Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3228

Appeal PA12-211

Ministry of Community Safety and Correctional Services

July 4, 2013

Summary: An individual sought access to OPP records related to incidents involving him. The ministry denied access to the eight records identified as responsive to the request, relying on section 49(a), in conjunction with sections 14 (law enforcement) and 20 (harm to safety or health), as well as section 49(b) (invasion of privacy). In this order, the adjudicator upholds the ministry's decision to deny access to seven of the eight records, in their entirety, under section 49(a), together with section 20, and also partly upholds the ministry's decision under section 49(b) in relation to the remaining record. The adjudicator orders disclosure of the appellant's own personal information contained in the remaining record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 14(1)(c),(d),(e) and (l), 20, 21(3)(b), 49(a) and 49(b).

Orders and Investigation Reports Considered: Orders PO-1939, PO-2751 and MO-2229.

Cases Considered: *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) for Ontario Provincial Police (OPP) records related to incidents involving him that took place in 1998 and 1999.

[2] The ministry identified general occurrence reports, an arrest report and witness statements as responsive to the request and issued a decision letter denying access to them, in their entirety. In denying access, the ministry relies on section 49(a) (refuse to disclose requester's personal information), in conjunction with the law enforcement exemptions in sections 14(1)(c),(d), (e) and (l),[1] as well as section 20 (harm to safety or health). The ministry also claims that disclosure of the records would result in an unjustified invasion of personal privacy under section 49(b), in conjunction with the factor in section 21(2)(f) and the presumption against disclosure in section 21(3)(b). Finally, the ministry claims that small portions of the records contain information which is not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to this office, and a mediator was appointed to explore resolution of the issues. A mediated resolution of the appeal was not possible, and it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal started her inquiry by seeking the representations of the ministry, initially.

[4] After the ministry submitted its representations, I assumed responsibility for the appeal. The ministry argued that its representations were confidential and that they ought to be withheld in their entirety, pursuant to the confidentiality criteria in *IPC Practice Direction 7.* I accepted the ministry's submission that the representations were confidential, for the most part. Accordingly, in preparing the Notice of Inquiry for the appellant, I summarized certain non-confidential portions of the ministry's representations to provide him with a basis for responding to the issues. The appellant provided submissions in response, and I moved the appeal to the order stage.

[5] In this order, I find that all of the records, with one exception, are exempt under section 49(a), together with section 20. I uphold the ministry's decision to deny access to the occurrence reports and the witness statements on this basis, but I order it to disclose the arrest report, subject to one severance under section 49(b), because the exemptions claimed do not apply to it.

[6] For the purpose of explaining my findings in this order, I have summarized or paraphrased the non-confidential portions of the ministry's representations. These brief summaries of the ministry's position on the issues represent only a small portion of the lengthier submissions provided, which I have considered carefully, in their entirety.

[1] Although the ministry also relied initially on section 14(2)(a) of the *Act* to deny access, this exemption claim has been withdrawn.

RECORDS:

[7] The records at issue are three general occurrence reports (July and December 1998, July 1999), one arrest report (March 1999) and four witness statements (July 1998), totalling 17 pages.

ISSUES:

A. Do the records contain "personal information"?

B. Could disclosure reasonably be expected to seriously threaten the safety or health of an individual under section 49(a)?

C. Does section 49(a), together with the claimed law enforcement exemptions, apply?

D. Does the discretionary exemption at section 49(b) apply to the personal information in the records?

E. Did the ministry properly exercise its discretion under sections 49(a) or (b)?

DISCUSSION:

Preliminary Matters

Limits of this inquiry

[8] In consideration of the submissions from the appellant, it is important to emphasize the limits of my jurisdiction. This inquiry is governed by a statutory mandate established under the *Act*, and is limited to reviewing the decision made by the ministry regarding access to the information in the OPP records requested by the appellant. While this includes reviewing the possible application of exemptions to the records, it does not extend to reviewing any actions taken by the ministry (or OPP) in relation to the underlying circumstances that concern the appellant. Accordingly, I will not be commenting on those matters further in this order.[2]

Responsiveness

[9] The ministry withheld brief portions of each of the eight records as "non-responsive," stating the following in the decision letter:

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[2] Orders PO-2802-I and PO-2883.

> Please note that some information, such as computer-generated text associated with the printing of reports, is not responsive to your request and has been marked N/R.

[10] The appellant challenged this reason for not disclosing information to him. Notably, since the records were withheld in their entirety, the appellant would not know that only one line from the first page of each record had been severed for this reason.

[11] To be considered responsive to the request, information must "reasonably relate" to the request.[3] Past orders of this office have upheld the severance of strings of computer code that appear in records as non-responsive because the information does not reasonably relate to the *real* subject matter of the appellant's interest.[4] In this appeal, I am satisfied that the one line severed from the first page of each of the eight records before me is, in fact, not responsive to the appellant's request. Therefore, I find that the information has been properly withheld as non-responsive.

A. Do the records contain "personal information"?

[12] 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 exemptions from this right and the parts of section 49 that are relevant in this appeal state:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) 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 [emphasis added];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[13] The ministry has withheld the records in this appeal under section 49(a) on the basis that sections 14(1)(c), (d) (e) and (l) and/or 20 apply to the withheld information. The ministry also takes the position that the disclosure of the records would constitute an unjustified invasion of another individual's personal privacy under section 49(b), taken together with sections 21(3)(b) and 21(2)(f).

[14] Sections 49(a) and 49(b) can only apply to records that contain information that qualifies as "personal information," as defined in section 2(1) of the *Act*. Accordingly,

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[3] Orders P-880 and PO-2661.

[4] See, for example, Order MO-2877-I.

before reviewing the possible application of the exemptions, I must determine if the records contain "personal information" and, if so, to whom it relates.

[15] To fit within the definition of personal information in section 2(1), the information must be "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. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[5]

[5] Order 11.

[17] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) 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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[18] 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.[6] 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.[7]

[19] 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.)].

[20] According to the ministry, the records contain the personal information of at least five identifiable individuals other than the appellant, including their names, views, and other identifying information about them. The ministry takes the position that due to the nature of the relationships in this situation, information about several individuals that appears in what might otherwise be considered an employment context, qualifies as their "personal information."

[21] The appellant's representations do not specifically address the issue of whether the records may contain personal information, as defined in the *Act.*

[22] Based on my review of the records, I find that they contain the names, addresses, dates of birth, employment history, views, and other details about six identifiable individuals, which qualifies as their personal information under paragraphs (a), (b), (d), (e), (f) and (h) of the definition of that term in section 2(1) of the *Act*.

[23] In addition, I find that all of the records contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a), (b), (c), (d), (e) and (h) of the definition in section 2(1) of the *Act.* Furthermore, I find that some of the records also contain personal information about the appellant as

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[6] Orders MO-1550-F and PO-2225.

[7] Orders P-1409, R-980015, PO-2225 and MO-2344.

contemplated by paragraph (g) of the definition, since it includes the views or opinions of other individuals about the appellant.

[24] I find, therefore, that all of the records contain the personal information of the appellant and other identifiable individuals. Since the records contain both the personal information of the appellant and other individuals, the relevant personal privacy exemption is the discretionary one found in section 49(b).[8]

[25] However, I also find that some information in the records does not constitute "personal information" under the definition in section 2(1) because it falls within the scope of section 2(3) of the *Act.* Section 2(3) provides that the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" does not constitute personal information for the purposes of the *Act*.

[26] While it is possible for information provided by individuals in a professional or business context to cross the threshold from professional to personal information, this is not, for the most part, one of those situations. There are several categories of information in this appeal that I find fit within the parameters of section 2(3), including the identities of the police officers involved in the occurrences and their contact information. I find that this professional information does not qualify as personal information because it fits within the exception in section 2(3).

[27] However, I accept that certain information about two identifiable individuals that is contained in one of the occurrence reports (page 9 & 10) and on the third page of the arrest report (page 6) "crosses that threshold." While the information relates to these individuals as they were carrying out professional duties or business activities, I am satisfied that it reveals something of a personal nature about them due to the specific context in which it appears. Therefore, I find that it qualifies as their personal information.

[28] Given my finding that the contact information of certain individuals does not fit within the definition of "personal information" in section 2(1) of the *Act* because it falls under section 2(3), it cannot be withheld under section 49(b) since only "personal information" qualifies for exemption under the personal privacy exemptions. However, section 49(a), together with either section 14(1) or section 20, may still apply to this information.

[29] I will begin by considering the application of section 49(a) to the eight records withheld by the ministry.

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[8] Order M-352.

B. Could disclosure reasonably be expected to seriously threaten the safety or health of an individual under section 49(a) with section 20?

[30] As outlined in the discussion of "personal information" above, section 49(a) permits an institution to refuse to disclose records containing a requester's (appellant's) personal information *if* an exemption would apply to that information.

[31] In this appeal, the ministry claims that section 49(a) applies, in conjunction with sections 14 and 20. I will address the application of section 20 first.

[32] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[33] For this exemption to apply, the ministry is required to demonstrate that disclosure of the records could reasonably be expected to lead to the specified result. To meet this test, the ministry must satisfy me that a reasonable basis exists for believing that endangerment will result from disclosure. In other words, the ministry must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[9] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[10]

[34] Regarding section 20 of the *Act*, the ministry submits that there is a reasonable basis for believing that endangerment will result from disclosure. The ministry's confidential representations on the application of section 20 are accompanied by detailed, additional information about the surrounding circumstances, as well as supporting documentation. The ministry's representations identify the relevant individuals whom it argues could reasonably be subjected to endangerment if the records are disclosed.

[35] While the appellant's representations do not directly address the test for exemption under section 20, he describes, more generally, the sequence of events that led to the creation of some of the records at issue in this appeal from his own perspective.

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[9] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) (*Office of the Worker Advisor*). See also, for example, Orders PO-2910, PO-2916, PO-2967 and MO-2229

[10] Orders PO-2003.

Analysis and findings

[36] The question to be asked in reviewing the possible application of section 20 is whether the ministry has provided sufficient evidence to demonstrate that disclosure of the specific information at issue could reasonably be expected to threaten the safety or health of the other individuals. However, while the expectation of harm must be reasonable, it need not be probable.[11]

[37] Past orders relating to this exemption have emphasized the need to consider both the type of information at issue and the behaviour of the individual who is requesting the information.[12]

[38] On the first point, an important case dealing with this exemption is the Ontario Court of Appeal decision in *Office of the Worker Advisor* where the court referred to the necessity of considering the nature of the information at issue and, more specifically, whether it is "potentially inflammatory."

[39] In the present appeal, based on the ministry's confidential submissions and my own review of the records and the context of their creation, I find that seven of the eight records contain information that may be considered inflammatory.

[40] The exception to this finding is the arrest report. I am not satisfied that its content is inflammatory in the sense contemplated by section 20. I find that the arrest report does not satisfy the first requirement of section 20 and that it cannot, therefore, be withheld on this basis. The ministry's decision to withhold the arrest report under other exemptions will be reviewed, below.

[41] With respect to the other seven records, my analysis does not end with the conclusion that they contain information that is inflammatory in nature. The decision of the Court of Appeal in *Office of the Worker Advisor* also provides guidance respecting the evaluation of the risk of threat from an appellant. In that case, affidavit evidence of threatening behaviour exhibited by the appellant towards staff from the institution's program offices had been provided and the evidence was not challenged. The Court of Appeal stated that uncontroverted evidence of this type was sufficient to establish the evidentiary foundation for the second requirement of this exemption, which is that the appellant could reasonably be expected to pose a threat to safety or health to an individual if the information at issue were to be disclosed.

[42] In the appeal before me, the ministry has provided evidence, from a number of sources, of threatening behaviour on the part of the appellant. The ministry's representations clearly and directly link specific behaviour of the appellant to the

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[11] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

[12] For example, see Order PO-1939.

information at issue and a corresponding, reasonable expectation of harm with its disclosure.[13] In my view, therefore, the ministry's confidential representations respecting the application of section 20 are sufficient to support a finding that there is a reasonable expectation of serious threat to the safety or health of the identified individuals if these particular records are disclosed.

[43] Accordingly, I find that section 20 applies to seven of the eight records at issue in this appeal. The records are exempt under section 49(a), subject to my review of the ministry's exercise of discretion in withholding them, below.

C. Does the discretionary exemption at section 49(a), in conjunction with the section 14 exemptions, apply to the information at issue?

[44] The ministry also relies on section 49(a) in conjunction with sections 14(1)(c), (d), (e), and (l) to deny access to the arrest report. The relevant parts of section 14(1) state:

> (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;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[45] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) of the *Act.* The term "law enforcement" has been found to apply to an investigation into a possible violation of the *Criminal Code*.[14] Accordingly, I am satisfied that the records at issue in this appeal were created in relation to law enforcement matters.

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[13] Orders PO-1939 and MO-2229.
[14] Orders M-202 and PO-2085.

[46] The law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[15]

[47] In relation to sections 14(1)(c), (d) and (l), which use the words "could reasonably be expected to," the ministry is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[16] In the case of section 14(1)(e), the ministry must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[17] 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.[18]

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

[48] In order to meet the "investigative technique or procedure" test, the ministry was required to show that disclosure of the technique or procedure to the public (as represented by the appellant) could reasonably be expected to hinder or compromise its effective utilization. Typically, the exemption will not apply where the technique or procedure is generally known to the public.[19] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[20]

[49] The ministry's representations describe the techniques or procedures over which it is claiming exemption. The ministry claims that these are investigative techniques or procedures that are currently in use in law enforcement. Further, the ministry submits that their disclosure could reasonably be expected to compromise their effective utilization because they are either not commonly known or "not commonly known enough to thwart their effectiveness." The ministry submits that disclosure of the techniques and procedures might affect "the quality of information gathering."

[50] The appellant's representations do not address the possible application of section 14(1)(c).

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

[16] 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.).

[17] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

[18] Order PO-2040; *Ontario (Attorney General) v. Fineberg*, above.

[19] Orders P-170, P-1487, MO-2347-I and PO-2751.

[20] Orders PO-2034 and P-1340.

Analysis and findings

[51] To meet the "investigative technique or procedure" test, the ministry was required to show that disclosure of the technique or procedure could reasonably be expected to hinder or compromise its effective utilization. Based on my review of the ministry's representations, past orders of this office, and the information in the arrest report that the ministry seeks to withhold, I find that section 14(1)(c) does not apply.

[52] In Order PO-2751, former Senior Adjudicator John Higgins reviewed the application of the section 14(1)(c) exemption in relation to detailed information about investigative methods used to investigate child pornography. He noted that:

> The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c).[21]

[53] The senior adjudicator found that section 14(1)(c) applied to many of the records, explaining that "any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*, falls under this exemption."[22]

[54] In this appeal, however, there is only the three-page arrest report remaining at issue. To the extent that it contains information about a technique or procedure by which OPP law enforcement investigations may be conducted, I find that the particular technique or procedure is generally known to the public. In my view, such methods as may be disclosed by the withheld information are in such common use generally as to render them nearly ubiquitous in similar situations.

[55] In the circumstances, I conclude that disclosure of this information could not reasonably be expected to hinder or compromise the effectiveness of the method, and I find that section 14(1)(c) does not apply to the record remaining at issue.

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[21] See also Orders P-170, P-1487 and PO-2470.

[22] In Order PO-2751, Senior Adjudicator Higgins reviewed the Supreme Court of Canada case, *R. v Mentuck* ([2001] 3 S.C.R. 442), where the Court dismissed the Crown's appeal of a partial publication ban granted in criminal proceedings in relation to undercover "operational methods." The senior adjudicator concluded that similar principles ought to be applied in the context of reviewing the law enforcement exemption in section 14(1)(c).

Section 14(1)(d): confidential source

[56] In order to establish that section 14(1)(d) applies, the ministry must establish that disclosure of the withheld record 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.[23] Further, the ministry is required to provide evidence of the circumstances in which the informant provided the information to the institution in order to establish confidentiality.[24]

[57] According to the ministry's non-confidential representations, disclosure of the records could reasonably be expected to disclose the identity of several confidential sources of information.

[58] The appellant's representations do not address section 14(1)(d).

Analysis and findings

[59] The exemption in section 14(1)(d) of the *Act* exists to protect confidential informants.[25] Past orders have found, for example, that section 14(1)(d) applies to law enforcement situations such as anonymous complaints about by-law infractions.[26]

[60] In the present appeal, however, I note that the ministry's representations were provided with respect to all eight of the records, but only one record remains at issue – the arrest report. On my review of it, I conclude that it does not identify any confidential source or information provided by one. Accordingly, I find that the ministry has not provided sufficient evidence to satisfy the onus under section 14(1)(d) with respect to the arrest report. As a result, I find that section 14(1)(d) does not apply to it.

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

[61] In order for section 14(1)(e) to apply, the ministry must provide evidence to establish a reasonable basis for believing that endangerment to the life or physical safety of a law enforcement officer or any other person will result from *disclosure of the record*. In other words, the ministry must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. A person's subjective fear, while relevant, may not be sufficient to establish the application of the section 14(1)(e) exemption.[27] The test for exemption under section 14(1)(e) of the *Act* is essentially the same as the test under section 20.

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[23] Orders MO-1416 and PO-3052.

[24] Order MO-1383.

[25] Order MO-2424.

[26] See, for example Orders MO-1805 and MO-2043.

[27] Order PO-2003.

[62] The ministry's representations on section 14(1)(e) are identical to those set out in the previous section of this order respecting the application of section 20. Above, I found that section 20 applied to seven of the eight records at issue and that those records are, therefore exempt under section 49(a) of the *Act.* However, as with section 20, section 14(1)(e) requires that there be clear and direct evidence that the appellant's behaviour is connected to the actual record at issue, such that a reasonable expectation of harm is established should it be disclosed.[28] In this appeal, I am not satisfied by the ministry's representations that a reasonable expectation of serious threat to the life or physical safety of a law enforcement officer or other person can be expected with disclosure of the arrest report. Accordingly, for these reasons and as set out in my analysis under section 20, I find that section 14(1)(e) does not apply to the arrest report.

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

[63] Section 14(1)(l) may apply if disclosure of the record could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Since section 14(1)(l) contains the words "could reasonably be expected to," the ministry was therefore required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm."

[64] The ministry's non-confidential representations state that disclosure of the information would hamper the control of crime because it would cause members of the public to stop cooperating with police investigations for fear of harm resulting to them from such disclosures.

[65] As with the other exemption claims, the appellant's representations do not specifically address section 14(1)(l) of the *Act.*

Analysis and findings

[66] In my view, the ministry has not provided the requisite "detailed and convincing" evidence to establish that disclosing the arrest report could reasonably be expected to render the ministry's law enforcement activities vulnerable in the sense contemplated by section 14(1)(l) of the *Act*. In particular, I reject the ministry's position that disclosure of this record could facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 14(1)(l) does not apply.

[67] In summary, I find that the record remaining at issue is not exempt under section 49(a), in conjunction with any of the four law enforcement exemptions claimed by the ministry.

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[28] Order PO-1939.

D. Does the discretionary exemption at section 49(b) apply to the personal information in the records?

[68] As stated earlier in this order, section 49(b) allows the head of an institution to refuse to disclose an individual's personal information "where the disclosure would constitute an unjustified invasion of another individual's personal privacy."Therefore, when a record contains the personal information of the appellant 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 appellant under section 49(b).

[69] If the information fits within the scope of section 49(b), the institution may still exercise its discretion to disclose the information to the appellant. This involves weighing the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

[70] As stated, the only record remaining at issue is the arrest report. This record contains only the appellant's personal information on all three of the pages and a brief snippet of one other individual's personal information on the third page. My review of section 49(b), therefore, is conducted only in relation to the personal information of the other individual on that third page. The disclosure of the appellant's own personal information to him cannot result in an unjustified invasion of another individual's personal privacy and, as stated, section 49(b) does not apply to "professional" information, i.e., the information relating to the arresting officer.

[71] 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 another individual's personal privacy. Section 21(2) provides 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).

[72] The ministry submits that section 49(b) applies to the withheld personal information and that the presumption against disclosure in section 21(3)(b) applies because the information was gathered as part of an investigation into a possible violation of law, namely the *Criminal Code of Canada*.

[73] I accept the ministry's position. Past orders have established that the presumption in section 21(3)(b) may still apply even if no criminal proceedings were commenced against any individual. The presumption only requires that there be an

investigation into a possible violation of law.[29] Based on the content of the records, it is clear that the undisclosed personal information of the other individual on the third page of the arrest report was gathered by the police and is identifiable as part of their investigation of a possible violation of the law. I find that this personal information fits within the ambit of the presumption against disclosure in section 21(3)(b).

[74] Accordingly, given the application of section 21(3)(b) to the limited personal information of another identifiable individual on the third page of the arrest report, I conclude that its disclosure would constitute an unjustified invasion of the personal privacy of that individual, and I find that it is exempt under section 49(b).

E. Should the ministry's exercise of discretion be upheld?

[75] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute her own discretion for that of the institution.[30]

[76] As previously noted, sections 49(a) and 49(b) are discretionary exemptions. I have upheld the ministry's decision to apply section 49(a) to deny access to seven of the eight responsive records. I have also found that section 49(b) applies to a brief portion of the third page of the arrest report. My review of the ministry's exercise of discretion is limited to the information that I have found to be exempt.

[77] Where access is denied under either section 49(a) or section 49(b), the ministry 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.

[78] The ministry submits that in denying access to the records under sections 49(a) and 49(b), it considered the importance of protecting the safety and privacy of other individuals. The ministry also suggests that it considered the usual (historic) practices regarding the disclosure of similar information, including the relationship between the appellant and other parties. The ministry submits that it exercised its discretion fairly in this case in choosing not to disclose the records.

[79] The appellant's representations suggest that there is a sympathetic or compelling need to receive the information in the records to provide him with adequate information about the 1998 and 1999 incidents. The appellant describes the reason for seeking

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[29] Orders P-242 and MO-2235.

[30] Section 54(2); see also Order MO-1573.

access to the information, which is to support other proceedings he would like to initiate to clear his name and otherwise address various wrongs he asserts have been committed against him by certain identified parties. The appellant disputes the ministry's assertion that the information already disclosed (in the decision letter) provides him with any meaningful basis to pursue this matter.

[80] Based on my own review of the records for which I have upheld the ministry's access decision under sections 49(a) and 49(b), and with consideration of the ministry's confidential representations, I am satisfied that the ministry considered relevant factors in exercising its discretion. I find that the ministry exercised its discretion properly in the circumstances, and I will not interfere with it on appeal.

ORDER:

1. I order the ministry to disclose the non-exempt responsive portions of the arrest report to the appellant by **August 14, 2013** but not before **August 8, 2013**.

   The personal information of the other individual on page 3 of that record, that is to be withheld pursuant to section 49(b), is highlighted in orange on the copy of the record sent to the ministry with this order.

2. I uphold the ministry's decision to deny access to the other records under section 49(a), together with section 20.

3. To verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant.

Original Signed By: July 4, 2013
Daphne Loukidelis
Adjudicator