

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3722-F

Appeal PA13-88-2

Ministry of Community Safety and Correctional Services

April 24, 2017

**Summary:** The appellant made an access 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 information relating to a specific investigation conducted by the Ontario Provincial Police, including the costs of the investigation. In its decision letter, the ministry advised the appellant that it was denying access to the records in their entirety, claiming a number of exemptions, and that no records exist that are responsive to the portion of the request relating to the costs of the investigation. During the inquiry of the appeal, the ministry then claimed, for the first time, the application of the exclusion in section 65(5.2) (ongoing prosecution).

In Interim Order PO-3424-I, the adjudicator found that the exclusion in section 65(5.2) did not apply and that the ministry's search for responsive records was inadequate. The adjudicator ordered the ministry to provide representations on the exemptions that it originally claimed and to conduct a further search for records relating to the costs of the investigation. The ministry subsequently provided representations to this office, conducted a further search for records and provided the appellant with the total cost of the investigation. Also following the issuance of Interim Order PO-3424-I, the appellant narrowed the scope of his request from over 12,000 pages to approximately 2,000 pages.

The remaining issues in this appeal are whether the records at issue are exempt from disclosure under section 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (confidential source of information), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), 15 (relations with other governments), 16 (prejudice defence of Canada), 19 (solicitor-client privilege) and section 49(b) (personal privacy).

In this final order, the adjudicator upholds the ministry's decision, in part. She finds that most of the records are exempt either in whole or in part, under section 49(a) in conjunction with sections 14(1)(c), 14(1)(d), 14(1)(l), 14(2)(a), 15(a), 15(b), and 19, or under section 49(b). Conversely, she finds that the exemption in section 16 is not applicable to any of the records, and that some of the records are not exempt under any of the exemptions claimed by the ministry. The ministry's exercise of discretion is upheld, as well as the further search for records it conducted as a result of Interim Order PO-3421-I.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 14(1)(c), 14(1)(d), 14(1)(l), 14(2)(a), 15(a), 15(b), 16, 19, 49(a) and 49(b).

**Orders and Investigation Reports Considered:** PO-2494.

**Cases Considered:** *R. v. Campbell* 2006 CanLII 14965 (ON SCDC).

## **OVERVIEW:**

[1] This final order disposes of the remaining issues raised as a result of an appeal of a decision made in response to an access request to 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 the investigation file and costs relating to the criminal investigation of the requester by the Ontario Provincial Police (the OPP). The investigation had been requested by the Royal Canadian Mounted Police (the RCMP) to the OPP.

[2] In response, the ministry denied access to the records in whole, claiming the application of the discretionary exemption in section 49(a) in conjunction with sections 14 (law enforcement), 15 (relations with other governments), 16 (national security), 17(1) (third party information) and 19 (solicitor-client privilege), as well as the discretionary exemption in section 49(b) (personal privacy). The ministry also advised the requester that no records exist in response to the portion of the request dealing with the costs of the investigation.

[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 records should exist relating to the costs of the investigation. As a result, reasonable search was added as an issue in the appeal.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I initially provided the ministry and the RCMP with the opportunity to provide representations. In the ministry's representations, it claimed for the first time that all of the records at issue were excluded from the *Act* due to the application of the exclusion in section 65(5.2) (ongoing prosecution). The RCMP indicated that all RCMP material was provided to the ministry in confidence, and that under the corresponding federal legislation the records would be exempt under the law enforcement and investigation exemption. I subsequently sought and received

representations from the appellant.

[5] I then dealt with two issues; whether the records were excluded from the *Act* under section 65(5.2) and whether the ministry conducted a reasonable search for records relating to the cost of the investigation. On November 14, 2014, I issued Interim Order PO-3424-I, stating the following in the order provisions:

1. I find that the exclusion in section 65(5.2) does not apply to exclude the records from the application of the *Act*.
2. I remain seized of this matter, and order the ministry to provide representations in response to the issues set out in the Notice of Inquiry of December 4, 2013, and to provide copies of the records at issue to this office no later than December 5, 2014.
3. I order the ministry to conduct a further search for records relating to the hotel, meal, travel and other incidental expenses incurred by OPP officers during the investigation.
4. If, as a result of this further search, the ministry identifies additional records responsive to the request, I order the ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26, 27 and 28 of the *Act*, treating the date of this order as the date of the request. I also order the ministry to provide me with a copy of any new decision letter that it issues to the appellant.

[6] Following the issuance of Interim Order PO-3424-I, the ministry submitted a request for reconsideration of the order. I dismissed the reconsideration request. The ministry then requested that the appeal be stayed, pending the outcome of notification of the appeal being provided to the RCMP.<sup>1</sup> I denied the ministry's request to stay the appeal.

[7] As a result of Interim Order PO-3424-I, the ministry provided a copy of the records to this office, as well as representations on the exemptions it originally claimed. In its representations, the ministry indicated that it was no longer relying on the exemptions in sections 14(1)(h) and 17(1). It also advised that it had conducted a further search for records relating to the hotel, meal, travel and other incidental expenses incurred by OPP officers during the investigation. The ministry advised that it was able to break down costs with respect to accommodations and meals, and that these records would be disclosed to the appellant. These records are located at pages 12,459 through 12,521. If it has not already done so, the ministry should disclose these records to the appellant and are ordered to do so in the Order provisions.

[8] In addition, shortly after submitting its representations, the ministry issued a

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<sup>1</sup> As previously stated, the RCMP was notified of the appeal by this office, and provided with the opportunity to provide representations prior to the issuance of Interim Order PO-3421-I.

supplementary decision letter to the appellant, in which it advised the appellant of the sum total of the hotel, meal, travel and other incidental costs related to the investigation.

[9] Representations were then sought and received from the RCMP and the appellant. In his representations, the appellant advised that he already had copies of numerous records and subsequently confirmed with staff of this office that he already had copies of pages 1 through 10,401 and that, accordingly, these pages could be removed from the scope of the appeal. In addition, the appellant did not provide representations regarding the ministry's second search for records. The appellant also objected to the ministry's approach taken in this appeal by initially claiming exemptions and then an exclusion, resulting in undue delay. In addition, the appellant submits that the exemptions claimed do not apply and that the ministry has taken an overly-broad approach in applying all of the exemptions to all of the records.

[10] The RCMP noted in its representations that all RCMP records responsive to the request were provided to the OPP in confidence, and that some of these records relate to a covert project for which the RCMP had sole jurisdiction. The RCMP submits that under the federal access to information and privacy legislative regimes, the records could be exempted under the law enforcement and investigation-related exemptions. The RCMP went on to argue that the records also contain the personal information of other individuals, as well as information about individuals operating in a covert capacity.

[11] As a result of the narrowed scope of the appeal, both the ministry and RCMP were provided with the opportunity to provide further representations. The ministry advised that the same exemptions apply to the remaining records at issue as set out in its original representations, although it did provide further representations on the issue of whether the remaining records at issue form part of the Crown brief, which will be considered under section 19 of the *Act*.

[12] The RCMP advised this office that it did not have copies of the remaining records at issue, and that the ministry had advised them that they were OPP records. The RCMP then advised this office that they would not be making further representations on the remaining records at issue.

[13] For the reasons that follow, I uphold the ministry's decision, in part. I find that most of the records are exempt either in whole or in part, under section 49(a) in conjunction with sections 14(1)(c), 14(1)(d), 14(1)(l), 14(2)(a), 15(a), 15(b), and 19, or under section 49(b). Conversely, I find that the exemption in section 16 is not applicable to any of the records. I also find that some of the records are not exempt under any of the exemptions claimed by the ministry. I uphold the ministry's exercise of discretion, as well as the further search for records it conducted as a result of Interim Order PO-3421-I. The ministry is ordered to disclose certain emails to the appellant either in whole or in part, as set out in the Order provisions.

## **RECORDS:**

[14] The records at issue are pages 10,402 to 12,458. The vast majority of the records are emails. Other records are investigative reports. All of the records at issue originated with the OPP.

## **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 in section 49(b) apply to the records?
- C. Does the discretionary exemption in section 49(a) in conjunction with sections 14(1) and 14(2) apply to the records?
- D. Does the discretionary exemption in section 49(a) in conjunction with section 15 apply to the records?
- E. Does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the records?
- F. Does the discretionary exemption in section 49(a) in conjunction with section 16 apply to the records?
- G. Did the ministry exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Background**

[15] In its representations, the ministry provided background information regarding the circumstances surrounding the creation of the records responsive to the access request. It states that the RCMP requested the assistance of the OPP to conduct a law enforcement investigation involving the appellant, who is an RCMP employee. The ministry advises that as part of the investigation, the RCMP provided the OPP with thousands of pages of records which were used by the OPP to conduct the investigation and that many of these records relate to an RCMP covert project.<sup>2</sup>

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<sup>2</sup> As previously stated, due to the narrowed scope of the request, the records that the RCMP provided to the OPP are no longer at issue.

## **Preliminary Issues**

### *Reasonable search and the expense records*

[16] As previously stated, in response to Interim Order PO-3421-I, the ministry conducted a second search for records relating to the costs of the investigation. It located responsive records, provided the appellant with the total cost of the investigation, and indicated that it is willing to disclose the OPP members' expense reports to the appellant. The appellant's representations do not address the ministry's second search for records. Based on the evidence provided by the ministry and the fact that the appellant has not established a reasonable basis for concluding that additional responsive records exist regarding the costs of the investigation, I find that the ministry has conducted a reasonable search for these types of records. The ministry has, therefore, complied with Order Provisions 3 and 4 of Interim Order PO-3421-I.

[17] As stated above, the ministry advised that it was able to break down the costs with respect to accommodations and meals, and that these records would be disclosed to the appellant. I note that these records are located at pages 12,459 through 12,521. Given that the ministry is no longer claiming the application of any exemptions to these records, I find that they are no longer at issue in this appeal. If it has not already done so, the ministry should disclose these expense reports to the appellant and I will order it to do so in the order provisions.

### *Purpose of the request*

[18] The ministry states that most of the records were provided to the OPP by the RCMP and are related to a covert RCMP project to combat crime. The ministry's position is that it does not advance the purposes of the *Act* to allow an employee to obtain access to records which belong to his employer by filing an access request with another police service. The ministry further submits that the RCMP is the proper body to direct a request for access to all of the records provided by the RCMP and the RCMP has a greater interest in the records.

[19] As previously stated, the appellant narrowed the scope of his request to the extent that he seeks only those records originated by the OPP starting at page 10,402 and ending at page 12,521. As a result, I find that the ministry has the greater interest in the remaining information at issue.

### *Duplication*

[20] It is worth noting that there is extensive duplication of the content in the records, as many of the emails consist of email chains that were received by several individuals.

### *Blank pages and non-responsive pages*

[21] I find that the following pages are not responsive to the request because they do

not relate to the OPP's investigation of the appellant: pages 10,664; 11,364 through 11,372; and 12,056 through 12,057. Accordingly, these records will not be disclosed to the appellant and will not be referred to again. Similarly, some of the pages are completely blank. These too will not be disclosed to the appellant and will not be referred to again. The blank pages are: pages 11,314 through 11,317; 11,320 through 11,323; 11,341; 11,346; 11,556; 11,613; 11,617; 11,663; 11,667; 11,675; 11,678; 11,706; 11,725; 11,730; 11,733 through 11,736; 11,739 through 11,742; 11,745 through 11,748; 11,752 through 11,755; 11,758 through 11,761; 11,764 through 11,767; 11,770 through 11,773; 11,818; 11,989; 12,027; 12,075; 12,084; 12,086; 12,108; 12,118; 12,121; 12,124; 12,127; 12,148; 12,290; 12,348; 12,420; 12,444; 12,446; and 12,448.

### **Personal Information**

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

[22] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.<sup>3</sup> Where the records contain the requester's own personal information, either alone or together with the personal information of other individuals, access to the records is addressed under Part III of the *Act*. Where the records contain only personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act*. Therefore, 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,

(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,

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<sup>3</sup> Orders PO-2113 and PO-2331.

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[23] 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.

[24] 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.<sup>4</sup> 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.<sup>5</sup>

[25] The ministry submits that the records contain the personal information of 42 individuals who were interviewed as part of the OPP investigation, or who were interviewed by the RCMP and whose interviews were subsequently provided to the OPP. Further, the ministry states that the records identify individuals who were the subject of the OPP investigation or who are otherwise identifiable in the records. The personal information, the ministry argues, includes individuals' names, cell phone numbers, as well as statements they made that contain their views or opinions. The ministry further submits that the individuals' business titles and business contact information also constitutes their personal information as it links them to the RCMP covert project and the OPP investigation. It goes on to argue that the OPP interviews are a personal matter because being interviewed for an OPP investigation was not part of the usual employment activities of the affected individuals, and the interviews recorded personal opinions and recollections belonging to individuals who spoke freely and frankly to OPP investigators, on the understanding that their personal information would be kept confidential.

[26] The appellant's representations do not address whether the records contain personal information.

[27] I have reviewed all of the records at issue. I find that the records contain the personal information of the appellant, some individuals who are neither OPP nor RCMP officers, and some individuals who are OPP or RCMP officers. In particular, I find that all of the records at issue contain the personal information of the appellant because the entire OPP investigation was *about* the appellant. This information includes the

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<sup>4</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.



appellant's marital status, his personal views, the views or opinions of others about him, and his name where it appears with other personal information about him. This personal information falls within paragraphs (a), (e), (g) and (h) of the definition of personal information set out in section 2(1). Although the investigation was in relation to alleged activities in his capacity as an RCMP employee, the fact that a criminal investigation was conducted qualifies as the appellant's personal information, as has been found in past orders of this office.

[28] With respect to the individuals who are not OPP or RCMP officers, I find that some of the records contain their personal information. In particular, some of the records contain the address of one identifiable individual, falling within paragraph (d) of the definition of personal information. Other records contain information about the marital status and financial transactions of another individual, falling within paragraphs (a) and (b) of the definition. Other records contain the name of a third individual where it appears with other personal information relating to that individual, which falls within paragraph (h) of the definition.

[29] Turning to the OPP officers and RCMP officers, I find that there is limited personal information about them in the records. In my view, these individuals were acting in their professional capacity as law enforcement officers and, therefore, the information is not about them in a personal capacity. However, in many of the records there are portions that would reveal something of a personal nature about these officers, which qualifies as their personal information for the purposes of section 2(1) of the *Act*.

[30] Given my finding that the records contain the personal information of the appellant and others, I will proceed to consider the appellant's access to this information under Part III of the *Act*. In particular, I will determine whether the discretionary exemptions in sections 49(a) and (b) apply to exempt the records from disclosure.

## **Personal Privacy**

***Issue B: Does the discretionary exemption in section 49(b) apply to the records?***

[31] 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.

[32] 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 ministry may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the ministry may also decide to disclose the information to the requester.

[33] Section 49(b) states:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

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

[35] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>6</sup> If any of the 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).

[36] Section 21(2) lists various factors that may be relevant in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>7</sup> The list of factors is not exhaustive. The ministry must consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>8</sup>

[37] 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.<sup>9</sup>

[38] The ministry is claiming that the presumptions in sections 21(3)(b), (d) and (f) apply. These sections 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 law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

. . .

(d) relates to employment or educational history;

. . .

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<sup>6</sup> Order MO-2954.

<sup>7</sup> Order P-239.

<sup>8</sup> Order P-99.

<sup>9</sup> Orders M-444 and MO-1323.

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[39] The ministry submits that the records were created pursuant to an OPP investigation and are clearly identifiable as part of an investigation into a violation of the law, even though no charges were laid. It argues that the presumption in section 21(3)(b) applies.

[40] The ministry also submits that the presumptions in sections 21(3)(d) and (f) apply. In particular, it states that the records contain the employment history of individuals interviewed as part of the OPP investigation, including those associated with the RCMP covert project. Concerning the presumption in section 21(3)(f), the ministry submits that there is information relating to one individual's finances in connection with the lease of a premises.

[41] The ministry also argues that the factor in section 21(2)(f) applies, and weighs in favour of non-disclosure of the records. This section, it states, allows the ministry to consider whether the personal information is highly sensitive in determining whether disclosure would constitute an unjustified invasion of privacy. It goes on to argue that disclosure of this personal information would cause the affected individuals significant personal distress.

[42] I find that the personal information at issue is exempt from disclosure under section 49(b), subject to my findings regarding the ministry's exercise of discretion, with one exception. I find that the presumption in section 21(3)(b) applies to the personal information at issue because it was compiled as part of an OPP investigation into a violation of law. I have also weighed the appellant's interests in the disclosure of the records with the presumption in section 21(3)(b), and am satisfied that this balancing weighs in favour of non-disclosure.

[43] I also find that the presumption in section 21(3)(f) applies to some of the personal information, which reveals a financial transaction in which an individual was involved. Conversely, I do not find that the presumption in section 21(3)(d) applies, as there is no information about individuals' employment history in the records at issue.

[44] I further find that some of the personal information at issue is highly sensitive and, therefore, the factor in section 21(2)(f) weighs in favour of the non-disclosure of this information. I find, therefore, that disclosure of the personal information contained in the records would constitute an unjustified invasion of the personal privacy of other individuals. In some of the records the personal information of the appellant is so intertwined with the personal information of other individuals that it would be impossible to sever the appellant's personal information from others. However, in other records, the personal information of others can be severed from the appellant's personal information.

[45] Consequently, the information I have found to be exempt under section 49(b), subject to my findings regarding the ministry's exercise of discretion, is contained either

in whole or in part in pages: 10,464 through 10,466; 10,468; 10,470; 10,472; 10,495 through 10,535; 10,538; 10,541 through 10,542; 10,544; 10,552; 10,554 through 10,555; 10,557; 10,559 through 10,566; 10,568 through 10,576; 10,578 through 10,587; 10,591; 10,600 through 10,601; 10,609; 10,668 through 10,694; 10,766 through 10,767; 10,771; 10,774 through 10,777; 10,780; 10,784; 10,792 through 10,796; 10,802; 10,807; 10,809; 10,811 through 10,813; 10,815; 10,819; 10,821 through 10,854; 10,866 through 10,875; 10,877 through 10,883; 10,890 through 10,894; 10,906 through 10,911; 10,922 through 10,923; 10,929 through 10,934; 10,938; 10,947 through 10,950; 10,964 through 10,965; 10,980; 10,982; 10,997; 11,007 through 11,010; 11,012 through 11,014; 11,016 through 11,018; 11,024 through 11,025; 11,028; 11,034 through 11,035; 11,039 through 11,040; 11,043; 11,046 through 11,047; 11,097; 11,103; 11,105; 11,107; 11,112 through 11,113; 11,115; 11,135 through 11,136; 11,148; 11,156 through 11,159; 11,163; 11,168; 11,178; 11,180 through 11,181; 11,210 through 11,213; 11,216; 11,219 through 11,221; 11,238 through 11,240; 11,246 through 11,251; 11,253 through 11,255; 11,312 through 11,313; 11,318 through 11,319; 11,326; 11,329 through 11,330; 11,351 through 11,352; 11,505; 11,512; 11,515; 11,539 through 11,544; 11,548 through 11,552; 11,593; 11,604; 11,653; 11,731 through 11,732; 11,737 through 11,738; 11,743 through 11,744; 11,749 through 11,751; 11,756 through 11,757; 11,762 through 11,763; 11,768 through 11,769; 11,778 through 11,779; 11,784 through 11,799; 11,806; 11,814 through 11,815; 11,820; 11,824; 11,826; 11,828 through 11,834; 11,865; 11,872 through 11,899; 11,919 through 11,924; 11,930 through 11,962; 11,973; 11,984; 11,990; 12,000; 12,006 through 12,011; 12,017 through 12,022; 12,033 through 12,038; 12,078 through 12,083; 12,085; 12,087; 12,089; 12,091; 12,094; 12,097; 12,099; 12,102 through 12,103; 12,105; 12,217; 12,225; 12,228; 12,421 through 12,422 and 12,457.

[46] Conversely, I find that some of the records consist of emails exchanged between the appellant and the OPP. In my view, it would be inconsistent with the purposes of section 49(b) to withhold these records from the appellant and, therefore I find that they are not exempt from disclosure under section 49(b).

## **Law Enforcement**

### ***Issue C: Does the discretionary exemption in section 49(a) in conjunction with sections 14(1) and 14(2) apply to the records?***

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

[48] 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, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[49] Section 49(a) recognizes the special nature of the 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.<sup>10</sup> Where access is denied under section 49(a), the ministry 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.

[50] In this case, the ministry relies on section 49(a) in conjunction with sections 14, 15, 16 and 19 of the *Act*.

[51] I will first consider whether the law enforcement exemptions in sections 14(1)(a), (c), (d), (e), (g), (i) and (l), and 14(2)(a) apply to the records.

*Section 14(1)*

[52] Section 14(1) states, in part:

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

(a) interfere with a law enforcement matter;

. . .

(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;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

. . .

(g) interfere with the gathering or reveal law enforcement intelligence information respecting organizations or persons;

. . .

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

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<sup>10</sup> Order M-352.

...

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

[53] The ministry is claiming the application of the above exemptions to all of the records at issue. The term law enforcement is used in several parts of section 14 and is defined in section 2(1). The definition includes policing and investigations that lead or could lead to proceedings in a court or tribunal.

[54] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>11</sup> Where section 14 uses the words *could reasonably be expected to*, the ministry must provide detailed and convincing evidence to establish a reasonable expectation of harm. Evidence amounting to speculation of possible harm is not sufficient.<sup>12</sup>

*Section 14(1)(a) - law enforcement matter*

[55] The ministry submits that the records relate to a law enforcement matter because they pertain to the RCMP covert project and the disclosure of the records would interfere with ongoing efforts to build cooperation between Ontario police services and the federal government to combat crime.

[56] I am satisfied, for the purposes of the *Act*, that the OPP's investigation into the appellant meets the definition of law enforcement as defined in section 2(1). As previously stated, the remaining records at issue are OPP records relating to the investigation of the appellant. The investigation was concluded, resulting in no charges being laid against the appellant. In order to qualify for exemption under section 14(1)(a), the matter in question must be ongoing or in existence.<sup>13</sup> The exemption does not apply where the matter is completed, or where the alleged interference is with potential law enforcement matters.<sup>14</sup> In my view, the law enforcement matter is the OPP's investigation. Given that the OPP's investigation is complete, I find that this exemption does not apply to the OPP records at issue.

[57] In addition, to the extent that the information in the records relates to the RCMP matter (the covert project), I find that information is exempt under other provisions, below.

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

<sup>12</sup> 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.).

<sup>13</sup> Order PO-2657.

<sup>14</sup> Orders PO-2085 and MO-1578.

*Section 14(1)(c) - investigative techniques and procedures*

[58] The ministry submits that the records describe techniques and procedures that are associated with the RCMP covert project, and that disclosing these records could hinder or compromise their effective utilization by giving criminals important information about a covert anti-terrorism project.

[59] In order to meet the investigative technique or procedure test, the ministry 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 will normally not apply where the technique or procedure is generally known to the public.<sup>15</sup> In addition, the technique or procedure must be investigative, rather than part of enforcement.<sup>16</sup>

[60] I find that some of the records at issue contain and describe OPP (not RCMP) investigative techniques and procedures, the disclosure of which could reasonably be expected to hinder its effective utilization in future investigations. As a result, I find that these records are exempt either in whole or in part, subject to my findings regarding the ministry's exercise of discretion. These records are located at pages: 10,504 through 10,535; 10,764 through 10,765; 10,779; 10,804 through 10,808 (partial); 10,821 through 10,832; 10,944; 10,946; 11,028; 11,038; 11,041; 11,165 through 11,166; 11,263; 11,557; 11,571; 11,586; 12,109 through 12,110; 12,113; 12,437 and 12,441.

*Section 14(1)(d) - confidential source*

[61] In order for this exemption to apply, the ministry must establish a reasonable expectation that the identity of the source of the information given by the source would remain confidential in the circumstances.<sup>17</sup>

[62] The ministry submits that the individuals who were interviewed as part of the OPP investigation are confidential sources of information, and their identities in association with the RCMP covert project are not known outside of the law enforcement community. In addition, the ministry submits that these individuals are a confidential source as the information could only have been provided by them as a result of their association with the RCMP covert project.

[63] I recognize that this exemption usually applies to the identity and information provided by citizens in a law enforcement matter,<sup>18</sup> I am satisfied in the specific circumstances of this request that the RCMP officers who were interviewed by the OPP are confidential sources for the purpose of section 14(1)(d). I make this finding in light of the fact that these individuals are involved in a covert RCMP project. Disclosing their identities, in my view, would expose the identities of officers involved in the covert

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<sup>15</sup> Orders P-170, P-1487, MO-2347-I and PO-2751.

<sup>16</sup> Orders PO-2034 and P-1340.

<sup>17</sup> Order MO-1416.

<sup>18</sup> Order PO-3065.

project and could reasonably lead to undermining that project. As a result, I find that the RCMP officers who were interviewed as part of the OPP investigation are confidential sources and their identities are exempt from disclosure under section 14(1)(d). The following pages of records are exempt either in whole or in part, subject to my findings regarding the ministry's exercise of discretion: 10,555 (partial); 10,559 (partial); 10,584 through 10,585 (partial); 10,596 through 10,598; 10,602 through 10,605; 10,633 through 10,637; 10,667; 10,763; 10,783; 10,785; 10,787; 10,811 through 10,812; 10,814 through 10,816; 10,819; 10,876 through 10,878; 10,903; 10,906 through 10,907; 10,927 through 10,928; 10,942 through 10,943; 10,945; 10,952 through 10,959; 10,964 through 10,965; 10,967; 10,969 through 10,971; 10,973; 11,028; 11,031 through 11,032; 11,059; 11,061 through 11,062; 11,085; 11,088; 11,110 through 11,111; 11,134; 11,185 through 11,186; 11,192; 11,210 through 11,212; 11,214 through 11,218; 11,223 through 11,237; 11,241 through 11,247; 11,252; 11,256 through 11,258; 11,261 through 11,262; 11,458 through 11,459; 11,513 through 11,514; 11,517 through 11,519; 11,521 through 11,523; 11,534; 11,599 through 11,601; 11,620 through 11,621; 11,827; 11,862 through 11,864; 12,265 through 12,268; and 12,364 through 12,365.

*Section 14(1)(e) – life or physical safety*

[64] The ministry submits that this exemption applies to withhold records that would identify members of the RCMP covert project, and that disclosure of this information could expose these individual to risk.

[65] I find that it is not necessary to consider this exemption, given that I have already found the identities of the RCMP officers involved in the covert project to be exempt under section 14(1)(d).

*Section 14(1)(g) – law enforcement intelligence information*

[66] The ministry submits that the records relating to the RCMP covert project contain information gathered by dedicated intelligence members of the RCMP in a covert manner, and that these records were provided by the RCMP to the OPP for the sole purpose of conducting the investigation of the appellant.

[67] I find that this exemption no longer applies as the appellant's narrowing of the scope of the appeal removed the RCMP records from the appeal. The OPP investigation into the appellant is not a covert operation and the information in the records at issue was not obtained through intelligence means.

*Section 14(1)(i) – security of a building, vehicle, system or procedure*

[68] The ministry submits that it has applied this exemption to the records relating to the lease of a facility to be used for the RCMP covert project. The ministry states that it is concerned that the disclosure of these records would reveal the location of the project facility, thereby jeopardizing its use and the process for leasing space used for covert projects.



[69] I find that it is not necessary to consider this exemption. The very limited information about the facility that is in the records I have already found to be exempt under section 14(1)(c) or 49(b).

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

[70] The ministry submits that the disclosure of the records would harm the RCMP covert project, thereby hampering the control of crime. The ministry states that it is also concerned that the disclosure of the records might deter the sharing of information between the OPP and other law enforcement agencies, because the OPP would be seen as unable to protect sensitive law enforcement records that were provided to it. This outcome, it argues, would have an adverse impact on the control of crime.

[71] Once again, I note that the records at issue are not the records that the RCMP provided to the OPP, but are internal OPP records of its own investigation of the appellant. However, I find that some information contained in these records is exempt under section 14(1)(l). In particular, I find that OPP police codes, conference call codes, file management codes, and information on how to access OPP files are exempt from disclosure. Past orders of this office have found that the disclosure of this type of information could be used to facilitate the commission of an unlawful act. The exempt information is contained either in whole or in part in the following pages, subject to my findings regarding the ministry's exercise of discretion: 10,539; 10,552; 10,606; 10,992; 10,994; 11,030; 11,099 through 11,100; 11,112; 11,160; 11,179; 11,187 through 11,188; 11,190 through 11,191; 11,193 through 11,195; 11,199 through 11,200; 11,259 through 11,260; 11,524; 11,536; 11,602 through 11,603; 12,061 through 12,062; and 12,064.

*Section 14(2)(a) – law enforcement report*

[72] Section 14(2) states, in part:

A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[73] In order for a record to qualify for exemption under section 14(2)(a) of the Act, the ministry must satisfy each part of the following three-part test:<sup>19</sup>

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

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<sup>19</sup> Orders 200 and P-324.

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[74] The word report means *a formal statement or account of the results of the collation and consideration of information*. Generally, results would not include mere observations or recordings of fact.<sup>20</sup> The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.<sup>21</sup>

[75] An overly broad interpretation of the word report could create an absurdity. If report means *a statement made by a person or something that gives information*, all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous.<sup>22</sup>

[76] The ministry submits that section 14(2)(a) applies to the case overview, which is a report for purposes of this exemption because it:

- Is a thorough summary of the investigation and contains analysis and contextual information prepared for Crown Counsel;
- Is organized in a formal manner. It bears the OPP logo, contains subject headings, and is typewritten in full paragraphs; and
- It was prepared by a law enforcement agency that has the function of enforcing and regulating compliance with the law, and was prepared in the course of an investigation.

[77] I find that pages 10,402 through 10,430 qualify for exemption under section 14(2)(a), subject to my findings regarding the ministry's exercise of discretion. These pages of records are reports, which constitute the formal statements of the OPP investigators, including their investigative findings and conclusions. Consequently, I find that these pages are law enforcement reports for the purposes of section 14(2)(a).

## **Relations with other Governments**

### ***Issue D: Does the discretionary exemption in section 49(a) in conjunction with section 15 apply to the records?***

[78] The ministry is claiming the application of section 49(a) in conjunction with sections 15(a) and (b) to all of the records at issue. These subsections state the following:

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

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<sup>20</sup> Orders P-200, MO-1238 and MO-1337-I.

<sup>21</sup> Orders MO-1238 and MO-1337-I.

<sup>22</sup> Order MO-1238.

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

(b) reveal information received in confidence from another government or its agencies by an institution; or

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

[79] 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.<sup>23</sup> Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.<sup>24</sup>

[80] The ministry 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.<sup>25</sup>

[81] 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.<sup>26</sup>

*Section 15(a) – prejudice to intergovernmental relations*

[82] With respect to the application of section 15(a), the ministry states:

The Ministry submits that disclosing the records would prejudice and harm the conduct of relations between the OPP and other law enforcement agencies or security counterparts, especially the RCMP. As we have already noted, the sharing of highly sensitive law enforcement records with the OPP is predicated on these records being used solely for a law enforcement purpose. We submit that the disclosure of these records to the appellant is antithetical to this law enforcement purpose for which they were created, and that disclosure would prejudice the conduct of relations between these two law enforcement organizations, specifically as it relates to future OPP investigations of RCMP employees.

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<sup>23</sup> Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.

<sup>24</sup> Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.). See also Orders PO-1927-I, PO-2569, PO-2647 and PO-2666.

<sup>25</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>26</sup> Order P-1552.

[83] In order for a record to qualify for exemption under section 15(a), the ministry must establish that: the record relates to intergovernmental relations, that is, relations between the ministry and another government or its agencies; and disclosure of the record could reasonably be expected to prejudice the conduct of intergovernmental relations.<sup>27</sup>

[84] This discretionary exemption was included in the *Act* in order to protect the interests of the government of Ontario in the conduct of intergovernmental relations. This exemption does not exist for the benefit of any other party, including other levels of government with which the province, or the ministry, as the case may be, is conducting intergovernmental relations.

[85] I find that some of the records at issue are exempt under section 15(a), subject to my findings regarding the ministry's exercise of discretion. These records contain discussions between the RCMP (a federal agency) and the OPP (a provincial agency) in which the two agencies are cooperating with each other on an investigation. I accept that in the circumstances of this appeal, the relationship between the RCMP and the OPP is intergovernmental and that the records reveal intergovernmental relations.

[86] Turning to whether there is a reasonable expectation of prejudice to intergovernmental conduct as a result of disclosure, I find that the ministry is not required to show that the RCMP and the OPP will refuse to collaborate in the future, should the records be disclosed. I am satisfied that the ministry has provided sufficient evidence that the intergovernmental relationship between the RCMP and the OPP could reasonably be expected to be prejudiced, and that it is reasonable that other governments would be hesitant to share information with the OPP in the future should the information at issue be disclosed.

[87] Consequently, the following pages of records are exempt either in whole or in part under section 15(a): 10,431; 10,546 through 10,551; 10,610 through 10,663; 10,665 through 10,666; 10,695 through 10,750; 10,786; 10,788 through 10,791; 10,856 through 10,864; 10,886 through 10,894; 10,917 through 10,921; 10,929 through 10,935; 10,947 through 10,951; 10,960 through 10,963; 10,966 through 10,968; 10,972; 10,974; 10,980; 10,995; 11,006; 11,048 through 11,049; 11,072 through 11,077; 11,089 through 11,094; 11,119 through 11,121; 11,126 through 11,133; 11,138 through 11,142; 11,147; 11,154; 11,182 through 11,184; 11,198; 11,206; 11,209; 11,270; 11,326; 11,360 through 11,365; 11,389 through 11,391; 11,394 through 11,395; 11,413 through 11,416; 11,444 through 11,449; 11,462 through 11,472; 11,494 through 11,496; 11,499 through 11,500; 11,531 through 11,533; 11,559; 11,562; 11,583; 11,592; 11,606 through 11,612; 11,614; 11,681 through 11,691; 11,695 through 11,697; 11,704 through 11,705; 11,709 through 11,711; 11,828 through 11,834; 12,055; 12,135 through 12,136; 12,139 through 12,140; 12,142 through 12,144; 12,147; 12,149; 12,199 through 12,206; 12,209 through 12,212; 12,214 through 12,215; 12,284 through 12,285; 12,296 through 12,301; 12,316 through 12,323; 12,326 through 12,335; 12,443; 12,445; 12,447;

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<sup>27</sup> Reconsideration Order R-970003.

12,449 through 12,450; and 12,458.

*Section 15(b) – information received from another government*

[88] In order for section 15(b) to apply, the ministry must show that:

1. The records reveal information received from another government or its agencies; and
2. the information was received by an institution; and
3. the information was received in confidence.

[89] The ministry submits that the records are exempt under section 15(b) because it has met the three-part test. In particular, the ministry argues that most of the records were provided to the OPP by the RCMP, with the remainder created by the OPP based on the records they received from the RCMP. The ministry confirms that it actually received the information from the RCMP and further argues that the information was received in confidence, based on the nature of the records, the large volume of records shared with the OPP, and the purpose for which they were shared.

[90] As previously stated, the records that the RCMP provided to the OPP are no longer at issue in this appeal. The records at issue are OPP records. However, I am satisfied that some of the records at issue contain information that was provided by the RCMP to the OPP as part of the investigation and I am satisfied that the OPP received this information in confidence.

[91] Consequently, I find that the following pages of records are exempt from disclosure under section 15(b), subject to my findings regarding the ministry's exercise of discretion: 10,477 through 10,478; 10,512 through 10,535; 10,610 through 10,664; 10,665 through 10,666; 10,695 through 10,717; 10,719 through 10,750; 10,778; 10,798 through 10,801; 10,817 through 10,818; 10,821 through 10,855; 10,868 through 10,875; 10,879 through 10,880; 10,882 through 10,883; 10,885; 10,896 through 10,902; 10,908 through 10,911; 10,917 through 10,923; 10,939 through 10,941; 10,976 through 10,978; 10,981; 10,983 through 10,991; 11,063 through 11,071; 11,078 through 11,084; 11,086 through 11,087; 11,095; 11,118 through 11,125; 11,129 through 11,131; 11,135 through 11,137; 11,156 through 11,159; 11,189; 11,201 through 11,204; 11,207 through 11,208; 11,266 through 11,267; 11,269; 11,347 through 11,350; 11,353 through 11,356; 11,553 through 11,555; 11,560 through 11,561; 11,563 through 11,564; 11,574 through 11,575; 11,608 through 11,611; 11,774 through 11,776; 11,778 through 11,779; 11,784 through 11,786; 11,788 through 11,799; 11,811; 11,817; 11,872 through 11,898; 11,909 through 11,913; 11,919 through 11,924; 11,930 through 11,962; 11,968 through 11,972; 11,978 through 11,983; 12,006 through 12,021; 12,028 through 12,038; 12,114 through 12,115; 12,132 through 12,134; 12,145 through 12,146; 12,199 through 12,216; 12,265 through 12,268; 12,274 through 12,275; 12,278 through 12,279; and 12,281 through 12,283.

## Solicitor-client Privilege

### ***Issue E: Does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the records?***

[92] The ministry relies on section 49(a) in conjunction with sections 19(a) and (b) to withhold all of the records in whole. These subsections state the following:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[93] Section 19 contains two branches as described below. Branch 1 arises from the common-law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The ministry must establish that at least one branch applies.

[94] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common-law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for Branch 1 to apply, the ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>28</sup>

[95] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>29</sup> The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>30</sup>

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

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.<sup>31</sup>

[97] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>32</sup>

[98] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and

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<sup>28</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.).

<sup>29</sup> *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>30</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>31</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>32</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

common law privileges, although not necessarily identical, exist for similar reasons. Regarding solicitor-client communication privilege, Branch 2 applies to a record that was prepared by or for Crown counsel for use in giving legal advice.

[99] The ministry has claimed that both Branch 1 and 2 apply to exempt the records from disclosure. It submits that all of the records were part of the Crown brief, which representatives of the OPP shared with Crown Attorneys, both as part of a continuum of communications and in contemplation of a prosecution. The ministry further submits that the context in which the records were both collected and used by the OPP contemplated that the OPP would be working especially closely with Crown Attorneys for the purpose of seeking and receiving legal advice.

[100] It goes on to argue that in order for this legal advice to be provided, the OPP had to share the records with Crown Attorneys. Responsive records advise of meetings that took place between the Crown Attorneys and representatives of the OPP to discuss the records and to discuss if charges should be laid. In addition, the ministry prepared a case overview report specifically for Crown Attorneys in anticipation of pending litigation.

[101] Further, the ministry submits that prior orders of this office have held that records containing confidential communications with Crown Attorneys can be solicitor-client privileged.<sup>33</sup> The ministry argues that this finding applies to the records at issue and that there is no evidence to suggest that the privilege in these records has been waived.

[102] The ministry then submits that it relies on the same reasoning for Branch 2 of the records.

[103] As previously stated, after the appellant narrowed the scope of his request to the OPP investigation records, the ministry was given an opportunity to provide further representations, which it did. The ministry reiterates that section 19 applies to the records and states the following:

While the records in the OPP investigation file may differ somewhat from what is in the Crown brief, they contain the same general type of information, and were prepared for the same purpose. Therefore, the same exemptions apply. We rely on the following passage from Order PO-2494, which explains the distinction between records originally in the OPP investigation file and those that end up in the Crown brief:

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are prepared twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion

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<sup>33</sup> See, for example, Order PO-2203.

and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

[104] The ministry states that in *Ontario (Attorney General) v. Holly Big Canoe*,<sup>34</sup> the Court held that the scheme of the *Act* places a heavy emphasis on the protection of the Crown brief. The ministry goes on to argue that for the same reasons, the *Act* should also place a heavy emphasis on the protection of the investigation file because the subject matter of the information is similar and the records were prepared for the same purpose.

[105] The remaining records at issue are emails. I find that several of them qualify for exemption in their entirety under Branch 2 of the exemption in section 19. These emails consist of communications between Ontario Provincial Police officers and Crown counsel for the purpose of seeking legal advice. Communications between police and Crown counsel may be privileged if certain conditions are met. In *R. v. Campbell*,<sup>35</sup> the Supreme Court of Canada found that privilege attached to communications between an RCMP officer and a federal Department of Justice lawyer over the legality of a proposed reverse sting operation by the RCMP. However, the court also noted that not everything done by a government lawyer attracts solicitor-client privilege. The Court stated the following:

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[106] This office has applied *Campbell* in several orders.<sup>36</sup> In each case, solicitor-client privilege was found on the basis that the police sought legal advice from Crown counsel. This approach is equally applicable in the circumstances of this appeal.

[107] The emails that I find are exempt consist of communications between OPP officers and Crown counsel in which the officers are seeking legal advice from counsel. The emails also capture the legal advice provided by Crown counsel to these officers. In the present circumstances these emails, in my view, form a continuum of communications between a solicitor (Crown counsel) and client (OPP) and are, therefore exempt from disclosure under the statutory solicitor-client communication privilege of Branch 2 of section 19, and that this privilege has not been waived. My findings regarding this exemption are subject to my findings regarding the ministry's exercise of discretion.

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<sup>34</sup> 2006 CanLII 14965 (ON SCDC).

<sup>35</sup> [1999] 1 S.C.R. 565 (*Campbell*).

<sup>36</sup> See, for example, Orders PO-1779, PO-1931 and MO-1241.



[108] The records that I find are exempt, in their entirety under section 19 are located at pages: 10,432 through 10,433; 10,436 through 10,461; 10,473 through 10,476; 10,480 through 10,494; 10,588 through 10,589; 10,752 through 10,761; 10,768 through 10,770; 10,772 through 10,777; 10,781 through 10,782; 10,924 through 10,925; 11,020 through 11,023; 11,050 through 11,058; 11,143 through 11,146; 11,149 through 11,153; 11,171 through 11,177; 11,196 through 11,197; 11,264 through 11,265; 11,268; 11,271 through 11,311; 11,324 through 11,325; 11,327 through 11,329; 11,357 through 11,359; 11,374 through 11,388; 11,392 through 11,393; 11,396 through 11,412; 11,417 through 11,443; 11,450 through 11,457; 11,460 through 11,461; 11,473 through 11,493; 11,504; 11,507 through 11,508; 11,510 through 11,511; 11,525 through 11,530; 11,537 through 11,538; 11,558; 11,569; 11,572; 11,576; 11,582; 11,587 through 11,591; 11,595 through 11,596; 11,615 through 11,616; 11,618 through 11,619; 11,622 through 11,652; 11,655 through 11,662; 11,664 through 11,666; 11,668 through 11,674; 11,676 through 11,677; 11,679 through 11,705; 11,707 through 11,724; 11,726 through 11,729; 11,780 through 11,781; 11,800 through 11,805; 11,807 through 11,810; 11,835 through 11,861; 11,867 through 11,870; 12,044 through 12,054; 12,058 through 12,059; 12,065 through 12,074; 12,076 through 12,077; 12,106 through 12,107; 12,111 through 12,112; 12,116 through 12,117; 12,119 through 12,120; 12,122 through 12,123; 12,125 through 12,126; 12,128 through 12,130; 12,132 through 12,134; 12,137 through 12,140; 12,142 through 12,144; 12,149 through 12,198; 12,219 through 12,224; 12,231 through 12,246; 12,259 through 12,264; 12,269 through 12,289; 12,291 through 12,320; 12,324 through 12,347; 12,349 through 12,363; 12,366 through 12,419; 12,421 through 12,424; 12,429 through 12,436; 12,438 through 12,440; 12,442 through 12,443; 12,445; 12,447; and 12,449 through 12,455.

[109] Conversely, I find that the exemption in section 19 does not apply to the remaining records at issue, which consist of the following:

- Emails between OPP officers;
- Emails between OPP officers and OPP civilian staff;
- Emails between OPP officers and an outside service provider; and
- Emails between OPP officers and the appellant.

[110] None of the emails listed above consist of communications between OPP officers and Crown counsel, nor do they reveal legal advice provided by Crown counsel, or reveal the seeking of legal advice from Crown counsel. Further, these emails were clearly not prepared by Crown counsel and I have no evidence before me that these records were specifically prepared for Crown counsel in contemplation of or for use in litigation and their contents do not suggest that they were so prepared.

[111] The ministry takes the position that all of the records at issue should be treated as though they are part of the Crown brief, including the records that form part of the

OPP's investigation file because the records contain the same general type of information and were prepared for the same purpose, namely eventual litigation. In support of its position, the ministry cites Order PO-2494 and sets out a passage from that order in its representations. The ministry argues that this passage explains the distinction between records originally in the OPP investigation file and those that end up in the Crown brief. For ease of reference, that passage is re-produced as follows:

In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are prepared twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.

The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared and are now held by the Ministry.

[112] In my view, the ministry has incorrectly interpreted the meaning of Order PO-2494. In that appeal, the appellant made a request to the same ministry, seeking records relating to her firearm possession licence, including OPP records. At that time, the ministry argued that many of the withheld records were included in the Crown brief documents maintained by Crown counsel for the purposes of a criminal prosecution and were, therefore, exempt under Branch 2 of section 19.

[113] In response, Commissioner Brian Beamish stated the following in Order PO-2494:

. . . I do not accept the Ministry's position that records held by the police should automatically be seen as meeting the *prepared for Crown counsel in contemplation of or for use in litigation* test on the basis that copies of them found their way into the Crown brief.

The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct litigation.

[114] Commissioner Beamish then stated the excerpt provided by the ministry and went on to state that if he were to accept that the privilege in Branch 2 applied, this arguably would extend the reach of section 19 to almost any investigative record created by the police, thereby undermining the purpose of the *Act*. He further stated:

Another difficulty with accepting the Ministry's position is that arguably police forces across Ontario would no longer have the discretion to disclose investigative records, out of a perceived obligation to *protect* the Crown's privilege.

Historically, and in general, the police have not relied on the solicitor-client privilege exemption for this type of material (as opposed to law enforcement and privacy exemptions). Accordingly, the police have used their discretion to disclose records where appropriate. If I were to find that privilege applies here, the result could be that records the police now routinely disclose would be withheld in the future, fundamentally altering a long-standing disclosure practice of police forces across Ontario.<sup>37</sup>

[115] As previously stated, none of the emails remaining at issue consist of communications between OPP officers and Crown counsel, nor do they reveal legal advice provided by Crown counsel, or reveal the seeking of legal advice from Crown counsel. Further, these emails were clearly not prepared by Crown counsel and I have no evidence before me that these records were specifically prepared for Crown counsel in contemplation of or for use in litigation and their contents do not suggest that they were so prepared.

[116] Consequently, based on the nature of the records and adopting the approach taken in Order PO-2494, I find that the remaining records at issue are not exempt from disclosure under either branch of section 19.

## **National Security**

### ***Issue F: Does the discretionary exemption in section 49(a) in conjunction with section 16 apply to the records?***

[117] The ministry is claiming the application of section 49(a) in conjunction with section 16 to all of the records. The remaining records at issue consist of:

- Emails between OPP officers;
- Emails between OPP officers and OPP civilian staff;
- Emails between OPP officers and an outside service provider; and
- Emails between OPP officers and the appellant.

[118] Section 16 states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

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<sup>37</sup> See, for example, Orders M-193, M-564, MO-1759, MO-1791, P-1214, P-1585, PO-2254, PO-2342. In addition, Order PO-2494 was upheld on judicial review. See *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. NO. 2769 (Div. Ct.).

[119] It is evident from the context of this exemption that it is intended to protect vital public security interests. Section 16 must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.<sup>38</sup>

[120] In order for section 16 to apply, the ministry 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.<sup>39</sup>

[121] This office has applied section 16 to exempt records containing detailed technical information about the operations of a nuclear facility.<sup>40</sup>

[122] The ministry submits that disclosure of the records, many of which are intelligence-based, could be prejudicial to the defence of Canada, and specifically the covert project of the federal government. The ministry also argues that the OPP only had custody of the records as a result of its investigation into the appellant and that, accordingly, the RCMP should be given the opportunity to provide representations on the harms associated with the disclosure of the records.<sup>41</sup>

[123] As previously stated, the remaining records at issue are not the records that the RCMP provided to the OPP. The appellant removed those records from the scope of the appeal. The records that are the subject matter of this appeal are OPP records. I have already found the OPP investigative reports to be exempt from disclosure under section 14(1). I have also found numerous emails to be exempt either in whole or in part under the exemptions in sections 14(1), 15, 19 and 49(b), which includes any information relating to the RCMP covert project. The remaining emails at issue are listed above.

[124] I find that the ministry's representations address only the records that the RCMP provided to the OPP and, thereby, do not provide sufficient evidence as to how the disclosure of the remaining information at issue would prejudice the defence of Canada. In addition, on my review of the records, I find that there is nothing in the remaining information at issue, the disclosure of which would jeopardize national security or prejudice the defence of Canada and its allies. Therefore, I find that the exemption in section 16 does not apply and the remaining information at issue is not exempt from disclosure.

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<sup>38</sup> Order PO-2500.

<sup>39</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>40</sup> Order PO-2500.

<sup>41</sup> As previously stated in this order, the RCMP was given an opportunity to provide representations and did so.

## Exercise of Discretion

### ***Issue G: Did the ministry exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?***

[125] The sections 49(a) and (b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[126] In addition, this office may find that the institution erred in exercising its discretion where for example:

- It does so in bad faith;
- It takes into account irrelevant considerations; or
- It fails to take into account relevant considerations.

[127] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>42</sup> The office may not, however, substitute its own discretion for that of an institution.<sup>43</sup>

[128] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:<sup>44</sup>

- The purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right 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 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;

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<sup>42</sup> Order MO-1573.

<sup>43</sup> See section 54(2).

<sup>44</sup> Orders P-244 and MO-1573.

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

[129] The ministry submits that it exercised its discretion based on three considerations as follows:

(a) Most of the records originate with the RCMP, and relate to [the RCMP covert project]. In the circumstances, it would not be appropriate for the OPP to disclose law enforcement records originating from another law enforcement agency . . .

(b) Although the records relate to an investigation about the appellant, the records were not intended for him, and we submit that in the circumstances, his interest in the records is secondary to a much larger public interest in the records not being disclosed; and

(c) The disclosure of the records would cause incalculable harm to law enforcement operations, and trust based relationships formed between the OPP and other law enforcement agencies.

[130] Based on the ministry's representations, I am satisfied that it properly exercised its discretion because it took into account relevant considerations and did not take into account irrelevant considerations in deciding to withhold the information which I have found qualifies for exemption. I find that the ministry considered the appellant's position and circumstances, balanced against the purpose of the exemptions. I find that the ministry considered the importance of law enforcement, intergovernmental relations between federal and provincial law enforcement agencies, solicitor-client privilege and personal privacy in weighing against disclosure of the records.

[131] Therefore, under all the circumstances, I am satisfied that the ministry appropriately exercised its discretion under sections 49(a) and 49(b) to the records that I have found to be exempt from disclosure.

## **SUMMARY**

[132] I uphold the ministry's decision, in part. I find that most of the records are exempt either in whole or in part, under section 49(a) in conjunction with sections 14(1)(c), 14(1)(d), 14(1)(l), 14(2)(a), 15(a), 15(b), and 19, or under section 49(b). Conversely, I find that the exemption in section 16 is not applicable to any of the records, and that some of the records are not exempt under any of the exemptions claimed by the ministry. I uphold the ministry's exercise of discretion, as well as the further search for records it conducted as a result of Interim Order PO-3421-I.

[133] In particular, I find that some of the emails at issue are only partially exempt from disclosure. I will order these emails to be disclosed to the appellant with the exempt portions to be withheld. I find that these portions are exempt from disclosure due to the application of section 49(a) in conjunction with sections 14(1)(d), 14(1)(l), 15(a), or 49(b). In addition, portions of some emails are not responsive to the request in that they reveal information relating to matters other than the OPP's investigation of the appellant.

[134] Other emails I find are not exempt from disclosure in their entirety because none of the exemptions relied on by the ministry apply to them. Many of these emails consist of direct communications between the OPP and the appellant, or are merely operational in nature. I find these emails contain only the personal information of the appellant, the disclosure of which would not constitute an invasion of others' personal privacy. In addition, the disclosure of these emails would not reveal law enforcement information, solicitor-client privileged information, information provided by another government or information that would harm intergovernmental relations.

## **ORDER:**

1. I uphold the ministry's search for responsive records.
2. I order the ministry to disclose the following pages of records, in part, to the appellant: 10,464; 10,466; 10,468; 10,470; 10,472; 10,538; 10,539; 10,541; 10,542; 10,552; 10,554; 10,555; 10,557; 10,559 through 10,566; 10,568 through 10,576; 10,578 through 10,587; 10,591; 10,606; 10,609; 10,751; 10,780; 10,796; 10,804 through 10,807; 10,866; 10,867; 10,881; 10,914; 10,915; 10,980; 10,982; 10,992; 10,994; 11,012; 11,014; 11,016 through 11,018; 11,030; 11,034; 11,035; 11,039; 11,043; 11,046; 11,047; 11,097; 11,099; 11,100; 11,103; 11,105; 11,107; 11,112; 11,113; 11,115; 11,160; 11,163; 11,168; 11,178; 11,179; 11,213; 11,219; through 11,221; 11,238 through 11,240; 11,249 through 11,251; 11,253 through 11,255; 11,260; 11,515; 11,520; 11,524; 11,536; 11,543; 11,544; 11,549 through 11,552; 11,593; 11,604; 11,653; 11,787; 11,806; 11,814; 11,820; 11,824; 11,826; 11,865; 11,899; 11,973; 11,984; 11,990; 12,000; 12,022; 12,061; 12,062; 12,064; 12,089; 12,091; 12,094; 12,097; 12,099; 12,102; 12,103; 12,105; 12,217; 12,225; 12,228; and 12,457 by **May 30, 2017** but not before **May 23, 2017**. I have included a copy of these pages for the ministry. The highlighted portions are not to be disclosed to the appellant.
3. I order the ministry to disclose the following pages of records, in whole, to the appellant: 10,434; 10,435; 10,462; 10,463; 10,467; 10,469; 10,471; 10,479; 10,536, 10537; 10,540; 10,543; 10,545; 10,553; 10,556; 10,558; 10,567; 10,577; 10,590; 10,592 through 10,595; 10,599; 10,607, 10,608; 10,808; 10,810; 10,820; 10,865; 10,884; 10,895; 10,904; 10,905; 10,912; 10,913; 10,916; 10,926; 10,937; 10,975; 10,979; 10,993; 10,996; 11,011; 11,015; 11,019; 11,026; 11,027; 11,029; 11,033; 11,036; 11,037; 11,042; 11,044;

11,045; 11,060; 11,096; 11,098; 11,101; 11,102; 11,104; 11,106; 11,108;  
11,109; 11,114; 11,116; 11,117; 11,155; 11,161; 11,162; 11,164; 11,167;  
11,169; 11,170; 11,205; 11,222; 11,330 through 11,340; 11,342 through  
11,345; 11,373; 11,497; 11,498; 11,501 through 11,503; 11,506; 11,509;  
11,516; 11,535; 11,545 through 11,547; 11,565 through 11,568; 11,570;  
11,573; 11,577 through 11,581; 11,584; 11,585; 11,594; 11,597; 11,598;  
11,605; 11,654; 11,777; 11,782; 11,783; 11,812; 11,813; 11,816; 11,819;  
11,821 through 11,823; 11,825; 11,866; 11,871; 11,900 through 11,908; 11,914  
through 11,918; 11,925 through 11,929; 11,963 through 11,967; 11,974 through  
11,977; 11,985 through 11,988; 11,991 through 11,999; 12,001 through 12,005;  
12,023 through 12,026; 12,039 through 12,043; 12,060; 10,063; 12,088;  
12,090; 12,092; 12,093; 12,095; 12,096; 12,098; 12,100; 12,101; 12,104;  
12,131; 12,141; 12,218; 12,226; 12,227; 12,229; 12,230; 12,247 through  
12,258; 12,425 through 12,428; 12,456 and 12,459 through 12,521 by **May 30,  
2017** but not before **May 23, 2017**.

4. I reserve the right to require the ministry to provide this office with copies of the records it discloses to the appellant.

Original signed by: \_\_\_\_\_

Cathy Hamilton  
Adjudicator

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April 24, 2017