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

ORDER PO-2714

Appeal PA07-258

Ministry of the Attorney General

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 the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> A letter from the Ministry of the Attorney General to the Hamilton Police Services [the Police] concerning [the appellant] and sent in 2004.

The Ministry located the responsive record and denied access to it pursuant to sections 49(a), in conjunction with 14(1)(c) and (e) (law enforcement), 19(b) (solicitor-client privilege) and 20 (threat to safety or health), of the *Act*.

The Police also received a request from the same requester under the *Municipal Freedom of Information and Protection of Privacy Act*. The Police located their copy of the same record and denied access to it.

The requester, now the appellant, appealed the decisions of both the Ministry and the Police.

The appellant's municipal appeal was considered by me in Appeal MA07-143, which resulted in the issuance of Order MO-2341-I, concurrently with this order.

During the course of mediation, the Ministry provided the appellant's representative with some additional information about the record at issue, namely, that the record identifies a concern about the appellant and communicates that concern to the Police.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, initially, seeking its representations. I also sent a Notice of Inquiry to the Police in the municipal appeal. I received representations from the Ministry in this appeal, but not from the Police in the municipal appeal. In its representations, the Ministry withdrew its reliance on sections 14(1)(e) and 20. I then sent a Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant, seeking his representations. I received representations from the appellant in response. Both the Ministry and the appellant provided representations on the applicability of the "public interest override", as set out in section 23 of the *Act*, to the record.

I also sought and received further representations from the appellant on the applicability of the personal privacy exemption in section 49(b) with respect to any personal information of other identifiable individuals that may be contained in the record.

RECORD:

The record at issue in this appeal consists of a two-page letter.

DISCUSSION:

PRELIMINARY ISSUE

The appellant has asked for an oral hearing for his appeal. In his representations, he requests that:

> …the Commissioner grant him the opportunity to make oral submissions and hear from seven other witnesses if issues of credibility on facts, regarding the history of his interaction with the Ministry and Hamilton Police Services leading up to the day that he was presented with the record at issue…
>
> [The] oral submissions and related evidence would further explore the background events leading up to the letter and demonstrate the origins of the letter…
>
> [He] would adduce expert testimony as to the impact of this letter and its circumstances…

Analysis/Findings

With respect to the right to make representations at the inquiry, section 52(13) of the *Act* states that:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

Oral representations are specifically referred to in this office's Practice Direction 15, which states that:

> During an inquiry, the Adjudicator may request additional information from any party, either orally or in writing.

The appellant wishes to make oral representations concerning the history of his interaction with the Ministry and the Police and to provide background information concerning the origin of this letter and its impact. However, in my view, these matters are not relevant to my determination of whether the claimed exemptions apply.

In this appeal, I agree with and adopt the reasoning of former Assistant Commissioner Irwin Glasberg in Order M-875 where he stated the following concerning a request for an oral hearing in an appeal where multiple exemptions were claimed:

> It is the usual practice of the Commissioner's office to invite the parties involved in an inquiry to submit their representations in writing. The parties to this appeal have provided detailed and well articulated written submissions which fully address the issues raised in this appeal. On the basis that the appellant's representations are clear and understandable, I have decided that this is not a situation where it would be appropriate to depart from the Commission's usual approach for the receipt of representations.

Therefore, based upon my review of the representations and the record at issue, I have decided to proceed with this inquiry in writing.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

> and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

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

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

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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.)].

The Ministry submits that:

> The only personal information contained in the document is personal information about the appellant. Names of his family members are also mentioned in passing, in connection with public court documents. Several other people are named or referred to in the letter, but only in their official capacities. There is no personal information at issue except that of the appellant himself.

The appellant does not disagree with the Ministry's representations on this issue.

Analysis/Findings

Upon my review of the record, I note that it contains the personal information of the appellant, and that it also contains the personal information of the appellant's family members, who, the Ministry acknowledges are named in the record in the context of certain court documents that were apparently enclosed with the record. This personal information consists of these individuals' marital or family status (paragraph (a)), the views or opinions of another individual about these individuals (paragraph (g)), and these individuals' names, where it appears with other personal information (paragraph (h) of the definition of "personal information" in section 2(1)).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

In this case, the institution relies on section 49(a) in conjunction with sections 14(1)(c) and 19(b).

LAW ENFORCEMENT

I will now determine whether the discretionary exemption at sections 14(1)(c) applies to the record.

The relevant portions of section 14(1)(c) state:

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

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 in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term "law enforcement" has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In 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 PO-2034, P-1340].

The Ministry submits that:

> The letter in question refers on the second page to a particular investigative technique in current use by police, and discusses the application of that technique. The technique in question is investigative; it is not an enforcement technique. Releasing the letter will reveal something about the investigative technique.
>
> It is signficant that any information released to the appellant effectively becomes public, since there is no restriction on how the appellant might use the information. The effectiveness of law enforcement techniques is diminished when they become widely known. In this case the technique identified in the letter should not be revealed.

The appellant submits that:

> [T]he Ministry has not provided detailed and convincing evidence to establish a reasonable expectation of harm…
>
> Given that [the appellant] and his friend reviewed the letter in June 2004, when it was provided voluntarily by the [Police] detective, there appears to he no basis for the claims of potential harm or interference arising from the further disclosure of this letter.
>
> The Ministry has not provided any "detailed and convincing" evidence in its submissions to establish a "reasonable expectation of harm" that releasing the letter will reduce the effectiveness of a particular investigative technique. Presumably, if there was ever any merit to this argument, it was abrogated when the detective of the Hamilton Police Service made a decision to share the contents of the letter with [the appellant and his friend]; however, the use of the letter by the detective appeared to [the appellant] to be the only investigative technique employed. Conversely, it seems reasonable to infer that if revealing the contents of the letter would erode the effectiveness of particular investigative techniques, then the officer would not have shared the letter with [the appellant] and his friend…

> As the Ministry has not provided detailed and convincing evidence that they were employing an unknown investigative technique, or that they had the authority and jurisdiction to do so, this exemption should not be upheld. Moreover, there appears to be an issue as to whether the "technique" in question is investigative - and potentially protected, or enforcement - which is not protected (Orders PO-2034, PO-1340).

The Ministry addressed the appellant's claim that he was shown a copy of the record, as follows:

> There has been some suggestion from the appellant that the Hamilton Police showed the letter briefly to the appellant on one occasion. The Ministry is unable to confirm or deny this claim… It is the Ministry's understanding that the police officer recalls meeting with the appellant and did have the letter with him in a folder with other papers, but does not recall intentionally showing the letter to the appellant. Neither does the officer deny showing it - he simply has no specific memory of this detail.

Analysis/Findings

Upon my review of the letter, I agree with the Ministry that some of the information on page two makes reference to an investigative technique. The remainder of the letter contains background information provided by the Ministry to the Police.

While the record at issue in this appeal does not relate to enforcement techniques and procedures, I find that its disclosure would reveal an investigative technique in use in law enforcement. [Order PO-1340 and PO-2034].

However, in my view, the Ministry has not provided "detailed and convincing" evidence in its submissions to establish that disclosure of the record will reduce the effectiveness of the particular investigative technique referred to on page 2 of the record. The investigative technique is identified in the letter, but the procedure undertaken to utilize this technique is not. Neither the record, nor the Ministry's representations, contains details as to how disclosure of the technique referred to in the letter could reasonably be expected to hinder or compromise its effective utilization by law enforcement agencies [Order PO-2582].

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*].

Based on the information from the record which is referred to in his representations, I also accept the appellant's evidence that he has seen a copy of the letter. Therefore, in the particular circumstances of this appeal, I conclude that disclosure of the record would also not reasonably

be expected to hinder or compromise its effective utilization by law enforcement agencies in these circumstances of the appellant's case.

Therefore, I find that the Ministry has not provided the necessary "detailed and convincing" evidence to establish a "reasonable expectation of harm" should the record be disclosed.

As a result, section 14(1)(c) is not applicable to exempt the information in the record from disclosure.

SOLICITOR-CLIENT PRIVILEGE

I will now determine whether the discretionary exemption at section 19(b) applies to the record.

Section 19(b) of the *Act* states as follows:

A head may refuse to disclose a record,

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

Section 19 contains two branches. The Ministry relies on the statutory exemption in Branch 2.

Branch 2 is available in the context of Crown counsel giving legal advice or conducting litigation. The Ministry claims that Branch 2 applies to the record as it "was prepared by or for Crown counsel for use in giving legal advice" or "in contemplation of or for use in litigation".

The Ministry states that:

> The letter was written by legal counsel within the Ministry. It adverts to past litigation conducted by Ministry counsel, and its context raises the possibility of future litigation which would also be conducted by Ministry counsel. Further, the letter provides advice to the Hamilton Police. The Ministry submits that the branch two privilege is clearly engaged.

The appellant submits that:

> Although the Ministry stated that the letter refers to prior legal proceedings and raises the possibility of future litigation, they have not provided any evidence to demonstrate this claim and engage the application of section 19(b)…
>
> Other than the Ministry's general statement regarding the application of section 19(b), the reliance on this discretionary exemption is not limited and specific as the *Act* intended. The section 19 exemption exists to protect the Crown's record

and its sensitive contents from disclosure to the general public by a simple request.

Analysis/Findings

The question of whether a communication between Crown counsel and a member of a police force can be protected by solicitor-client communication privilege has been addressed in several previous orders. In Order MO-1663-F, Adjudicator Sherry Liang summarized these decisions, stating:

> In *R. v. Campbell* [reported at [1999] 1 S.C.R. 565 (S.C.C.)], the Supreme Court of Canada adopted what it described as the "functional" definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.
> >
> > The Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that:
> >
> > > [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.
>
> *R. v. Campbell* has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the [municipal] *Act*, or [its equivalent] section 19 of the provincial *Act*…

> Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.

Based on my review of the record at issue and the parties' representations, I find that the record is not subject to the statutory solicitor-client communication privilege. I find the Ministry has provided an insufficient basis for me to conclude that the communication in the record was in relation to the seeking or giving of legal advice. There is nothing in the specific communication at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking or giving of legal advice to the Police from the Crown. I find, accordingly, that the Ministry has not established that these communications occurred within the framework of a solicitor-client relationship [Order MO-1663-F].

Concerning the Ministry's claim of litigation privilege, the Court of Appeal in Ontario has described it as protecting records created for the "dominant purpose" of existing or reasonably contemplated litigation [Orders MO-1663-F and MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. In *General Accident v. Chrusz*, above, the Ontario Court of Appeal approved of the "dominant purpose" test from *Waugh* v. *British Railways Board*.

For this privilege to apply there must be more than a vague or general apprehension of litigation. Based upon my review of the record, I am not satisfied that it was created for the dominant purpose of litigation. There is no reference to pending or current litigation in the record, nor has the Ministry provided me with representations to allow me to conclude this. The reference in the record to prior litigation involving the appellant occurred well before the letter that comprises the record was written. I find that the record was not created for use in relationship to this prior litigation proceeding, and that, section 19(b) does not apply to the record.

PERSONAL PRIVACY

The sole remaining issue is whether the discretionary exemption at section 49(b) applies to the personal information of identifiable individuals other than the appellant which I have found are contained in the record.

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 exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion"

of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information at issue does not fit within these paragraphs.

In deciding 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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information does not fit within these paragraphs.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). The information does not fit within these paragraphs.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The appellant refers to the applicability of the factors in favour of disclosure of the record in sections 21(2)(a), (b) and (d). These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

I will deal with each factor raised by the appellant separately.

21(2)(a): public scrutiny

The appellant submits that:

> [He] strongly believes that the letter was created in response to his efforts to resolve difficulties he was experiencing with various government offices. Those circumstances, as previously detailed, raise serious concerns as to whether the Ministry engaged in inappropriate conduct and whether the [Police have] exercised its discretion in bad faith or for an improper purpose. More importantly, they demonstrate that full disclosure of the documents is desirable in terms of its value as a tool for subjecting the activities government agencies to public scrutiny.

Analysis/Findings

With respect to whether section 21(2)(a) is a factor in a given situation, and whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny, previous orders have stated as follows:

> Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in clause (a) [Order P-256].

Although the appellant is clearly interested in access to the record, I have not been provided with sufficient evidence to support the view that this factor is relevant in the circumstances. The appellant clearly has a personal interest in obtaining the record, but I do not find that the disclosure of the personal information of the identifiable individuals other than the appellant found in the record is desirable for the purpose of subjecting the activities of either the Ministry or the Police to public scrutiny [Order PO-2420].

In my view, section 21(2)(a) is not a relevant factor favouring disclosure in these circumstances.

21(2)(b): public health and safety

The appellant submits that:

> the non-disclosure of the information in question has impacted his health and his son's health, which constitute part of the broader public health and safety.

Analysis/Findings

On my review of the personal information at issue in this appeal, I am not satisfied that its disclosure may promote public health and safety. The information in the record concerns the appellant specifically. The appellant has seen the record. The appellant has not directed me to any specific personal information in the record that is relevant to public health and safety. Therefore, I find that section 21(2)(b) is not a factor favouring disclosure in this appeal.

21(2)(d): fair determination of rights

The appellant submits that disclosure of the personal information at issue is necessary for a determination to be made of how his rights have been affected.

Analysis/Findings

For section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

I find that the appellant has not established that the personal information at issue is relevant to a fair determination of his rights. He has not established that there is a legal right which is related

to an existing or contemplated proceeding. Therefore, I find that section 21(2)(d) is not a factor favouring disclosure in this appeal.

Summary

I have found that the factors in favour of disclosure in sections 21(2)(a), (b) and (d) raised by the appellant have no application to the personal information of the identifiable individuals in the record other than the appellant. Based upon my review of this personal information, I find that the listed factor in section 21(2)(f) (that the personal information is highly sensitive) favouring non-disclosure of this information applies. To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518]. Although this personal information of identifiable individuals other than the appellant may be contained in public court documents, disclosure of this information, along with remaining information in the record, could reasonably be expected to cause significant personal distress to these individuals. Considering that the sole factor which I have found relevant under section 21(2) favours privacy protection, I find that the disclosure of the personal information of individuals other than the appellant will give rise to an unjustified invasion of their personal privacy.

Accordingly, I find that the personal privacy exemption in section 49(b) applies to the personal information of the identifiable individuals other than the appellant in the record.

Absurd result

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(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 [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

The appellant submits that:

> [T]he names of [the appellant's] family are mentioned in connection with public court documents. This indicates that the information contained in the documents at issue relating to parties other than the appellant would be readily accessible to any member of the public through other means. There were no publication bans or other orders that would impede the ability of any member of the public from accessing this information…
>
> [T]he information discussed in the document relating to the third parties is clearly within the knowledge of [appellant]… [T]he information relates to [the appellant's] family's involvement in public court proceedings that also directly involved [the appellant].

Analysis/Findings

Although the appellant was present or involved in the incidents detailed in the record and has seen a copy of the record, I find that the absurd result principle is inapplicable to allow disclosure of the personal information of identifiable individuals other than the appellant referred to in the record. In the particular circumstances of this case, I agree with the findings of Adjudicator Laurel Cropley in Order MO-1524-1, where she stated that:

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

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

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

> sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

The portions of the record that contain the personal information of identifiable individuals other than the appellant contain the personal information of individuals involved in highly sensitive personal situations. I find that the sensitivity of this personal information constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this personal information would be inconsistent with the purpose of the exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

Therefore, I find that the absurd result principle is inapplicable in this case and that it would not be absurd to withhold the personal information of identifiable individuals other than the appellant that I have found to be exempt under section 49(b).

PUBLIC INTEREST OVERRIDE

I will now consider whether the public interest override applies to allow disclosure of the personal information of identifiable individuals other than the appellant that I have found to be exempt.

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.

Even though section 49(b) is not listed, because section 23 may override the application of section 14, it may also override the application of section 49(b) with reference to section 21 [see for example Order PO-2246]. If section 23 were to apply in this case, it would have the effect of overriding the application of section 49(b), and the appellant would have a right of access to the personal information at issue.

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, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

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. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant did not provide specific representations concerning the application of section 23 to the personal information of other identifiable individuals. He did submit, however, that:

> …there is a basic public interest in knowing about the operations of government and their interactions with, and effects on, the public…
>
> [The appellant] strongly believes that the letter was created in response to his efforts to resolve difficulties he was experiencing with various government offices. Rather than follow up with him directly, the Ministry involved the [Police] to "silence him down"; therefore, this raises serious issues as whether the Ministry engaged in inappropriate conduct and whether the [Police have] exercised its discretion in bad faith or for an improper purpose.
>
> It is certainly not in the interest of the public if government institutions can refuse to disclose records, which result from the possible abuse of government political power. Refusing access to the letter may mean that the integrity of the interaction or communication between the client and law enforcement personnel is negatively impacted due to the lack of transparency and respect for the client's freedom to access the record. Both [the appellant] and the public can clearly perceive this, in general, as an abuse of power, unless the validity of the record's contents can be examined and challenged and resolved, if appropriate. A decision to uphold the exemptions that the [Police] have relied on effectively restricts [the appellant's] freedom of expression to counter the record and delay his attempt to resolve his previous issues with the Ministry's officc.

Analysis/Findings

In my view, the interests being advanced by the appellant are essentially private in nature. Accordingly, I find that the privacy interests protected by section 49(b) concerning the personal information of identifiable individuals other than the appellant in the record that I have not ordered disclosed above cannot be overcome in this case by the "public interest override" in section 23. There is no compelling public interest in the disclosure of this personal information that clearly outweighs the purpose of this established exemption. Upon review of the record, I find that it was created in response to a specific incident concerning the appellant and that the appellant is requesting the information for a predominantly personal reason [Order M-319]. Furthermore, based on the provisions of this order, a significant amount of information will be

disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568].

EXERCISE OF DISCRETION

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

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

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

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

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

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

According to the Ministry, the factors it considered include the following:

> …the fact that the record contains personal information about the appellant; the appellant's legitimate interests in gaining access to the record; the fact that the record was not addressed to or intended for the appellant; the sensitive nature of the record's contents and the confidential context of its creation; and the public interest in fostering an ongoing relationship of confidence between the Ministry and law enforcement agencies.

The appellant did not address this issue directly in his representations.

Analysis/Findings

I find that the Ministry exercised its discretion in a proper manner taking into account relevant factors and not taking into account irrelevant factors to withhold the personal information of identifiable individuals other than the appellant. Disclosure of this information would constitute an unjustified invasion of the personal privacy of the identifiable individuals in the record other than the appellant.

ORDER:

1. I uphold the Ministry's decision not to disclose the personal information of identifiable individuals other than the appellant in the record. For ease of reference I have highlighted the portions of the record that should not be disclosed to the appellant on the copy of the record sent to the Ministry with this order.

2. I order the Ministry to disclose the remainder of the record to the appellant by **October 3, 2008** but not before **September 26, 2008.**

3. 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 record disclosed to the appellant.

August 29, 2008

Diane Smith
Adjudicator