Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3271-I

Appeal PA10-151

Ministry of Community Safety and Correctional Services

October 29, 2013

Summary: The appellants sought access to all police records relating to themselves compiled during a specified time period. The ministry located responsive records and granted partial access to them, relying on the discretionary exemptions in sections 49(a), in conjunction with sections 14(2)(a) and 19, and 49(b), with reference to sections 21(2)(f) and 21(3)(b) of the *Act*. The ministry also severed some information, claiming that it was not responsive to the request. The appellants appealed the decision of the ministry and raised reasonable search as an issue in the appeal. This interim order upholds the ministry's search as reasonable. It does not uphold the ministry's decision that the withheld information is exempt under sections 49(a) and (b), due to the application of the absurd result principle. The ministry is ordered to disclose the withheld information. The decision regarding a withheld police code is reserved pending clarification and further submissions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 21(3)(b), 19, 49(a) and 49(b).

OVERVIEW:

[1] The appellants submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for access to the following information:

> … any and all field notes, incident or occurrence reports, videos, communications with the Crown, etc. that Huntsville OPP detachment

> have on file pertaining to [the appellants]. The search and production should not be limited to these areas but should cover all documents. This will apply to all material since my last request, [specified date].

[2] The ministry located responsive records relating to incidents occurring between the date of the request and the date of the appellants' previous request. The ministry granted partial access to the responsive records. It relied on the discretionary exemptions at section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(2)(a) (law enforcement) and 19 (solicitor-client privilege) and 49(b) (invasion of privacy) with reference to the factor in section 21(2)(f) and the presumption in section 21(3)(b) of the *Act* to withhold portions of the records. The ministry denied access to some information because it was not responsive to the request.

[3] The appellants appealed the ministry's decision to this office. Shortly thereafter, the ministry granted complete access to a video-taped interview of the appellants which took place at the Huntsville Ontario Provincial Police (OPP) detachment.

[4] During mediation, the appellants confirmed that they are not interested in pursuing access to pages 2 through 16 of the records, or to the information marked non-responsive by the ministry. The appellants also expressed their belief that an additional video, including audio, exists that the ministry did not identify as a responsive record. Accordingly, the issue of reasonable search is included as an issue in this appeal. The ministry also advised that it was claiming the discretionary exemption in section 49(a) in conjunction with section 14(1)(l) (facilitate commission of unlawful act) with respect to one of the severances on page 18. At the conclusion of mediation, the appellants confirmed that they are only interested in pursuing the information withheld under sections 49(a) and (b) on pages 1, 17, 18 and 19 of the records.

[5] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to this appeal sought and received representations from the ministry and the appellant. The ministry submitted representations to this office which were shared, in their entirety, with the appellants.

[6] The appellants then requested that the appeal be placed on hold due to personal circumstances that prevented them from submitting representations. After being on hold for a significant amount of time without any representations being received from the appellants, the appeal file was closed. However, it was subsequently reopened at the appellants' request after they provided this office with compelling reasons that justified reopening the appeal and allowing them to provide representations.

[7] Upon being reopened, the appeal file was transferred to me to complete the inquiry and issue a decision. I received the appellants' representations and concluded the inquiry.

[8] In this interim order, I uphold the ministry's search for responsive records as reasonable. However, I find that most of the withheld information should be disclosed, with the exception of one severance on which I invite clarification from the appellants.

RECORDS:

[9] The records at issue consist of the withheld portions of a supplementary occurrence report (page 1) and police officers' handwritten notes (pages 17 – 19).

ISSUES:

A. Did the institution conduct a reasonable search for records?

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

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

D. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the withheld sentence in record 1?

DISCUSSION:

A. Did the institution conduct a reasonable search for records?

[10] The appellants claim that additional records exist beyond those identified by the ministry. As such, I must decide whether the ministry has conducted a reasonable search for records as required by section 24.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's decision. If I am not satisfied, I may order further searches.

[11] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[13] A further search will be ordered if the ministry does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[14] The appellants must provide a reasonable basis for concluding that additional records exist.[6]

Representations

[15] In its representations, the ministry notes that an earlier appeal for similar records involving the same appellant resulted in the issuance of Order PO-2955, which the ministry states, it relied upon exclusively for its representations in this appeal. The ministry also notes that this appeal relates to records collected by the OPP as a result of a longstanding, acrimonious property dispute between neighbouring landowners.

[16] To establish the adequacy of its search for responsive records, the ministry provides two affidavits from the individuals who conducted the searches, detailing the various steps they took. The first affidavit was sworn by the regional Freedom of Information Liaison for the Central Region, the area that includes the Huntsville detachment. The liaison states he is a 29-year member of the OPP and his duties include receiving access requests from the ministry, identifying the responsible OPP detachment and receiving and reviewing responsive records prior to sending them to the ministry. He describes his search for responsive records as follows:

- … 23 March 2010 I received a request from the Ministry FOI and Privacy Office …. I identified the responsive detachment to be Huntsville. … I conducted a preliminary search for any responsive records in the RMS [records management system] data base, which the OPP uses to store investigative records …. *Initially I found no new occurrences that would be responsive to the request …*

- … 26 March 2010 I communicated with [the ministry's FOI analyst] requesting clarification on records to be searched for.

- … 19 April 2010 I was advised by [the analyst] that she left a message with the requester asking for clarification.

[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

- … 20 April 2010 I advised [the analyst] that a further search of RMS had revealed some responsive records attached to a file predating this request. … I sent the request via fax to Huntsville Detachment to conduct and gather the responsive records. …

- … 05 May 2010 I received a courier package of records from Huntsville detachment in response to this FOI request. I reviewed these records …. I sent the records via courier to [the analyst].

- … 13 May 2010 I received further communication from [the analyst] requesting clarification of the received records and a further search for records

- … 26 October 2010 I was advised that an appeal had been issued on this file. As a result of mediation [the analyst] requested a further search for records. … 26 October 2010 this request was reviewed and forwarded to [specified detective constable] of Huntsville Detachment for him to conduct an additional search and answer the related questions.

- … 13 December 2010 I received a courier package of records from Huntsville detachment in response …. I reviewed these records. These records were found to be responsive but predated this request time period. As a result additional records were sent via Courier to the Ministry…

- … 19 January 2011 [the analyst] advised that this file has moved from appeal to adjudication and requested some further clarification on some of the records provided. This request was forwarded to [specified detective constable] of the Huntsville OPP detachment.

[*sic*]

[17] The second affidavit was sworn by the Huntsville Detachment Administration Clerk. She states she is a 20-year member of the OPP and has detailed knowledge and experience in the search and retrieval of information in the police databases, including RMS, and record maintenance policies and practices, including retention schedules. She describes her search as follows:

- … 20th of April 2010, I received a fax from [the liaison] requesting any and all responsive records pertaining to [the request].

- … 25th April 2010, I conducted a detailed search in the RMS data base for all responsive records and printed off all records. I sent an email to the officers involved, requesting copies of their notebook entries.

- … 04th May 2010, a package of records was [couriered to the liaison].

- … 26th October 2010, I was advised by [the liaison] that the [request] was under appeal. I conducted another search for records.

- … 12th of December 2010 additional responsive records were couriered to [the liaison].

[*sic*]

[18] In their representations, the appellants assert that another thorough search is in order as some of the information they provided to the OPP in writing has not been included in the records. The appellants state that even though they have copies of these documents, the fact that they do not exist in the OPP information database "is most disturbing as some of them include significant information that the OPP should have reviewed and noted." They argue that the absence of a record from the OPP files is not proof that the record does not exist. They also state that the "continued lack of acknowledgement of the existence of records not only prejudices [their] position in future dealings with the OPP, but it unilaterally denies [them] their rights under 47(2) of the *Act*."

Analysis and findings

[19] The ministry has provided detailed information on its searches from two employees who have more than two decades of experience each with the OPP and who are knowledgeable in searching for OPP records in response to access requests such as the appellants'. The affidavits provided by these experienced employees provide details of the dates and locations of the searches, and communications clarifying the request. The affidavits reveal that multiple searches were conducted in response to the appellants' request.

[20] The appellants allege that the search is not adequate because written information that they have provided to the OPP was not included in the responsive records. They do not specify what written information they are referring to, nor do they provide the dates of this information so as to establish that it is contained in a record that is responsive to their time period specific request.

[21] I am not convinced by the appellants' representations that there is a reasonable basis for concluding that additional responsive records exist. Unlike most reasonable search situations, the appellants in this appeal are best positioned to advise what records are missing, since they claim that these alleged missing records originated with them; however, they do not provide representations establishing that these alleged records exist and are responsive. Conversely, I am satisfied by the ministry's representations, including the two affidavits, that it has provided sufficient evidence to

demonstrate that its efforts to identify and locate all of the responsive records were reasonable. Accordingly, I find the ministry's search to be reasonable.

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

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

> "personal information" means recorded information about an identifiable individual, including,
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> . . .
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> . . .
>
> (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;

[23] 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.[7]

[24] Section 2(3) also relates to the definition of personal information and states:

> (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.

[25] 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.[8]

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[7] Order 11.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[26] 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.[9]

[27] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

[28] The ministry submits that the records contain personal information about the individuals involved in the property dispute, including their names in conjunction with their interactions with the OPP. It states that because the dispute is between neighbouring landowners, disclosure of personal information such as the names of those involved is likely to identify these individuals.

[29] The appellants do not directly address this issue. Instead, they take issue with the ministry's contention that the records are about a landowner dispute and assert that the dispute is actually between them and the OPP. They argue that the ministry's submissions should be given no weight because its submissions are based on the false premise that the dispute is between them and their neighbours.

[30] Based on my review of the records, I find that they all contain the personal information of the appellants as that term is defined in paragraphs (e) and (h) of section 2(1) of the *Act.* I also find that pages 1, 17 and 19 contain the personal information of other identifiable individuals as that term is defined in paragraphs (g) and (h). However, I find that one severance on page 17 does not qualify as the personal information of an identifiable individual other than the appellants. Although the ministry withheld this information on the basis of the personal privacy exemption, the ministry did not take the position in its representations that this information qualifies as the personal information of the individual identified, nor did it explain why this information should not be considered professional in nature. The information is incidental information about the OPP officer's activities during the day in question and does not reveal anything of a personal nature about this officer. I find that the information contained in this severance is about the officer in a professional capacity alone, and accordingly, in the absence of any other applicable exemption, I will order it disclosed.

[31] As for page 18 of the records, I disagree with the ministry's position that it contains the personal information of an identifiable individual other than the appellants. The name that has been severed from this record appears not in a personal capacity, but rather in this individual's professional capacity, as it is the name of the surveyor that the appellants retained to assist them. This is confirmed in the officer's notes where he includes the surveyor's company name immediately preceding the surveyor's

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[9] Orders P-1409, R-980015, PO-2225 and MO-2344.
[10] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

name. I note that this information has already been disclosed to the appellants. As the surveyor's name in the record reveals only his professional affiliation with his company and the fact of his attendance on the date in question at the service of his clients, the appellants, the record itself does not reveal anything of a personal nature about this individual. Therefore I find that his personal information is not contained in this record, which contains only the appellants' personal information. Accordingly, I will order the severed name on page 18 disclosed.

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

[32] Section 49 provides a number of exemptions from individuals' general right of access under section 47(1) of the *Act* to their own personal information held by an institution.

[33] 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.

[34] 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 her own personal information against the other individual's right to protection of his privacy.

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

[36] 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).

[37] 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,*[11] 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.

[11] [2001] O.J. 749.

[38] 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.[12]

[39] 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).[13]

[40] In this appeal, the ministry asserts that the presumption in section 21(3)(b) applies. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> > 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.

[41] 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.[14]

Absurd result

[42] 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.[15]

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

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

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[12] Order P-239.
[13] Order P-99.
[14] Orders P-242 and MO-2235.
[15] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[16] Orders M-444 and M-451.
[17] Orders M-444, P-1414 and MO-2266.

[44] 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.[19]

Representations

[45] The ministry states in its representations that the records were created by the OPP for the purpose of investigating an alleged violation of law, and therefore, they qualify for exemption under section 49(b), with reference to the presumption in section 21(3)(b). The ministry also states that the withheld information is highly sensitive as contemplated by the factor in section 21(2)(f), and this weighs against disclosure.

[46] The appellants assert that the section 49(b) exemption does not apply to the records due to the application of the absurd result principle. They state that the OPP and the Crown Attorney shared the withheld personal information in the records with them, and therefore, it is absurd to continue to withhold this information from them. They also state that, as noted by the ministry, both they and their neighbours know each other and know about the property dispute, and therefore, the information is not highly sensitive. The appellants also point to pages 2 through 16 of the records, which were at issue initially but were subsequently disclosed to them, as proof that they were present for and/or have knowledge of the withheld information, as required to satisfy the absurd result principle.

Analysis and findings

[47] While I accept the ministry's submission that the presumption in section 21(3)(b) applies to the records at issue, I agree with the appellants that the withheld information is not exempt under section 49(b) due to the application of the absurd result principle. Specifically, the names withheld in pages 1, 17 and 19, are names that were provided to the police by the appellants and were openly discussed between the appellants and the police on the day that the police officers' notes in pages 17 and 19 of the records were created. This is confirmed in pages 2 through 16 of the records, which contain a typewritten synopsis of an interview the appellants had with the OPP on the day that the officers' notes in pages 17 and 19 were created. Some of the officers' notes were recorded during the interview. The synopsis indicates on its face that the appellants' interview was also recorded on DVD. A copy of the DVD recording of the interview was disclosed to the appellants during the mediation stage of this appeal.

[48] Having regard to the appellants' participation in the interview, their knowledge of everything that was discussed, including the withheld names in pages 1, 17 and 19 of the records, it would be an absurd result to withhold this information. I find that the

[18] Orders MO-1196, PO-1679, PO-1679, MO-1755 and MO-2257-I.
[19] Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

names in pages 1, 17 and 19 do not qualify for exemption under section 49(b). As no other exemptions have been claimed for these names, I will order them disclosed.

D. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the withheld sentence in record 1?

[49] As noted above, section 47(1) gives individuals a general right of access to their own personal information held by an institution while section 49 provides a number of exemptions from this right.

[50] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > 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.

[51] 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.[20]

[52] In this case, the ministry relies on section 49(a) of the *Act*, in conjunction with section 19, which states:

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

[53] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The ministry must establish that at least one branch applies.

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[20] Order M-352.

Branch 1: common law privilege

[54] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[21]

Solicitor-client communication privilege

[55] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[22]

[56] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[23]

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

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[24]

[58] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[25]

Litigation privilege

[59] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[26]

[60] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

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[21] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders PO-2441, MO-2166 and MO-1925.
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[25] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[26] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
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> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations

[61] The ministry submits that the information withheld under the section 49(a) and section 19 exemptions, refers to communications between the OPP and the Crown Attorney's office. It asserts that this severance is subject to solicitor-client privilege as it refers to a discussion between the Crown Attorney and an OPP officer. The ministry argues that this information is squarely within the protected "continuum of communications" between solicitor and client, given that the record contains legal advice provided by the Crown Attorney regarding the OPP investigation. The ministry adds that there is no indication that anyone else besides members of the OPP and the Crown Attorney were present when the discussion that is referred to took place, or that the contents of this discussion were disclosed or that privilege has otherwise been waived.

[62] The ministry also claims that the information was created for the dominant purpose of litigation, as it refers to a record that was used to facilitate an OPP investigation, which could have resulted in charges being laid.

[63] The appellants submit that the OPP waived solicitor-client privilege when one OPP officer advised them by email that he had received instructions from the Crown Attorney's office to retrieve a specified video tape and then discussed this issue with them on the telephone and on other occasions. They state that the same OPP officer and his Detachment Commander discussed the process of obtaining the video and the

result of their discussions with the Crown Attorney on the day that they were interviewed, and they point to specific parts of the disclosed synopsis of the interview that refer to the origins of the video and communications about the video. As such, the appellants argue that the OPP cannot claim this information is subject to solicitor-client privilege.

[64] The appellants also refute the ministry's assertion that the information is subject to litigation privilege. They assert that no investigation was conducted with the withheld information. They rely on Order MO-1337-I to argue that when an investigation is commenced and then terminated, common law privilege is lost upon that termination.

Analysis and findings

[65] The information withheld by the ministry under the solicitor-client privilege exemption is contained in a supplementary occurrence report in which the OPP officer dealing with the appellants' concerns summarizes his meeting with the appellants the day that they had their interview. It does not contain direct confidential communications between the Crown Attorney and the OPP officer that were made for the purpose of obtaining legal advice as is required in order for the information to be subject to solicitor-client communication privilege. It simply recounts action taken by the OPP at the request of the Crown Attorney. This same information is set out in the fifth sentence of the same record, and has already been disclosed to the appellants. The same information was also discussed during the appellants' interview with the OPP and recorded in the disclosed synopsis. Accordingly, I agree with the appellants that this communication cannot be said to have been made in confidence as it was repeatedly and openly discussed with the appellant. I do not accept the ministry's submission that this information is subject to solicitor-client privilege.

[66] I also do not accept the ministry's assertion that the information is subject to litigation privilege as there is no evidence before me that the supplementary occurrence report was prepared in contemplation of litigation. There is no evidence before me to suggest that litigation was contemplated at the time that the record was prepared; on the contrary, the evidence before me indicates that no further investigation of the matter was forthcoming.

[67] Accordingly, I find that the withheld information is not subject to solicitor-client or litigation privilege, and it is therefore not exempt under section 49(b). I will order this information disclosed as well.

[68] In light of my findings above and my decision to disclose the withheld information, it is not necessary for me to consider the ministry's exercise of discretion in this interim order.

Police Code

[69] The final severance to be addressed is the withheld police code on page 18 of the records. I have decided to address it separately because it is not clear from my review of the appeal file that the appellants were provided with proper notice of the exemption claimed by the ministry to withhold the police code.

[70] The mediator's report in this appeal indicates that the police code severed from page 18 of the records is at issue and that the police have relied on the discretionary exemptions in sections 49(a) and 14(1)(l) to withhold it. However, the Notice of Inquiry provided to the parties did not include the possible application of the section 14(1)(l) exemption as an issue. I note that the police nonetheless provided representations on this exemption which were shared with the appellants. The appellants did not provide representations on this issue and exemption.

[71] As I am concerned that the police code issue and the section 14(1)(l) exemption were not clearly raised for the appellants' consideration, I will give them an opportunity to provide representations before making a final determination on access to the police code. I will also ask the appellants to indicate whether they continue to seek access to this severance.

INTERIM ORDER:

1. I order the ministry to disclose the withheld portions of the records that I have found are not exempt from disclosure by **December 4, 2013** but not before **November 29, 2013**. I have attached to this order a copy of the records highlighting the information that I am ordering disclosed.

2. I reserve the right to require the ministry to provide me with a copy of the records it discloses pursuant to provision 1 of this order.

3. If the appellants continue to seek access to the police code withheld in page 18 of the records, they must confirm their interest in access and provide representations on the possible application of sections 49(a) and 14(1)(l) to the police code, by **November 29, 2013**.

4. I remain seized of the outstanding issue in provision 3 of this order pending its final determination.

Original signed by: October 29, 2013
Stella Ball
Adjudicator