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

ORDER PO-2916

Appeal PA08-367

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL

An individual submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records in his Ontario Provincial Police (OPP) personnel file, and an OPP Professional Standards Bureau (PSB) investigation file.

The ministry subsequently issued a decision disclosing the requester's OPP personnel file in its entirety, except for a small portion of one page to which the appellant chose not to pursue access. Access to portions of the 12-page PSB report identified as responsive to the second part of the request was denied pursuant to section 49(b) (personal privacy), along with the presumption in section 21(3)(d), and the factors in sections 21(2)(f) and (h), and pursuant to section 49(a) (discretion to refuse requester's own information) in conjunction with section 15(b) (relations with other governments) of the *Act*.[1]

As the withheld portions of the PSB report appeared to contain the personal information of individuals other than the appellant, this office contacted these individuals (the affected parties) during mediation to explore obtaining their consent to disclosure of the information pertaining to them. Two of the affected parties consented to the disclosure of their personal information to the appellant during this stage, and the ministry issued a supplemental decision letter accordingly. The remaining affected parties either declined to provide consent, or did not respond to contact by this office, although contacted a second time at the adjudication stage of the appeal.

During my inquiry into the appeal, I received representations from the ministry; however, the appellant decided not to submit representations. Upon filing his appeal with this office, however, the appellant provided a detailed explanation of his position on the access decision before me. The appellant asked that these submissions remain confidential, and so they will only be reproduced in summary form in the body of this decision.

In this order, I reach the following conclusions with respect to the withheld portions of the PSB report:

- Section 65(6) does not apply in the circumstances of this appeal; the record is subject to the *Act*;
- The record contains the personal information of the appellant and other identifiable individuals;
- Portions of the record contain only the personal information of the appellant and must be released to him;
- Other information withheld by the ministry under section 49(b) must be released to the appellant because its disclosure would not result in an unjustified invasion of another individual's personal privacy;
- Section 49(a), together with section 15(b), does not apply to the record; and

[1] The ministry's November 26, 2008 and April 22, 2009 decisions respecting the PSB report also referred to reliance on additional exemptions in its denial of access, namely sections 21(3)(b) and 15(a). These exemptions were not carried forward in the appeal; the ministry offered no representations in support of their application.

- The ministry's exercise of discretion is upheld.

DISCUSSION

PRELIMINARY MATTER – Section 65(6) of the *Act*

The record at issue in this appeal is an investigation report prepared by the Professional Standards Bureau of the OPP. In a number of past orders, similar records have been determined to be excluded from the scope of the *Act* under section 65(6), which states that the *Act* does not apply to certain labour relations and employment-related records.[2] If any of the three exclusionary provisions in section 65(6) apply, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the *Act* and not subject to the Commissioner's (or my) jurisdiction. The possible application of section 65(6) was not raised by the ministry in this appeal. However, as the application of section 65(6) is a jurisdictional issue, I am obliged to consider it, even if it is not raised by an institution.

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157). Further, the courts have confirmed that the type of records excluded from the *Act* by section 65(6) are documents related to *matters in which the institution is acting as an employer*, and terms and conditions of employment or human resources questions are at issue.[3]

Based on my review of the information contained in the appeal file, including the ministry's representations, the appellant's letter of appeal and the record, and in consideration of the requirements of section 65(6) of the *Act*, I am satisfied that none of the three exclusions apply. As noted above, the application of section 65(6) requires at a minimum that there be an employer-employee relationship in existence at the time the record was collected, prepared, maintained or used. In the circumstances of this appeal, I am satisfied that the appellant's employer was not the ministry, but rather an identified band council, pursuant to the terms of the Ontario First Nations Policing Agreement. In view of the specific employment relationship present in this appeal, I find that section 65(6) does not apply. Accordingly, the record is subject to the *Act*, and I must review the possible application of the exemptions claimed by the ministry to it.

DO THE RECORDS CONTAIN 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. Sections 49(a) and 49(b) are relevant in this appeal. These sections state:

[2] See, for example, Orders PO-2531, PO-2499, PO-2426 and PO-2658.

[3] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

> 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];
> >
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

As stated, the ministry has withheld information in this appeal on the basis that its disclosure would constitute an unjustified invasion of another individual's personal privacy under section 49(b). Certain portions of the record have also been withheld under section 49(a), taken together with section 15(b). However, the personal privacy exemption only applies to information that qualifies as "personal information," as defined in section 2(1) of the *Act*. Accordingly, before reviewing the possible application of the exemptions claimed, I must first determine if the record contains "personal information" and, if so, to whom it relates.

To satisfy the requirements of the definition in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[4] The definition of personal information in section 2(1) contemplates inclusion of the following types of information:

> (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 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,

[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if 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) of the definition of the term in section 2(1) may still qualify as personal information (Order 11).

Older orders of this office established that information associated with an individual in a professional, official or business capacity will not necessarily be considered to be "about" the individual.[5] On April 1, 2007, amendments relating to the definition of personal information in the *Act* came into effect. To some extent, the amendments formalized the distinction made in previous orders between personal and professional (or business) information for the purposes of the *Act*. Sections 2(3) and (4) state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

However, it remains true that 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.

The ministry submits that the record contains the personal information of the appellant and other identifiable individuals that fits within paragraphs (a), (b), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. The ministry also takes the position that the information provided by the affected parties in their official capacity for the purpose of the PSB investigation should be considered to be their personal, rather than professional, information in the particular circumstances of this request.

Having reviewed the records, I am satisfied that they contain the "personal information" of the appellant and other identifiable individuals within the meaning of the definition of that term in section 2(1) of the *Act*. I accept the ministry's submission that information about the affected parties, provided in the context of the PSB investigation, brings that information within the scope of the definition of "personal information" in the particular circumstances of this appeal. Accordingly, I find that the record contains "personal information" according to paragraphs (a), (b), (e) and (h) of the definition in section 2(1) of the *Act*.

[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

In my view, however, and according to paragraph (g) of the definition in section 2(1) of the *Act*, the opinions or views expressed *about* the appellant by the other individuals constitute the personal information of the appellant. Accordingly, I find that there is undisclosed personal information about the appellant in the records in the form of opinions and views expressed about him. The disclosure of the appellant's own personal information to him cannot result in an unjustified invasion of another individual's personal privacy under section 49(b).

With the exception of the personal information about the appellant provided by two of the affected parties (contained on pages 31-35), over which the ministry has also claimed section 49(a) in conjunction with section 15(b), no other exemptions are claimed in relation to this personal information. I will order the ministry to disclose those portions of the record to the appellant. Accordingly, subject to my review of the application of section 49(a) together with section 15(b) to the statements of two of the affected parties on pages 31 to 35 *containing the appellant's personal information*, I find that those other portions of the record containing the appellant's personal information are not exempt under section 49(b) (Order PO-2896). On the copy of the record sent to the ministry with this order, I have marked the appellant's personal information that must be disclosed to him in green highlighter.

Moreover, there is other information recorded on pages 32 to 35 that consists primarily of the recitation of facts about, or steps taken with respect to, the process and the situation that led to the PSB investigation. I find that this information does not constitute the personal information of the affected parties providing it. These specific portions of pages 32 to 35 cannot qualify for exemption under section 49(b) because they do not contain the personal information of another identifiable individual. Accordingly, I will only review the possible exemption of these portions of the record under section 49(a), along with section 15(b).

I will now review the application of section 49(b) to the personal information of other identifiable individuals contained in the record.

WOULD DISCLOSURE RESULT IN AN UNJUSTIFIED INVASION OF PERSONAL PRIVACY?

Where a record contains both the personal information of the appellant and other individuals, the relevant personal privacy exemption is section 49(b). Under section 49(b), the ministry has the discretion to deny the appellant access to his own personal information in that record if the ministry determines that the disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to his own personal information against another individual's right to protection of their privacy, the ministry may choose to disclose a record with mixed personal information.

When the analysis takes place under section 49(b), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information *would* constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Where one of the

presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or the "public interest override" at section 23 applies.[6] The "public interest override" in section 23 has not been argued in this appeal and, in my view, neither it nor any of the exceptions in section 21(4) apply in the circumstances.

If none of the presumptions against disclosure contained in section 21(3) apply, the ministry is obliged to consider and weigh the possible application of the factors listed in section 21(2) of the *Act*, as well as all other considerations which are relevant in the circumstances of the case (Order P-99).

The ministry relies on the presumption against disclosure in section 21(3)(d) and also refers to the factors in sections 21(2)(f) and (h) to deny access to the record. The ministry submits that in the context of the PSB investigation that is the focus of the appellant's request, the personal information supplied by other individuals is "inherently highly sensitive," as contemplated by section 21(2)(f).

The ministry submits that the personal information provided by the affected parties "may have been supplied implicitly in confidence" according to the factor in section 21(2)(h). However, the ministry states that it "defers to the views of the affected parties in this regard." As noted, none of the affected parties whose statements remain at issue in this appeal responded to this office's request for representations during the adjudication stage of the inquiry.

The ministry also argues that some of the information in the records is exempt because it consists of the employment history of some of the affected parties and therefore falls within the presumption in section 21(3)(d). However, on the copy of the record provided to this office, section 21(3)(d) is only recorded adjacent to a portion of text withheld on page 33.

Further, I also note that although section 21(3)(b) is marked on all of the pages of the record, the ministry offered no representations in support of the application of this presumption, and I find that it does not apply in any event.

As discussed in previous orders, the absurd result principle may apply whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it; in appropriate circumstances, the information may be found not exempt under section 49(b) (or section 21(1)) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[7] In this appeal, the ministry argues that applying the absurd result principle in the circumstances would be inconsistent with the purpose of the exemption applied, at least in part because of the "interconnectedness" of the appellant's personal information with that of the affected parties in the PSB report.

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[6] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[7] The absurd result principle has been applied where: the requester sought access to his or her own witness statement (Orders M-444 and M-451); the requester was present when the information was provided to the institution (Orders M-444 and P-1414); or the information is clearly within the requester's knowledge (Orders MO-1196 and PO-2679).

As previously noted, the appellant did not submit representations in response to the Notice of Inquiry. However, the appellant's appeal letter to this office contains a lengthy review of the background to his request as well as comments on the exemptions claimed by the ministry in denying access to the record. This correspondence is marked confidential. The appellant's comments, which directly address the factors relied on by the ministry in denying access and also allude to several of the factors favouring disclosure in section 21(2), may only be outlined in general. To begin, the appellant's appeal letter provides an explanation that implicitly suggests that the factor in section 21(2)(a) (public scrutiny) may be relevant due to concerns about the fairness of the process that forms the subject matter of his request, as well as the adequacy of disclosure of information about that process to him. As I read it, the thrust of the appellant's appeal letter is that fairness dictates that he be given access to the full PSB investigation report because it relates directly to his employment and because it must have formed the basis for the eventual outcome. Further, on my reading, the appellant's submissions raise the possible relevance of several "unlisted factors" discussed in previous orders of this office relating to institutional integrity and adhering to principles of natural justice.

Analysis and Findings

The following parts of section 21 will be discussed in the reasons that follow:

> (2) 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; …
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive; …
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;

Having considered the ministry's representations and on my review of the personal information in the records, I agree with the ministry that the presumption against disclosure in section 21(3)(d) applies to one small piece of personal information relating to one of the affected parties. Specifically, I find that there is information relating to one of the affected parties that fits within the presumption in section 21(3)(d) on pages 31 and 32. In this appeal, where it appears that the

ministry is claiming section 21(3)(d) in relation to information at the top of page 33, I find that the personal information there does not provide a sufficiently detailed description of any individual's "employment history" to fit within the presumption in section 21(3)(d). I reach a similar conclusion about a brief piece of text appearing midway down page 33 regarding a senior OPP employee, and I find that it does not fit within the presumption in section 21(3)(d).

I turn now to a review of the factors in section 21(2) respecting the personal information that is not subject to the presumption in section 21(3)(d) and has not been ordered disclosed because it is only the appellant's own personal information. In the following reasons, I find that the factors in sections 21(2)(f) and 21(2)(h) are relevant considerations favouring the protection of privacy in the circumstances of this appeal. However, I also find that the factors in section 21(2)(a) and several unlisted factors – public confidence in the institution and an adequate degree of disclosure – also apply and that in the balance, the factors weigh in favour of disclosure of most of the undisclosed information in the record.

Factors weighing in favour of privacy protection

In order to bring personal information within the ambit of section 21(2)(f) (highly sensitive), I must be satisfied by the evidence that disclosure of the information would result in "a reasonable expectation of 'significant' personal distress" to the subject individual.[8] The ministry argues that the personal information at issue is "inherently highly sensitive" due to the context in which it was gathered. On my view of the information at issue, I am satisfied that some of the personal information about, and provided by, the affected party witnesses may be distressing in nature (if disclosed) and that it therefore attracts the application of the factor in section 21(2)(f).

Accordingly, I find that section 21(2)(f) applies to the personal information of individuals other than the appellant and with respect to the information they provided in direct response to the PSB investigator's questioning about the appellant and other circumstances leading to the investigation (see Order P-1014).

I take a similar, but not identical, view of the application of the factor in section 21(2)(h) (provided in confidence) to the remaining personal information at issue. I accept that the context and the surrounding circumstances of the PSB investigation are such that a reasonable person would expect that information supplied to the investigator would be subject to a degree of confidentiality (Order PO-1910). Having said this, however, past orders have determined that there are limits to the expectation of confidentiality in relation to information provided in the course of an investigation into workplace conduct (Orders M-82 and P-1014). In Order M-82, Inquiry Officer Holly Big Canoe stated the following with respect to the application of section 14(2)(h), which is the municipal equivalent to section 21(2)(h):

> In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of

[8] See, for example, Orders PO-2518, PO-2617, MO-2262 and MO-2344.

> what they are accused of and by whom to enable them to address the validity of the allegations. …

In that decision, Inquiry Officer Big Canoe found that section 21(2)(h) applied, but that it was only relevant as a consideration with respect to "the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint."[9] Senior Adjudicator John Higgins reached the same conclusion in Order P-1014 that the factor in section 21(2)(h) applied to "all personal information provided by the witnesses and the complainant which pertains to individuals **other than the appellant** [emphasis added]."

I find this approach helpful and will adopt the reasoning set out in Orders M-82 and P-1014 in the present appeal. Accordingly, I find that the factor favouring non-disclosure in section 21(2)(h) applies only to the personal information that identifies the affected parties, not the information or views they shared with the investigator respecting the subject matter of the PSB investigation, which is intermingled with the views and opinions expressed about the appellant himself, and which I have already ordered disclosed.

Factors weighing in favour of disclosure

The objective of section 21(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. I note that in Order P-1014, Senior Adjudicator Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Senior Adjudicator Higgins agreed with the appellant that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, in the facts of that appeal, the senior adjudicator concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Rather, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," the factor in section 21(2)(a) did not apply.

In the appeal before me, the appellant's motives in seeking access appear to be similar to those attributed to the appellant in Order P-1014. However, I find a basis for distinction in the facts of the present appeal, given the nature of the appellant's term of employment under the terms of Ontario First Nations Policing Agreement. I am of the view that the subject matter of the record suggests a public scrutiny interest.[10] In addition, although I may not share the confidential letter of appeal, I am satisfied that the circumstances of the appellant's request support the application

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[9] Institution's application dismissed February 9, 1995 in *Hamilton (City) v. Ontario (Information and Privacy Commissioner)*, Hamilton Doc. D246/93 (Ont. Div. Ct.).

[10] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of the *Act* to apply, but rather that this fact would be one of several considerations leading to its application.

of this factor. For these reasons, I find that the factor in section 21(2)(a) applies and weighs in favour of disclosure of the withheld information in the record.

With respect to the factor in section 21(2)(d), I note that it is intended to apply to personal information which is relevant to a fair determination of rights affecting the person who made the request. The appellant's letter of appeal does not specifically address the requirements for section 21(2)(d). As the appellant's correspondence was submitted to this office prior to the adjudication stage, when the various tests under section 21 were set out in the Notice of Inquiry to assist the parties in framing their representations, this lack of specificity is not surprising. However, in circumstances where my attention has not been drawn to any particular proceeding for which the information is claimed to be relevant, I find that there is no basis upon which I am able to find that the factor in section 21(2)(d) applies.

As mentioned previously, I find that there are two additional relevant circumstances that apply in the present appeal, and which have assisted me in determining whether disclosure would be an unjustified invasion of personal privacy.

The first of these relates to disclosure of personal information to ensure public confidence in the integrity of an institution.[11] In Order P-1014, where the appellant was seeking access to all of the information gathered by the investigator of a workplace harassment complaint, as well as all the statements given by people interviewed in the investigation, Senior Adjudicator John Higgins stated:

> In my view, the comments made by the appellant, quoted above in my discussion of section 21(2)(a), also raise the possible application of this factor. In my discussion of section 21(2)(a), I found that the appellant's interest in scrutiny of the institution's activities in this case was a private one, and I did not apply section 21(2)(a). However, it is my view that the degree of disclosure to the parties in WDHP [Workplace Discrimination and Harassment Prevention] investigations does have an influence on public confidence in institutions conducting such investigations.
>
> If it appears that these investigations are secret trials which prejudice the rights of those accused, public confidence will be eroded. Failure to disclose information which was considered by the investigator in arriving at his decision would clearly prejudice the rights of individuals accused of harassment. Accordingly, I find that this factor applies to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

I agree with the reasoning set out above, and I have concluded that the unlisted factor described as "public confidence in the integrity of an institution" applies in favour of disclosure in the present appeal.

[11] See Order P-237.

As with the factor discussed above, the unlisted factor for "adequate degree of disclosure" also arose from the exhortation in the preamble to section 21(2), which requires consideration of "all the relevant circumstances." In my view, this unlisted factor also owes its existence, in part, to the purposes section of the *Act*, which provides that individuals should have a right of access to their own personal information. As described in Order P-1014, this factor relates to "the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice." Senior Adjudicator Higgins had the following to say about the desirability of disclosure regarding the workplace investigation in that appeal:

> In this case, in the context of an administrative proceeding which has had serious consequences for the appellant, a number of witness statements which the investigator considered in reaching his decision were entirely withheld from the appellant. Others were partially withheld.
>
> … In my view, adequate disclosure is a fundamental requirement in a proceeding such as a WDHP investigation. Both the complainant and the respondent in such a proceeding are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision.
>
> In a similar vein, individuals such as the appellant, who face accusations which result in administrative or judicial proceedings, are entitled to know the case which has been made against them.

I am in full agreement with this description of the rationale supporting the application of the unlisted factor for "adequate degree of disclosure." Based on my review of the record, and for the reasons advanced by the appellant at the request stage and earlier in this appeal process, I find that this factor applies in favour of disclosure in this appeal.

In the circumstances of this appeal, I find that the factors favouring disclosure are more compelling than those favouring non-disclosure and the protection of privacy. In my view, disclosure of information that is directly related to the subject matter of the investigation, including most of the information provided by the affected parties and the investigator's findings, would not result in an unjustified invasion of the personal privacy of other individuals. On balance, I find that this specific information is not exempt under section 49(b). On the copy of the record provided to the ministry with this order, I have marked the information that is to be disclosed pursuant to my findings on the factors in section 21(2) in blue highlighter.

However, there is some personal information relating to the affected parties which does not, in my view, serve to elucidate on the subject matter of the investigation, the basis upon which the investigator reached his finding, or the final disposition resulting from the investigation. In the specific circumstances of this appeal, I find that disclosure of the names, positions and some of the views of the affected parties who were interviewed do not attract the application of the unlisted factors and that, accordingly, the factors favouring privacy protection weigh against disclosure of this information. In my view, disclosure of this relatively restricted class of information would constitute an unjustified invasion of the personal privacy of those individuals, and I find that it is exempt under section 49(b).

Accordingly, subject to my review of the ministry's exercise of discretion below, I find that the discretionary exemption in section 49(b) applies only to a very limited amount of the affected parties' personal information. Further, based on the nature of the information for which I have upheld the application of section 49(b), I find that the absurd result principle does not apply to that information.

I will now review the possible application of section 49(a), in conjunction with section 15(b) to pages 31-35 of the record.

WOULD DICLOSURE HARM RELATIONS WITH OTHER GOVERNMENTS?

The ministry argues that disclosure of the information withheld under section 15(b) on pages 31 to 35 "would reveal information that was potentially provided [to it] in confidence." According to the ministry,

> Release of this information has the potential to jeopardize the conduct of relations between the OPP and the relevant affected party [who provided it]. The affected party is an official representing a First Nation government. The provision of such information assists the OPP in carrying out its responsibilities in relation to the Ontario First Nations Policing Agreement that provide 71 First Nations Constables to police 19 communities in Ontario. As noted in the records at issue, this tripartite agreement is funded by the Government of Canada and the Government of Ontario.
>
> The Ministry notes, however, that the affected party has been given the opportunity to provide representations in relation to the disclosure of the records at issue. Should the affected party consent to the disclosure of the information at issue, the Ministry withdraws section 15(b) as grounds for non-disclosure of the relevant information.

Given the ministry's indication that it would withdraw its discretionary exemption claim of section 15(b) if the identified affected party consented, I asked staff from this office to contact the identified individual to determine his position on the disclosure of his statement to the PSB investigator. This was also necessary because he had not responded to the initial Notice of Inquiry. Based on this office's contact, another copy of the inquiry documentation was sent to the identified affected party. However, ultimately, this individual did not respond to the Notice of Inquiry and it was not possible to confirm his position with respect to the disclosure of his statement.

Respecting the ministry's claim that section 15 applies to the record, the appellant expressed the view in his letter of appeal that it was simply not reasonable to believe that the PSB investigation report could reasonably be expected to reveal information received in confidence from another government or its agencies.

Analysis and Findings

To begin, I must point out that the ministry's position respecting the application of section 15(b) – that it would withdraw its claim to the exemption if the identified affected party consented – is inconsistent with the requirements of the exemption. Once the requirements of section 15(b) of the provincial *Act* are met, the records cannot be disclosed without the "prior approval" of Cabinet. The consent of the government or agency providing the information is only relevant in considering the application of the nearly equivalent provision found in the municipal *Act* (section 9); however, this is not the statute – or provision – under consideration in the present appeal.

It has been said that the purpose of this exemption is to allow institutions of the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.[12] On the face of it, I accept that the ministry may deem that it has an interest in the smooth operation of "affairs of mutual concern" such as the Ontario First Nations Policing Agreement and in maintaining relations with first nations representatives that are conducive to this arrangement. However, I note that past orders of this office in which the section 15 exemption was raised respecting relations with first nations have typically addressed information related to ongoing negotiations between government and first nations on issues such as land claims, fishing licenses and tobacco enforcement.[13] In other words, the appeals involved claims that disclosure of the requested information could reasonably be expected to prejudice negotiations between the government and the first nation (with or without the involvement of the federal government).

In Order PO-2897, Assistant Commissioner Brian Beamish upheld the application of section 15(a) of the *Act* with respect to records related to meetings held to discuss the issue of tobacco enforcement in the province. However, he explained that in upholding the exemption in that case, it was unnecessary for him to determine whether or not a particular first nation constituted a "government" for the purpose of section 15 because he was relying on the fact that the meeting included participants from the federal government.[14] Regarding consideration of whether a first nation constituted a government for the purpose of access to information legislation, Assistant Commissioner Beamish referred to a case decided under the federal *Access to Information Act*, noting that:

> … the Federal Court of Appeal was faced with this issue in the context of a request for information made under the federal *Access to Information Act*. In the *Chippewas of Nawash First Nation*, [1999] F.C.J. No. 1822 Rothstein J.A. (as he was then), writing for the Federal Court of Appeal stated:
>
> > …[T]here is limited evidence of significant probative value on the question of whether an Indian band is a government of the same

[12] 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.). See also Orders PO-1927-I, PO-2569, PO-2647 and PO-2666.
[13] See, for example, Orders P-96, P-1406/R-970003, PO-2088-F and PO-2897.
[14] In reviewing the application of section 15(a), Assistant Commissioner Beamish had to consider whether the evidence satisfied him that the conduct of "intergovernmental" relations would be prejudiced by disclosure. In that case, it was sufficient for the purpose of establishing an intergovernmental relationship that both the federal and provincial governments had participated in the meetings in question.

> nature as those referred to in section 13 of the *Access to Information Act*. We do not say that the question of Aboriginal self-government is not a well known issue that is currently subject to public debate. However, our decision must be based on evidence and on a matter of this significance and complexity, much more evidence would have to have been adduced…

In my view, the Ministry has failed to provide sufficient evidence to support its position, having merely stated its belief that the First Nations group is another government for the purpose of section 15. I agree with the position taken by Justice Rothstein that making a finding that a First Nations group is a government for the purposes of freedom of information legislation would require an analysis of significant and relevant evidence. I have not been presented with that type of evidence in this appeal.

Furthermore, I note that the federal *Access to Information Act* was amended following the Court's decision in the *Chippewas* appeal to expressly include "an aboriginal government" at section 13(1) of that *Act*. In addition, section 16 of the British Columbia *Freedom of Information and Protection of Privacy Act* expressly includes "an aboriginal government," which is defined in definitions at Schedule 1 of that statute to mean "an aboriginal organization exercising governmental functions." While in no way determinative of the question of whether a First Nations group is a "government" for purposes of section 15 of Ontario's *Act*, the apparent need for express provisions in the federal and British Columbia statutes combined with its absence in Ontario's *Act* reinforces my conclusion that there is not sufficient evidence to support the Ministry's conclusion.

Assistant Commissioner Beamish's consideration of this issue provides an excellent foundation for my reasons in the instant appeal. In my view, the ministry's evidence respecting whether the affected party may be found to be a representative of "another government" for the purpose of section 15(b) of the *Act* is wholly unpersuasive. As in Order PO-2897, I find that it is unnecessary for me to determine whether the first nation to which the affected party belongs is "another government" because the ministry has simply failed to present sufficiently "detailed and convincing evidence" to establish any of the requirements of section 15(b). In my view, there is not sufficient evidence that disclosure of the information withheld under section 15(b) "could reasonably be expected to reveal information the institution has received in confidence," let alone information the institution has received in confidence *from another government*.

In the circumstances, I find that the ministry has not provided the requisite detailed and convincing evidence to satisfy me that disclosure of the information at issue on pages 31-35 of the record could reasonably be expected to "reveal information received in confidence from another government" pursuant to section 15(b) of the *Act*. This includes the details and facts related to the process described under my review of the "personal information" issue on page five, above. Accordingly, I find that the ministry's claim for exemption of this particular information under section 49(a), together with section 15(b), fails.

SHOULD THE MINISTRY'S EXERCISE OF DISCRETION BE UPHELD?

In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute his or her own discretion for that of the institution.

As previously noted, section 49(b) is a discretionary exemption, and I have upheld the ministry's decision to apply it to deny access to certain portions of the record. I must now review the ministry's exercise of discretion in doing so. To be clear, my review of the ministry's exercise of discretion is limited to the information that I have not ordered disclosed pursuant to this order.

The appellant's letter of appeal alludes to a sympathetic and compelling need to receive the information to provide him with adequate information to glean the "real reasons" behind the decision respecting his employment.

The ministry submits that it considered all relevant factors, including the major purposes and objects of the *Act*. The ministry maintains that it carefully considered the appellant's right of access to personal information in these records, and that it exercised its discretion appropriately under section 49(b) through its initial, and subsequent, decision letters. The ministry submits that this practice is in keeping with the historic practice of the ministry to respond to personal information requests by releasing as much information as possible in the circumstances. One of the circumstances the ministry claims to have considered in making its access decision is the relationship between the appellant and the affected parties. The ministry states that it was not possible to sever any additional non-exempt personal information from the records at issue for release to the appellant.

Based on my own review of the limited information for which I have upheld the ministry's access decision under section 49(b), I agree with the ministry that the nature of the relationship between the appellant and the affected parties is a relevant factor which must be considered in the exercise of discretion. With further consideration of the overall circumstances and the ministry's representations, I find that the ministry has properly exercised its discretion in withholding the personal information of the affected parties that I have found qualifies for exemption under section 49(b). Accordingly, I will not interfere with the ministry's exercise of discretion on appeal.

ORDER

1. I uphold the ministry's decision to deny access under section 49(b) to the portions of the record marked in orange highlighter on the copy of the record sent to the ministry with this order.

2. I order the ministry to disclose the remaining portions of the record, which I have found do not qualify for exemption, to the appellant by **November 3, 2010** but not before **October 29, 2010**.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant pursuant to provision 2.

Original signed by: September 29, 2010
Daphne Loukidelis
Adjudicator