

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3003

Appeal PA10-121

Ministry of the Attorney General

October 18, 2011

Summary: The appellant sought access to records relating to an incident at an apartment where he was shot in the leg. The Ministry of the Attorney General identified the records of the Special Investigation Unit's file as responsive and denied access to them, in full and in part, on the basis of the discretionary law enforcement exemption in section 14(2)(a) and the mandatory personal privacy exemption in section 21(1). The law enforcement report exemption applies to one record only while the rest of the records were found not to be "reports" for the purposes of section 14(2)(a) of the *Act*. The disclosure of some of the records, containing the personal information of the appellant and other identifiable individuals, was presumed to be an unjustified invasion of the personal privacy of other identifiable individuals and thus exempt under section 21(1) or section 49(b). The ministry was ordered to disclose some records containing the appellant's personal information only or severed to remove the personal information of other individuals.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss.14(2)(a), 21(1), 21(3)(b), 49(a), 49(b).

Orders and Investigation Reports Considered: PO-1959 and PO-2524.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the ministry) for access

to records relating to an incident at an apartment in which he was shot in the leg¹. The specific request was for:

... a copy of the complete file on the above noted incident including all officer notes and statements, witness statements, reports and investigation into the incident and all other materials included in your file.

[2] The ministry identified the responsive records and granted partial access to the records contained in the Special Investigations Unit's file (SIU). Access was denied to records or parts of records pursuant to the discretionary exemption at section 14(2)(a) (law enforcement report) and the mandatory exemption at section 21(1) with reference to the presumption in section 21(3)(b).

[3] The appellant appealed the ministry's decision specifying that he is seeking access to:

- (a) a video and photographs of the scene and environs of the shooting;
- (b) a digital recording of his interview, and
- (c) the digital recordings and synopsis of all witness interviews conducted, whether civilian or non-civilian.

[4] During mediation, the ministry issued a supplementary decision granting access in full to the appellant's audio CD statement and two additional pages. The ministry also provided the appellant with an index of records and specified that it denied access to the SIU Report pursuant to section 14(2)(a). The appellant also removed a number of records from the scope of his appeal.

[5] During the inquiry into this appeal, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, I uphold the ministry's decision in part and order the ministry to disclose other records to the appellant.

RECORDS:

Page #	Exemption Claimed	Withheld in part or full	Description
1 - 2	49(a), 14(2)(a), 49(b), 21(1),	Part	Intake form

¹ The appellant was represented by counsel throughout the appeal and counsel sent in representations. The ministry refers to the appellant as the appellant's client as his lawyer filed the appeal. For the sake of clarity, I will only be referring to the appellant in this order, meaning the individual who was shot.

	21(3)(b)		
3	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	Case closure/ Notification form
6 - 7	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	Letter to Chief of Ottawa Police Service
23	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	SIU Follow Up Reports
24 - 35	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Follow-up Reports
36 - 38	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	SIU Follow-up Reports
39 – 70	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Follow-up Reports
73 – 74	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Follow-up Reports
75	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	SIU Follow-up Reports
76 – 77	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Follow-up Reports (Civilian Witness Interview)
79	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Part	SIU Follow-up Reports (2 nd page to report starting on page 78 which was released in full)
81 – 84	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Occurrence Report
106 – 203	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Police Documents
204	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Report
205	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Report
209 – 211	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Ottawa Veterinary Hospital Report
216 – 230	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Property Status Review
232 – 233	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Property Receipts
234	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Evidence Tracking
235	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Diagram
237 – 238	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Diagrams

239	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Document List
240	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Civilian Witness List
241	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Police Witness List
242 – 252	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	Transmittal and Receipt forms
253	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Forensic ID File Label
345	Not responsive	Part	Media Article
350	Not responsive	Part	Media Article
351	Not responsive	Full	Media Article
355	Not responsive	Part	Media Article
357	Not responsive	Part	Media Article
358 – 425	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	SIU Investigator Notes
Recording 82	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	CD – Police Communications
Recording 83	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	CD – Police Service Photographs
Recording 84	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	CD – Video of scene
Recording 85	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	CD – Digital images
Recording 87	49(a), 14(2)(a), 49(b), 21(1), 21(3)(b)	Full	CD – Interviews

ISSUES:

- A. Is the information identified as not responsive within the scope of the appellant’s request?
- B. Do the records contain “personal information”?
- C. Does the discretionary exemption at section 49(a), in conjunction with the section 14(2)(a), exemption apply to the information at issue?
- D. Does the discretionary exemption at section 49(b) apply to the information at issue?
- E. Was the ministry’s exercise of discretion proper?

DISCUSSION:

A. Is the information identified by the ministry as not responsive within the scope of the appellant's request?

[7] The ministry has identified portions of pages 345, 350, 355, 357 and all of 351 as not responsive to the appellant's request.

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

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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

[10] To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

[11] Pages 345, 350 – 351, 355 and 357 are all media articles. The appellant's request as stated above is for records relating to the incident that occurred where he was shot in the leg. The portions of pages 345, 350, 355 (except for one sentence), 357 and all of page 351 that were withheld by the ministry do not relate to this incident. Instead, these portions of the media articles relate to other news stories. Accordingly, I find that these pages and the information withheld on them do not "reasonably relate" to the appellant's request and I uphold the ministry's decision to deny access to them on the basis that this information is not responsive to the request. One sentence on page 355 does reasonably relate to the appellant's request and I will consider the application of the exemptions to it only.

B. Do the records contain "personal information"?

[12] 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;

[13] 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 individual².

[14] 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 individual³.

[15] The ministry claims that the records contain recorded information about identifiable individuals other than the appellant, including police officers involved in the incident and the subsequent investigation, civilian witnesses interviewed during the course of the investigation and other persons involved. The ministry submits that the record contains the following personal information relating to these individuals:

- Age and sex [paragraph (a)]
- Medical, criminal and employment histories [paragraph (b)]
- Addresses [paragraph (d)]
- The personal opinions and views of witnesses and not related to the appellant [paragraphs (g)]
- Names of individuals together with other personal information in circumstances where disclosure of the names would reveal other personal information [paragraph (h)]

[16] The ministry further argues that the appellant does not own the apartment where the incident took place and the lessees of the apartment had a reasonable expectation of privacy in the interior of their home. The ministry submits that the images taken of the apartment are the personal information of these individuals.

[17] The ministry argues that the individuals in the records would be identifiable as the incident “garnered a reasonable amount of media attention” and the individuals in the records were identified in the news releases. Further, the ministry submits that the appellant is aware of the other individuals present in the apartment at the time of the incident.

[18] The ministry also argues that the information relating to the police officers is their personal information for the purposes of the *Act*. The ministry states:

The records in question consist predominantly of information provided by witnesses during the course of a law enforcement investigation. The objective of that investigation was to ascertain whether there were reasonable grounds to believe that the officer who was the focus of the

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225

³ Orders P-1409, R-980015, PO-2225 and MO-2344

investigation had committed any criminal offences in connection with the matter investigated. As information collected and/or produced for the purposes of a criminal investigation, the Ministry submits that the information in question was inherently of a personal nature. For example, the officers were not giving voice to their organization when they provided statements to the SIU. Rather, they were expressing their personal recollections, views and opinions with respect to the incident in question.

[19] In support of this position, the ministry cites Orders PO-2414 and PO-2524.

[20] The appellant disputes that some of the records, as described in the index, do not contain personal information. For example, the appellant submits that the following records may not contain personal information: police documents (pages 106-203), veterinary records (pages 209 – 211) and diagrams (pages 237 – 238).

[21] Based on my review of the records, I find that the records contain the personal information of both the appellant and other identifiable individuals. I further find that the information relating to the police officers in the records is their personal information for the purposes of this appeal. Finally, I find that some of the records contain no personal information and I will consider the application of the section 14(2)(a) exemption to these records, only.

[22] With the exception of the records described below, I find that they relate to an incident where the appellant was injured, and as such contain his personal information within the meaning of the section 2(1) definition of that term as they are “about” him. Further I accept that the information relating to the police officers’ qualifies as their personal information and is not their professional information for the purposes of this appeal. The police officers, following the incident which is the subject matter of this appeal, were the subjects of a SIU investigation into their conduct. As stated above, even if information relates to an individual in their professional capacity, it may be considered personal information if it reveals something of a personal nature. Prior orders of this office have held that records relating to an investigation into a police officer’s conduct while on duty does reveal something of a personal nature and as such is their personal information⁴.

[23] The following portions of records withheld contain the personal information of other individuals only, as the appellant’s personal information was already disclosed to him: pages 1 – 2, 3, 6 – 7, 23, 37, 75 and 79.

[24] The following records, withheld in full, contain the personal information of the appellant and other identifiable individuals: pages 24 – 35, 39 – 70, 73 – 74, 81 – 84,

⁴ Order PO-2524 and PO-2633

106 – 186, 218, 223 – 228, 229 -230, 232 - 235, 238 – 241, 242 – 253, 358 – 425, Recording 82, Recording 85 and 87.

[25] The following records only contain the personal information of the appellant: pages 221 – 222, a sentence on page 355, images of the appellant's personal property (wallet with contents, belt, jewellery and clothing) on Recording 85.

[26] The following records contain the personal information of other individuals only (specifically the subject police officers) remaining at issue: pages 204 – 205 and Recording 83.

[27] I find that the following records do not contain personal information for the purposes of the *Act*. As only records that contain personal information can qualify for exemption under section 21(1), I find that the following records are not exempt under section 21(1) and I will consider whether they are exempt under section 14(2)(a) below.

- Pages 209 – 211 (Veterinary Report)
- Page 37 (information withheld relates to a dog and the Ottawa Humane Society)
- Page 23 (professional information – phone numbers of vets)
- Page 76 – 77 (information of the vet and injury to the dog)
- Pages 187 – 203 (policies)
- Pages 216 – 217 (property status review)
- Page 220 (property status review)
- Page 237 (map)
- Images of bullet and bullet casing on Recording 85

[28] Lastly, I will consider the ministry's submissions that the pictures or video images of the apartment, in Recordings 84 and 85, where the incident took place are the personal information of the apartment residents. The ministry submits that the appellant is not a resident of the apartment and the residents had a reasonable expectation of privacy in their home and thus any images of their home is their personal information within the meaning of that term in section 2(1) of the *Act*.

[29] Past decisions of this office have found that photographs of property that do not include images of individuals are not personal information for the purposes of the *Act*⁵. Further, decisions of this office have also found that videotaped images are only personal information if they include recorded images of identifiable individuals⁶. Based on my review of the video and the photographic images taken of the apartment, I find that these images do contain recorded information about identifiable individuals, namely the apartment residents. The images contain a picture of the apartment door

⁵ MO-2264

⁶ PO-2033-I

with the number of the apartment and detailed images of each room of the apartment. Further the residents' personal items including clothing, electronics, and other items are figured prominently in the images. The images also include the area where the incident took place. While neither the appellant's name nor the residents' names are in the images or on the video, in my view, disclosure of the images and the video would reveal personal information about an identifiable individual. Accordingly, I find that the images of the apartment are the personal information the identifiable individuals within the meaning of that term in section 2(1) of the *Act*.

C. DOES THE DISCRETIONARY EXEMPTION AT SECTION 49(A) IN CONJUNCTION WITH THE SECTION 14(2)(A) EXEMPTION APPLY TO THE INFORMATION AT ISSUE?

[30] 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, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information [emphasis added].

Law enforcement

[31] In this appeal, the ministry relies on section 49(a), in conjunction with section 14(2)(a) of the *Act*, which reads as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[32] 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)

[33] The term "law enforcement" has been found to apply in the context of a police investigation into a possible violation of the Criminal Code and to investigations conducted by the SIU [Orders M-202 and PO-2215].

Section 14(2)(a)

[34] In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

[35] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

[36] The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Orders MO-1238, MO-1337-I].

[37] Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption [Order PO-2751].

[38] An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous [Order MO-1238].

[39] The ministry submits that the records at issue form part of the SIU investigative brief that the Director reviews in order to write his or her report to the Attorney General as mandated by section 113(8) of the *Police Services Act* (the *PSA*). Accordingly, the ministry submits:

...[both] the *SIU Director's Report to the Attorney General* and the records that comprise the *investigative brief* constitute a 'formal statement or account of the results of the collation and consideration of information' in that they provide an overview of the incident and a description of the events prior to, during and subsequent to the incident that was investigated. As described above, the records that comprise the investigative brief, in this and other SIU investigations, form an integral part of the Director's Report in that they are considered by the Director in arriving at an ultimate disposition of the case, which disposition is then formally articulated in the Director's Report.

[40] The ministry goes on to argue that the records at issue meet the three-part test for the application of section 14(2)(a) on the following basis:

- The records at issue are reports for the purposes of section 14(2)(a) as they are more than "mere observations or recordings of fact" and are formal statements of the results of the investigation as well as accounts of the results of the collation and consideration of information.
- The records at issue were created by the SIU which is the agency authorized by the *PSA* to investigate "...the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers".
- The records at issue, which the ministry terms the "investigative brief", were prepared by the SIU during its investigation into the incident which is the subject of the appellant's request.

[41] The appellant concedes that the Director's Report, which is not at issue in the present appeal, is a report properly exempt under section 14(2)(a) of the *Act*. The appellant argues that the Director's Report is the only record qualifying for exemption under section 14(2)(a) and submits that I consider Order PO-1959 where Adjudicator Sherry Liang found that the entire investigative brief is not exempted under section 14(2)(a) and that I must consider the nature of each record to determine whether they fall within the requirements of section 14(2)(a)⁷.

[42] The ministry submits that I consider Orders P-1418 and P-1315 which support its representations on the applicability of section 14(2)(a) to the records at issue. The ministry does acknowledge that Orders PO-1959, PO-2414 and PO-2524 also may apply to the issue.

⁷ The appellant refers me to Orders PO-2414, PO-2524 and PO-2633 also in support of his position.

[43] In Order PO-1959, Adjudicator Sherry Liang reviewed a number of previous decisions that address the application of section 14(2)(a) to records created during the course of an SIU investigation and made the following findings with respect to the contents of an SIU file, including investigative material and the Director's Report:

Essentially, the Ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to accept this submission, and I find that section 14(2)(a) requires consideration of whether each record at issue falls within that exemption. The Ministry has enclosed copies of two prior orders of this office in support of its position. In Order P-1315, it appears that a group of records described as the SIU's final investigative report, and which included witness statements, expert reports, summaries of forensic testing and other evidence gathered in the course of the police investigation into an accident, was considered as one record and found as a whole to constitute a "report" for the purposes of section 14(2)(a). A similar approach was applied in Order P-1418. More recently, however, in PO-1819, section 14(2)(a) was applied to each record which formed part of the SIU investigation file.

On my reading of these orders, it is clear that even in P-1315, there were a large number of records in the SIU investigation file which were considered separately by the adjudicator for the purposes of section 14(2)(a). Some of these records, such as interview notes, a motor vehicle accident report and vehicle examination and damage report, are similar to those before me which the Ministry asserts form part of an overall SIU 'investigation brief'.

Order P-1418 is less easily reconciled with Order PO-1819, and with the approach I have taken in this order. I am satisfied that, if there is any inconsistency between the approaches in some of the orders in this area, the analysis in PO-1819 is more in keeping with the intent of this section of the Act. Although I find that Record 2 (the Report of the Director) meets the requirements of section 14(2)(a), it does not follow that all the material which may have been gathered together, placed before and considered by the Director before arriving at his conclusions is also exempt, without further analysis. In this respect, I agree with the appellant that section 14(2)(a) does not provide a 'blanket exemption' covering all records which the Ministry views as constituting part of the SIU's 'investigative brief.'

In the case before me, the SIU investigation file consists of numerous different records from diverse sources. As the representations of the Ministry describe, they are essentially a compilation of information

obtained during the course of the SIU's investigation and the steps taken by SIU staff in the discharge of that investigative jurisdiction, and include documentary materials obtained by the SIU or generated by the SIU. The Director's decision is based upon a review of all the records, but his analysis and decision is contained in Record 2 (the Director's Report) alone.

. . .

I find that none of the remaining records at issue meet the definition of a "report". To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the Act, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

On my review of the incident reports, supplementary reports and police officers' notes at issue in this appeal, I am satisfied that they also do not meet the definition of a "report" under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature.

[44] Adjudicator Liang's reasoning and approach has been followed numerous times by this office. I find that, in the present appeal, the ministry has not provided me with sufficiently persuasive arguments to accept its reasoning that the records at issue are part of the Director's investigative brief and should be exempt under section 14(2)(a) as law enforcement reports. Instead, I adopt the reasoning set out in Order PO-1959 for the purposes of this appeal and will consider each record individually.

[45] Based on my review of the records, I find that only pages 109-110, which comprises the Executive Summary, consists of the required "formal statement of results

of the collation and consideration of information” set out in the definition of the term “report” referred to above. Accordingly, the exemption in section 14(2)(a) applies only to this information. In applying the reasoning in Order PO-1959, I find that the remaining records at issue do not qualify as “reports” as they only consist recordings of facts and observations. This information is contained in the various notes, witness statements, lists, SIU and Ottawa Police occurrence reports, notes and, drawings compiled by the SIU and the Ottawa Police Service. Lastly, I find that the video and recordings also do not qualify under section 14(2)(a) as they also do not include any consideration or analysis of the information contained therein.

[46] In summary, I find that pages 109-110 are exempt under section 49(a), subject to my finding on the ministry’s exercise of discretion. The following records do not contain personal information and are not reports within the meaning of section 14(2)(a). In addition, the ministry has not claimed any additional discretionary exemptions for these records, and no other mandatory exemptions apply. Accordingly, I will order that they be disclosed to the appellant:

- Pages 209 – 211 (Veterinary Report)
- Page 37 (information withheld relates to a dog and the Ottawa Humane Society)
- Page 23 (professional information – phone numbers of vets)
- Page 76 – 77 (information of the vet and injury of the dog)
- Pages 187 – 203 (policies)
- Pages 216 – 217 (property status review)
- Page 220 (property status review)
- Page 237 (map)
- Images of bullet and bullet casing on Recording 85

[47] The following records are not exempt under section 49(a) as I have found that section 14(2)(a) does not apply to them as they are not “reports” for the purposes of that section. I will proceed to consider whether these records are exempt under section 21(1) or section 49(b) in my discussion below.

- Records partially withheld: Pages 1 – 2, 3, 6 – 7, 75 and 79
- Records withheld in full: Pages 24 – 35, 39 – 70, 73 – 74, 81 – 84, 106 – 186, 218, 223 – 228, 229 -230, 232 - 235, 238 – 241, 242 – 253, 358 – 425, Recording 82, 83, 84, 85 and 87; pages 204 – 205, 221 – 222 and a sentence on page 355, images of the appellant’s personal property (belt, jewellery and clothing) on Recording 85

D. DOES THE DISCRETIONARY EXEMPTION AT SECTION 49(B) APPLY TO THE INFORMATION AT ISSUE?

[48] Where a record contains personal information only of an individual other than the appellant, section 21(1) of the *Act* prohibits the ministry from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

If the disclosure does not constitute an unjustified invasion of personal privacy.

[49] Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would not constitute an unjustified invasion of another individual's personal privacy.

[50] Where, however, the record contains the personal information of the appellant along with the personal information of other identifiable individuals, section 49(b) of the *Act* applies. This section reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[51] 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.

[52] If the information falls within the scope of section 49(b). The institution may exercise its discretion to disclose the information to the appellant. 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.

[53] Under both sections 21(1)(f) and 49(b) the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

[54] Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[55] The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 21(2)⁸ 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. In the present appeal, I find that section 21(4) does not apply and the appellant has not raised section 23 as an issue.

[56] As I have found that pages 221 – 222, a sentence on page 355, and images of the appellant's personal property (wallet and contents, belt, jewellery and clothing) on Recording 85 only contain the appellant's personal information, the disclosure of these records would not result in an unjustified invasion of another individual's personal privacy under either section 21(1) or 49(b). As I have found that section 14(2)(a), in conjunction with the section 49(a) exemption, does not apply to these records, no other discretionary exemptions were claimed and no other mandatory exemptions apply, I will order that they be disclosed to the appellant.

[57] The records that remain at issue consist of the following:

- Records partially withheld: Pages 1 – 2, 3, 6 – 7, 75 and 79
- Records withheld in full: Pages 24 – 35, 39 – 70, 73 – 74, 81 – 84, 106 – 186, 204 – 205, 218, 223 – 228, 229 -230, 232 - 235, 238 – 241, 242 – 253, 358 – 425, Recording 82, 83, 84, 85 and 87

Section 21(3)(b)

[58] The ministry relies on the presumption in section 21(3)(b) 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

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

disclosure is necessary to prosecute the violation or to continue the investigation;

[59] The ministry submits that the SIU is a law enforcement agency that conducts criminal investigations into the circumstances surrounding incidents which fall within its jurisdiction. The SIU investigation leads to a determination of whether there are reasonable grounds to believe a criminal offence has been committed and to lay criminal charges where such evidence is found to exist. The ministry further submits that personal information in the record was compiled and is clearly identifiable as part of an investigation into a possible violation of the *Criminal Code*.

[60] The appellant concedes that where the personal information of others is identifiable as part of an investigation into a possible violation of law, its disclosure is presumed to be an unjustified invasion of personal privacy pursuant to section 21(3)(b). However, the appellant submits that the ministry has failed to sever the record to disclose to the appellant his own personal information as required under section 10(2) of the *Act*. Further, the appellant argues that the absurd result principle should apply.

[61] Based on my review of the records remaining at issue, I find that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law. Both the SIU investigator records and the Ottawa Police records contain personal information compiled and identifiable as part of investigations into possible violations under the *Criminal Code*. Accordingly, I find that the presumption in section 21(3)(b) of the *Act* applies to the personal information remaining at issue. Therefore, disclosure of the personal information is presumed to be an unjustified invasion of another individual's privacy. Accordingly, I find pages 204 – 205 and Recordings 84 and 85 which contain the personal information of other individuals only to be exempt under section 21(1) of the *Act*.

[62] Further, I find that the exemption in section 49(b) applies to exempt the personal information which pertains to other individuals remaining at issue in the records listed below, subject to my finding on the "absurd result" principle and the ministry's exercise of discretion.

- Records partially withheld: Pages 1 – 2, 3, 6 – 7, 75 and 79
- Records withheld in full: Pages 24 – 35, 39 – 70, 73 – 74, 81 – 84, 106 – 186, 218, 223 – 228, 229 - 230, 232 - 235, 238 – 241, 242 – 253, 358 – 425; Recordings 82, 83 and 87

Absurd Result

[63] Previous orders have determined that, 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 and MO-1323].

[64] The absurd result principle has been applied where, for example:

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

[65] 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 and MO-1378].

[66] Based on my review of the records, I find that the appellant would not have been present when the information therein was provided to the police or the SIU and it is not evident that the information would clearly be within the appellant's knowledge. As the appellant is aware, there were a number of police officers and other identifiable individuals in the apartment during the incident. Each individual (both civilian and officer) provided their own statements of events and not all of the information necessarily relates directly to the appellant.

[67] Further, I wish to address the issue of whether the absurd result principle applies to the photographic images and the video recording of the apartment where the incident took place that are in Recordings 84 and 85. As the appellant did not reside in the apartment, I am not satisfied that the personal information contained in either the photographic images or the video recording of the apartment would be within his knowledge.

[68] In summary, I find that the absurd result principle does not apply in the circumstances of this appeal.

Severance

[69] Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

[70] The ministry submits that in the event that some of the records are found to contain the appellant's personal information as well as the personal information of other individuals, the appellant's personal information is "so amalgamated and interwoven" with the personal information of the other individuals that severance is not reasonably feasible. The ministry states:

In order to avoid disclosing information which is properly exempted from disclosure, any such attempt at severance in these circumstances would result in the disclosure of information that is substantially unintelligible and, therefore, meaningless.

[71] Adjudicator Steven Faughnan in Order PO-2524 also dealt with the issue of severing records that contained the personal information of both the appellant and other identifiable individuals within the context of SIU investigation records. He identified that the key question raised by section 10(2) was reasonableness and in finding that some records could be severed he set out the rationale applied by this office:

A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

[72] I adopt that rationale for the purposes of this appeal.

[73] I find that the personal information exempt from disclosure under section 49(b) is severable from the appellant's personal information on pages 124 – 130 only. I enclosed a highlighted copy of those pages of record with this order indicating the severances.

[74] For the rest of the records, I find it is not practicable to sever the exempt information from the appellant's personal information. As stated above, the number of witnesses to the incident and the information remaining which relates to the appellant is interwoven such that only disconnected snippets would remain if I were to sever the remaining records.

E. Was the ministry's exercise of discretion proper?

[75] 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, this office may determine whether the institution failed to do so.

[76] In addition, this office 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.

[77] 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)].

[78] In exercising its discretion under sections 49(a) and (b), the ministry submits that it considered its historical practices and the policy considerations in disclosing the personal information of individuals who provide information to the police and SIU investigators. The ministry submits:

Central in any such [criminal] investigation is the willingness of witnesses to come forward and provide information that is relevant to an investigation. This type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is frequently of a sensitive nature whose provision is often only forthcoming where confidentiality can be assured. The concern for confidentiality is shared between police officers and civilians. In respect of the former, it should be noted that pursuant to section 113(9) of the PSA, all members of police forces are required to cooperate fully with the SIU in the conduct of an SIU investigation. In order to facilitate that cooperation in the course of SIU investigations, it is necessary that police officers retain a measure of confidence that their cooperation with the SIU, in the form of information they provide, will remain confidential and will not be disclosed to third parties. With respect to civilian witnesses, it has been the experience of the SIU that there are many occasions when they will only provide the SIU with information if they believe that all communications will be kept in confidence. Many express

fear of possible police reprisal, whereas others are worried that what they say may at some point be sued against them in a legal proceeding.

[79] Further, I note that the manner in which the ministry severed the records indicates that it considered the fact that the appellant was requesting his own personal information, and recognized the need to balance his right to his own personal information against the other individuals' right to privacy.

[80] The ministry has made similar submissions in Orders PO-1959 and PO-2524 in support of its exercise of discretion. Based on the circumstances of this appeal, the records at issue and the representations of the parties, I find the ministry's exercise to be proper. The ministry properly considered the exemptions and the interests they seek to protect as well as the right of the appellant to his own personal interest balanced against the affected persons' rights to privacy. I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose the following records by providing him with a copy of them by **November 19, 2011** I enclose with this order a highlighted copy of pages 124 – 130 and 355 with the information not to be disclosed identified. To be clear, the information highlighted should **not** be disclosed to the appellant.
 - Pages 23, 37, 76 – 77, 187 – 203, 209 – 211, 216 – 217, 220, 221 – 222, 237
 - Sentence on page 355
 - Images on Recording 85 of the appellant's property (belt, wallet and contents, clothing, jewellery); images of bullet and bullet casing
 - Portions of pages 124 – 130 that contain the appellant's personal information
2. I uphold the ministry's decision to withhold the following records: pages 1 -2, 3, 6 – 7, 24 – 35, 39 – 70, 73 – 74, 75, 79, 81 – 84, 106 – 186, 204 – 205, 218, 223 – 228, 229 – 230, 232 – 235, 238 – 241, 242 – 253, 345, 350-351, 355 (except one sentence), 357, 358 – 425; Recordings 82, 83, 84, 85 (except images ordered disclosed), 87.
3. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the records provided to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

October 18, 2011 _____