Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3182

Appeal PA12-226

Ministry of Community Safety and Correctional Services

March 26, 2013

Summary: The appellant sought access to various records relating to an Ontario Provincial Police (OPP) investigation into the theft of a trailer. The ministry granted access to many of the responsive records, and denied access to portions of the records and the corresponding police officers' notebook entries on the basis of the exemption in section 49(b) (personal privacy). This order determines that the records at issue contain the personal information of the appellant as well as other identifiable affected parties, and that the records qualify for exemption under section 49(b). The decision of the ministry is upheld.

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), 21(3)(b), 21(2)(d) and 49(b).

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records regarding an Ontario Provincial Police (OPP) investigation into the theft of a trailer, and subsequent reports and investigations undertaken by the OPP. The request also referred to three specific occurrence reports.

[2] In response, the ministry identified 46 pages of responsive records. It granted access to certain records, and denied access to other records or portions of records on the basis of the exemptions in sections 49(a) (discretion to deny access to requester's own information), 14(1)(l) and 14(2)(a) (law enforcement) and 49(b) and 21(1) (personal privacy) of the *Act*. In addition, the ministry identified portions of the records that are not responsive to the request.

[3] The appellant appealed the ministry's decision to deny access to the withheld records.

[4] During mediation, and after two affected parties provided their consent, the ministry issued a supplementary decision disclosing additional records and portions of records. The ministry confirmed that access to the remaining portions of the records continued to be denied on the basis of the identified exemptions.

[5] Also during mediation, the appellant confirmed that she is not seeking access to information that was severed under section 14(1)(l) of the *Act*, nor to information identified by the ministry as not responsive to the request. Accordingly, the portions of the records containing information withheld on these grounds are no longer at issue in this appeal.

[6] Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the ministry, initially, and received representations in response. In its representations, the ministry stated that it no longer relies on the exemptions in sections 49(a) or 14(2)(a), and these exemptions are no longer at issue in this appeal. I then sent a modified Notice of Inquiry, along with a complete copy of the representations of the ministry, to the appellant.

[7] The appellant also provided representations in response. In those representations, she indicates that she is not seeking access to "names, addresses, phone numbers or any other personal information" and that she would be content for that information to be removed from the scope of this appeal. Based on her representations, I have removed the name, addresses, telephone numbers, birth dates, and other identifiers from the scope of this appeal. I address the issue of whether the remaining information is personal information below.

[8] In this order, I find that the portions of records remaining at issue contain the personal information of identifiable individuals, and that the ministry properly denied access to them on the basis of the exemption in section 49(b).

RECORDS:

[9] After removing the names and other identifiers from the scope of this appeal, the records remaining at issue are the withheld portions of 26 pages. These consist of:

1) the withheld portions of seven pages of occurrence summaries and occurrence reports, specifically:

- page 1 (2 lines describing the actions taken by an affected party)
- page 2 (4 sentences identifying statements between an affected party and the OPP)
- page 3 (7 lines identifying statements made between affected parties and the OPP, and one sentence identifying actions taken by the police relating to an affected party)
- page 4 (supplementary occurrence report indicating actions taken by the OPP relating to certain affected parties)
- page 5 (7 lines relating to actions taken by the OPP and statements made by certain affected parties)
- page 34 (a brief reference to a telephone call from an affected party)
- page 35 (one paragraph relating to OPP actions concerning a complaint, including statements by affected parties)

2) the corresponding and/or similar information contained in the withheld portions of 19 pages of police officers' notebook entries, which reflect the information contained in the withheld portions of the occurrence summaries and reports referenced above.

ISSUES:

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

B. Does the discretionary exemption at section 49(b) apply to the information?

DISCUSSION:

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

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except where they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (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;

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[1]

[12] The ministry states that the portions of records remaining at issue contain the personal information of identifiable individuals (the affected parties). It states:

> … The personal information ranges from their names, addresses, and phone numbers to substantive and inherently sensitive personal observations [the affected parties] provided about themselves and about other individuals as part of the law enforcement investigation.
>
> The Ministry submits that the release of this personal information would identify these affected third party individuals, and would link them to their involvement in the OPP law enforcement investigation.

[13] The ministry also states that none of these affected parties were acting in a professional or business capacity when the personal information about them was collected.

[14] As indicated above, the appellant has stated that she is not seeking certain personal information including names, addresses and identifiers. Accordingly, this information has been removed from the scope of the appeal. The appellant does state, however, that she is seeking access to information relating to the incident including statements by "all involved." She also states that she is not interested in the names of certain individuals because she knows who they are and/or where they work.

[15] On my review of the records at issue, I find that all of the records contain the personal information of the appellant, as they relate to an incident involving her and reveal other personal information about her (paragraph (h) of the definition).

[16] I also find that the withheld records or portions of records (identified in detail above) also contain the personal information of a number of other identifiable individuals, including their personal views and opinions [paragraph (e)], and their names, along with other personal information relating to them [paragraph (h)]. Although the appellant has stated that she is not seeking the names or identifiers of the affected parties, in the circumstances, I am satisfied that the information remaining at issue, even with the names severed, constitutes the personal information of identifiable individuals who can be identified and connected to the information at issue if the information is disclosed.

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

[17] Accordingly I find that the portions of the records remaining at issue contain the personal information of the appellant as well as that of other identifiable individuals.

B. Does the discretionary exemption at section 49(b) apply to the information?

[18] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the ministry must look at the information and weigh the appellant's right of access to her own personal information against the affected persons' right to the protection of their privacy. If the ministry determines that release of the information would constitute an unjustified invasion of the affected persons' personal privacy, then section 49(b) gives the ministry the discretion to deny access to the appellant's personal information.

[19] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b).

[20] The ministry refers to the presumption in section 21(3)(b) and the factor in section 21(2)(f) in support of its decision to deny access to the portions of records remaining at issue. The appellant states that she is the victim of the alleged theft being investigated, and relies on the factors in sections 21(2)(a), (b) and (d), as well as some unlisted factors, in support of her position that the information contained in the records ought to be disclosed. In her representations, she also reviews the other factors in section 21(2) and states that they do not apply in favour of withholding the information.

[21] The presumption in section 21(3)(b) reads:

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

continue the investigation;

[22] The factors in section 21(2) which were referred to and relied on by the parties read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;

The presumption in section 21(3)(b)

[23] Previous 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.[2] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[3]

[24] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[4]

[25] The ministry submits that the records "fall squarely" within the presumption in section 21(3)(b). It states:

> The records were compiled by, and are identifiable as part of an OPP investigation into a possible violation of law. The possible violation of law in this instance was related to the investigation about alleged stolen property. If the OPP had discovered that a criminal offence had in fact occurred, they could have commenced criminal proceedings by laying

[2] Orders P-242 and MO-2235.
[3] Orders MO-2213, PO-1849 and PO-2608.
[4] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

> charges. Stealing property is an offence under the *Criminal Code*.
>
> As noted in the Notice of Inquiry, criminal proceedings do not have to be commenced in order for section 21(3)(b) to apply. The presumption only requires that *"there be an investigation into* a *possible violation of law"*. The Ministry submits as a result, and in conclusion, that the records clearly relate to an investigation into a possible violation of law, and are therefore protected under section 21(3)(b).

[26] The appellant does not address this issue in her representations.

[27] On my review of the records, which consist of occurrence reports and police officers' notes, it is clear that they were compiled by the OPP in the course of its investigation of a possible violation of law (theft). As noted, the presumption can apply even if no criminal proceedings were commenced against any individuals. Accordingly, I find that the presumption in section 21(3)(b) applies to the personal information contained in the records remaining at issue, and that disclosure is, therefore, presumed to constitute an unjustified invasion of privacy.

The factors in section 21(2)(a), (b), (d) and (f)

21(2)(a) – public scrutiny

[28] The appellant takes the position that this factor applies because access to the information is necessary to confirm the conclusion of the OPP that no offence occurred, and to confirm that a "full and thorough investigation" was conducted.

[29] The appellant identifies her interest in reviewing the withheld portions of the records to allow her to determine the basis upon which the decision that no offence occurred was made; however, this is not sufficient to establish that the factor in section 21(2)(a) applies. In this appeal, I have not been provided with sufficiently cogent evidence to satisfy me that the disclosure of the withheld portions of the records is desirable for the purpose of subjecting the activities of the OPP to "public scrutiny," and I find that the factor in section 21(2)(a) has no application to the records.

21(2)(b) – public health and safety

[30] The appellant argues that if proper protocol was not followed by the OPP in this investigation, changes to the protocol would affect "public health and safety." In the absence of further information, and after reviewing the withheld portions of the records, I am not satisfied that access to the personal information may "promote public health and safety," and I find that this factor does not apply.

21(2)(d) – fair determination of rights

[31] With respect to the factor in section 21(2)(d), the appellant states that the information is "absolutely necessary" to a fair determination of her rights, and she states that if she chooses to proceed with litigation, it is "imperative" that she has this information "in order to prepare."

[32] As set out in the Notice of Inquiry sent to the parties, for section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[5]

[33] Based on the appellant's representations, I am not satisfied that the requirements set out above have been established. The appellant refers to possible litigation, but she does not identify what litigation is contemplated. In addition, the appellant has not provided any information regarding how the information at issue has a bearing on the determination on any legal rights, nor has she described why the information is *required* in order to prepare for the proceeding. I also note that much of the information relating to the investigation was disclosed to the appellant, and that she has stated that she knows the identities of the individuals involved. In the circumstances of this appeal, I am not satisfied that the personal information at issue is relevant to the fair determination of the appellant's rights, and find that the factor in section 21(2)(d) does not apply.

Other factors

[34] The appellant also refers to the unlisted factor of "inherent fairness" in favour of disclosure. In other portions of her representations, she identifies that the investigation

[5] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

about alleged stolen property relates to her property. She states that she does not understand why the OPP made the decision that no charges would be laid, and wants to understand the reasons for that decision by the OPP. She also provides arguments in support of her position that the OPP decision not to lay charges may have been based on inaccurate information or statements. In addition, she identifies the importance the property had to her.

[35] On my review of the records at issue in this appeal, I am not satisfied that this factor of "inherent fairness" applies in this appeal. I understand the appellant's interest in obtaining as much information as possible about an investigation concerning property allegedly stolen from her, and her interest in the reasons why the OPP came to the conclusion they did. However, I note that the appellant was provided with significant portions of the records. These portions of the records include many of the factual circumstances involved in this investigation, as well as the results of the investigation and the reasons why the OPP came to the conclusion that they did. Accordingly, I find that the unlisted factor of "inherent fairness" does not apply in favour of disclosure of the records.

[36] The appellant also takes the position that the unlisted factor of "ensuring public confidence in an institution" favours disclosure. In the absence of further information in support of this factor applying, and on my review of the records at issue, I am not satisfied that this factor applies to the information at issue.

[37] Lastly, the appellant provides representations arguing that the factors favouring non-disclosure do not apply. However, having found that there are no factors favouring disclosure, there is no purpose served in reviewing whether or not factors favouring non-disclosure apply.

[38] In summary, I find that disclosure of the records remaining at issue is presumed to constitute an unjustified invasion of the personal privacy of identifiable individuals under section 21(3)(b), and that no factors favouring disclosure apply. As a result, I am satisfied that the withheld portions of the records qualify for exemption under section 49(b), subject to my review of the absurd result principle and the ministry's exercise of discretion, below.

Absurd Result

[39] Previous orders have determined that, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[6]

[6] Orders M-444 and MO-1323.

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

- the requester sought access to his or her own witness statement[7]
- the requester was present when the information was provided to the institution[8]
- the information is clearly within the requester's knowledge[9]

[41] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[10]

[42] The appellant argues that she is aware of the identity of those involved, and that to deny her access to the information "is confusing at best."

[43] Based on my review of the withheld information, I find that the absurd result principle does not apply to the records or portions of records withheld under section 49(b). The records remaining at issue consist of information relating to identifiable individuals other than the appellant. Although the appellant has indicated that she is aware of the identities of the individuals (and has stated that she is not pursuing access to names, addresses, etc.) this does not mean that the appellant is aware of the content of the withheld portions of the records remaining at issue. In these circumstances, I find that the absurd result principle does not apply.

Exercise of discretion

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

[45] 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.

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[7] Orders M-444 and M-451.
[8] Orders M-444 and P-1414.
[9] Orders MO-1196, PO-1679 and MO-1755.
[10] Orders M-757, MO-1323 and MO-1378.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[47] The ministry states that it provided the appellant with substantial portions of the records responsive to her request. It also states that disclosure of the remaining portions of records would result in the disclosure of the personal information of other identifiable individuals, and that the records cannot be "further severed" without revealing that personal information.

[48] The appellant argues that she has a sympathetic/compelling need to receive the information. She also refers to the nature of the information and its significance to her, and her inability to "get the information" from the investigation. In other portions of her representations she identifies her interest in the remaining portions of records, particularly if they contain information about other property that may belong to her.

[49] I have reviewed the circumstances surrounding this appeal and the representations of the parties. I note that much of the information in the records was disclosed to the appellant. Only small portions of the occurrence summaries and reports (and the corresponding police officers' notes) were withheld, as described in more detail above. I also note that the withheld portions do not contain additional information about property which may belong to the appellant. In this appeal, the appellant was provided with many of the responsive records, including information relating to her actions and her property.

[50] In the circumstances, I am satisfied that the ministry has not erred in exercising its discretion not to disclose the remaining information contained in the records. Consequently, I find that the withheld portions of the records qualify for exemption under section 49(b) of the *Act*.

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original Signed by: March 26, 2013
Frank DeVries
Adjudicator

[11] Order MO-1573.
[12] See section 54(2) of the *Act*.