Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3112

Appeal PA11-165

Office of the Independent Police Review Director

September 26, 2012

**Summary:** The appellant seeks access to records relating to his complaints about police officers to the Office of the Independent Police Review Director. The OIPRD claims that the records are law enforcement reports exempt under section 49(a), in conjunction with section 14(2)(a). The OIPRD's decision to withhold most of the records is upheld. The only records ordered disclosed are copies of the appellant's complaint the OIPRD claims was already disclosed to the appellant, but appear to have not been disclosed to the appellant. Appeal upheld in part.

**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", 14(2)(a) and 49(a).

**Orders and Investigation Reports Considered:** P-1588.

## OVERVIEW:

[1] The proclamation of Bill 103 on October 19, 2009 created a new civilian agency called the Office of the Independent Police Review Director (OIPRD). The OIPRD is now responsible for overseeing complaints by members of the public about the police where the complaints relate to events occurring on or after October 19, 2009. Prior to the proclamation, the Ontario Civilian Police Commission (OCPC) oversaw the public's complaints about the police.

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

> … *any and all* records related to my two complaints submitted with the Office of the Independent Police Review Director, Complaints [two specified numbers]. I specifically request any accompanying records such as letters, e-mails, copies of warrants or court orders, directives, informal notes, incident notes, screen prints, written informal notes, or e-file media such as disks or insertable media, etc. pertaining to me or alluding to any communication about me or may case with a federal court, agency or service, and in particular, CSIS. This includes any official reports, police reports, received reports from any sources related to me, and anything filed in any Police Records Managements System. [Emphasis in the Original]

[3] The ministry granted the appellant partial access to the responsive records. The ministry claimed that the withheld records and a CD disc were exempt under section 49(a), in conjunction with section 14(2)(a)(law enforcement report) of the *Act*.

[4] The appellant appealed the ministry's decision to this office and a mediator was assigned to the file. During mediation, the ministry issued a revised decision letter claiming that pages 28-44 and 57-71 were excluded from the scope of the *Act* under section 65(6)1. The ministry also claimed that the discretionary exemption at section 13(1)(advice and recommendation) applies to pages 45, 46 and 72. The mediator raised the possible application of section 49(a) to pages 45, 46 and 72 as it appears that these pages contain information about the appellant.

[5] At the end of mediation, the appellant confirmed that he does not wish to pursue access to the CD disc. However, the appellant confirmed that he wishes to pursue access to the remaining withheld information.

[6] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry process, I invited and received representations from the ministry and appellant by sending them a Notice of Inquiry identifying the relevant facts and issues in this appeal. The OIPRD submitted representations in response to the Notice withdrawing its claim that pages 28-44 and 51-71 were excluded from the scope of the *Act* under section 65(6)1. The OIPRD's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. In response, the appellant provided extensive representations and photographic evidence, however some of the appellant's representations did not respond to the issues identified in the Notice and contained submissions that were outside the scope of this appeal. As a result, a copy of the appellant's representations was not provided to the OIPRD.

[7] In this order, I uphold the ministry's/OIPRD's decision to withhold its letters to the Ottawa Police Chief (the Chief) and Case Coordination Analysis reports (pages 28, 45, 46, 57 and 72). However, I order the OIPRD to disclose pages 37-44 and pages 65-71 to the appellant.

## RECORDS:

[8] The responsive records relate to two complaints the appellant filed with the OIPRD.

[9] In its representations, the OIPRD submits that the documents attached to its letters to the Chief, dated August 11, 2010 and December 23, 2010 (pages 29-44 and 58-71) are not at issue as they are duplicates of the appellant's complaint form and letter. The OIPRD submits that the attachments were disclosed to the appellant in response to his access request.

[10] The OIPRD submits that the records at issue should be limited to pages 28, 45, 46, 57 and 72, and should not include the attachments which comprise of pages 29-44 and 58-71 which have already been disclosed to the appellant.

[11] In his representations, the appellant questions whether the attachments only contain his complaints given the volume of records. The appellant also raises a question whether additional information such as written comments are contained on the copies of his complaint attached to the OIPRD's correspondence to the Chief.

[12] I have carefully reviewed the records and it appears that pages 29-36, representing the appellant's first complaint and pages 58-64, representing the appellant's second complaint have been disclosed to him. In addition, no additional information such as written comments appear on these records. Given that these records have already been disclosed to the appellant, I have removed them from the scope of this appeal.

[13] However, it appears that the redacted copies of the appellant's complaint attached to the OIPRD's letters to the Chief were not disclosed to him. These records are located at pages 37-44, representing the first complaint and pages 65-71, representing the second complaint. Redacted copies of the complaints were sent to the Chief for distribution to the officer(s) in question. These records will remain within the scope of this appeal because they are responsive and have not been disclosed in this redacted form to the appellant.

[14] The records at issue are described in the following chart:

***Complaint Number One:***

| Page Number(s) | General Description of Record | Disclosed? |
|---|---|---|
| 28, 37-44 | Letter from the OIPRD to Chief of Police, dated August 11, 2010 and redacted attachments<br><br>(Redacted copy of page 1 and 3 of Complaint form, dated July 7, 2010 and complaint letter, dated July 9, 2010) | Withheld – 49(a) in conjunction with 14(2)(a) |
| 45-46 | OIPRD case coordinator notes (Case Coordination Analysis) | 49(a) in conjunction with 13(1) and 14(2)(a) |

***Complaint Number Two:***

| Page Number(s) | General Description of Record | Disclosed? |
|---|---|---|
| 57, 65-71 | Letter from OIPRD to Chief of Police, dated December 23, 2010 and redacted attachments<br><br>(Redacted copy of the complaint form, dated December 15, 2010 and complaint letter, dated December 2, 2010, supplemental complaint letter, dated December 3, 2010.) | 49(a) in conjunction with 14(2)(a) |
| 72 | OIPRD case coordinator notes (Case Coordination Analysis reports) | 49(a) in conjunction with 13(1) and 14(2)(a) |

## ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?
B. Does the discretionary exemption at section 49(a), in conjunction with section 14(2)(a) apply to the records?
C. Did the OIPRD properly exercise its discretion?

# DISCUSSION:

## A. Do the records contain "personal information" as defined in section 2(1)?

[15] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[16] 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.[1]

[17] 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.[2]

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[19] The parties agree that the records contain the appellant's personal information. Having regard to the records, I find that the records contain the appellant's personal opinions or views [paragraph (e) of the definition of "personal information" in section 2(1)]. In addition, the appellant's information appears with other personal information relating to him [paragraph [h]]. Accordingly, I am satisfied that the records contain the appellant's personal information as that term is defined in section 2(1) of the *Act*.

[20] In light of my finding, I will review the OIPRD's decision to withhold the records under section 49(a), which recognizes the special nature of requests for one's own information.

## B. Does the discretionary exemption at section 49(a), in conjunction with section 14(2)(a) apply to the records?

[21] 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. Section 49(a) reads:

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[22] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[23] 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.

[24] In this case, the institution relies on section 49(a), in conjunction with sections 13(1) and 14(2)(a). I will first consider the possible application of section 14(2)(a) which states:

> A head may refuse to disclose a record, that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[25] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[26] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[3]

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

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

[27] The OIPRD submits that its letters to the Chief and the Case Coordination Analysis reports are "reports" prepared in the course of law enforcement and thus qualifies for exemption under section 14(2)(a) because they represent law enforcement reports. With respect to the Case Coordination Analysis, the OIPRD submits that these records are a "formal account" of the case coordinator's review and preliminary investigation of a complaint under section 60(1) of the *Police Services Act*.[4] The OIPRD submits that its letters to the Chief of Police were written to satisfy its reporting requirement under section 60(7) of the *Police Services Act*.[5]

[28] In this case, the subject-matter of the records addresses the appellant's complaints about several police officers from the Ottawa Police Service. The OIPRD submits that it "is an agency mandated with the authority to enforce and regulate compliance with Part V of the [*Police Services Act*], and as such is a 'law enforcement' agency". The OIPRD advises that if an investigation finds there are reasonable grounds to believe that police misconduct has occurred, a Notice of Hearing will be issued and the matter may proceed to a disciplinary hearing under Part V of the *Police Services Act* or the officer could agree to disciplinary measures. The OIPRD goes on to state, "[i]n other words, once a complaint of misconduct has been substantiated the subject officer faces penalties under the [*Police Services* Act]".

[29] As noted above, the OIPRD submits that it disclosed redacted copies of the complaint to the appellant. However, my review of the records suggest that this did not occur. As a result, pages 37-44 and 65-71 of the records remain at issue. Though the OIPRD also claims that these records qualify for exemption under section 49(a), in conjunction with section 14(2)(a), its representations do not address this issue.

[30] The appellant submits that the records are not reports prepared in the course of law enforcement, inspections or investigations. The appellant also submits that the OIPRD is not a law enforcement agency because its investigations could lead or could not lead to proceedings in court. In any event, the appellant argues that law enforcement matters are matters that apply to citizens of the age of majority, not a selected group such as police officers. The appellant also questions whether the OIPRD

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[4] Section 60(1) of the *PSA* states:

> The Independent Police Review Director may, in accordance with this section, decide not to deal with a complaint made to him or her by a member of the public under this Part.

[5] Section 60(7) of the *PSA* states:

> If the Independent Police Review Director decides not to deal with a complaint, other than a complaint described in subsection (9), in accordance with this section, he or she shall notify the complainant and the chief of police of the police force to which the matter relates in writing of the decision, with reasons, and in the case of the chief of police, shall also give notice of the substance of the complaint.

is a law enforcement agency given its ability to "address or ignore a complaint at their whim, or, at best, a screening checklist, and this belies what a *law* enforcement function is supposed to be; namely, to not only respond to complaints of law-breaking…but to investigate and pre-empt law-breaking".

[31] The appellant argues that the screening process that OIPRD's case coordinators undertake when reviewing complaints, "disqualifies them from being a law enforcement body, since most law enforcement bodies are required to enforce the law in a universal sense, despite the need for clarity, incapacity or judge interpretation". The appellant also argues that OIPRD merely reacted to his complaint and thus cannot be said to be enforcing the law. Finally, the appellant states that the OIPRD is a "complaint-receiving" agency not a "law enforcement" agency.

[32] I have carefully considered the representations of the parties, along with the records at issue and find that the OIPRD's letters to the Chief and the Case Coordination Analysis reports are law enforcement reports under section 14(2)(a).

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

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[6]

*Part 1 of the test*

[34] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[7] I have carefully reviewed the OIPRD's letters to the Chief and Case Coordination Analysis reports (pages 28, 45, 46, 57 and 72) and am satisfied that these records comprise of "reports" for the purpose of section 14(2)(a). I am satisfied that these records contain some analysis and information that goes beyond merely reporting observations or facts. Accordingly, I find that part 1 of the test has been met.

[35] However, I find that the redacted copies of the appellant's complaint found at pages 37-44 and 65-71 are not "reports" for the purpose of section 14(2)(a) and thus do not meet part 1 of the test. These records were prepared by the appellant and, as noted above, contain no additional information such as written comments by OIPRD

[6] Orders 200 and P-324.
[7] Orders P-200, MO-1238, MO-1337-I.

investigators. As the OIPRD has not claimed that any other exemption applies to pages 37-44 and 65-71, I will order it to disclose these records to the appellant.

*Parts 2 and 3 of the test*

[36] The appellant takes the position that the letters to the Chief and Case Coordinator Analysis reports were not prepared in the course of law enforcement, inspections or investigations. In addition, the appellant submits that the OIPRD is not an agency which has the function of enforcing and regulating compliance with a law.

[37] As noted above, the OIPRD is now responsible for overseeing complaints by members of the public about the police. Prior to the establishment of the OIPRD, such complaints were overseen by the Ontario Civilian Police Commission (OCPC) which succeeded the Police Complaints Commissioner (PCC). Previous decisions from this office found that the OCPC and PCC were agencies which had the function of enforcing and regulating compliance with a law.[8] In Order, P-1588, former Inquiry Officer Mumtaz Jiwan stated:

> Previous orders of this office have accepted that the PCC is an agency which has the function of enforcing and regulating compliance with a law. These orders have also held that an investigation into a public complaint against a police officer is a law enforcement matter since it can lead to charges against the subject officer and a hearing before a Board of Inquiry under the *PSA.*[9]

[38] I agree with the above reasoning and adopt it for the purposes of this appeal. In this appeal, the OIPRD investigated the appellant's complaints against police officers. In doing so, the OIPRD created the reports which the appellant wishes to access. Having regard to the reports themselves and the representations of the parties, I am satisfied that the reports were prepared in the course of the OIPRD's investigation of the appellant's complaints. I am also satisfied that the OIPRD is an agency which has the function of enforcing and regulating compliance with a law. The OIPRD is charged with identifying whether there is reasonable grounds of police misconduct at the conclusion of its investigation which could lead to disciplinary hearings and the imposition of penalties and sanctions on officers found to have engaged in unlawful conduct under the *Police Services Act* by the relevant police agency. Having regard to the above, I am satisfied that parts 2 and 3 of the test have been met.

[39] Accordingly, I find that the OIPRD's Letters to the Chief and Case Coordination Analysis reports (pages 28, 45, 46, 57 and 72) qualify for exemption under section 49(a), in conjunction with section 14(2)(a).

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[8] Orders P-659, P-1028, P-1457.
[9] Orders P-1250 and P-932.

[40] Given my finding that the records qualify for exemption under section 49(a), it is not necessary that I also consider whether the Case Coordination Analysis reports found at pages 45-46 and 72 are also exempt under section 49(a), in conjunction with section 13(1).

[41] However, I must go on to determine whether the OIPRD properly exercised its discretion when it withheld these records from the appellant.

### C. Did the OIPRD properly exercise its discretion?

[42] The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[43] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[44] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[45] The appellant submits that the OIPRD exercised its discretion in bad faith and for an improper purpose. The appellant also submits that the OIPRD failed to take into account the fact that the information at issue is significant to him as it directly relates to him. The appellant provided a list of factors he suggests the OIPRD should have not taken into consideration in exercising its discretion to deny him access to the records. I reviewed this list and note that most of the appellant's arguments address issues outside the scope of this appeal, such as quality of the OIPRD's investigation and decision-making process.

[46] The OIPRD did not specifically address this issue in its representations. However, I find that its submission in support of the application of section 49(a) reflects the manner in which discretion was exercised. Having reviewed the OIPRD's submissions and the circumstances of the appeal, I am satisfied that it properly exercised its discretion and in doing so, took into account relevant considerations. In making my decision, I also considered the appellant's submission that he should have

access to his own personal information. Though I recognize that this is an important principle under the *Act*, I find that the confidential nature of the information at issue and sensitivity of it outweighs this principle in the circumstances of this appeal, particularly in light of the amount of information already disclosed to the appellant.

[47] Having regard to the above, I find that the OIPRD properly exercised its discretion to withhold the records I found exempt under section 49(a).

## ORDER:

1. I order the OIPRD to disclose pages 37-44 and 65-71 to the appellant by **October 25, 2012**.

2. I uphold the OIPRD's decision to withhold pages 28, 45, 46, 57 and 72.

3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the information disclosed by the OIPRD to be provided to me.

Original signed by: September 26, 2012
Jennifer James
Adjudicator