

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3659

Appeal PA15-533

Ministry of Community Safety and Correctional Services

October 14, 2016

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for access to information about the requester. The ministry denied access to portions of Ontario Provincial Police reports, citing the discretionary personal privacy exemption in section 49(b), and the discretionary prejudice to intergovernmental relations exemption in sections 15(a), read with section 49(a) (discretion to refuse requester's own information). In this order, the adjudicator upholds the ministry's decision under section 49(b) but does not uphold its decision under section 15(a), read with section 49(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of personal information), 49(b), 21(3)(b), 21(2)(f), 49(a), 15(a).

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 access to:

...all information about [the requester] that the Ontario Provincial Police [the OPP] has on record.

[2] In response to the access request, the ministry issued a decision granting partial

access and denying access, pursuant to the discretionary exemptions in sections 49(b) (personal privacy), 14(1)(l) and 14(2)(a) (law enforcement), read in conjunction with 49(a) (discretion to refuse requester's own information), and 15(b) (information received from another government), read in conjunction with 49(a), of the *Act*. The ministry also indicated that it had denied access to some information it had deemed non-responsive, such as computer generated text associated with the printing of reports.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During mediation, the appellant indicated that he was not seeking access to information that the ministry deemed non-responsive. Accordingly, portions of records containing this information are no longer at issue in this appeal.

[5] The appellant also indicated that he was not seeking access to information that the ministry denied access to under sections 14(1)(l), read in conjunction with 49(a), of the *Act*. Accordingly, portions of records containing this information are no longer at issue in this appeal.

[6] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. I sought the representations of the ministry initially.

[7] In its representations, the ministry withdrew its reliance on the law enforcement exemption at section 14(2)(a), therefore, this exemption is no longer at issue.

[8] I sent a copy of the ministry's representations to the appellant and the appellant provided representations in response.

[9] The ministry also clarified in its representations the subsection of section 15 it was relying on. Instead of section 15(b), the ministry noted that it was relying on section 15(a) (prejudice to intergovernmental relations) to deny access to the information at issue in pages 10 and 11 of the records.

[10] I then sought the representations of the Royal Canadian Mounted Police (the RCMP) as to the application of section 15(a) to pages 10 and 11 of the records. The RCMP did not provide representations in response.

[11] In this order, I uphold the ministry's decision under section 49(b) but I do not uphold its decision under section 15(a), read with section 49(a).

RECORDS:

[12] The records remaining at issue consist of occurrence summaries (pages 1, 4, 5 and 10) general occurrence reports (pages 2, 3 and 11) and a homicide/sudden death

report (pages 6, 7 and 8).

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 personal privacy exemption at section 49(b) apply to the information at issue?
- C. Does the discretionary exemption at section 49(a) (discretion to refuse requester's own information), in conjunction with section 15(a) (prejudice to intergovernmental relations), apply to the information at issue in pages 10 and 11 of the records?
- D. Did the institution exercise its discretion under section 49(b)? 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?

[13] 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:

[14] "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;

[15] 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

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

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

[17] 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.²

[18] 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

¹ Order 11.

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.

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

[20] The ministry states that the records contain personal information of affected individuals who were witnesses or complainants to incidents investigated by the OPP, including those identified as potential witnesses and complainants, including:

- a. The names, dates of birth, and addresses of a number of affected individuals, and the fact that these affected individuals are listed as being witnesses, complainants or that they were otherwise involved in OPP investigations; and,
- b. Statements provided by the affected parties, which due to their detailed nature would likely reveal the identities of the affected individuals, and their opinions and actions, which led to the OPP investigations.

[21] The ministry submits that due to the subject matter of the records (i.e., records related to law enforcement investigations), severing identifying information may not serve to remove the personal information from the records.

[22] The appellant did not provide representations on this issue.

Analysis/Findings

[23] The records consist of three General Occurrence Summaries, a General Occurrence Report, and a Homicide/Sudden Death Report.

[24] I find that the records contain the personal information of the appellant and affected individuals in their personal capacity and includes their names as they appear with other personal information relating to these individuals, their addresses, telephone numbers, personal opinions or views, date of births, ages and marital status in accordance with paragraphs (a), (d), (e), (g), and (h) of the definition of personal information in section 2(1) of the *Act*.

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

[25] 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.

[26] 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

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

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.

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

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

[29] 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.⁵

[30] 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).

[31] The ministry relies on the presumption in section 21(3)(b), which reads:

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

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;

[32] The ministry states that the records were created pursuant to law enforcement investigations conducted by the OPP and specifically document the OPP attending a location as a result of a complaint or an incident being reported, and the details of their investigation. It states that although no Criminal Code or other charges were laid by the OPP, they could have been had the OPP investigations determined that such charges were warranted.

[33] The appellant did not provide representations on this issue.

Analysis/Findings

[34] Even if no criminal proceedings were commenced against any individuals, section

⁵ Order MO-2954.

21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁷

[35] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁸

[36] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁹ and violations of environmental laws or occupational health and safety laws.¹⁰

[37] I agree with the ministry that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law related to the incidents set out in the records. Therefore, the presumption in section 21(3)(b) applies to the personal information in the records.

[38] In addition, 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.¹¹

[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).¹²

[40] The ministry relies on the factor in section 21(2)(f). This section 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;

[41] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹³

[42] 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

⁶ Orders P-242 and MO-2235.

⁷ Orders MO-2213, PO-1849 and PO-2608.

⁸ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

⁹ Order MO-2147.

¹⁰ Orders PO-1706 and PO-2716.

¹¹ Order P-239.

¹² Order P-99.

¹³ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f). It submits that this reasoning should be applied to the records, especially given that the other individuals have not consented to the disclosure of their personal information.

[43] Based on my review of the specific incidents in the records, I agree with the ministry that the information at issue is highly sensitive information of individuals other than the appellant. I find that the factor favouring privacy protection in section 21(2)(f) applies.

[44] As I have found that only the presumption in section 21(3)(b) and the factor in section 21(2)(f) apply, both favouring privacy protection, subject to my review of the ministry's exercise of discretion, the information at issue is exempt under section 49(b).

C. Does the discretionary exemption at section 49(a) (discretion to refuse requester's own information), in conjunction with section 15(a) (prejudice to intergovernmental relations), apply to the information at issue in pages 10 and 11 of the records?

[45] 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.

[46] 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.

[47] 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.¹⁴

[48] 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. The institution was asked to address this under "Exercise of Discretion", below.

[49] In this case, the institution relies on section 49(a) in conjunction with section 15(a), which reads:

¹⁴ Order M-352.

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

prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

and shall not disclose any such record without the prior approval of the Executive Council.

[50] The ministry states that the records contain information created by the OPP, recording specific communications which took place between the OPP and the RCMP, a federal law enforcement agency.

[51] The ministry states that disclosure of records that it has protected under section 15(a) can be expected to harm the close working relationship which exists between the OPP and the RCMP, a federal law enforcement agency, which is another level of government, for the purpose of the exemption.

[52] The ministry states that law enforcement agencies must have the ability to communicate with one another on a confidential basis regarding policing information that is of mutual interest. The nature of this communication may be recorded, as it has been in this case, but the communication is clearly only meant for internal use.

[53] The ministry is concerned that the disclosure of the records at issue could cause the RCMP to lose confidence in the ability of the OPP to safeguard confidential information provided by, or in respect of the RCMP. This may harm future information sharing between the OPP and the RCMP, which could harm both of their respective law enforcement mandates.

Analysis/Findings

[54] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships.¹⁵

[55] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶

¹⁵ Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[56] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.¹⁷

[57] The ministry was asked to provide a copy of the records to this office, identifying what portions of pages 10 and 11 it has applied section 15(a) specifically to. In response, the ministry states that it has applied it to records of communications which took place between the OPP and the RCMP, which specifically name the RCMP.

[58] I have found that the personal information of other individuals on pages 10 and 11 is subject to section 49(b). From my review of the remaining information on these two pages there is very little information that concerns the RCMP, and what information there is reveals no more than the fact that the OPP communicated with the RCMP. It does not reveal information that is exempt under section 15(a). I find that disclosure of the information at issue could not reasonably be expected to prejudice the conduct of relations between the OPP and the RCMP.¹⁸

[59] Based on my review of the ministry's representations and in the absence of representations from the RCMP, I find that I do not have detailed and convincing evidence about the potential for harm should the information at issue be disclosed. The fact that these two law enforcement agencies communicate with each other is well-known and also apparent from the ministry's representations. Therefore, I find that section 15(a), read in conjunction with section 49(a), does not apply and I will order this information disclosed.

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

[60] 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.

[61] 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
- it fails to take into account relevant considerations.

¹⁷ Order P-1552.

¹⁸ See Orders P-270, PO-2247, PO-2369-F, PO-2715 and PO-2734.

[62] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[63] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁰

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

[64] The ministry states that, concerning section 49(b), it has exercised its discretion based on the following considerations:

The public policy interest in protecting the privacy of personal information belonging to affected individuals who are associated with a law

¹⁹ Order MO-1573.

²⁰ Orders P-344 and MO-1573.

enforcement investigation, including where they are specifically identified as witnesses or complainants, particularly where they are not aware that their personal information is subject to disclosure pursuant to this appeal.

[65] The appellant did not address this issue in his representations.

Analysis/Findings

[66] Based on my review of the ministry's representations, I agree that it exercised its discretion in a proper manner with respect to section 49(b), taking into account relevant factors and not taking into account irrelevant factors.

[67] The ministry considered the purposes of the personal privacy exemption, as well as considering the nature, significance and sensitivity of the information.

[68] Accordingly, I am upholding the ministry's exercise of discretion and find that the information at issue that I found subject to section 49(b) is exempt.

ORDER:

1. I order the ministry to disclose to the appellant by **November 21, 2016** but not before **November 16, 2016** the information that I have found not subject to section 15(a), read with section 49(a). For ease of reference, I have enclosed with this order being sent to the ministry a copy of pages 10 and 11 of the records highlighting the information to be disclosed to the appellant by the ministry.
2. I uphold the ministry's decision to deny access to the remaining information at issue in the records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ October 14, 2016