

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3218

Appeal PA12-230

Ministry of Community Safety and Correctional Services

June 17, 2013

Summary: The appellant requested records relating to him maintained by the Ontario Provincial Police. The ministry located responsive records and issued a decision granting partial access to them. The ministry relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 14(1)(c), (d) and (l) and 14(2)(a), and the discretionary exemption in section 49(b) (invasion of privacy), in conjunction with the presumption in section 21(3)(b), to deny access to certain records. The ministry also denied access to portions of the records on the basis that they were not responsive to the request. During the inquiry, the ministry also claimed the discretionary exemption in section 49(a), in conjunction with section 14(1)(e) (endanger life or safety), to withhold all of the records. This order upholds the ministry's decision and dismisses the appeal on the basis that the records are exempt under sections 49(a) and 14(1)(l), and sections 49(b) and 21(3)(b).

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

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I am requesting information about any files, investigations or actions, involving myself, including any paperwork done or in control of the Ontario Provincial Police, all info in my personal information bank, or with your ministry [requester's name and date of birth]

[2] The requester subsequently narrowed his request as follows:

1. I am asking for all and any reports investigations or court orders within the county of Simcoe and surrounding area, "i.e. Barrie, Alliston, All departments within this region,
2. reports from detachments within the area between Carleton Place and Peterborough on Highway 7.

[3] The ministry located responsive records and provided partial access to them. The ministry denied access to the remainder of the records relying on the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions in sections 14(1)(c), (d), (l) and 14(2)(a), and section 49(b) (invasion of privacy), in conjunction with the presumption in section 21(3)(b). The ministry also denied access to portions of the records on the basis that they were not responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] During mediation, the appellant confirmed that he sought access to all of the withheld information in the records, including the information that was withheld on the basis that it was not responsive.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage for an inquiry under the *Act*.

[7] I sought and received representations from the ministry first, as it bears the burden of proving that the records qualify for the exemptions it relies on. The ministry provided representations and asked that portions be kept confidential from the appellant. In its representations, the ministry asserted that the discretionary exemption in section 49(a), in conjunction with the exemption in section 14(1)(e) (endanger life or safety), also applies to the records at issue.

[8] I determined that portions of the ministry's representations satisfied the confidentiality criteria set out in *Practice Direction 7* of this office's *Code of Procedure* (the *Code*), and I shared the ministry's non-confidential representations with the appellant, including a summary of the ministry's confidential representations on section 14(1)(e), in accordance with section 7 of the *Code*.

[9] The appellant provided representations in which he questioned why a specified court order relating to him that fell within his request, was not included in the responsive records.

[10] I notified the ministry of this additional issue and sought reply representations.

[11] The ministry replied that the court order referred to by the appellant was not identified as responsive because the Ontario Provincial Police (OPP) does not have a copy of it in its custody or under its control. The ministry explained that while the OPP knows about the existence of the court order as a result of its access to the Canadian Police Information Centre database, it does not possess a copy of the court order, which was posted on the database by the originating police service, the Barrie Police Service.

[12] I am satisfied with the ministry's reply representations on why the specified court order was not included in the responsive records. Accordingly, the reasonableness of the ministry's search for responsive records is not at issue in this appeal.

[13] In this order, I uphold the ministry's decision to withhold the records and dismiss the appeal.

RECORDS:

[14] The records at issue consist of nine pages of OPP documents that have been withheld in their entirety, and a one page Street check summary that has been partially disclosed.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b), in conjunction with the presumption in section 21(3)(b), apply to the nine pages of OPP documents?
- C. Does the discretionary exemption at section 49(a), in conjunction with any of sections 14(1)(c), (d), (e) and (l), and 14(2)(a), apply to the information at issue?
- D. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[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. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

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

[16] 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.¹

[17] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[18] The ministry submits that almost all of the records contain personal information within the meaning of the definition in section 2(1) of the *Act*. The appellant does not address this issue in his representations.

[19] Based on my review of the records, I find that the one page Street check summary contains only the appellant's personal information as that term is defined in paragraphs (a), (c), (d) and (h) of section 2(1) of the *Act*.

[20] I also find that the remaining records at issue all contain the personal information of the appellant, and other identifiable individuals. Specifically, this information consists of names, addresses, telephone numbers, ages, and other information, that qualifies as the personal information of the appellant and other individuals under paragraphs (a), (d) and (h) of the definition in section 2(1).

[21] As I have found that the nine pages of OPP records contain the personal information of the appellant and other individuals, I will first address whether the discretionary exemption in section 49(b), in conjunction with the presumption in section 21(3)(b), applies to them.

B. Does the discretionary exemption at section 49(b), in conjunction with the presumption in section 21(3)(b), apply to the nine pages of OPP documents?

[22] 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.

[23] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[24] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his own personal information against the other individuals' right to protection of their privacy. Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

[25] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[26] 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 49(b). In *Grant v. Cropley*,³ the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s. 21(3)(b) in determining, under s. 49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[27] In this appeal, it appears that the presumption at paragraph (b) applies.

21(3)(b): investigation into violation of law

[28] 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.⁴ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁵

[29] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁶

[30] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁷ and violations of the Ontario Human Rights Code.⁸

³ [2001] O.J. 749.

⁴ Orders P-242 and MO-2235.

⁵ Orders MO-2213, PO-1849 and PO-2608.

⁶ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁷ Order MO-2147.

⁸ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

[31] 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).⁹

[32] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹⁰

Representations

[33] In its representations, the ministry asserts that the discretionary exemption in section 49(b), in conjunction with the presumption in section 21(3)(b), applies to the nine pages of OPP records at issue, and that disclosure of these records would presumptively constitute an unjustified invasion of personal privacy. The ministry adds that the withheld nine pages are highly sensitive, and it claims that section 21(2)(f) applies as well. The ministry's remaining representations on this issue are confidential and cannot be described in this order.

[34] In his representations, the appellant does not address this issue directly. The appellant asks that I ensure the records at issue are not of a frivolous or vindictive nature, or that they were created in bad faith, or for an improper purpose. He states that although his representations and knowledge in this appeal are limited, this matter is very important to him as he has concerns about his past dealings with the police. The appellant concludes by asserting that he is not asking for any personal information contained in the records, but rather, for a timeline of the investigation and information on the nature of the investigation, so that he is afforded an opportunity to defend himself.

Analysis and Findings

[35] As I noted above, part of the ministry's representations were kept confidential from the appellant because I determined that they satisfied the criteria established by this office and enshrined in the *Code* for withholding representations. Revealing the ministry's confidential representations on the application of this exemption would disclose the substance of the records claimed to be exempt, as well as information that I have decided is exempt. Therefore, I cannot describe the ministry's confidential representations in this order in any greater detail.

[36] Nonetheless, having carefully reviewed the records and the parties' submissions on all of the issues and exemptions raised, I am satisfied that disclosure to the

⁹ Order P-239.

¹⁰ Order P-99.

appellant of other individuals' personal information contained in the records is presumed to be an unjustified invasion of personal privacy under section 21(3)(b), as the personal information was compiled as part of a law enforcement investigation.

[37] I have considered whether any of the paragraphs under sections 21(1) and 21(4) applies to the records, and I find that none of them does. I have also considered whether any of the factors in section 21(1) applies, and I find that only the factor in section 21(2)(f), which the ministry relies on, applies. The withheld records are highly sensitive and therefore, this factor weighs in favour of not disclosing the personal information in the records. I find that there are no factors that weigh in favour of disclosing the personal information in the records.

[38] Accordingly, I find that the nine pages of records qualify for exemption under section 49(b), in conjunction with the presumption in section 21(3)(b).

[39] I also find that the appellant's personal information in the nine pages of OPP records cannot be severed and disclosed without disclosing the personal information of other individuals that I have found is exempt under section 49(b).

[40] As I have found that the discretionary exemption in section 49(b), in conjunction with the presumption in section 21(3)(b), applies to exempt the nine pages of OPP records from disclosure, I will consider whether the ministry exercised its discretion appropriately in claiming the application of this exemption, below.

C. Does the discretionary exemption at section 49(a), in conjunction with any of sections 14(1)(c), (d), (e) and (l), and section 14(2)(a), apply to the information at issue?

[41] In light of my findings above that the nine pages of OPP records are exempt from disclosure under section 49(b), I need not consider the possible application of the section 49(a) exemption to these records.

[42] The only remaining record I must address is the Street check summary which the ministry partially withheld on the basis of the exemption in section 49(a), in conjunction with section 14(1)(l).

[43] The ministry states that it claims this exemption to withhold police codes in accordance with the established jurisprudence of this office that police codes qualify for exemption under section 14(1)(l) because of the reasonable expectation of harm that would result from their release. In support of its position, the ministry relies on Orders PO-2571 and PO-2700.

[44] The appellant does not address this issue directly in his representations.

[45] Based on the ministry's representations and my review of the withheld information in the Street check summary, I agree with the ministry. This office has repeatedly accepted that police codes are exempt from disclosure by virtue of section 14(1)(l).¹¹ I find that the section 14(1)(l) exemption applies to the withheld police codes in this record, and this information is exempt under section 49(a).

[46] I also note that there are a few additional pieces of information in this record that the ministry withheld on the basis that they are not responsive to the request; namely, details of when the Street check summary was either printed or faxed, and by whom. I find that these portions of the record have been appropriately withheld from the appellant as non-responsive.

**D. Did the institution exercise its discretion under sections 49(a) and (b)?
If so, should this office uphold the exercise of discretion?**

General principles

[47] Sections 49(a) and (b) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it.

[48] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[49] 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.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution.¹³

¹¹ See for example Orders PO-1665, PO-2571 and PO-2700.

¹² Order MO-1573.

¹³ Section 54(2).

Relevant considerations

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁴

- 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
 - 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.

¹⁴ Orders P-344 and MO-1573.

Analysis and Findings

[52] The ministry's representations on this issue are confidential and the appellant does not directly address this issue in his representations.

[53] I have reviewed the ministry's representations and the records, and I have found above that the records and information at issue are exempt from disclosure. While I cannot describe the factors that the ministry considered, I am satisfied that the ministry considered all relevant factors including:

- the fact that the request was for the appellant's own information
- the wording of the section 49(a) exemption and the section 14(1)(l) exemption, and the significant interests these sections seek to protect
- the wording of the section 49(b) exemption and the section 21(3)(b) presumption, and the significant interests these sections seek to protect
- the nature and sensitivity of the personal information contained in the records.

[54] I am also satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose.

[55] I therefore find that the ministry properly exercised its discretion under sections 49(a) and (b) to withhold the records and information at issue in this appeal.

ORDER:

I uphold the ministry's decision and dismiss this appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ June 17, 2013