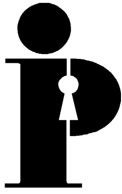

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2628

Appeal PA07-201

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The requester submitted a 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 access to information in the custody and/or control of the Ontario Provincial Police (OPP) related to her application for a firearms licence. The request stated, in part, as follows:

> … all personal records related to me and the falsified statements made in my RCMP –Firearms files… under the custody and control of the O.P.P….
>
> Please forward the information and the Police reports that support the following statements:
>
> Page 6 of 17 "She has made threats to police officers"
>
> Page 7 of 17 Refused – due to public safety
>
> Page 13 of 17 "she has been convicted of uttering threats against her neighbour"
>
> I am requesting copies of all original notes made by police and police reports made by police including signatures of who wrote reports, and the names of the police officers threatened and the name of the neighbour who was threatened.

To assist in the search, the requester identified two OPP officers by name, as well as all firearms licencing management staff.

The Ministry located responsive records and denied access to the information, in its entirety, in accordance with the following sections of the *Act*:

- 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(c) (reveal investigative techniques and procedures), 14(1)(e) (endanger life or physical safety), 14(1)(l) (facilitate the commission of an unlawful act), 14(2)(a) (law enforcement report) and 19 (solicitor-client privilege);

- 49(b) (personal privacy), with reference to the factor in section 21(2)(f) (highly sensitive) and the presumption in section 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law); and

- 65(6) (application of the *Act*).

The requester, now the appellant appealed that decision.

No issues were resolved by mediation. Accordingly, the file was referred to the adjudication stage of the process.

I decided to seek representations from the Ministry, initially and sent it a Notice of Inquiry setting out the facts and issues on appeal. The Ministry submitted representations in response

and consented to sharing portions of them with the appellant. I agreed with the Ministry's request that certain portions be withheld due to confidentiality concerns. I attached the non-confidential portions of the Ministry's representations to the copy of the Notice of Inquiry that I sent to the appellant.

In its representations, the Ministry withdrew its reliance on the discretionary exemption in section 14(2)(a) and clarified that it relies on the application of section 65(6)3 to withhold certain portions of the records.

The appellant submitted a letter, which I will consider as her submissions in this appeal. The appellant indicated that she required that I answer a number of questions for her before she could prepare her submissions. In part, the appellant sought explanations for certain comments and references to previous orders of this office that were made in the Ministry's representations. It was apparent as well that the appellant was seeking additional information about the contents of the records themselves. At my direction, a staff member from this office contacted the appellant to advise her that I could not answer her questions as they pertained to the contents of the records at issue. The staff member also explained to the appellant that many of the references she was concerned about in the Ministry's representations pertained to other orders issued by this office that the Ministry was relying on in support of its position. The staff member confirmed with her that these references were not about the appellant. The appellant was invited to submit further representations but declined to do so unless she had answers to her questions. However, I am unable to completely answer those questions without revealing the information that forms the subject matter of the appeal.

RECORDS:

The records at issue comprise 107 pages of OPP records, and include Occurrence Summaries and Reports, officer notes, Canadian Firearms Information System Printout, interview notes and correspondence.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

As I indicated above, the Ministry relies only on the exclusionary provision in section 65(6)3 to remove pages 40 through 66 of the records at issue from the scope of the *Act*.

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Requirements 1 and 2

The Ministry indicates that pages 40 to 66 of the records at issue were provided to the OPP Professional Standards Bureau by the Chief Firearms Office (CFO). The Ministry submits that these records contain information in relation to the appellant's allegations of misconduct on the part of an identified OPP officer. The Ministry submits further that the Professional Standards Bureau is maintaining the records.

According to the Ministry, the Professional Standards Bureau is responsible for monitoring, conducting investigations and making recommendations to senior management in cases where internal or external concerns pertaining to a police officer's conduct or service are made. The Ministry notes that the Professional Standards Bureau maintains three files in relation to complaints and allegations of misconduct on the part of police officers that have been filed by the appellant. In fulfilling its role, the Ministry submits that the Professional Standards Bureau collected and maintained the records at issue in relation to meetings, consultations, discussions and communications arising from the appellant's complaint of misconduct of an OPP officer.

On review of the records and the Ministry's representations, it is apparent that the records at issue in pages 40 to 66 pertain to allegations of misconduct made by the appellant against an OPP officer. Although the appellant's allegations were initially made to the CFO, it is clear from the records that they were more properly directed to the Professional Standards Bureau and were, therefore, forwarded to that branch. I am satisfied that they were collected and maintained by the Professional Standards Bureau of the OPP in relation to meetings, consultations, discussions and communications relating to the appellant's complaint against the OPP officer. Accordingly, I find that requirements 1 and 2 of the test have been met.

Requirement 3

The phrase "labour relations or employment-related matters" has been found to apply in the context of disciplinary proceedings under the *Police Services Act* (the *PSA*) (Order MO-1433-F) or more generally in the context of investigations into complaints by a police services professional standards bureau (Orders M-931 and P-1481).

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

The Ministry submits that it clearly has an interest in issues relating to the conduct of the employees who are part of its workforce. The Ministry submits further that allegations made by a member of the public of misconduct by an OPP officer must be dealt with in accordance with the process described by the *PSA*, and is an employment matter in which the Ministry has an interest.

In Order M-931, Adjudicator Donald Hale concluded that an investigation under the *PSA* was an employment-related matter, and because of the statutory requirements imposed on the police in the *PSA* to investigate public complaints, he found that the police "have an interest" in the investigation within the meaning of section 52(3)3 of the municipal *Act*, which is similar to section 65(6)3 of the *Act*. I agree with this conclusion, which in my view applies equally in this case. Accordingly, requirement 3 has also been met.

Since all three requirements have been met, I find that section 65(6) applies to pages 40 through 66 of the records. As these are not records to which section 65(7) applies, they are excluded from the scope of the *Act*.

PERSONAL INFORMATION

General principles

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 as defined in section 2(1) means recorded information about an identifiable individual, including but not limited to 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 (Order 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 professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, 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 [Orders P-1409, R-980015, PO-2225].

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.)].

The Ministry submits that the records remaining at issue contain the personal information of the appellant and a number of other identifiable individuals. Noting that some of the records pertain to individual police officers, the Ministry submits that the officers are referred to in their personal capacity in this case.

The appellant did not address this issue.

On review of the records, I find that they all contain the appellant's personal information as they pertain to the various contacts she has had with the OPP and/or the observations of other individuals about her.

I find that many of the records also contain the personal information of other identifiable individuals, including individuals who have provided information to the OPP regarding the appellant's application for a firearm licence and individuals that she has come into contact with, including a number of individuals who also happen to be police officers. In certain portions of the records, I find that the information is about these police officers in their personal capacity as it pertains to their off-duty activities and/or relates to the complaints the appellant has made against them. In other portions of the records, I find that references to police officers pertain to these individuals in their professional capacity only.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

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.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, **14**, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with sections 14(1)(c), (e), (l) for some or all of the records (depending on which subsection is claimed).

Law Enforcement

General principles

Sections 14(1)(c), (e) and (l) state:

> 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;
>
> (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.

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, and
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

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 [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.)].

In the case of section 14(1)(e), the institution 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 [*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.)].

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

I will begin with the Ministry's claim that section 14(1)(e) applies in the circumstances of this appeal.

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

The Ministry claims that this section applies to all of the records remaining at issue.

As I noted above, unlike the other parts of section 14(1), "detailed and convincing" evidence is not required under section 14(1)(e). Rather, under section 14(1)(e), 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. [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*, cited above.]

A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Orders PO-2003, PO-2338 and PO-2334]. The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

The Ministry's concerns regarding disclosure of the records remaining at issue are contained in the confidential portion of its submissions. Due to the concerns expressed, I am unable to provide any details in this order. However, in support of its position, the Ministry attached a copy of a *Firearms Act* Reference Hearing Ruling (the Ruling) of the Ontario Court of Justice, dated December 6, 2000, which contains detailed information relating to the appellant and the factors that resulted in the Court confirming the CFO's decision that it was not in the interest of public safety to permit the appellant to possess a firearm. The Ministry takes the position that the comments in this Ruling, along with the confidential information provided in its submissions, are sufficient to meet its burden under this section.

I am persuaded by the Ministry's submissions, the documentary evidence provided to support its position, and the appellant's submissions that disclosure of the records remaining at issue could reasonably be expected to endanger the life or physical safety of individuals referred to in them.

The Ruling describes a number of actions and behaviours of the appellant that depict a difficult and vengeful person. As the Judge noted at the beginning of the Ruling, the appellant's attempts to obtain and retain a firearms licence "has a long and tortured history" dating back to 1991. In 1991, the appellant obtained a semi-automatic handgun. The Ruling sets out a number of incidents involving the appellant beginning in 1998. These include disputes with neighbours, initiated by the appellant; allegations and accusations made by the appellant, and her exhibiting intimidating and aggressive behaviour. The OPP began to investigate the appellant at about this time, and in May 1998, seized the appellant's handgun. The appellant's behaviour continued after her gun was seized. The Ruling gives examples of the appellant making threatening statements about other individuals in public and confronting individuals in an intimidating manner. A Prohibition Hearing relating to the seized firearm was held in April 1999. For reasons unexplained, not all of the evidence against the appellant was placed before the Judge at the Prohibition Hearing and he ruled that the seized firearm was to be returned to the appellant.

Describing the evidence that was not placed before the Judge at the Prohibition Hearing, the Judge who issued the Ruling noted that as a result of an incident that occurred in November 1998, the appellant was charged with assault, attempting to obstruct justice and threatening and subsequently entered into a peace bond after which the *Criminal Code* charges were withdrawn. Although the Court recognized that the allegations were "relatively minimal" in nature, they formed part of the context in which the Ruling was made. Similarly, they form part of the evidence before me relating to whether the concerns raised by the Ministry are frivolous or exaggerated.

The appellant then completed a firearm Possession Licence Application. Several questions on the form pertained to whether the applicant had been reported for criminal activity and whether she had been ordered by the courts to keep the peace. The appellant answered no to these questions. At the subsequent Reference Hearing, the appellant was asked why she did not answer the questions truthfully. She testified that the *Criminal Code* proceedings and subsequent peace bond 'were something that was criminally set-up as a false charge, a false arrest, a false fingerprinting and a false jailing so it was a game…it wasn't something that really happened." The Judge at the Reference Hearing expressed serious concern about the appellant's attitude regarding this matter. In addition, the Judge noted, "because the court was furnished with much more evidence than this, I will briefly review that evidence in the event that the long and tortured history of this matter does not end with this Hearing." For the next two pages of the Ruling, the Judge lists numerous other incidents involving the appellant, her unpredictable behaviour, her paranoia and her obsession with revenge.

The Judge in her Ruling noted that no evidence had been established that the appellant had been involved in "incidents of actual violence or a present intention to use violence; nor did any of the incidents involve a weapon or a threat to use a weapon." Nevertheless, the Judge concluded that the evidence overall established that the appellant has had on-going conflicts with the local police and her neighbours and it would not be in the interest of public safety if she possessed a firearm. The Judge also found that the appellant presented throughout that hearing as having

perceptual distortions that cause her to be in conflict with others. This difficulty was of great concern to the Court.

The Ministry's confidential submissions reflect similar concerns.

In reading the appellant's submissions, many of the observations made by the Judge in her Ruling came to mind. The appellant states, "I need the following police reports, police statement, police court briefs and submissions to support the following new statements – criminal falsified statements that were in the Nov. 6.07 letter [the Ministry's submissions]. The appellant then asks a number of questions in which she seems to believe that references in the Ministry's submissions to previous orders of this office were about her. She wants to know who at the Professional Standards Branch was communicating about her. She demands to know what facts support the Ministry's references to the *Firearms Act* generally. She also wants to know what facts support public safety concerns regarding her previous gun ownership – despite having gone through the Reference Hearing and having these facts laid out before her. The appellant states:

> OPP who criminally falsify police statements reports, criminally mislead justice, criminally obstruct justice, criminally conspire with other OPP officers are definitely a danger to themselves and to others in owning a gun. Police are supposed to protect not victimize civilians.
>
> …Support any kind of proof of violence about me. Where are the facts? Support any kind of threats to anyone in this world.

The appellant then reiterates some of her grievances against individuals identified in the records. She notes that the interviews in the records are with people she doesn't know – she doesn't know what they look like or where they live. She claims that all of the interviews were falsified.

Although the evidence before me indicates that the appellant has not yet committed "actual violence" in her dealings with other individuals that she has some kind of grievance with, I am satisfied that the concerns expressed by the Ministry regarding the physical safety of the individuals referred to in the records at issue should they be disclosed are not frivolous, nor are they exaggerated. Accordingly, I find that there is sufficient evidence before me to conclude that the appellant's motives in obtaining the information at issue are not benevolent and that she has a demonstrated history of aggressive and intimidating behaviour. The Ministry is legitimately concerned that disclosure of the information in the records remaining at issue could reasonably be expected to worsen the situation and I agree. Accordingly, I find that the Ministry has satisfied its onus under the discretionary exemption in section 14(1)(e) and this exemption applies to all of the records remaining at issue.

EXERCISE OF DISCRETION

As I noted above, the section 14 and 49(a) exemptions are discretionary. In these cases, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Accordingly, I must also review the Ministry's exercise of discretion in deciding to deny access to the information that I have found to be exempt. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

The Ministry indicates that it is mindful of the purposes of the *Act* and the appellant's right of access to her own personal information. However, it states that its decision to deny the appellant access to the records in their entirety was based on very careful consideration of all relevant factors.

In particular, the Ministry notes that it considered the relationship between the appellant and the other individuals referred to in the records. It also considered whether release of the records would discourage members of the public from reporting potential violations of law to the police and undermine public confidence in the ability of the OPP to provide policing services and the CFO to conduct *Firearms Act* public safety investigations into individual licencing. The Ministry notes that in some instances confidentiality is necessary for public safety and protection.

The Ministry submits that although its historic practice is to release as much personal information as possible in response to requests for law enforcement records, in the circumstances of this case, its view is that release of any information is not appropriate.

Having reviewed the Ministry's explanation for its exercise of discretion in the context of this particular case, as discussed above, I find that the Ministry's decision takes into account relevant considerations and does not take into account irrelevant considerations. Accordingly, I find that the Ministry has properly exercised its discretion under sections 14(1)(e) and 49(a) to withhold the records remaining at issue, in their entirety.

Because of this finding, it is not necessary to consider the other exemptions claimed for the records remaining at issue.

ORDER:

I uphold the Ministry's decision.

_______________________________ December 6, 2007

Laurel Cropley
Adjudicator