

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3374

Appeal PA13-497

Ministry of Community Safety and Correctional Services

July 31, 2014

Summary: The appellant sought access to his firearm application records under the *Freedom of Information and Protection of Privacy Act*. The ministry denied access, citing the discretionary law enforcement exemption at section 14(1), read in conjunction with section 49(a), and the discretionary personal privacy exemption in section 49(b). This order partially upholds the application of the law enforcement exemption and does not uphold the personal privacy exemption.

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), 49(a), 14(1)(c), 14(1)(l), 49(b), 21(2)(f).

Orders and Investigation Reports Considered: Order PO-2582.

OVERVIEW:

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

[a]ny and all correspondence both internal and external, originating from and received by any and all employees in the [ministry], their Chief

Firearms Office [of Ontario, (the CFO)] employees, and any or all other institutions &/or persons, concerning [the requester]...

[2] The ministry issued a decision in which it provided partial access to the records, citing the discretionary law enforcement exemption in section 14(1), read in conjunction with section 49(a), and the discretionary personal privacy exemption in section 49(b) of the *Act*.

[3] The requester, now the appellant, appealed this decision.

[4] During mediation, the ministry issued a revised decision, providing access to more records. Accordingly, pages 3, 4, 6 and 14 have been removed from the appeal. During mediation, the appellant also removed the non-responsive severances from the appeal.

[5] As mediation did not resolve the issues in this appeal, this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought representations from the ministry. I received representations from the ministry, which were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. I received confidential representations from the appellant in response.

[6] In making my decision, I have considered the appellant representations, even though I am unable to refer to the details of these confidential representations in this order.

[7] In this order, I partly uphold the ministry's decision under section 49(a), read in conjunction with section 14(1). I do not uphold the ministry's decision under section 49(b).

RECORDS:

Record #	Pages	Pages at issue	Description of record	Severed or withheld	Section(s)
1	11 - 21	15-16	Client Applications	Severed	14(1)(c), 14(1)(l), 49(a)
2	22	22	Note	Withheld	14(1)(c), 14(1)(d), 14(1)(l), 49(a)
3	23	23	Screen shot	Withheld	14(1)(c), 14(1)(d), 14(1)(l), 49(a)
4	24	24	Handwritten notes	Withheld	14(1)(c), 14(1)(d),

					14(1)(l), 49(a), 49(b)
5	25 - 30	26, 27, 29- 30	Handwritten notes	Severed	49(b)
6	31	31	Notes	severed	14(1)(l), 49(a), 49(b)

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(a), in conjunction with the section 14(1) law enforcement exemption, apply to the information at issue?
- C. Does the discretionary personal privacy exemption at section 49(b) apply to pages 26, 27, and 29 to 30 of the records?
- D. Did the institution exercise its discretion under section 49(a)? 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?

[8] 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;

[9] 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

[10] 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.

[11] 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

¹ Order 11.

professional, official or business capacity will not be considered to be “about” the individual.²

[12] 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.³

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[14] The ministry states that the records relate to:

...the appellant’s application for a possession and acquisition licence under the *Firearms Act (FA)*, which is federal legislation. These records are held by the CFO, which is established under the *FA*. The head of the CFO is designated in Ontario by the Minister of Community Safety and Correctional Services. The CFO has a broad statutory mandate to administer the licensing requirements of the *FA* for the purpose of protecting public safety. The CFO has numerous responsibilities in connection with the *FA*, but for the purpose of this appeal the applicable one is that the CFO authorizes who can possess and acquire a firearm in circumstances that would otherwise constitute an offence under the Criminal Code...

[15] As a result, the ministry takes the position that all of the records contain the personal information of the appellant.

[16] The ministry also states that pages 24, 26, 27, and 29-31 of the records contain the names of individuals who were spoken to by the CFO in relation to the application for a firearms licence by the appellant, and that this information is the personal information of these individuals.

Analysis/Findings

[17] Based on my review of the records, I agree with the ministry that pages 24, 26, 27, and 29-30 contain the personal information of individuals other than the appellant in their personal capacity. This personal information consists of these individuals’ names where disclosure of the name would reveal other personal information about them in accordance with paragraph (h) of the definition of personal information in section 2(1).

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] However, I find that page 31 of the records does not contain the personal information of individuals other than the appellant, but information about an individual in a business capacity. As this page does not contain the personal information of other individuals, the discretionary personal privacy exemption in section 49(b) cannot apply to page 31 of the records.

[19] All of the records relate to the appellant's application for a licence to acquire and possess a firearm, and I am satisfied that they contain the personal information of the appellant under paragraph (h) of the definition of personal information in section 2(1).

B. Does the discretionary exemption at section 49(a), in conjunction with the section 14(1) law enforcement exemption, apply to the information at issue?

[20] 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.

[21] Section 49(a) reads:

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

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[22] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁵

[23] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[24] In this case, the institution relies on section 49(a) in conjunction with sections 14(1)(c), (d) and (l), which read:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

⁵ Order M-352.

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

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

"law enforcement" means,

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

[26] The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.⁶
- a police investigation into a possible violation of the *Criminal Code*.⁷
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.⁸

[27] The term "law enforcement" has been found *not* to apply in the following circumstances:

⁶ Orders M-16 and MO-1245.

⁷ Orders M-202 and PO-2085.

⁸ Order MO-1416.

- an internal investigation by the institution under the *Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.⁹
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.¹⁰

[28] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹¹

[29] Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.¹²

[30] 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.¹³

[31] The ministry states that it determined that the records are 'law enforcement records' for the purpose of section 14 because:

1. The records are collected, and used by the CFO, which operates under the umbrella of the OPP, a provincial law enforcement agency;
2. The records are used for a law enforcement purpose, which is to protect public safety by regulating the circumstances in which someone may be licensed to acquire and possess a firearm; and,
3. The records are used by the OPP and other law enforcement agencies for investigative and public safety purposes. Records are used, for example, to determine whether individuals have been licensed to possess a firearm. If they are not licensed, and they have acquired or possess such a firearm, they are likely in contravention of the *Criminal Code*.

⁹ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

¹⁰ Order P-1117.

¹¹ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹² Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹³ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

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

[32] The ministry applied section 14(1)(c) to withhold a client eligibility check on pages 15 and 16, a print-out of a computer screen on page 23, and handwritten notes on pages 22 and 24.

[33] The ministry states that it applied this exemption because it is concerned that disclosure of the records would harm public safety by undermining the effectiveness of security measures that have been put into place pursuant to the *FA* to assess applications, and to ensure that only qualified applicants are granted licences to acquire and to possess firearms.

[34] The ministry states that:

The client eligibility check is a checklist developed by the Canadian Firearms Program (CFP), which is part of the Royal Canadian Mounted Police (RCMP), to assist the CFO and others like it across the country, in determining whether applicants are eligible to obtain a firearm licence. The ministry is concerned that the disclosure of this record would enable applicants for firearms licences to find out the types of checks that are conducted on a licence application or renewal, which could thwart this security technique...

[35] The ministry states that it has applied section 14(1)(c) because the information at issue shows techniques that are employed to determine whether an applicant is eligible to hold a firearms licence. These techniques would include who is contacted, and what considerations CFO officers make in deciding whether to grant a firearms licence.

[36] The ministry submits that these law enforcement techniques are not well known to the public, and further, the disclosure of the records would hinder the ability of the CFO to carry out its responsibilities in relation to the *FA*.¹⁴

Analysis/Findings: section 14(1)(c)

[37] In order to meet the “investigative technique or procedure” test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.¹⁵

¹⁴ The ministry relies on Order PO-2582.

¹⁵ Orders P-170, P-1487, MO-2347-I and PO-2751.

[38] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.¹⁶

[39] The records at issue in this appeal are similar to those at issue in Order PO-2582. In that order, the information at issue was the client eligibility checks undertaken by the CFO in relation to the appellant's firearm license. I found that:

...the techniques for checking eligibility to obtain or maintain a firearm license, could reasonably be expected to reveal law enforcement investigative techniques currently in use. In my view, disclosure of these techniques could reasonably be expected to hinder or compromise their effective utilization as it would enable individuals to modify his or her behaviour and activities in order [to] unlawfully obtain or retain firearms. As such, I conclude that disclosure of this information would hinder the ability of the CFO to carry out its responsibilities in relation to the *Firearms Act*.

[40] Based on my review of the information at issue in the records, I adopt my findings in Order PO-2582 and agree with the ministry that disclosure of the information at issue could reasonably be expected to reveal investigative techniques currently in use in law enforcement. These techniques concern the investigation undertaken by firearm officers in assessing firearm applications and are not generally known to the public. I find that disclosure could reasonably be expected to hinder or compromise these techniques effective utilization.

[41] Accordingly, subject to my review of the ministry's exercise of discretion, I find that the client eligibility check on pages 15 and 16, the print-out of a computer screen on page 23, and the handwritten notes on pages 22 and 24 are exempt by reason of section 49(a), read in conjunction with section 14(1)(c).

[42] As I have found the information at issue in pages 15, 16, and 22 to 24 of the records is subject to section 14(1)(c), it is not necessary for me to also consider whether these pages are also subject to sections 14(1)(d) or 14(1)(l).

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

[43] The ministry states that it applied this exemption to page 31 of the records, which consists of typewritten notes, for the following reasons:

(a) The records contain information, which would provide insight as to how the CFO and other CFOs in Canada determine who is granted permission to acquire and to possess a firearm. The ministry submits this

¹⁶ Orders PO-2034 and P-1340.

information could be used by the appellant (or any third party who obtains access to the records) to modify his or her behaviour when applying to possess a firearm in such a way as to interfere with CFO operations. We contend this could lead to an increase in firearms related offences; and,

(b) Disclosing the records could be expected to discourage individuals from cooperating with the CFO. The ministry questions why anyone would be candid and forthright in response to CFO inquiries, if they knew that the information they provided to the CFO, no matter how sensitive it might be, would be subject to disclosure. We contend that the lack of cooperation could be expected to undermine CFO measures, also potentially leading to a resulting increase in firearms related offences.

Analysis/Findings

[44] Page 31 of the records contains information about the status of the appellant's firearm application. I determined above that this page does not contain the personal information of other individuals.

[45] I find that the ministry's representations do not address how disclosure of the particular information in page 31 of the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The information at issue on page 31 simply consists of brief notes about the status of the appellant's firearm application.

[46] Based on my review of the information at issue in page 31 of the records, I find that disclosure could not reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As no other exemptions apply to this page, I will order it disclosed.

C. Does the discretionary personal privacy exemption at section 49(b) apply to pages 26, 27, and 29 to 30 of the records?

[47] 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.

[48] Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[49] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[50] If the information fits within any of paragraphs (a) to (e) of section 21(1) or section 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In this appeal, the information does not fit within paragraphs (a) to (e) of section 21(1) or section 21(4).

[51] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹⁷

[52] The ministry relies on the factor favouring privacy protection in section 21(2)(f), which reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive.

[53] The ministry states that the personal information of the individuals other than the appellant in this record is 'highly sensitive', as this term has been interpreted, for the following reasons:

(a) Affected third party individuals have not been advised of the disclosure of their personal information, and have no expectation that such disclosure may occur. The ministry submits that disclosure could be expected to cause significant distress were it to take place in such circumstances, especially without prior notification;

(b) If the personal information in the records is ordered disclosed, it will cease to be protected by the protection of privacy provisions in the *FIPPA*. The ministry contends that individuals will permanently lose control over personal information about themselves, and that disclosure to the appellant therefore, in effect, constitutes disclosure to the world; and,

(c) The nature of the personal information at issue (candid opinions that one person has about another) is by definition highly sensitive, especially where the individuals who provided it have no expectation that it is subject to disclosure.

¹⁷ Order MO-2954.

Analysis/Findings

[54] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁸

[55] Severed from pages 26, 27, and 29 to 30 of the records are the names of four individuals in handwritten notes of the interview of the appellant by the CFO officer. I do not agree with the ministry that the factor in section 21(2)(f) applies and that the personal information at issue is highly sensitive. In the pages at issue, the information was provided by the appellant, not by the other individuals listed in pages 26, 27, and 29 to 30.

[56] However, in this appeal, as no factors favouring disclosure apply, I find that, subject to my review of the absurd result principle and the ministry's exercise of discretion, the information at issue in pages 26, 27, and 29 to 30 of the records is exempt under section 49(b).

Absurd result

[57] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁹

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

- the requester sought access to his or her own witness statement²⁰
- the requester was present when the information was provided to the institution²¹
- the information is clearly within the appellant's knowledge.²²

[59] However, 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.²³

¹⁸ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁹ Orders M-444 and MO-1323.

²⁰ Orders M-444 and M-451.

²¹ Orders M-444 and P-1414.

²² Orders MO-1196, PO-1679 and MO-1755.

²³ Orders M-757, MO-1323 and MO-1378.

[60] The ministry submits that the absurd result principle is not applicable as the records that have been withheld contain personal information belonging to third party individuals that the appellant is likely not aware of or that have been withheld for law enforcement reasons.

Analysis/Findings

[61] As stated above, at issue are the names of four individuals in the handwritten notes prepared by a CFO officer who interviewed the appellant. The names of these four individuals were provided to the ministry by the appellant. I find that with respect to this information:

- the appellant is seeking access to his own statement²⁴
- the appellant was present when the information was provided to the institution²⁵
- the information is clearly within the requester's knowledge.²⁶

[62] As such, I find that the absurd result applies and that it would be absurd to withhold the information in the circumstances of this appeal. I also find that disclosure is not inconsistent with the purpose of the section 49(b) exemption.

[63] As the absurd result principle applies, the information at issue in pages 26, 27, and 29 to 30 of the records is not exempt under section 49(b). Furthermore, as no other exemptions have been claimed for this information and no mandatory exemptions apply, I will order this information disclosed.

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

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

[65] 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

²⁴ Orders M-444 and M-451.

²⁵ Orders M-444 and P-1414.

²⁶ Orders MO-1196, PO-1679 and MO-1755.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[66] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of the institution.²⁸

[67] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁹

- 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

²⁷ Order MO-1573.

²⁸ Section 54(2).

²⁹ Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

[68] The ministry states that in considering whether to exercise its discretion to disclose the information at issue it took into account its wish to protect the integrity of processes used by CFO and the Canadian Firearms Program to regulate firearms and to protect public safety, which are part of the statutory mandate of the CFO.

[69] The ministry states that it disclosed many of the records that are responsive to this appeal, and as much as possible, without disclosing records that are otherwise exempt.

Analysis/Findings

[70] I found above that the information at issue in pages 15, 16, and 22 to 24 of the records is subject to the discretionary law enforcement exemption in section 14(1)(c) as disclosure would reveal investigative techniques currently in use in law enforcement.

[71] Based on my review of the records and the parties' representations, I find that the ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I am upholding the ministry's exercise of discretion and find that the information at issue in pages 15, 16, and 22 to 24 of the records is exempt by reason of section 49(a), read in conjunction with section 14(1)(c).

ORDER:

1. I order the ministry to disclose the information at issue in pages 26, 27, 29 to 30, and 31 of the records to the appellant by **August 27, 2014**.
2. I uphold the ministry's decision to deny access to the remaining information in the records.

Original Signed By: _____
Diane Smith
Adjudicator

July 31, 2014 _____