

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3606

Appeal PA15-422

Ministry of Community Safety and Correctional Services

May 13, 2016

Summary: This issues in this appeal are whether the information the Ministry of Community Safety and Correctional Services (the ministry) withheld in response to an access request is exempt under section 49(b) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) and whether the searches it conducted for responsive records were reasonable. In this order, the adjudicator finds that the records contain personal information which is exempt under section 49(b) of the *Act*, and that other information in the records is not responsive to the appellant's request. She upholds both the ministry's exercise of discretion and its searches for responsive records, and dismisses the appeal.

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), 21(1), 21(3)(b), 21(3)(d), 21(2)(f), 24 and 49(b).

OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of an access decision made by the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for records relating to a complaint the requester made to the Ontario Provincial Police (the OPP) regarding the Ontario Lottery and Gaming Corporation (the OLG) and two named individuals.

[2] The ministry identified two records that were responsive to the request, consisting of an occurrence summary and a memorandum. The ministry granted access

to these records, in part. The ministry withheld portions of the records, claiming the application of the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) and 14(2)(a) (law enforcement), and 49(b), in conjunction with section 21(1) (personal privacy). The ministry also withheld other portions of the records, claiming that they were not responsive to the request.

[3] The requester (now the appellant) appealed the ministry's decision to this office. During the mediation of the appeal, the appellant advised the mediator that an OPP Detective must have interviewed certain individuals and that notes of these interviews should exist. Consequently, reasonable search was added as an issue in this appeal. The appellant also advised the mediator that she continued to seek access to all of the information that was withheld, including the information that the ministry identified as being non-responsive.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations which were shared in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Also during the inquiry, the ministry located further records and disclosed them to the appellant, in part. The ministry relied on the same exemptions as referred to above. These records are also at issue in this appeal.

[5] In her representations, the appellant stated that the police codes in the records could be removed from the scope of the appeal. Consequently, any police codes contained in the records are no longer at issue and will not be disclosed to the appellant. The remaining portions of the appellant's representations, while voluminous, do not address the issues in this appeal.

[6] For the reasons that follow, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[7] There are 13 pages of records consisting of an occurrence summary, a memorandum, officer's notes and two interview reports. Pages 1-12 were disclosed to the appellant, in part. Page 13 was withheld in its entirety.

ISSUES:

- A. What records, or portions thereof, are responsive to the request?
- 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 in section 49(b), in conjunction with section 21(1) apply to the information at issue?
- D. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?
- E. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: What records, or portions thereof, are responsive to the request?

[8] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

[9] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹ To be considered responsive to the request, records must reasonably relate to the request.²

[10] The ministry submits that the appellant's request was sufficiently detailed to identify responsive records, and that it, therefore, did not require further clarification from the appellant.

[11] As previously stated, during the mediation of the appeal, the appellant advised the mediator that she is seeking access to all of the withheld information in the records. The ministry has identified some of the information as being non-responsive to the request. I have reviewed the records in detail and I find that there is information contained in pages 1, 8, 10 and 11 that is not responsive to the appellant's request, because it is unrelated to her complaint to the OPP. The information on page 1 that is non-responsive is administrative information that was the result of processing the access request, and not the substantive content of the record. The remaining information is contained in officer's notes and deals with matters unrelated to the appellant's complaint. Consequently, this information is not within the scope of the appellant's request and will not be disclosed to the appellant.

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

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

[12] 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), which states, in part:

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,

(d) the address, telephone number, fingerprints or blood type of the 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.

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

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.

[14] 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.³ Even if the 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.⁴

[15] The ministry claims that the records contain personal information including:

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

- the names addresses, phone numbers and employment history of one or more individuals; and
- information, including opinions or statements provided by one or more affected individuals, even if their names were withheld.

[16] The ministry states:

. . . due to the subject matter of the records (i.e. a law enforcement investigation where the appellant and the affected individuals know each other), severing identifying information such as names and dates of birth would not serve to remove the personal information from the records. The Ministry submits that this same reasoning was applied in Order PO-2955 to similar police records, and it ought to be applied in this appeal as well.

[17] I have reviewed the records and I find that they contain the personal information of the appellant and three identifiable individuals. The personal information in the records includes:

- information relating to the age and family status of two individuals, which falls within paragraph (a) of the definition of personal information in section 2(1) of the *Act*;
- information relating to the employment history of one individual, which falls within paragraph (b) of the definition;
- the address and telephone number of two individuals, which falls within paragraph (d) of the definition;
- one individual's opinion of the appellant, which falls within paragraph (g) of the definition; and
- two individuals' names where it appears with other personal information relating to them or where the disclosure of the name would reveal other personal information about them, which falls within paragraph (h) of the definition.

[18] I will go on to determine if the personal information I have described above is exempt from disclosure under section 49(b) of the *Act*.

Issue C: Does the discretionary exemption in section 49(b), in conjunction with section 21(1) apply to the information at issue?

[19] 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.

[20] Under section 49(b), where a record contains 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.

[21] However, if any of paragraphs (a) to (e) of section 21(1) apply, the personal privacy exemption is not available.

[22] In applying the section 49(b) exemption, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. 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. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[23] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester’s personal information), this office will consider and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁵

[24] The ministry is claiming the application of the exemption in section 49(b), relying on the presumptions in section 21(3)(b) and 21(3)(d), as well as the factor in section 21(2)(f). Sections 21(3)(b) and (d) of the *Act* state:

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

(b) was compiled and is identifiable as part of an investigation into a possible violation of the law, except to the extent that disclosure is necessary to prosecute the violation of to continue the investigation;

(d) relates to employment or educational history;

[25] Section 21(2)(f) of the *Act* states:

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,

(f) the personal information is highly sensitive;

[26] The ministry submits that the records were compiled as part of a law enforcement investigation conducted as a result of a complaint the appellant made alleging that other individuals had committed theft. The complaint led to an OPP investigation into whether a theft, which is an offence under section 322 of the *Criminal*

⁵ Order MO-2954.

Code of Canada, had occurred. Although charges were not laid in this case, they could have been, had the evidence that was gathered in the investigation pointed in a different direction. As a result, the ministry submits, the personal information is exempt from disclosure under section 21(1) by virtue of the presumption in section 21(3)(b).

[27] With respect to the presumption in section 21(3)(d), the ministry argues that it applies to portions of pages 3, 6 and 12 of the records because these portions contain the employment history of an individual. In particular, these portions set out how long the individual has been employed with the OLG.

[28] The ministry further submits that the factor in section 21(2)(f) applies because the personal information at issue is highly sensitive. In making this argument, the ministry states:

The Ministry relies on Order P-1618, where the IPC found that the personal information of individuals who are complainants, witnesses or suspects as part of their contact with the OPP is highly sensitive for the purpose of section 21(2)(f). The Ministry submits that this reasoning should be applied to personal information belonging to the affected individuals, especially given that none of the affected individuals have consented to the disclosure of their records, and much of the personal information was provided by them with the expectation that it would be held in confidence.

[29] As previously stated, the ministry is relying on the presumption in section 21(3)(b) to exempt it from disclosure. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law,⁶ and even if no criminal proceedings were commenced against any individuals, it may still apply. The presumption can apply to a variety of investigations, including those related to by-law enforcement⁷ and violations of environmental laws or occupational health and safety laws.⁸

[30] The ministry also relies on the presumption in section 21(3)(d), to exempt the employment history of one individual from disclosure. Past orders of this office have determined that information that falls within this presumption includes the start and end dates of employment and the number of years of service.

[31] I am satisfied that the OPP conducted an investigation into a possible violation of the law, namely a section of the *Criminal Code of Canada*, and that the records at issue were compiled and are identifiable as part of that investigation. I am also satisfied that the records were created contemporaneously with the investigation and not following its conclusion. Consequently, I find that the presumption in section 21(3)(b) applies to the personal information at issue.

⁶ Orders P-242 and MO-2235.

⁷ Order MO-2147.

⁸ Orders PO-1706 and PO-2716.

[32] I am also satisfied that the presumption in section 21(3)(d) applies to the employment history of one individual, which is clearly set out in the records.

[33] Turning to the factors in section 21(2), the list of factors in section 21(2) is not exhaustive, and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).⁹ Some of the factors weigh in favour of the disclosure of personal information, while others weigh against it. The ministry has claimed the application of the factor in section 21(2)(f), which weighs against disclosure because it refers to personal information that is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁰ Based on my review of the nature of the personal information at issue and the surrounding circumstances, including the allegations made by the appellant, I find that it qualifies as being highly sensitive, and I give this factor considerable weight.

[34] I also find that none of the other factors in section 21(2) either weighing for or against disclosure apply.

[35] Consequently, having considered and weighed the factors and presumptions in sections 21(2) and (3), I find that disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of three individuals and that it is, therefore, exempt under section 49(b) in conjunction with section 21(1). I note that a limited amount of the appellant's personal information was withheld under this exemption. I find that it too is exempt under section 49(b) because it is so intertwined with another individual's personal information that it cannot be severed.

[36] Having found that all of the personal information at issue is exempt under section 49(b), it is not necessary for me to consider whether it is exempt under section 49(a).

Issue D: Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[37] The section 49(b) 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.

[38] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not,

⁹ Order P-99.

¹⁰ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹¹ Order MO-1573.

however, substitute its own discretion for that of the institution.¹²

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹³

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

[40] The ministry submits that it exercised its discretion properly in withholding the information at issue. In particular, the ministry states that it considered the public policy interest in protecting the privacy of personal information belonging to affected individuals where the information is contained in law enforcement investigation records. It also argues that disclosure of the information at issue would jeopardize public confidence in the OPP, given that the OPP depend on the public's cooperation when they conduct investigations and collect personal information.

[41] I have carefully considered the representation of the parties. I find that the ministry took into account relevant factors weighing both for and against the disclosure of the information at issue, and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that it considered the appellant's position and circumstances and balanced it against the protection of the other identifiable individuals' personal privacy in exercising its discretion not to disclose the information at issue. I am also mindful that the ministry has disclosed as much of the appellant's

¹² See section 54(2).

¹³ Order P-344 and MO-1573.

personal information to her as possible, and withheld primarily only the personal information of others.

[42] Under all the circumstances, therefore, I am satisfied that the ministry has appropriately exercised its discretion under 49(b) to withhold the personal information that I have found to be exempt.

Issue F: Did the ministry conduct a reasonable search for records?

[43] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution had conducted a reasonable search for records as required by section 24.¹⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[44] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁵ To be responsive, a record must be "reasonably related" to the request.¹⁶ 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.¹⁷ A further search will be ordered if the institution 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.¹⁸

[45] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹⁹

[46] The ministry states that it initially located seven pages of records that were responsive to the appellant's request. During the mediation of the appeal, the appellant raised the issue of reasonable search by indicating that she believed that a Detective's interview notes should exist. The ministry states that, as a result, the OPP Detective who conducted the investigation subsequently conducted a second search for records. He specifically searched for records stored at the OPP offices of the Alcohol and Gaming Commission of Ontario. This search yielded six further pages of records, which consist of four pages of Detective's notes and two pages of notes contained in an interview report. The ministry states that it regretted the fact that these records were not identified prior to the inquiry. The ministry goes on to state that because it conducted a second search which yielded further records, it has conducted a reasonable search for records in response to this access request.

¹⁴ Orders P-85, P-221 and PO-1954-I.

¹⁵ Orders P-624 and PO-2559.

¹⁶ Order PO-2554.

¹⁷ Order M-909, PO-2469 and PO-2592.

¹⁸ Order MO-2185.

¹⁹ Order MO-2246.

[47] On my review of the representations provided by the ministry, I am satisfied that they have conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. As previously stated, a reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request. The ministry has provided an explanation of the nature and extent of the search conducted in response to the request and also during the inquiry of the appeal. The second search, in particular, was conducted by the Detective who investigated the appellant's complaint to the OPP, and yielded the type of records that the appellant was of the view should exist. The appellant's representations in this appeal do not provide sufficient evidence to establish a reasonable basis for concluding that the ministry's search was inadequate, or that further records exist. Consequently, I am satisfied that these searches were reasonable in the circumstances.

[48] In sum, I find that the records contain personal information which is exempt under section 49(b) of the *Act*, and that other information in the records is not responsive to the appellant's request. I uphold both the ministry's exercise of discretion and its searches for responsive records, and I dismiss the appeal.

ORDER:

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

Original Signed by: _____

Cathy Hamilton
Adjudicator

_____ May 13, 2016