information in the records that were withheld by the Ministry as being non-responsive pertain only to:

- other investigations or police matters in which the officers were involved on that day,
- information about shift duty times and/or shift preparation that is administrative in nature or,
- fax or document printing information that post-dates the request.

In my view, none of this information reasonably relates to the request and is not responsive to it. Accordingly, I will not address this specific information further in this order.

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.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by an 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", 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.)].

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], but 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, PO-2435].

In my view, all of the records at issue contain the personal information of the appellant. This information qualifies as his personal information because it includes information about his marital status (paragraph (a)), his medical, psychiatric, psychological, criminal or employment history (paragraph (b)), his address (paragraph (d)), the views or opinions of other individuals about him (paragraph (g)) and his name along with other personal information relating to him (paragraph (h)). I also find that these records contain the personal information of other identifiable individuals. This information qualifies as their personal information because it includes their address (paragraph (d)) or refers to their names, along with other personal information about them (paragraph (h)).

Finally, some of the withheld portions of the records contain, or refer to, complaints the appellant made about the alleged improper conduct of certain identifiable individuals. In my opinion, these withheld portions therefore contain the "personal information" of those identifiable individuals under paragraph (g) of the definition.

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(a) provides a number of exemptions from this right. It reads:

> 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. [emphasis added]

LAW ENFORCEMENT

Sections 14(1)(c) and (l) of the *Act* read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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.)].

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* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) ("*Fineberg*")].

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Fineberg*, cited above].

Under section 2(1) of the *Act*, "law enforcement" is defined to mean:

> (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, or
>
> (c) the conduct of proceedings referred to in (b).

I am satisfied that the matter at issue relates to policing and qualifies as "law enforcement" under paragraph 2(1)(a).

Section 14(1)(c): investigative techniques and procedures

In its revised index the Ministry claims that section 14(1)(c) applies to portions of the withheld information on page 1 of the General Occurrence Report and pages 5 and 10 of the police officers' notes.

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487]. The techniques or

procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders P-1340, PO-2034].

The Ministry submits that the investigative techniques and procedures documented in the withheld portions of pages 1, 5 and 10 of the records at issue relate to the management and handling of a suspicious package delivered directly to the involved OPP Detachment. It states that such information would not be generally known to members of the public and that releasing this information would compromise the ability of the OPP to effectively deal with future incidents involving suspicious packages delivered to an OPP Detachment. The Ministry submits that due to the difficulty of predicting future behaviour in a law enforcement and public safety context, any perceived threats against OPP officers must be treated as serious and handled with extreme care and caution. It submits that release of information under the *Act* is generally viewed as release to the world at large, which theoretically could include individuals engaged in criminal activity. It states that disclosure of the information may thereby also reasonably be expected to undermine the effectiveness of the law enforcement techniques and procedures that are reflected in the records at issue. Some of the Ministry's representations on this issue could not be shared with the appellant due to confidentiality concerns.

Analysis and Findings

I have reviewed the withheld portions of the records that the Ministry claims are subject to section 14(1)(c) and the confidential and non-confidential representations of the Ministry on this issue. In light of the direction in *Fineberg* that the law enforcement exemption be approached in a sensitive manner and recognizing the difficulty of predicting future events in a law enforcement context, I find that in all the circumstances, the Ministry has provided sufficient evidence to establish that section 14(1)(c) applies to the undisclosed information in the third full paragraph on page 1, the withheld responsive portion at the bottom of page 5 and the first sentence of the withheld responsive portion on page 10 of the records. As a result, I find that the exemption in section 49(a) applies to this information.

Section 14(1)(l): facilitate the commission of an unlawful act

The Ministry claims that section 14(1)(l) applies to any Police codes found in the records as well as the information on page 1 that I have already found to fall within the ambit of section 14(1)(c), a portion of the second full paragraph on page 2, a portion of page 6, a portion of page 10 (including the line that I found to fall within the ambit of section 14(1)(c)) and the withheld responsive portion of page 11.

Analysis and Finding

As I have found that section 14(1)(c) applies to certain information on pages 1 and 10 of the records, it is not necessary for me to also consider whether section 14(1)(l) applies to that information. I will accordingly only address the other information that the Ministry claims is subject to section 14(1)(l).

A number of decisions of this office have consistently found that police codes qualify for exemption under section 14(1)(l) of the *Act* (see for example Orders M-393, M-757 and PO-1665). These codes have been found to be exempt because of the existence of a reasonable expectation of harm to an individual or individuals and a risk of harm to the ability of the police to carry out effective policing in the event that this information is disclosed. I adopt the approach taken by previous orders of this office. I find that the Ministry has provided me with sufficient evidence to establish a reasonable expectation of harm with respect to the release of this information. I find, therefore, that this information falls within the ambit of section 14(1)(l). As a result, the exemption in section 49(a) applies to this information.

However, I do not make the same finding with respect to the other portions of the responsive records the Ministry claimed were subject to section 14(1)(l). I am not satisfied that I have been provided with the kind of detailed and convincing evidence required to establish a reasonable expectation of harm from disclosure of that information. In my opinion, the Ministry has failed to demonstrate that disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime as required by section 14(1)(l). As a result, the exemption in section 49(a) does not apply to this information.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that the withheld portion of paragraph 4 on page 1 of the General Occurrence Report contains information obtained from Canadian Police Information Centre (CPIC) records, and thereby qualifies for exemption under section 49(a), in conjunction with section 15(b) of the *Act*.

Section 15(b) of the *Act* reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to
>
> > reveal information received in confidence from another government or its agencies by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

The Ministry submits that CPIC is a computerized system operated by the RCMP that provides the law enforcement community with informational tools to assist in combating crime by providing information on crimes and criminals. It relies on Order M-1004 in support of its position that there exists an expectation of confidentiality with regard to the information contained in the CPIC system. The Ministry submits that this information should not be disclosed.

Analysis and Finding

The Ministry tenders no specific factual evidence that the information in the withheld portion of paragraph 4 on page 1 was subject to an implicit or explicit expectation of confidentiality when it was provided to the CPIC system. Instead, it simply submits that the conclusions in Order M-1004 support its position with respect to the confidentiality of the information at issue.

With respect, I prefer the analysis of Adjudicator Holly Big Canoe in Order MO-1288. In that appeal the institution claimed the application of the exemption at section 9(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act*, which although not necessarily identical, is analogous to section 15(b) of the *Act*. In determining whether CPIC information was subject to an expectation of confidentiality, she wrote:

> The Police submit that the information severed from Records 188 and 189 was supplied to the Canadian Police Information Centre (CPIC) by the Ontario Provincial Police (OPP), which administers the Ontario Suspension Control Centre. A previous decision by the Police to deny access to this same type of information was reviewed in Order M-1055. Former Inquiry Officer Marianne Miller found that section 9(1)(d) did not apply in that case:
>
> > In many circumstances, it will be clear that a reasonable expectation of confidentiality exists among police agencies providing information to and retrieving information from the CPIC system. I do not accept, however, that the OPP have a reasonable expectation of confidentiality against the appellant with regard to

> the specific information obtained from the CPIC system on this occasion. All the information retrieved relates to the suspension of the appellant's driving licence. Therefore, I find that page 44 does not qualify for exemption under section 9(1) of the *Act*. Accordingly, section 38(a) does not apply and the record should be disclosed to the appellant.
>
> …
>
> An expectation of confidentiality must have been reasonable, and must have an objective basis. In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case. It is not sufficient to simply assert an expectation of confidentiality with respect to the information received by the institution.
>
> …
>
> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.

I agree with and adopt this analysis for the purposes of this appeal. In this appeal, there is no evidence before me that any agency which made the entry on the CPIC system or that supplied

information to the CPIC system did so with an implicit or explicit expectation of confidentiality. The appellant is the requester and the information at issue relates to the suspension of the appellant's driver's licence and a history of his previous charges, convictions and dealings with police agencies, the facts of which he must be aware. In my view, this information does not fit within the ambit of section 15(b).

I therefore find that the section 49(a) exemption does not apply to this information.

In light of my conclusions above I will therefore order that the information that I have highlighted on pages 1, 2, 6 and 10 on a copy of the records that I have provided to the Ministry along with this order, be disclosed to the appellant.

PERSONAL PRIVACY

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.

Accordingly, under section 49(b) where a record contains personal information of both the appellant and another identifiable individual, and disclosure of that information would constitute an "unjustified invasion" of that other individual's personal privacy, the Ministry may refuse to disclose that information to the appellant.

Despite this, the Ministry may exercise its 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.

Under section 49(b), 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 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; 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]

Section 21(3)(b)

Section 21(3)(b) reads as follows:

> 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 at issue was compiled and is identifiable as part of an investigation into allegations that an offence under the *Criminal Code* may have been committed.

Analysis and Findings

I find that section 21(3)(b) applies in the circumstances of this appeal. I have reviewed the portions of the records remaining at issue and in my opinion, the personal information of other identifiable individuals severed from the records was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Criminal Code*. The fact that charges were not laid does not affect the application of 21(3)(b) [Order PO-1849]. The presumed unjustified invasion of personal privacy at section 21(3)(b) therefore applies to this information. Section 21(4) does not apply to this information and the appellant did not raise the possible application of the public interest override at section 23 of the *Act*. Accordingly, I conclude that the disclosure of the withheld personal information contained in the severances remaining at issue would constitute an unjustified invasion of personal privacy.

In conclusion, I find that because the remaining withheld portions of the records are subject to the section 21(3)(b) presumption, this information qualifies for exemption under section 49(b).

As I have found that the remaining withheld portions of the records qualify for exemption under the section 21(3)(b) presumption, it is not necessary for me to address whether the factors in section 21(2) might also apply.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because sections 49(a) and (b) are discretionary exemptions, I must also review the Ministry's exercise of discretion in deciding to deny access to

the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed 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 the circumstances of this appeal and based upon the representations of the Ministry on this issue, I conclude that the exercise of discretion by the Ministry to withhold the information that I have not ordered to be disclosed was appropriate, given the circumstances and nature of the information.

ORDER:

1. I find that the Ministry's search for responsive records is reasonable.

2. I order the Ministry to disclose to the appellant the portions of the records that are highlighted on the copies provided to the Ministry with this order by sending them to the appellant by **April 7, 2008** but no earlier than **April 2, 2008**.

3. I uphold the Ministry's decision to deny access to the unhighlighted portions of the information severed from the records.

4. In order to verify compliance with provision 2 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.

Original signed by: February 29, 2008
Steven Faughnan
Adjudicator