Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3075

Appeals PA08-196-2, PA08-197-2 and PA08-198-2

Ministry of Community Safety and Correctional Services

April 27, 2012

Summary: In these three appeals, the appellant is seeking access to records relating to him and his family held by the Ontario Civilian Commission on Police Services, the Ontario Provincial Police, and the ministry itself, including the minister's office. The ministry disclosed a substantial number of records to him. However, it denied access to the remaining records and parts of records under the exclusion in section 65(6) and the discretionary exemptions in sections 49(a) (in conjunction with other exemptions) and 49(b). In this order, the adjudicator finds that the ministry has provided the appellant with an adequate index of records for each appeal and has conducted a reasonable search for records responsive to the appellant's requests. In addition, he finds that most of the records and parts of records withheld by the ministry qualify for exclusion or exemption, but some do not. He orders the ministry to provide the appellant with access to the personal information of his mother-in-law in various records and to the personal information of the appellant and his wife in other records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 2(3), 13(1), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l), 14(2)(a), 15(b), 19, 24, 49(a), 49(b) and 65(6).

Orders and Investigation Reports Considered: MO-1288, PO-2456 and PO-2582.

OVERVIEW:

[1] A husband and wife and their daughter filed requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) with the Ministry of

Community Safety and Correctional Services (the ministry) for information relating to them held by the Ontario Civilian Commission on Police Services (OCCPS), the Ontario Provincial Police (OPP), and the ministry itself, including the minister's office.[1]

[2] Subsequently, the husband requested that the appeals continue in his and his daughter's name alone and stated that his wife was removing her name as one of the requesters. The wife then provided the ministry with a signed consent form authorizing her husband to access any of her personal information that might be contained in the responsive records. In addition, several members of their extended family, including his mother-in-law, provided signed consent forms that authorized the ministry to disclose their personal information to him, his wife and his daughter.

[3] The ministry located 999 pages of OCCPS records, 7,610 pages of OPP records and 2,304 pages of ministry records that are responsive to the appellant's requests. It issued three decision letters that provided him with access to a substantial number of these records but denied access to the remaining records under an exclusionary provision and various exemptions in the *Act*.[2]

[4] The husband appealed the ministry's decisions to the Information and Privacy Commissioner of Ontario (IPC), which opened three appeal files:

- PA08-196-2 (OCCPS records)[3]
- PA08-197-2 (OPP records)[4]
- PA08-198-2 (ministry records, including the minister's office)[5]

[5] The ministry provided the IPC with a copy of the records at issue in each appeal, which are contained in two banker's boxes and include paper records, CDs and audiotapes.

[6] The appellant advised the IPC intake analyst that he was appealing the ministry's decisions to deny access to the remaining records under various provisions in the *Act*. In addition, he alleged that the ministry had not conducted a reasonable search for responsive records. Finally, he claimed that the ministry had not provided him with proper indexes of records for each appeal.

[7] The appeals were streamed directly to adjudication for an inquiry. I started my

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[1] OCCPS and the OPP fall under the ministry for the purposes of *FIPPA*.
[2] The ministry issued two decision letters on May 19, 2010 with respect to the OCCPS and ministry records and a third decision letter on June 22, 2010 with respect to the OPP records.
[3] Ministry file numbers CSCS-2007-02961/02962/02963.
[4] Ministry file number CSCS-2007-03376.
[5] Ministry file number CSCS-2007-03377.

inquiry by issuing a notice of inquiry, setting out the facts and issues in the three appeals, to the ministry. In response, the ministry submitted representations, including several attachments, to the IPC.

[8] In its representations, the ministry withdrew its reliance on two exemptions and provided arguments to support its decisions to withhold the remaining records and parts of records under the following provisions in the *Act*, which remain at issue in these appeals:

- the exclusion in section 65(6) (labour relations and employment records);

- the discretionary exemption in section 49(a) (right of access to one's own personal information), read in conjunction with the exemptions in sections 13(1) (advice and recommendations), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l) and 14(2)(a) (law enforcement), 15(b) (relations with other governments), and 19 (solicitor-client privilege); and

- the discretionary exemption in section 49(b) (personal privacy), read in conjunction with the factor in section 21(2)(f) (highly sensitive) and the presumptions in sections 21(3)(b) (investigation into violation of law) and (d) (employment or educational history).

[9] Moreover, the ministry's representations state that it is claiming the application of the discretionary exemptions in sections 13(1), 14(1)(e), 14(1)(i) and 19 of the *Act* for additional records. Section 11 of the IPC's *Code of Procedure* sets out rules that apply to circumstances in which institutions seek to raise new discretionary exemption claims during an appeal. Consequently, whether the ministry should be allowed to claim discretionary claims for additional records at this stage of these appeals is a preliminary issue that will be resolved within Issue D of this order.

[10] On the issue of whether the ministry has conducted a reasonable search for records responsive to the appellant's requests, the ministry's representations include an affidavit from the deputy coordinator of its freedom of information and privacy office, which provides evidence about the searches that were carried out to locate records. The attachments also include copies of three letters and other documents that the ministry sent to the appellant, including supplementary decision letters, copies of additional records that the ministry disclosed to him, and an index of records for each appeal.[6]

[11] I then issued a notice of inquiry to the appellant and shared the ministry's representations with him in accordance with the rules in IPC *Practice Direction 7.* In response, the appellant submitted one page of representations to the IPC.

[6] These letters are dated April 6, 2011.

[12] In this order, I find that the ministry has provided the appellant with an adequate index of records for each appeal and has conducted a reasonable search for records responsive to his requests. In addition, I find that most of the withheld records and parts of records qualify for exclusion or exemption under the *Act*, but the following information in the records does not:

- the personal information of the appellant's mother-in-law in various records;
- the appellant's personal information in an OPP address history record;
- the appellant's and his wife's personal information in some Canadian Police Information Centre (CPIC) records;
- the appellant's and his wife's personal information in Ministry of Transportation (MTO) records; and
- the appellant's personal information and other non-exempt information in Toronto Police Service (TPS) records.

[13] I am ordering the ministry to disclose the non-exempt information in these records, which are specified by page number in the order provisions on the last page of this order, to the appellant.

RECORDS:

[14] The records remaining at issue in each appeal are identified in the three indexes of records that the ministry provided to both the appellant and the IPC during the adjudication stage of the appeal process. The vast majority of these records relate to: (1) various criminal investigations and proceedings brought against the appellant, and (2) various complaints and civil proceedings that the appellant has brought against the OPP and the Ontario government. These records include emails, correspondence, police occurrence reports, witness statements, court documents, exhibit register reports, CPIC records, driver's license records, and many other records.

ISSUES:

Issue A: Did the ministry provide the appellant with an adequate index of records for each appeal?

Issue B: Does section 65(6) exclude any records from the *Act?*

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Issue D: Does the discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l), 14(2)(a), 15(b) and 19 exemptions, apply to the information at issue?

Issue E: Does the discretionary exemption at section 49(b) apply to the information at issue?

Issue F: Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

Issue G: Did the ministry conduct a reasonable search for records?

DISCUSSION:

A. Did the ministry provide the appellant with an adequate index of records for each appeal?

[15] The appellant claims that the ministry has not provided him with a proper index of records for each appeal. During the intake stage of the appeal process, he stated the following:

> … [L]ooking at things from a reasonable perspective, especially given the voluminous amount of information that exists, there absolutely needs [to] be an **Index** or **List of Documents**, **a "Control Sheet"** that shows ie:
>
> 1) the Date,
> 2) the Number of Pages of that Document,
> 3) the Author,
> 4) the Recipient,
> 5) the Type of Information, ie: a Letter, a CD, Police Officer Note, etc.[7]
> (Emphasis in original.)

[16] The *Act* does not impose any statutory obligation on an institution to provide a requester with an index of records, either at the request stage or during an appeal before the IPC. However, a requester cannot participate effectively in an appeal unless he or she has some information about the specific records that the institution is withholding and its reasons for doing so. Consequently, I find that fair procedure

[7] Appellant's letter of May 20, 2010.

requires that an institution provide a requester with an index of records that provides some basic information about the withheld records.

[17] Section 10.02 of the IPC's *Code of Procedure* (the *Code*) states:

> Where the IPC determines that it is required in order to process an appeal, the IPC may issue an order requiring the institution to number the records, number the pages of records, provide legible copies, provide highlighted copies, or *provide a detailed index indicating the date of creation of each record, a brief description of the record, the extent to which it was disclosed, and what exemption has been claimed*. (Emphasis added.)

[18] The IPC may exercise the authority granted by section 54(3) of the *Act* to order an institution to prepare a proper index of records.[8]

[19] During this inquiry, the ministry sent the appellant a letter that included, as attachments, an index of records for each of the three appeals.[9] These indexes cover the records remaining at issue in each appeal. I included copies of these same indexes with the notice of inquiry that I sent to the appellant.

[20] The ministry states that these indexes are "both numbered and legible" and that it is not necessary to provide the appellant with additional indexes to conduct the inquiry. The appellant submits that the ministry should provide him with a "full and complete list of all the info[rmation] that exists, and what has been provided and when."

[21] I have reviewed the indexes of records that the ministry provided to both the appellant and the IPC. Each index sets out the page number(s) of each record that remains at issue, the date of each record, a brief description of each record, whether the record is being withheld in full or in part, and the exclusion or exemptions claimed. In my view, the indexes provided by the ministry meet the requirements of section 10.02 of the *Code* and are sufficient to enable the appellant to participate effectively in these appeals. In short, I find that the ministry has provided the appellant with an adequate index of records for each appeal.

B: Does section 65(6) exclude any records from the *Act?*

[22] The ministry has withheld a number of records under the exclusionary provision in sections 65(6) of the *Act*. These records include emails, letters, reports and other

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[8] In Order MO-2282-I, Adjudicator Daphne Loukidelis found that the Commissioner may exercise the authority granted to her by section 43(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) to order an institution to prepare a proper index of records.

[9] Ministry's letter of April 6, 2011.

documents held by both the OPP and OCCPS that relate directly to the appellant's complaints against various OPP officers.[10] In particular, he filed complaints with the OPP's Professional Standards Bureau (PSB) about the conduct of specific officers at the OPP's Bancroft detachment.[11] He also asked OCCPS to review the PSB's decisions with respect to his complaints.[12]

[23] Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[24] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[25] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[13]

[26] The IPC has found in previous orders that OPP and OCCPS records similar to the ones at issue in this appeal are excluded from the scope of the *Act* under section

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[10] These records are listed in the ministry's indexes of records for appeals PA08-196-2 (ministry file #: CSCS-P-2007-02961) and PA08-197-2 (ministry file #: CSCS-P-2007-03376).

[11] Under section 56(1) of the *Police Services Act* (the *PSA)*, any member of the public may make a complaint about specified matters, including the conduct of a police officer.

[12] Section 64(6) of the *PSA* provides that a complainant may ask OCCPS to review the decision of a chief of police with respect to a particular complaint.

[13] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

65(6)3.[14] Consequently, I will address the possible application of section 65(6)3 to the above records.

[27] Section 65(6)3 stipulates that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[28] The ministry submits that the above records were collected, prepared, maintained or used by the OPP in relation to meetings, consultations, discussions and communications in connection with complaints filed by the appellant that were investigated by the PSB and ultimately the subject of OCCPS review. It further submits that the records relate to matters that are "inherently employment-related."

[29] The appellant's representations do not address whether the section 65(6) exclusion applies to the above records.

[30] The term "employment related matters" in section 65(6)3 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.[15] I find that the records in these appeals relating to the PSB investigation about the conduct of specific OPP officers from the Bancroft detachment are "employment related" because of the potential for disciplinary action against those officers. Moreover, as the employer of these officers, the ministry clearly has "an interest" in the PSB's decisions with respect to the complaints filed against them and the outcome of the subsequent reviews conducted by OCCPS.

[31] I find that these records were collected, prepared, maintained or used by or on behalf of the ministry by the OPP and OCCPS in relation to meetings, consultations, discussions or communications about employment related matters involving OPP officers in which the ministry has an interest. Consequently, these records are excluded from the scope of the *Act* under section 65(6)3. Section 65(7) provides exceptions to the section 65(6) exclusions but none of them apply to these records.

C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[32] The discretionary exemptions in sections 49(a) and (b) of the *Act* apply to personal information. Consequently, it is necessary to determine whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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[14] See, for example, Orders PO-2658, PO-2531, PO-2499 and PO-2426.
[15] Order PO-2157.

"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;

[33] 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.[16]

[34] The ministry submits that the records at issue contain the personal information of numerous individuals, including the appellant, his family, victims, witnesses and other

[16] Order 11.

individuals. The appellant does not address whether the records at issue contain the personal information of any individuals.

[35] I have reviewed the records at issue and agree with the ministry that they contain the personal information of the appellant, his wife, his daughter, members of his extended family, witnesses to various incidents and other individuals. The types of personal information relating to these individuals in the records fall within paragraphs (a) to (h) of the definition in section 2(1).

[36] The ministry states that some records contain information about several OPP officers who were the subject of complaints by the appellant. It submits that this information reveals something personal about these officers, thereby qualifying as their personal information, and it cites previous IPC orders to support its submissions on this issue.[17] It further submits that other records contain information relating to the employment history of various OPP officers, which also qualifies as their personal information.

[37] Section 2(3) of the *Act* excludes certain information from the definition of personal information. It states:

> 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.

[38] In addition, previous IPC orders have found that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[18]

[39] However, previous orders have also found 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.[19]

[40] Many of the records at issue contain the names and job titles of various OPP officers and public servants. In my view, this information identifies these individuals in a professional or official capacity. In accordance with the exception to the definition of "personal information" in section 2(3) of the *Act*, I find that this information does not qualify as the personal information of these OPP officers and public servants.

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[17] Orders PO-2524 and PO-2633.
[18] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[19] Orders P-1409, R-980015, PO-2225 and MO-2344.

[41] However, I agree with the ministry that the information in the records relating to those OPP officers who were the subject of a PSB investigation and subsequent OCCPS review into their conduct, takes on a different, more personal quality. I find that this information qualifies as the personal information of these officers.[20]

[42] In addition, I find that the information in the records relating to the employment history of various OPP officers qualifies as their personal information under paragraph (b) of the definition in section 2(1).

[43] I will now turn to assessing whether the records and parts of records withheld by the ministry qualify for exemption under the discretionary exemptions in sections 49(a) and (b) of the *Act*.

Issue D: Does the discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l), 14(2)(a), 15(b) and 19 exemptions, apply to the information at issue?

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

[45] The ministry is withholding a number of records and parts of records under section 49(a), read in conjunction with the sections 13(1), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l), 14(2)(a), 15(b) and 19 exemptions. These records contain the appellant's personal information.

[46] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. This will be addressed under Issue F (exercise of discretion) below.

[47] Based on my review of the records at issue, I have decided to examine the ministry's exemption claims in the following order: sections 19, 15(b), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l), 14(2)(a) and 13(1). However, I will start by disposing of a preliminary issue that relates to the late raising of discretionary exemptions by the ministry.

[20] Some of the records that contain such information are excluded from the scope of the *Act* under section 65(6) and are therefore no longer at issue in these appeals.

Preliminary issue

[48] In its representations, the ministry states that it is claiming the discretionary exemptions in sections 13(1), 14(1)(e), 14(1)(i) and 19 of the *Act* for a larger number of records.

[49] Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[50] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[21]

[51] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[22] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[23]

[52] The ministry states that its failure to claim the discretionary exemptions in sections 13(1), 14(1)(e), 14(1)(i) and 19 for a number of records was inadvertent and resulted, in part, from the unusually large number of records requested. It submits that claiming these discretionary exemptions does not compromise the integrity of the appeal process or prejudice the appellant's interests because the claim was made before the appellant had been asked to submit representations.

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[21] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[22] Order PO-1832.
[23] Orders PO-2113 and PO-2331.

[53] The appellant's representations do not address whether the ministry should be allowed to make new discretionary exemption claims for additional records at the adjudication stage of the appeal process.

[54] The ministry's decision to claim these discretionary exemptions for a larger number of records was made at the outset of adjudication, which was beyond the 35-day timeline set out in section 11.01 of the *Code*. However, section 11.01 is discretionary and allows an adjudicator to consider a new exemption claim made after the prescribed timeline.

[55] I am mindful of the fact that the appellant has requested an extremely large number of records. In some requests, an individual may seek access to 10 or 20 pages of records held by an institution. In this case, the ministry located 999 pages of OCCPS records, 7,610 pages of OPP records and 2,304 pages of ministry records, and the appellant is seeking access to all of them. I also recognize that the ministry has devoted significant staff time and resources to locating, severing and disclosing the voluminous amount of responsive records. In addition, I accept that the ministry's failure to claim sections 13(1), 14(1)(e), 14(1)(i) and 19 at an earlier stage for some records was inadvertent.

[56] I note that the ministry cited the discretionary exemptions in sections 13(1), 14(1)(e), 14(1)(i) and 19 in its decision letters to the appellant.[24] Consequently, the appellant had notice that these exemptions were at issue in these appeals for a number of other records when he received the ministry's decision letters. In addition, the appellant's representations do not allege that he has suffered prejudice by the late raising of these exemptions for some records. In my view, the ministry's decision to claim these exemptions for a larger number of records during adjudication has not resulted in prejudice to the appellant and does not compromise the integrity of the appeal process.

[57] In short, I have decided to allow the ministry to claim the discretionary exemptions in sections 13(1), 14(1)(e), 14(1)(i) and 19 for a larger number of records.

Section 19: Solicitor-client privilege

[58] The records at issue include records relating to various criminal proceedings that the Crown has brought against the appellant and civil proceedings that the appellant has initiated against the OPP and the Ontario government. The ministry claims that the discretionary exemption in section 49(a), in conjunction with the solicitor-client privilege exemption in section 19, applies to a significant number of the withheld records.

[24] *Supra* note 2.

[59] Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[60] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The ministry must establish that at least one branch applies.

Branch 1: common law privilege

[61] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[25]

Solicitor-client communication privilege

[62] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[26]

[63] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[27]

[64] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[28]

[65] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[29]

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[25] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[26] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[27] Orders PO-2441, MO-2166 and MO-1925.
[28] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[66] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[30]

Litigation privilege

[67] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[31]

Branch 2: statutory privileges

[68] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[69] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.[32] However, branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.[33]

[70] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.[34]

[71] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[35]

[72] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[36]

[73] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

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[29] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[30] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[31] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).
[32] Order PO-2733.
[33] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[34] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[35] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).
[36] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

- waiver of privilege by the head of an institution;[37] and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[38]

[74] The ministry states that all of the records that it has identified as exempt under section 19 have been properly withheld. It submits that it has not waived privilege with respect to any of these records. It then describes the contents of the records and explains why they qualify for exemption under section 19:

> The ministry has applied section 19, Branch 1 and Branch 2, to exempt from disclosure records held by the OPP Risk Management Unit (pages 56 to 1110 of request CSCS-2007-03376). The ministry refers to the content of the records in support of its position.
>
> The Risk Management Unit's responsibilities include liaising with legal counsel at the Ministry of the Attorney General who have carriage of civil litigation involving the OPP. Risk Management Unit staff are directed by Crown counsel in relation to ongoing civil litigation. The records at issue reflect confidential communications between Crown counsel and the client OPP. A 2006 civil action filed by the appellant and his family against two named OPP officers and HMQ remains before the Court. The records held by the Risk Management Unit contain extensive information that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation involving the appellant.
>
> The responsive records held by the OPP also include documents in relation to the settlement by alternative dispute resolution of earlier civil action initiated by the appellant. Such information continues to be exempt under Branch 2 of section 19 in accordance with the Court of Appeal's ruling in *Magnotta*. Examples of such records include pages 79 to 82, 85 to 86, 95, 99 to 105, 150 to 160 and 3351 of request CSCS-2007-03376.
>
> The responsive records include records that reflect the provision of confidential legal advice from Crown counsel to the OPP and other employees in relation to matters concerning the appellant. The ministry submits that such information is exempt from disclosure under Branch 1 and Branch 2 of section 19. Examples of such records include pages 3515 to 3521 of request CSCS-2007-03376 and pages 653 to 654 of request CSCS-2007-03377.

[37] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[38] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

> The responsive records also include copies of Crown brief materials that were prepared in relation to prosecutions involving the appellant. The ministry submits that such information is exempt from disclosure under Branch 2 of section 19 in accordance with the Court of Appeal's ruling in *Magnotta* and Order PO-2871. Examples of such records include pages 2542 to 2556, 2569, 2627 to 2629, 2665 to 2666, 2683 to 2684, 2807 to 2812, 2830, 2847 to 2851 2855 to 2861, 2881 to 2884, and 2909 to 2911 of request CSCS-2007-03376.
>
> The records exempted under section 19 include a number of other records that reflect confidential communications between Crown counsel and the OPP in relation to matters concerning the appellant. The ministry submits that such records are exempt from disclosure in accordance Branch 1 and Branch 2 of section 19. Examples of such records include pages 1561 to 1562, 1568 to 1572, 1574 to 1588, 1590 to 1626, 1628 to 1638, 1648, 1651 to 1656, 1659, 1662 to 1678, 1660 to 1700, 2937, 2950 and 3449 of request CSCS-2007-03376.

[75] The appellant's representations do not address whether the records withheld by the ministry qualify for exemption under section 49(a), in conjunction with section 19 of the *Act*.

[76] I have reviewed the records at issue and considered the ministry's representations. I am satisfied that these records fall within branches 1 and 2 of section 19 for the following reasons. A number of the records relate to the appellant's civil lawsuit against the OPP and the Ontario government. Lawyers for Crown Law Office Civil (CLOC) represent the OPP and many of the records at issue either contain legal advice or are part of a "continuum of communications" between these solicitors and the OPP's representatives. I find that these records are exempt under the solicitor-client communication privilege component of branch 1 of section 19. The records also include documents that were prepared for use in the mediation or settlement of actual or contemplated litigation with the appellant. As stipulated in the *Magnotta* case,[39] these records qualify for exemption under branch 2 of section 19.

[77] A number of the records withheld by the ministry under section 19 relate to various criminal proceedings that the Crown brought against the appellant. Many of these records form part of the Crown brief, including copies of materials provided to prosecutors by the OPP, and other materials created by or for counsel. I find that these records are also exempt under the statutory litigation privilege aspect of branch 2 of section 19.

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[39] *Supra* note 36.

[78] In summary, I am satisfied that the records that the ministry has withheld under the discretionary exemption in section 49(a), in conjunction with section 19, are exempt from disclosure, subject to my review of the ministry's exercise of discretion in Issue F below.

Section 15(b): information received from another government

[79] The ministry claims that a number of records are exempt from disclosure under the discretionary exemption in section 49(a), read in conjunction with section 15(b).

[80] Section 15(b) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution;

[81] The purpose of section 15(b) is to allow the Ontario government to receive information from another government or its agencies in confidence, thereby building the trust required to conduct affairs of mutual concern.[40]

[82] For a record to qualify for exemption under subsection 15(b), the institution must establish that:

1. the records must reveal information received from another government or its agencies;

2. the information must have been received by an institution; and

3. the information must have been received in confidence.[41]

[83] In its representations on section 15(b), the ministry states the following:

> . . . [D]isclosure of the records exempted pursuant to section 15(b) would reveal law enforcement information provided in confidence to the ministry. Release of this information would jeopardize the conduct of relations between the OPP and the Royal Canadian Mounted Police and the OPP and a municipal police service. The OPP has an ongoing relationship with these other law enforcement agencies. If the exempt confidential law

[40] 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.
[41] Order P-210.

> enforcement information was disclosed to the appellant, these other law enforcement agencies may be unwilling to disclose similar information in the future to the ministry.
>
> The ministry did not seek approval from the Executive Council to disclose the records exempted pursuant to section 15 and it submits with respect that it is not obliged to do so. *FIPPA* provides that it is within the head of the Institution's discretion as to whether the record gets disclosed, but if the decision is made that records under this section ought to be disclosed, then approval is required from Executive Council.

[84] The appellant's representations do not address whether the records withheld by the ministry qualify for exemption under section 49(a), in conjunction with section 15(b) of the *Act*.

[85] I have reviewed the records at issue and considered the ministry's representations. I note that the ministry has applied section 15(b) to some records that I have already found exempt under section 49(a), in conjunction with section 19. Consequently, it is not necessary to determine whether these records are also exempt under section 49(a) in conjunction with section 15(b).

[86] However, the ministry has also withheld the following records under section 49(a), in conjunction with section 15(b), that contain the appellant's and/or his wife's personal information:

- OPP address history record;
- Canadian Police Information Centre (CPIC) records;
- Ministry of Transportation (MTO) records; and
- Toronto Police Service (TPS) records.

OPP address history record

[87] The ministry has withheld a record on page 1922 of appeal PA08-197-2 that contains the appellant's personal information, including his current and previous addresses. The ministry has withheld this record under section 49(a), in conjunction with section 15(b).

[88] The section 15(b) exemption only applies to information that an institution receives in confidence from another government or its agencies. However, the OPP appears to have extracted this record from its own records management system (RMS). There is no evidence before me to show that the OPP received this information in

confidence from another government or its agencies. Moreover, even if the OPP did receive this information from another government or its agencies, the appellant is clearly aware of his own personal address history, and there would be no reasonable expectation of confidentiality with respect to this information.

[89] Consequently, I find that section 49(a), in conjunction with section 15(b), does not apply to the appellant's personal information in this record.

CPIC records

[90] CPIC is a computer database that is managed by the RCMP. The CPIC website contains the following definition:

> CPIC is a computerized information system providing all Canadian law enforcement agencies with information on crimes and criminals. [It is] electronically accessed by authorized agencies based on name and date of birth queries.[42]

[91] The records at issue include a number of CPIC records that contain the appellant's personal information, particularly a history of his charges and convictions under the *Criminal Code* and other statutes. There is also one CPIC record relating to his wife, who has provided the ministry with a written consent that authorizes it to disclose her personal information to the appellant.

[92] Some of these CPIC records are exempt under section 49(a), in conjunction with the solicitor-client privilege exemption in section 19 of the *Act*, because they either fall within the "continuum of communications" between Crown counsel and the OPP with respect to the appellant's civil lawsuit against the OPP and the Ontario government, or were part of a Crown brief in previous criminal matters involving the appellant.[43]

[93] However, the records at issue also include a number of CPIC records containing the appellant's and his wife's personal information that are simply in the OPP's hands. They do not appear to be part of a "continuum of communications" between Crown counsel and the OPP or part of any Crown brief. These CPIC records are on the following pages of the records at issue in appeal PA08-197-2: pages 1924-1927, 1929-1933, 1959-1960, 2616-2619 and 3401-3403. The ministry submits that these CPIC records are exempt from disclosure under section 49(a), in conjunction with section 15(b).

[94] The gist of the ministry's submissions is that disclosing the CPIC records that contain the appellant's personal information could reasonably be expected to reveal

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[42] http://www.cpic-cipc.ca/English/crimrec.cfm

[43] For example, pages 2546-2548 of the records at issue in appeal PA08-197-2 are CPIC records that are part of a "Show Cause Brief" that was prepared by the OPP for the Crown's office.

information that the OPP received in confidence from the RCMP, which is an agency of Public Safety Canada, a federal government department. However, the IPC has consistently found in previous orders that CPIC records containing a requester's personal information do not qualify for exemption under section 15(b) of the *Act* or the municipal equivalent in section 9(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act*.[44] In Order MO-1288, former Adjudicator Holly Big Canoe rejected the argument of the Toronto Police Service that they had received CPIC information "in confidence" for the purposes of the section 9(1)(d) exemption:

> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
>
> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware. In my view, section 9(1)(d) does not apply to the [withheld records].

[44] Orders MO-1288, M-1055, MO-2508 and Order PO-2647.

[95] I agree with former Adjudicator Big Canoe's reasoning and adopt it with respect to the appellant's and his wife's personal information in the CPIC records at issue, which the ministry claims is exempt under section 15(b). There are certainly circumstances in which the OPP receives records in confidence from the RCMP. However, I find that there is no reasonable expectation of confidentiality with respect to the appellant's personal information in these particular CPIC records, which contain a list of his previous charges and convictions. This offence history constitutes the appellant's personal information and he clearly knows of its existence. The same reasoning would apply to his wife's personal information in such records.

[96] In short, I find that section 49(a), in conjunction with section 15(b), does not apply to the appellant's and his wife's personal information in these records. However, in the next section of this order I find that some of the non-personal information in these CPIC records, such access/transmission codes, query information and other similar data, qualifies for exemption under sections 14(1)(i) and (l) of the *Act*, because its disclosure could reasonably be expected to endanger the security of the system established for the protection of information in the CPIC database or facilitate the commission of an unlawful act.

MTO records

[97] The records at issue also include a number of MTO driver and vehicle records that contain the appellant's personal information, including his name, sex, date of birth, height, address, licence number, class, expiry date, fines, license suspensions, etc. There is also one driver record relating to wife. These MTO records are on the following pages of the records at issue in appeal PA08-197-2: pages 1965, 1967, 1969-1975, 1977-1981, 1983, 1985-1986, 1988-1989, 1991, 1993, 1995-1997 and 2021. The ministry has withheld these records under section 49(a), in conjunction with section 15(b).

[98] The section 15(b) exemption only applies to information that an institution receives in confidence from another government. In this case, the OPP, which is part of the Ontario government, has received the appellant and his wife's driver/vehicle records from MTO, which is also part of the Ontario government. Consequently, I find that section 49(a), in conjunction with section 15(b), does not apply to the appellant's and his wife's personal information in these records.

TPS records

[99] The records at issue include a number of TPS records that contain the appellant's personal information, including Master Name Index (MANIX) database records, a record of arrest, records/supplementary records of P.O.T. (provincial offences ticket) and a general occurrence report. Some of these records also contain the personal information of other individuals. These TPS records are on the following pages of the records at

issue in appeal PA08-197-2: pages 1499-1500, 1502-1516, 1518-1520, 1522-1526, and 1936-1957. The ministry has withheld these records under several exemptions, including section 49(a), in conjunction with section 15(b).

[100] Previous orders of this office have consistently found that municipal entities, including municipal police services such as the TPS, do not constitute "another government or its agencies" for the purpose of section 15(b) of the *Act*.[45] In Order PO-2456, former Adjudicator John Swaigen addressed the issue of whether a municipal police service could be regarded as a "government agency" for the purpose of section 15(b). Adjudicator Swaigen reviewed Order 69 and then stated:

> I agree with Commissioner Linden's conclusion [set out in Order 69] that the intent of the Legislature, as evidenced by the Williams Report and the statements of the Attorney General during legislative debates on the *Act*, was that municipalities are not "governments" for the purpose of section 15 of the *Act*. In particular, the statements of the Attorney General make it clear that the Legislature turned its mind to the question of whether municipalities are governments for the purpose of section 15.
>
> When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act.* Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:
>
> > (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
> >
> > (a) the Government of Canada;
> >
> > (b) the Government of Ontario or the government of a province or territory in Canada;
> >
> > (c) the government of a foreign country or state;
> >
> > (d) an agency of a government referred to in clause (a), (b) or (c); or

[45] Orders P-69, PO-2715 and PO-2751.

> (e) an international organization of states or a body of such an organization.
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal board. That is, section 9 does not apply to information received from another municipality.

It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.

Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.

Accordingly, I find that the municipal police service that provided these records to the ministry is not an agency of another government for the purposes of section 15 of the *Act*. Therefore, I find that the exemption claimed under section 49(a) in conjunction with section 15(b) does not apply to these records.

[101] I agree with former Adjudicator Swaigen's reasoning and adopt it with respect to the TPS records in the appeals before me. Given that the municipal police service (TPS) that provided these records to the OPP is not an agency of another government for the purposes of section 15(b), I find that section 49(a), in conjunction with section 15(b), does not apply to the appellant's personal information in these records.

Section 14: Law enforcement

[102] The ministry claims that a number of records and parts of records are exempt under the discretionary exemption in section 49(a), read in conjunction with the law enforcement exemptions in sections 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(g), 14(1)(i), 14(1)(l) and 14(2)(a) of the *Act*.

[103] Sections 14(1) and (2) state, in part:

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

> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> . . .
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> . . .
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> . . .
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

> (a) 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;

[104] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[46]

[46] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[105] Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[47]

[106] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[48]

Section 14(1)(c): investigative techniques and procedures

[107] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(c).

[108] Under section 14(1)(c), an institution may refuse to disclose a record where the disclosure could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

[109] In order to meet the "investigative technique or procedure" test in section 14(1)(c), the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[49]

[110] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[50]

[111] The ministry submits that the section 14(1)(c) exemption is applicable for the following reasons:

> . . . [T]he records at issue contain copious amounts of information in relation to confidential investigative techniques and procedures employed by police services, including the OPP, in relation to the investigation of incidents involving the appellant. Examples of such information include pages 1112 to 1146, pages 2332 to 2355, pages 3496 to 3621, and pages 3627 to 3633.

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[47] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[48] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[49] Orders P-170, P-1487, MO-2347-I and PO-2751.
[50] Orders PO-2034 and P-1340.

> Release of the records would reveal detailed information about procedures followed by the police in relation to individuals and evidence that could be exploited by criminals to evade a future prosecution. Revealing information about confidential police resources would compromise the ability of the police to effectively use such investigative tools.
>
> In the appeal that resulted in the issuing of Order PO-2380, Adjudicator Donald Hale concluded that section 14(1)(c) applied to a number of records that described the procedures and techniques used by the Ministry of Natural Resources to obtain and execute a search warrant in a specific high profile case. Adjudicator Hale commented:
>
> > The records contain a great deal of detail about the manner in which the ministry went about achieving the result they did in this situation and includes information about the involvement of the Ontario Provincial Police in the matter. In my view, many of the records relate directly to the investigation and behind the scenes activities of a law enforcement nature. As such, I am of the view that many of the records, or part of records, fall within the ambit of the exemption in section 14(1)(c).
>
> The ministry submits that "investigation and behind the scenes activities of a law enforcement nature" aptly describes a great number of the records withheld in request CSCS-2007-03376.
>
> The records at issue contain investigative information that would not be generally known to members of the public. Release of this exempt information would undermine the ability of the police to conduct similar law enforcement investigations in the future including those relating to suspicious fires, assaults and the other incidents reflected in the withheld records. The procedures revealed in the records are procedures that would be followed by the police to investigate similar incidents in the future. Accordingly, the ministry submits that section 14(1)(c) has been appropriately applied to the records at issue.

[112] The appellant's representations do not address whether the section 14(1)(c) exemption applies to any of the information in the records at issue.

[113] I have reviewed the information that the ministry has withheld under section 49(a), in conjunction with section 14(1)(c). I am satisfied that they reveal "investigative techniques or procedures" employed by the OPP in various investigations involving the appellant and other parties, and disclosing them could reasonably be expected to hinder or compromise their effective utilization. In short, I find that these parts of the

withheld records qualify for exemption under section 49(a), in conjunction with section 14(1)(c).

Section 14(1)(d): confidential source

[114] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(d).

[115] Under section 14(1)(d), an institution may refuse to disclose a record where the disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[116] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.[51]

[117] The ministry submits that the section 14(1)(d) exemption is applicable for the following reasons:

> . . . [R]elease of the requested records would disclose the identity of confidential sources of law enforcement information and disclose information supplied by the confidential sources.
>
> The exemption provided by section 14(1)(d) may apply in two different sets of circumstances, namely, where disclosure could reasonably be expected to:
>
> > (1) disclose the identity of a confidential source of information in respect of a law enforcement matter, or
> > (2) disclose information furnished only by the confidential source.
>
> The ministry submits that the records at issue contain detailed information that was provided by identifiable confidential sources during the context of various investigations into potential violations of law. The free exchange of relevant information between law enforcement officers and other parties is a necessary and vital component of law enforcement investigations. Examples of such information include pages 1118 to 1121, 1128 to 1130 and 1133 to 1140.

[51] Order MO-1416.

> The confidential sources of the highly sensitive information at issue would reasonably have expected that the information provided would be kept as confidential. Should the information be divulged, these confidential sources might be reluctant to assist with future law enforcement investigations.
>
> The ministry notes that a number of previous IPC Orders (e.g. MO-2238, MO-2043 and MO-2350) concluded that the identity and contact information of a confidential informant in respect to a law enforcement matter was exempt from disclosure in accordance with section 8(1)(d) the *Municipal Freedom of Information and Protection of Privacy Act* equivalent of section 14(1)(d) of *FIPPA*.

[118] The appellant's representations do not address whether the section 14(1)(d) exemption applies to any of the information in the records at issue.

[119] I have reviewed the information that the ministry has withheld under section 49(a), in conjunction with section 14(1)(d). I am satisfied that disclosing this information could reasonably be expected to reveal the identity of several confidential sources of information in respect of various law enforcement matters involving the appellant. In my view, it is evident from the records themselves that there is a reasonable expectation that the identity of the sources or the information given by these sources would remain confidential in the circumstances. In short, I find that these parts of the withheld records qualify for exemption under section 49(a), in conjunction with section 14(1)(d).

14(1)(e): life or physical safety

[120] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(e).

[121] I find that the records and parts of records that the ministry has withheld under section 14(1)(e) have been properly withheld under other exemptions claimed by the ministry, including section 49(a), in conjunction with the other law enforcement exemptions in section 14(1) and the solicitor-client privilege exemption in section 19, and the personal privacy exemption in section 49(b) of the *Act*. Consequently, I find that it is not necessary to determine whether these withheld records and parts of records are also exempt from disclosure under section 14(1)(e).

Section 14(1)(g): law enforcement intelligence information

[122] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(g).

[123] Under section 14(1)(g), an institution may refuse to disclose a record where the disclosure could reasonably be expected to interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons.

[124] The term "intelligence information" means:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[52]

[125] The ministry submits that the section 14(1)(g) exemption is applicable for the following reasons:

> . . . [R]elease of the records at issue will interfere with the gathering of or reveal law enforcement intelligence information.
>
> Previous IPC orders have considered the meaning of the term "intelligence information." In IPC Order MO-202, Inquiry Officer Asfaw Seife commented as follows in respect to the interpretation of section 8(1)(g), the *MFIPPA* equivalent of section 14(1)(g):
>
> > In my view, for the purposes of section 8(1)(g) of the [*FIPPA*] "intelligence" information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.
>
> Intelligence information is gathered for purposes relating to the maintenance of law and order and for ensuring the safety of communities and individuals. The gathering of intelligence information helps police agencies to take a pro-active approach in regard to targets and criminal activities of interest. Such information is treated as highly confidential and is disclosed within the law enforcement community on an absolute need to know basis only. The value of such information would be seriously compromised should it be disclosed.

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[52] Orders M-202, MO-1261, MO-1583, PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

> Pages 3496 to 3633 of the records at issue consist of a group of documents collected as part of the OPP intelligence information gathering function. The ministry submits that release of the withheld records would interfere with the gathering of and reveal law enforcement intelligence information.

[126] The appellant's representations do not address whether the section 14(1)(g) exemption applies to any of the information in the records at issue.

[127] I have reviewed the information in the records at issue that the ministry has withheld under section 49(a), in conjunction with section 14(1)(g). A number of these records contain information relating to the appellant that was gathered by a detective constable in the OPP's intelligence bureau. I am satisfied that disclosing this information could reasonably be expected to reveal law enforcement intelligence information respecting a person, as contemplated by section 14(1)(g). In short, I find that these withheld records and parts of records qualify for exemption under section 49(a), in conjunction with section 14(1)(g).

Section 14(1)(i): security of a building, vehicle, system or procedure

[128] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(i).

[129] Under section 14(1)(i), an institution may refuse to disclose a record where the disclosure could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

[130] Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection.[53]

[131] The ministry submits that the section 14(1)(i) exemption is applicable for the following reasons:

> . . . [D]isclosure of parts of the records at issue may reasonably be expected to endanger the security and integrity of the Canadian Police Information Centre (CPIC) system and other law enforcement systems.
>
> The ministry submits that the release of CPIC access / transmission codes, as well as CPIC query format information, has the potential to compromise

[53] Orders P-900 and PO-2461.

> the integrity and ongoing security of the CPIC system and facilitate unauthorized access to the CPIC system. A similar concern exists in relation to access / transmission codes relating to other police information systems. Examples of records containing such information include pages 1557, 2553, 2616 to 2619, 2630 to 2632, 2682, 2690 to 2692, 2827 to 2829, 3357 to 3358 and 3382 to 3383.
>
> CPIC is a computerized system that provides the law enforcement community with informational tools to assist in combating crime by providing information on crimes and criminals. CPIC is operated by the RCMP under the stewardship of National Police Services, on behalf of the Canadian law enforcement community. Unauthorized access to the CPIC system has the potential to compromise investigations and other law enforcement activities and the privacy and safety of individuals.
>
> The ministry notes that Adjudicator Diane Smith in Order PO-2582 accepted the ministry's position that disclosure of CPIC access and transmission codes may reasonably be expected to endanger the "integrity of the CPIC system".

[132] The appellant's representations do not address whether the section 14(1)(i) exemption applies to any of the information in the records at issue.

[133] I have reviewed the information that the ministry has withheld under section 49(a), in conjunction with section 14(1)(i). Each of the CPIC records containing the appellant and his wife's personal information also contains access/transmission codes and query information. I agree with Adjudicator Smith's findings in Order PO-2582 and am satisfied that disclosing this information could reasonably be expected to endanger the security of the system established for the protection of information in the CPIC database, for which protection is reasonably required. In my view, this finding would also apply to the codes in records extracted from other law enforcement databases, such as the TPS's MANIX database. In short, I find that this information qualifies for exemption under section 49(a), in conjunction with section 14(1)(i).

Section 14(1)(l): commission of an unlawful act or control of crime

[134] The ministry claims that there is information in the records at issue that is exempt from disclosure under section 49(a), in conjunction with section 14(1)(l).

[135] Under section 14(1)(l), an institution may refuse to disclose a record where the disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[136] The ministry submits that the section 14(1)(l) exemption is applicable for the following reasons:

> The ministry has applied section 14(1)(l) to exempt from disclosure various types of operational police codes including "ten" codes, location codes, zone codes, and similar information. Release of such information would hamper the ability of the OPP to safety and effectively respond to future incidents involving the appellant and/or other individuals (examples include pages 1, 4 to 5, 20 to 22, 30, 46, 48, 52, 1152, 1265, 1894, 2521, 2644, 3500 to 3512, and audio recordings).
>
> With particular reference to police "ten" codes referenced in the records at issue, these operational police codes are used by OPP officers in their radio communications with each other and their detachments and Provincial Communication Centres. The ministry submits that release of "ten" codes would compromise the effectiveness of police communications and jeopardize the safety and security of OPP officers.
>
> With respect to other operational police codes that have been withheld, these codes reveal identifiable zones from which OPP officers are dispatched for patrol and other law enforcement activities. Although a detachment may cover a large geographic region, the exempt information reveals a specific, identifiable zone and service location. This information is used to dispatch officers to calls for service and could be used to track the activities of police officers carrying out law enforcement activities in the community.
>
> The ministry submits that the public disclosure of these operational police codes would leave police officers more vulnerable and compromise their ability to provide effective policing services. For example, if individuals engaged in illegal activities were monitoring police radio communications and had access to the meanings of the various police codes it would be easier for them to carry out criminal activities and would jeopardize the safety of police officers. Intimate knowledge of the whereabouts of a given officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activities.
>
> The ministry refers to Orders M-393, M-757, PO-1877, PO-2209, PO-2339, PO-2394, PO-2409 and PO-2660 in support of its position with respect to the withholding of the operational police codes contained in the records at issue.

> The ministry has also applied section 14(1)(l) to withhold information that if disclosed would facilitate the commission of an unlawful act or hamper the control of crime by undermining the ability of the OPP to safety and effectively respond to any future incidents involving the appellant. Such information includes cautions and similar law enforcement information communicated to ensure the safety of individuals. Examples of such information include pages 1893, 1898, 1901,1925, 2753, 3503, 3511, 3617 and 3618. Additionally, the ministry submits that disclosure of information, such as CPIC access/transmission codes and similar information, may reasonably be expected to leave the CPIC computer system and similar police systems more vulnerable to security breaches. Security breaches could lead to data corruption, compromise data integrity and result in unauthorized/illegal disclosures of confidential law enforcement and personal information. The ministry notes that Adjudicator Donald Hale in Order P-1214 determined that similar information met the requirements for exemption pursuant to section 14(1)(l). Adjudicator Hale stated:
>
> > . . . the disclosure of the transmission access codes for the CPIC system which have been severed from Page 5 of the Police records could reasonably be expected to facilitate the commission of an unlawful act, the unauthorized use of the information contained in the CPIC system.

[137] The appellant's representations do not address whether the section 14(1)(l) exemption applies to any of the information in the records at issue.

[138] I have reviewed the information that the ministry has withheld under section 49(a), in conjunction with section 14(1)(l). A number of these records, such as the OPP address history record and the TPS records, contain various police codes, such as location codes, patrol area codes and patrol car numbers. In addition, the CPIC records and the TPS's MANIX records contain access/transmission codes and query information. I agree with previous IPC orders that have consistently found that the disclosure of such information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.[54] Consequently, I find that this information qualifies for exemption under section 49(a), in conjunction with section 14(1)(l).

[139] However, I find that disclosure of the badge numbers and units of named police officers in the TPS records could not reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. In my view, there are strong public accountability considerations that generally apply to such information and

[54] See, for example, Orders MO-2175, M-757 and PO-2970.

it should only be withheld in highly exceptional situations. In the circumstances of these appeals, I find that this information does not qualify for exemption under section 49(a), in conjunction with section 14(1)(l).

Section 14(2)(a): law enforcement report

[140] The ministry claims that a number of records are exempt from disclosure under section 49(a), in conjunction with section 14(2)(a).

[141] I find that the records that the ministry has withheld under section 14(2)(a) have been properly withheld under other exemptions claimed by the ministry, including section 49(a), in conjunction with the other law enforcement exemptions in section 14(1) and the solicitor client privilege exemption in section 19, and the personal privacy exemption in section 49(b) of the *Act*. Consequently, I find that it is not necessary to determine whether these withheld records are also exempt from disclosure under section 14(2)(a).

Section 13(1): Advice and recommendations

[142] The ministry claims that some information in the records is exempt from disclosure under the discretionary exemption in section 49(a), read in conjunction with section 13(1).

[143] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[144] The purpose of section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[55]

[145] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[56]

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[55] Orders 24, 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.).
[56] Order PO-2681.

[146] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[57]

[147] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.[58]

[148] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views;
- draft documents; and
- a supervisor's direction to staff on how to conduct an investigation.[59]

[149] In addition, sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1).

[150] The ministry states that it has claimed the section 13(1) exemption for a small number of records:

> The [section 13(1)] exemption has been applied in relation to documents that would reveal express advice or recommendations of public servants in relation to matters involving the appellant.

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[57] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[58] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[59] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

> The advice reveals a recommended course of action. An example of such advice is contained in the draft briefing note exempted on pages 145 to 148 of request CSCS-2007-03376.
>
> The ministry has considered whether the exceptions to the section 13 exemption, set out in sections 13(2) and (3) apply, and is of the view that they do not.

[151] The appellant's representations do not address whether the section 13(1) exemption applies to any of the information in the records at issue.

[152] I have reviewed the information that the ministry has withheld under section 49(a), in conjunction with section 13(1). I am satisfied that disclosing these parts of the records would reveal advice or recommendations of a public servant, or permit one to accurately infer the advice or recommendations given. For example, pages 145 to 148, which are cited by the ministry, are an email from a public servant that contains advice to other individuals about how to deal with the appellant. I find that such information qualifies for exemption under section 49(a), in conjunction with section 13(1). None of the exceptions in sections 13(2) or (3) apply to this information.

Summary

[153] Subject to my review of the ministry's exercise of discretion under Issue F below, I find that the discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(c), 14(1)(d), 14(1)(g), 14(1)(i), 14(1)(l), and 19 exemptions, applies to a number of records and parts of records. The section 15(b) exemption does not apply to the personal information of the appellant and his wife in a number of OPP, CPIC, MTO and TPS records. It not necessary to consider whether the sections 14(1)(e), 14(2)(a) and 15(b) exemptions apply to other records and parts of records because the information in these records has been properly withheld under other exemptions.

[154] Section 10(2) of the *Act* requires an institution to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. In many records, the appellant's personal information cannot reasonably be severed without disclosing the information that falls under one of the exemptions (e.g., the solicitor-client privilege exemption in section 19). However, I find that the OPP, CPIC, MTO and TPS records can be severed in a manner that provides the appellant with access to his and his wife's personal information and other non-exempt information, without disclosing the information in these records that falls under the exemptions (e.g., the access/transmission codes in the CPIC records).

E: Does the discretionary exemption at section 49(b) apply to the information at issue?

Introduction

[155] The ministry has withheld the personal information of various individuals under the discretionary exemption in section 49(b) of the *Act* for many of the records and parts of records that remain at issue in the three appeals.

[156] 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, including the personal privacy exemption in section 49(b).

[157] Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester.

[158] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

[159] At the outset, I note that the section 49(b) exemption only applies to personal information. It does not apply to professional information, such as the names of police officers, public servants, health care workers, lawyers and other individuals who are identified in a professional capacity in the records. For example, the TPS records contain the names, badge numbers and units of various officers who investigated occurrences involving the appellant. I find that this information cannot qualify for exemption under section 49(b) because it constitutes the professional rather than the personal information of these officers.

21(1)(a) exception: consent

[160] Sections 21(1)(a) to (e) contain exceptions to the discretionary exemption in section 49(b) of the *Act*. If the personal information fits within any of the exceptions in paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b).

[161] Section 21(1)(c) requires an institution to disclose another individual's personal information to a requester "upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access."

[162] The appellant's wife provided the ministry with a written consent form authorizing her husband to have access to any of her personal information that might be contained in the responsive records. In addition, several members of his extended family provided written consent forms that authorized the ministry to disclose their personal information to the appellant, his wife and his daughter.

[163] I have thoroughly reviewed the records and it appears that the ministry has generally disclosed to the appellant the personal information in the records that relates to his wife and the members of his extended family who provided written consent forms. Consequently, the ministry has complied with section 21(1)(a) of the *Act*, except for a small number of records that contain the personal information of his mother-in-law.

[164] The appellant's mother-in-law provided a written consent form to the ministry, which has disclosed most of her personal information to the appellant. However, it appears to have withheld the following records and parts of records that contain her personal information:

- Appeal PA08-196-2 (OCCPS records) – pages 981-985 (sworn statement and affidavit); and

- Appeal PA08-197-2 (OPP records) – pages 1 (occurrence summary), 2-3 (general occurrence report), 4 (arrest report), 6-7 (notes reports), 27-28, 32-34, 36-39, 42-43 (police officer's notes), and 47-48 (another police officer's notes).[60]

[165] I find that personal information of the appellant's mother-in-law in these records is covered by the written consent form that she submitted, which authorizes the ministry to disclose her personal information to the appellant, her daughter and granddaughter. Because her personal information fits within the exception in section 21(1)(a), its disclosure to the appellant would not constitute an unjustified invasion of her personal privacy and the information is therefore not exempt from disclosure under section 49(b) of the *Act*.

Section 21(3) presumptions

[166] The records at issue also contain the personal information of other individuals. Section 21(3) lists the types of personal information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of

[60] In its supplementary decision letter of April 6, 2011, the ministry withdrew its claim that pages 1 to 55 of the OPP records (appeal PA08-197-2) are excluded from the scope of the *Act* under section 65(6). It provided the appellant with partial access to these records but did not disclose the personal information of the appellant's mother-in-law in some of these records.

section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[167] The ministry submits that disclosure of the personal information in a number of records to the appellant is presumed to be an unjustified invasion of the personal privacy of other individuals under sections 21(3)(b) and (d). These provisions state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) 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;
>
> . . .
>
> (d) relates to employment or educational history;

[168] With respect to the presumption in section 21(3)(b), the ministry submits that the withheld records consist of personal information that was compiled and is identifiable as part of various police investigations into possible violations of law, including alleged violations of the *Criminal Code* by the appellant. The appellant's representations do not address whether the section 21(3)(b) presumption applies to the personal information in the withheld records.

[169] A substantial number of the records at issue in the three appeals were created as a result of investigations by the OPP and other police services into allegations that the appellant committed various offences under the *Criminal Code* or other statutes. These records include occurrence reports, police officers' notes, witness statements and other records.

[170] For example, pages 1910 to 1920 of the records at issue in appeal PA08-197-2 are statements that OPP officers gathered from several individuals who witnessed an incident involving the appellant and his family. Another example is pages 1504-1505 of the TPS records in the same appeal, which are part of a supplementary record of P.O.T. (provincial offences ticket) that include the names and addresses of several "complainants/victims" that were compiled by the Toronto police with respect to various *Highway Traffic Act* charges laid against the appellant. The ministry has withheld the personal information of these other individuals from the appellant.

[171] I find that the personal information in these and other withheld records fits squarely within the section 21(3)(b) presumption, because it was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code* or other statutes.

[172] It is evident from my review of the records at issue that some of the criminal investigations of the appellant did not result in charges against him. However, previous IPC orders have found that 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.[61] Consequently, I find that the personal information in such records fits within the section 21(3)(b) presumption.

[173] I am also satisfied that some withheld records contain personal information that relates to an OPP officer's employment history, which fits within the section 21(1)(d) presumption.

[174] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21 or section 49(b). Once a presumed unjustified invasion of personal privacy under section 21(3) is established for records which are claimed to be exempt under section 21(1), it can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[62]

[175] I have considered the application of the exceptions contained in section 14(4) and find that the withheld personal information does not fall within the ambit of this section. In addition, the appellant has not raised the public interest override at section 23. Consequently, I find that disclosing the personal information in these records to the appellant would constitute an unjustified invasion other individuals' personal privacy and this personal information qualifies for exemption under section 49(b) of the *Act*.

Section 21(2) factors

[176] For a small number of records, the ministry has withheld the personal information of individuals other than the appellant under section 49(b), read in conjunction with the factor in section 21(2)(f), but none of the section 21(3) presumptions.

[177] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b).[63]

[178] Section 21(2)(f) states:

> 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,

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[61] Orders P-242 and MO-2235.
[62] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[63] Order P-239.

(f) the personal information is highly sensitive;

[179] To be considered "highly sensitive," as stipulated in the factor in section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[64]

[180] The ministry submits that section 21(2)(f) is a factor favouring non-disclosure of the personal information of individuals other than the appellant in these records. The appellant's representations do not address whether any section 21(2) factors weighing in favour of disclosure apply to the personal information in these records.

[181] I have reviewed the small number of records which the ministry claims is exempt under section 49(b), in conjunction with the factor in section 21(2)(f) but no section 21(3) presumptions. For example, the ministry has withheld the name of an individual on pages 633-634 of the records at issue in appeal PA08-196-2 (OCCPS records) under section 49(b), read in conjunction with section 21(2)(f).

[182] While I am not necessarily convinced that disclosing the personal information in such records could reasonably be expected to cause "significant personal distress" to the individuals concerned if their personal information were disclosed to the appellant, I also have no evidence before me to support a finding that any of the factors favouring disclosure in section 21(2) applies to this personal information.

[183] In such circumstances, I find that disclosing the personal information of these individuals to the appellant would constitute an unjustified invasion of their personal privacy. Consequently, this information qualifies for exemption under section 49(b) of the *Act*.

Summary

[184] Subject to my review of the ministry's exercise of discretion under Issue F below, I am satisfied that the personal information of individuals other than the appellant in the records qualifies for exemption under section 49(b) of the *Act*. As noted above, however, the personal information of the appellant's mother-in-law, which is found in a number of withheld records, fits within the consent exception in section 21(1)(a) and must be disclosed to the appellant.

[185] Section 10(2) of the *Act* requires an institution to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. In many records, the appellant's personal information is closely intertwined with the personal information of other individuals and cannot reasonably be

[64] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

severed. However, I find that the TPS records, for example, can be severed in a manner that provides the appellant with access to his own personal information, without disclosing the personal information of other individuals that falls under the section 49(b) exemption.

F: Did the ministry exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

[186] The sections 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[187] In this order, I have found that most of the records and parts of records withheld by the ministry qualify for exemption under sections 49(a) and (b). Consequently, I will assess whether the ministry exercised its discretion properly in applying these exemptions to those withheld records and parts of records.

[188] The IPC 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.

[189] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[65] The IPC may not, however, substitute its own discretion for that of the institution.[66]

[190] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information

[65] Order MO-1573.
[66] Section 54(2).

    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.[67]

[191] The ministry submits that it exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b):

> The ministry is mindful of the major purposes and objects of *FIPPA.* The ministry considers each request for access to information on an individual, case-by-case basis. The ministry maintains that it has properly exercised its discretion at all times.
>
> The ministry is cognizant of the appellant's right of access to personal information records held by the ministry. The ministry took into account that the appellant is an individual rather than an organization. The ministry also considered the relationship between the appellant and the various other individuals referenced in the records.
>
> The ministry considered releasing the exempt records at issue to the appellant notwithstanding that discretionary exemptions from disclosure applied to the records at issue.

[67] Orders P-344 and MO-1573.

> The ministry was mindful of the fact that the responsive records in this particular instance document many different law enforcement investigations that are in relation to the appellant.
>
> The historic practice of the ministry when responding to personal information requests for law enforcement records is to release as much information as possible in the circumstances while maintaining a cautious regard for the ministry's public safety responsibilities.
>
> The ministry was satisfied that much of the information remaining at issue was compiled and is identifiable as part of investigations into a possible violation of law.
>
> The ministry considered whether release of the records at issue could generally discourage members of the public from reporting potential violations of law to the police and undermine public confidence in the ability of the OPP to provide policing services. The ministry in its exercise of discretion took into consideration the fact that confidentiality of information in some instances is necessary for police officer safety, as well as public safety and protection.
>
> The ministry in its exercise of discretion was also mindful that disclosure of records . . . subject to solicitor-client privilege could prejudice the legal and other interests of the ministry.
>
> Through its final decision letters issued May 19, 2010, and June 22, 2010, and the supplemental decision letters issued April 6, 2011, a substantial amount of information has been released to the appellant. The ministry carefully considered whether it would be possible to sever any non-exempt information from the records at issue. However, the Ministry concluded that additional severing was not feasible in this instance.
>
> The ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's requests for access to information was not appropriate.

[192] In his representations, the appellant does not directly address whether the ministry has properly exercised its discretion in withholding records and parts of records under sections 49(a) and (b). However, he asserts that the ministry must provide "strict proof" for withholding records and parts of records under the *Act*.

[193] As noted above, the ministry located 999 pages of OCCPS records, 7,610 pages of OPP records and 2,304 pages of ministry records that are responsive to the

appellant's requests. It disclosed a substantial number of these records to him, but denied access to the remaining records under various provisions in the *Act*, including the discretionary exemptions in sections 49(a) and (b).

[194] In my view, the ministry exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b). It conducted a thorough review of the voluminous number of records that it located in response to the appellant's request and decided to disclose a substantial number to him, while exercising its discretion to withhold some records and parts of records that fall within the purview of these exemptions. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors. Consequently, I uphold the ministry's exercise of discretion under sections 49(a) and (b).

G: Did the ministry conduct a reasonable search for records?

[195] During the intake stage of the appeal process, the appellant alleged that the ministry had not conducted a reasonable search for responsive records.

[196] 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.[68] 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.

[197] 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.[69] To be responsive, a record must be "reasonably related" to the request.[70]

[198] 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.[71]

[199] The ministry submits that it conducted a reasonable search for records responsive to the appellant's request:

> . . . [T]he ministry and OCCPS have conducted reasonable searches for records in the circumstances of the appellant's multiple requests for access to information.

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[68] Orders P-85, P-221 and PO-1954-I.
[69] Orders P-624 and PO-2559.
[70] Order PO-2554.
[71] Orders M-909, PO-2469 and PO-2592.

> The appellant's requests necessitated the conduct of comprehensive record searches in various locations and program areas of the ministry. These record searches were largely conducted in 2008 and involved a very large number of records. In some instances, the staff who conducted the records searches are no longer with the ministry or have changed employment responsibilities within the ministry since 2008.
>
> As a result of the foregoing, the information available in relation to the ministry and OCCPS record search activities has been amalgamated into the attached affidavit sworn to by [the deputy coordinator of the ministry's freedom of information and privacy office].

[200] The deputy coordinator's nine-page affidavit sets out the searches that were conducted by employees at the ministry, the OPP and OCCPS to locate records responsive to the appellant's requests. This included inputting search terms into "Niche", which is the OPP's electronic records management system, and searching for paper and electronic records at OPP Central Region, OPP Eastern Region, OPP Intelligence Bureau, OPP Communications Bureau, OPP Risk Management Unit, OCCPS, minister's office and ministry's Correspondence Unit.

[201] 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.[72] However, in his representations, the appellant does not address whether the ministry conducted a reasonable search for responsive records or why he believes additional records exist.

[202] In my view, the ministry has provided sufficient evidence to show that it conducted a reasonable search for responsive records. Experienced employees knowledgeable in the subject matter of the appellant's request expended substantial efforts to locate records held by the OPP, OCCPS and the ministry. In short, I find that the ministry conducted a reasonable search for records that are responsive to the appellant's requests, as required by section 24 of the *Act*.

CONCLUSION:

[203] In this order, I find that:

A. The ministry has provided the appellant with an adequate index of records for each appeal.

B. Section 65(6) excludes a number of records from the scope of the *Act*.

[72] Order MO-2246.

C. The records contain "personal information," as defined in section 2(1) of the *Act*, relating to the appellant, his wife, his daughter, members of his extended family, witnesses to various incidents, and other individuals.

D. The discretionary exemption at section 49(a), in conjunction with the sections 13(1), 14(1)(c), 14(1)(d), 14(1)(g), 14(1)(i), 14(1)(l), and 19 exemptions, applies to a number of records and parts of records. The section 15(b) exemption does not apply to the personal information of the appellant and his wife in the OPP, CPIC, MTO and TPS records set out below. It not necessary to consider whether the sections 14(1)(e), 14(2)(a) and 15(b) exemptions apply to other records and parts of records because the information in these records has been properly withheld under other exemptions.

E. The discretionary exemption at section 49(b) applies to a number of records and parts of records, except for the personal information of the appellant, his mother-in-law and his wife in the records set out below.

F. The ministry exercised its discretion properly in withholding records and parts of records under sections 49(a) and (b).

G. The ministry conducted a reasonable search for records.

[204] I find that the following personal information in the records does not qualify for exemption under sections 49(a) or (b) of the *Act:*

- the personal information of the appellant's mother-in-law in various records;
- the appellant's personal information in an OPP address history record;
- the appellant's and his wife's personal information in some CPIC records;
- the appellant's and his wife's personal information in MTO records; and
- the appellant's personal information in TPS records.

[205] In addition, there is other information in these records that does not qualify for exemption under the *Act*, such as the names, badge numbers and units of various police officers in the TPS records.

[206] However, some information in the OPP, CPIC, MTO and TPS records qualifies for exemption under the *Act*. For example, I have found that the access/transmission codes, query information and similar data in the CPIC records qualifies for exemption

under section 49(a), in conjunction with the law enforcement exemptions in section 14(1)(i) and (l) of the *Act*.

[207] In addition, the TPS records include the personal information of individuals other than the appellant. Unlike the members of his family, these individuals have not consented to the disclosure of their personal information to him. I have found that this personal information qualifies for exemption under section 49(b) of the *Act* because its disclosure to the appellant would constitute an unjustified invasion of these other individuals' personal privacy.

[208] Section 10(2) of the *Act* requires an institution to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. Many of the records containing the appellant's personal information cannot reasonably be severed without disclosing information that falls under the exemptions. However, I have found that specific OPP, CPIC, MTO and TPS records can be severed in a manner that provides the appellant with access to his and his wife's personal information and other non-exempt information, without disclosing the information that falls under the exemptions.

ORDER:

1. I order the ministry to disclose the following information in the records at issue to the appellant:

   (a) the personal information of the appellant's mother-in-law in the records on pages 981-985 of appeal PA08-196-2[73] and pages 1-4, 6-7, 27-28, 32-34, 36-39, 42-43 and 47-48 of appeal PA08-197-2;[74]

   (b) the appellant's personal information in the OPP address history record on page 1922 of appeal PA08-197-2;

   (c) the appellant and his wife's personal information in the CPIC records on pages 1924-1927, 1929-1933, 1959-1960, 2616-2619 and 3401-3403 of appeal PA08-197-2;

   (d) the appellant and his wife's personal information in the MTO records on pages 1965, 1967, 1969-1975, 1977-1981, 1983, 1985-1986, 1988-1989, 1991, 1993, 1995-1997 and 2021 of appeal PA08-197-2; and

   (e) the appellant's personal information and other non-exempt information in the TPS records on pages 1499-1500, 1502-1503, 1506-1511, 1513-

[73] Ministry file numbers CSCS-2007-02961/02962/02963.
[74] Ministry file number CSCS-2007-03376.

1514, 1516, 1518-1520, 1522-1526, 1936-1949 and 1952-1957 of appeal PA08-197-2.

2. I have provided the ministry with a copy of the above records. The exempt parts, which must not be disclosed to the appellant, are highlighted in green. The non-exempt parts, which must be disclosed to the appellant, are not highlighted in green.

3. I order the ministry to disclose the records identified in order provision 1 to the appellant by **May 28, 2012**.

4. I uphold the ministry's decisions to withhold the remaining records and parts of records from the appellant.

5. In order to verify compliance with the provisions of this order, I reserve the right to require the ministry to provide me with a copy of the records that it sends to the appellant.

Original signed by: April 27, 2012
Colin Bhattacharjee
Adjudicator