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

ORDER PO-2955

Appeal PA09-84-2

Ministry of Community Safety and Correctional Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellants made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for "…any and field notes, incident or occurrence reports etc. that they have on file pertaining to [names of two appellants]" from a specified Ontario Provincial Police detachment. The appellants identified specific dates that would assist the ministry with its search. However, the appellants also stated that the search should not be limited to the specific dates identified in the request.

The ministry located a number of responsive records and issued a decision letter to the appellants advising them that the request was not subject to the *Act* pursuant to the exclusion in section 65(6).

The ministry subsequently issued a second decision letter in which it withdrew its reliance on the exclusion in section 65(6) and instead denied the appellants access to "…police reports and officer's notes relating to incidents investigated by the [named] detachment of the Ontario Provincial Police" pursuant to the law enforcement and personal privacy provisions of the *Act* in sections 14 and 21 respectively. In particular, the ministry claims that disclosure of the information at issue would constitute an unjustified invasion of personal privacy under sections 21(1) and/or 49(b), taking into consideration the presumptions at section 21(3)(b) and the factor favouring non-disclosure at section 21(2)(f). The ministry also claims the law enforcement exemptions at sections 14(1)(a), (b), (f), (l) and 14(2)(a), in conjunction with section 49(a), apply to the records.

The appellants appealed the ministry's decisions. As the ministry no longer claimed that the exclusion in section 65(6) applied to the records at issue, the appellants withdrew their appeal and appeal file PA09-84 was closed. The appellants continued to pursue access to the records denied to them on the basis of the ministry's second decision and PA09-84-2 was opened.

During mediation, the ministry issued two additional decision letters and provided this office and the appellants with an index of records.

In its third decision letter, the ministry advised the appellants that because their service complaint against the specified OPP detachment had been dealt with, it was now prepared to grant partial access to the records. The ministry advised that portions of the records were being withheld pursuant to the personal privacy provisions of the *Act* in sections 21(1) and/or 49(a), in addition to the law enforcement provisions under section 14(1)(l) and 14(2)(a), in conjunction with section 49(a). The ministry also advised that some of the information was withheld as non-responsive.

In response to this decision, the appellants raised the issue of whether the ministry had conducted a reasonable search for records. The appellants provided the mediator with a list of records they believed should exist and the mediator reviewed the list with the ministry.

The ministry undertook a further search for records and issued a fourth decision letter to the appellants. The ministry's fourth decision letter advised that additional responsive records were located and that authorization was received from two individuals named in the records which allowed the release of their personal information to the appellants. As a result, the appellants were granted partial or full access to pages 000006, 000007, 000049 and 000058 – 71. The ministry's decision letter confirmed that it continued to rely on the personal privacy and law enforcement exemptions referred to in its third decision letter to deny the appellants access to the remaining information at issue.

At the end of mediation, the appellants confirmed that they were not pursuing any information that was considered non-responsive; nor were they seeking access to those undisclosed portions of the records which referred to individuals' names, addresses and telephone numbers for which consent was not obtained. The appellants continue to assert that additional records exist.

As further mediation was not possible, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During my inquiry into the appeal, I sought and received representations from the ministry and the appellants. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

The records at issue consist of occurrence reports and officers' notes.

Record Type	Page Number	Exemptions Claimed
Occurrence Report	000004	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000012	Denied in full - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
Officer's notes	000018	Denied in part - 49(b), 21(3)(b), 21(2)(f)
Occurrence Report	000029	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
Occurrence Report	000033	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000037	Denied in full - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000043	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000044	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000045	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
Officer's notes	000047	Denied in full - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)

	000048	Denied in full - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000050	Denied in part - 49(b), 21(3)(b), 21(2)(f)
Occurrence report	000065	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000066	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000067	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)
	000069	Denied in part - 49(a), 14(2)(a), 49(b), 21(3)(b), 21(2)(f)

DISCUSSION:

PRELIMINARY ISSUES

The appellants' representations confirm they are not interested in pursuing access to the following information:

- Names, address and phone numbers of the affected persons withheld under section 49(b)
- Police codes withheld under section 49(a), in conjunction with section 14(1)(l)

I have accordingly, removed from the scope of the appeal those pages of the records which contain this information.

Further, the appellants have provided me with a complete unsevered copy of pages 5, 6 and 7, a General Occurrence Report. As the appellants already have a copy of the information which has been severed from this record, I will not be addressing access to this record in this order.

The appellants' representations in support of their position that the records at issue should be disclosed to them focus solely on their position that the OPP disclosed personal information about them to other individuals and that they should be given an opportunity to correct their personal information in the record. As a procedural matter, these issues were not raised prior to the submission of their representations at adjudication.

In the circumstances of the present appeal, I am unable to resolve whether there exists a right of correction under the *Act*. While the IPC has jurisdiction to deal with the correction of records, this issue is not properly before me. A request for the correction of a record must first be made to the institution before this office can review its decision not to make the requested correction.

I will not be addressing this issue further in this appeal.

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

In support of its search for records, the ministry submitted two affidavits from the individuals who conducted the searches. The first affidavit is from the regional Freedom of Information liaison for Central Region, the area which includes the specified OPP detachment. He identified the specified OPP detachment as the location where the records would be kept and describes the search for responsive records as follows:

> I received a request from the Ministry FOI and Privacy Office… I identified the responsive detachment to be Huntsville. I conducted a preliminary search for any responsive records in the RMS data base, which the OPP uses to store investigative records, and I looked for records that would be responsive to the appellant's request under the FIPPA. I found a number of records responsive to the request.
>
> On or about 20 February 2009 I sent the request via fax to Huntsville Detachment to conduct a search and to gather responsive records. I addressed my fax to Doris Dann, administrative assistant who has been identified as the FOI contact person for Huntsville detachment.

The affidavit goes on to describe that two additional searches for records were conducted by both the administrative assistant at the Huntsville detachment and the liaison officer. The administrative assistant also affirms that she conducted the following searches:

> On or about the 21st of February 2009, I conducted a detailed search in the RMS data base for all responsive records and printed off all records. I sent an email to the officers involved, requesting copies of their notebook entries.
>
> On or about the 2nd of March 2009, I received an email from [the liaison officer] advising that there was an ongoing PSB file which involved some of the responsive records and officers.
>
> On or about the 8th of March 2009, I faxed the remaining responsive records to [the liaison officer], of Haliburton Highland Detachment.
>
> On or about the 22nd of October 2009, I received a fax from FOI Liaison Co-ordinator. This fax indicated that this file had been appealed to the Ministry FOI and Privacy Office and included a detailed list of searches which needed to be conducted.
>
> Between the 22nd of October 2009 and 23rd of November 2009, with the assistance of [the liaison officer], I conducted an additional search to address the identified issues as stated in the last fax. As a result, additional records were sent via Purolator on or about the 23rd of November 2009.
>
> On the 5th of May 2010, I received an email from [the liaison officer], Haliburton Highland Detachment advising of the Notice of Inquiry.
>
> Between May 5th and May 12th, 2010, I conducted another search of the RMS database, a search of our deferred files and spoke to involved officers to ascertain if this Detachment holds any other responsive records that have not been provided in past submissions. This search has provided negative results.

The ministry also submits that records may not have been located due to OPP retention policies which mean, "…that records that are not kept on RMS are destroyed after 2 years plus the current year in which they were created, unless there is litigation." Finally, the ministry suggests that the appellants are under the mistaken belief that records would have been created every time they spoke to officers when that is not the case.

The appellants provided a list of records that they believed should exist and state:

> …this is not a complete list of documents that have not been identified during the searches. This list does not consider officer's notes as we believe that an officer has to keep notes of all interactions with members of the public and, therefore, notes will exist even if an Occurrence Report is not generated.

Finally, the appellants submit that the list of records they have identified should exist even with the ministry's retention protocol for records.

As stated above, the institution is not required to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559].

The institution has provided me with the dates and locations of its searches. I further accept the institution's explanation about its retention policy and the fact that the officers may not have taken notes of all of the incidents indicated by the appellant. However, the institution did not provide representations of any specific searches conducted for the records which the appellants claim should exist. I have reviewed the responsive records, and I find that the following records identified by the appellants were referred to in the responsive records but were not located:

- Survey document delivered to two officers
- Land title document confirming ownership delivered to officers
- Photographs taken by an officer.

The institution's representations do not address whether a search for these records was conducted. As I have found references to these records in the responsive records, I conclude that the searches conducted for these specific documents were not reasonable. Accordingly, I order the institution to conduct additional searches for these specific records and to provide the appellants with the results of its search.

As for the other records that the appellants' claim should exist, I find that they have not provided sufficient evidence for me to require that additional searches should be ordered for these specific records. Accordingly, I find that the institution's search for these records to be reasonable.

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].

The ministry submits that the records contain the personal information of the appellant and other identifiable individuals, including their names, addresses, telephone numbers, records of police interactions with affected persons and the statements of affected persons to the police. The ministry further submits that due to the subject matter of the records, the individuals would be identifiable in the records even if their names and addresses were severed.

As stated above, the appellants submit that they are not interested in access to the names, addresses and telephone numbers about the affected persons. They are only interested in pursuing access to statements made about them to the police.

Based on my review of the records, I find that they contain recorded information about the appellant and other individuals within the meaning of paragraphs (a) through (e), and (g) and (h) of the definition of personal information in section 2(1) of the *Act*. Additionally, I find that the individuals would be identifiable even if their names and contact information were severed from the record.

I note that most of the appellants' personal information has been disclosed to them and the remaining portions of the records contain personal information solely relating to the affected persons or the affected persons views or opinions about the appellants. I find that some of the portions of the records containing the affected persons' views or opinions about the appellants are the appellants' personal information under paragraph (g) of the definition, especially the information on pages 4, 37, 43, 44, 47, 48 and 69.

It is not necessary for me to consider whether the appellants' own personal information qualifies for exemption under section 49(b) since its disclosure to them cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I will order the disclosure of the appellants' own personal information to them, as highlighted in the copy of the record at issue to be sent to the ministry.

The rest of the appellants' personal information is so intertwined with that of other identifiable individuals that it cannot be severed. Accordingly, I will proceed to consider whether this personal information is exempt from disclosure under the exemptions claimed.

PERSONAL PRIVACY

Due to my findings under section 49(b), I do not need to consider the application of section 49(a) of the *Act*.

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(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. 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.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met. In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of the personal privacy of another individual. Section 21(2) lists factors to consider in determining whether disclosure would constitute an unjustified invasion of another individual's personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the exemption (see Order PO-1764). The application of sections 21(4) or 23 has not been raised and, in my view, neither are available in the circumstances of this appeal.

In the present appeal, the ministry submits that all the records are exempt under section 49(b) with reference to the presumption in section 21(3)(b) applies; which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086, PO-1819 and PO-2019].

In support of the application of the presumption, the ministry states:

> In the records at issue in this appeal, there have been a number of complaints alleging violations of the law, and the records were created by the OPP for the purpose of investigating them. The contents of the records being withheld, such as Occurrence Reports, summaries and officers notes, are in fact the kinds of records that are created when the police perform an investigation into a violation of the law. In one instance, a complaint did in fact result in a charge being laid against the Appellant by the OPP, which was subsequently withdrawn when the Appellant entered into a peace bond. In sum, there can be no doubt that these records were 'compiled' and are 'identifiable' as part of an investigation into a possible violation of law.

The appellant argues that the ministry should not be permitted to claim the presumption as the OPP disclosed their personal information to other individuals without regard to the fact that their personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

Based on my review of the records, I find that the remaining personal information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law. I accept the ministry's representations that the information was compiled by the OPP as part of its investigations arising from the complaints by the appellants and other individuals. The appellants' argument that the ministry should not be allowed to raise the presumption after allegedly disclosing their personal information to others is irrelevant. Accordingly, I find that presumption in section 21(3)(b) applies to the personal information in the remaining records and as such, section 49(b) applies subject to my finding on the ministry's exercise of discretion.

While the appellants ask that I consider the factors for disclosure in section 21(2), as I have found the presumption in section 21(3)(b) applies it cannot be rebutted by one or more factors in section 21(2).

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)].

The ministry submits that in exercising its discretion to withhold the records it considered:

- The purposes of the exemptions and the interests to be protected.
- The purposes of the *Act*.
- Its historical practice in disclosing these types of records.
- The need for information given in confidence to the OPP to remain confidential.
- The fact that the appellants were requesting their personal information.
- The privacy interests of the affected persons.

The appellants submit that the ministry exercised its discretion in a biased manner and that the ministry should have considered the appellants need to have the information so that they can correct mistakes and misinformation in the records. Further, the appellants argue that the rights of the appellant wife, and in particular her disability, should have been considered and accommodated.

I have reviewed the information disclosed to the appellants as well as the appellants' allegations that the ministry exercised its discretion in a biased manner to withhold information. The appellants' allegations of bias relate to their position that their privacy interests were breached by

the OPP in disclosing their information to the affected persons. Based on my review of the ministry's decision to withhold the affected persons' personal information, I find that the ministry exercised its discretion in a proper manner, after considering the relevant considerations. The appellants' allegations of bias or unfair treatment are not substantiated by the contents of either their representations or the records at issue.

Accordingly, I uphold the ministry's exercise of discretion to withhold the remaining personal information.

ORDER:

1. The ministry is ordered to disclose the portions of the following pages of the records to the appellants by providing them with a copy of the following records by **April 5, 2011**. I have provided a highlighted copy of these records to the ministry with the information to be disclosed highlighted. To be clear, the information highlighted is the information to be disclosed to the appellants.

   4, 37, 43, 44, 47, 48 and 69

2. I uphold the ministry's decision to deny access to the remaining records.

3. I order the ministry to conduct a search for the following records and to provide the appellant with the result of its search treating the date of this order as the date of the request:

   - Survey document delivered to two officers
   - Land title document confirming ownership delivered to officers
   - Photographs taken by an officer.

4. I reserve the right to require the ministry to provide me with a copy of the records sent to the appellants in accordance with Order Provision 1.

Original Signed by: March 2, 2011
Stephanie Haly
Adjudicator