



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

ORDER PO-2893

Appeals PA09-175 and PA09-176

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry of Community Safety and Correctional Services (the Ministry) received the following request:

Please send the incident report for [specified date], where I was stopped [at specified location]. Please include a transcript of the alerting calls that caused this police action.

The Ministry also received the following additional request from the same requester:

Please send me the incident report for [a different specified date], in which three cruisers responded to my location at [a different specified address]. Please include a transcript of the alerting calls that caused this police action.

In response to the first request, the Ministry identified the responsive records and issued a decision granting partial access, but denying parts of the records citing the personal privacy exemptions at section 49(a), with reference to the law enforcement exemptions in sections 14(1)(d), 14(1)(e), 14(1)(l), 14(2)(a); and section 49(b), in conjunction with section 21(1). The Ministry also indicated that some of the information in the records was not responsive to the request.

In response to the second request, the Ministry identified the responsive record and issued a decision providing partial access to the record, but denying parts of the record citing the personal privacy exemptions at section 49(a), with reference to the law enforcement exemptions in sections 14(1)(d), 14(1)(e), 14(1)(l), 14(2)(a); and section 49(b), in conjunction with section 21(1). Again, the Ministry indicated that some of the information in the record was not responsive to the request.

In both cases, the requester, now the appellant, appealed the Ministry's decisions. Appeal number PA09-175 was opened relating to the first request, while appeal number PA09-176 was opened relating to the second request.

During mediation of both appeals, the appellant agreed that the non-responsive information and police codes could be removed from the scope of the appeal. As further mediation was not possible, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

I began my inquiry of both appeals by sending a Notice of Inquiry to the Ministry setting out the facts and issues. The Ministry provided representations in response to the Notice. I then sent a Notice to the appellant along with a copy of the Ministry's representations. Portions of the Ministry's representations were withheld due to my concerns about confidentiality. I also received representations from the appellant.

This order addresses all of the issues before me in both appeals.

RECORDS:

The records consist of the withheld portions of an occurrence summary, a general occurrence report and the transcripts of the alerting calls from both occurrences.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. Section 2(1) states in part:

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

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, 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 records contain the personal information of the appellant and other identifiable individuals within the meaning of paragraphs (a), (b), (d) and (e) of the definition of that term found in section 2(1) of the *Act*.

Based on my review of the records, I find that the records relate to two occurrences that were recorded by the Ontario Provincial Police (OPP) regarding the appellant. I agree with the Ministry that the records contain the appellant's personal information as well as the personal information about other identifiable individuals (the complainants) within the meaning of paragraphs (a), (b), (c), (d), (e) and (g) of the definition of "personal information" found in section 2(1) of the *Act*. The personal information includes contact information about the complainants, their observations and statements to the OPP and other information about the appellant.

As I have found that the records contain the personal information of the appellant as well as other identifiable individuals, the appellant's right of access to these records is governed by Part III of the *Act* which gives an individual a general right of access to their own personal information held by institutions.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

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(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 personal information.

The Ministry relies on section 49(a) in conjunction with sections 14(1)(d), (e) and (l) to deny access to the records remaining at issue. Based on my finding under section 49(a) and 14(1)(e) below, I do not need to consider the application of sections 14(1)(d) and (l). Section 14(1)(e) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

endanger the life or physical safety of a law enforcement officer or any other person;

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, or
- (c) the conduct of proceedings referred to in clause (b)

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.)].

In the case of section 14(1)(e), the Ministry must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the Ministry must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The Ministry provided a confidential affidavit along with its representations as evidence in support of the application of this exemption to certain portions of the withheld records.

The appellant disputes the Ministry's claims that section 14(1)(e) applies and submits that the OPP's actions against him "endangered the public's and my safety". The appellant's representations also describe in detail the occurrences which are the subject of his requests.

While I did not provide the appellant with a copy of the Ministry's confidential affidavit due to my confidentiality concerns, the appellant was provided with a copy of the representations the Ministry provided on the application of section 14(1)(e) to the records.

I have reviewed the representations of the Ministry including the affidavit, the records and the representations of the appellant. The information remaining at issue consists of contact information for the complainants and the information they provided the OPP as well as other information regarding the two occurrences. In the circumstances of this appeal, I find that the Ministry has provided me with a reasonable basis for establishing that the harm in section 14(1)(e) could reasonably be expected to occur. I find that section 14(1)(e) applies to the withheld portions of the records including the transcripts from the two occurrences, as disclosure of these portions of the record could reasonably be expected to endanger the life or physical safety of a law enforcement officer or other person. In making my finding I also took into consideration the fact that the Ministry has provided the appellant with severed copies of the records.

Accordingly, as I have found that section 14(1)(e) applies to the records I find that the records are exempt under section 49(a), subject to my finding on the Ministry's exercise of discretion. As I have found the records exempt under section 49(a), I do not need to consider the possible application of section 49(b).

EXERCISE OF DISCRETION

As noted, the sections 49(a) exemption is discretionary, and permits the Ministry 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)].

The Ministry provided extensive representations on its exercise of discretion:

The Ministry has given careful consideration to the appellant's right of access to personal information records held by the Ministry. The Ministry is aware that the appellant is an individual rather than an organization. By providing the appellant with partial access to the requested information, the Ministry has tried to appropriately balance the appellant's right of access to personal information records against the law enforcement sensitivity of the requested police records.

The Ministry considered releasing the exempted information to the appellant notwithstanding that the discretionary exemptions from disclosure contained in sections 49(a) and (b) applied to the withheld information...The historic practice of the Ministry when responding to personal information requests for police records is to release as much information as possible in the circumstances. The Ministry notes, however, that at times public safety considerations must override an individual's right of access to personal information records.

Given the highly sensitive nature of the matters reflected in the records remaining at issue, the Ministry was satisfied that release of this information may reasonably be expected to lead to significant law enforcement harms.

The Ministry in its exercise of discretion took into consideration the fact that confidentiality of law enforcement information in some instances is necessary for public safety and protection. Likewise, for similar reasons information about confidential consultations undertaken during the course of law enforcement

activities must at times be withheld. This circumstance adds a heightened level of sensitivity to the exempt information.

The Ministry carefully considered whether it would be possible to sever any additional non-exempt information from the records at issue. However, the Ministry concluded that additional severing was not feasible in this instance.

The appellant's representations focus on the need to have the information at issue in order to address an issue dealing with his driving privileges. The appellant also alleges that the OPP may have acted maliciously against him in the two occurrences which are the subject of his requests.

Based on the Ministry's representations and the circumstances in this appeal, I find the Ministry properly exercised its discretion to withhold the remaining records and portions of records from disclosure under section 49(a). While I am sympathetic to the appellant's need to have access to the information at issue, I have not been provided with evidence that the Ministry has acted in bad faith in applying section 49(a) to withhold the information at issue. Further, I find that the Ministry properly considered the fact that the appellant was requesting his own personal information, the historic practice of the institution to such requests and the nature of the exemptions and the interests protected under the exemptions. In balancing the appellant's right to his own personal information against other individuals' right to privacy, the Ministry disclosed much of the information in the occurrence reports to the appellant, while withholding only that information protected under sections 49(a) of the *Act*. I uphold the Ministry's exercise of discretion in the circumstances of the appeal.

ORDER:

I uphold the Ministry's decision.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ May 26, 2010