

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3756

Appeal PA16-442

Ministry of Community Safety and Correctional Services

July 28, 2017

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 police reports involving the requester and other individuals. The ministry issued a decision denying access to the requested records under the discretionary exemptions in sections 49(b) (personal privacy) and section 49(a) (discretion to refuse requester's own information), in conjunction with section 14 (law enforcement) of *FIPPA*. The adjudicator upholds the ministry's decision in this order.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 49(b), 21(3)(b), 21(2)(f), 49(a), 14(1)(l).

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 police reports involving the requester and other individuals from May and June 2016.

[2] The ministry issued a decision denying access to the requested records under the discretionary exemptions in sections 49(b) (personal privacy) and section 49(a) (discretion to refuse requester's own information), in conjunction with section 14 (law enforcement) of the *Act*. The ministry also indicated that some information contained in

the responsive records, such as computer generated text associated with the printing of the report, is not responsive to the request.

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

[4] During mediation, the mediator contacted an affected person to determine if they would consent to the disclosure of their information. However, consent was not obtained.

[5] The ministry explained that the computer generated text located at the top and bottom of the records is associated with the printing of the report and is not responsive to the request.

[6] The appellant advised the mediator that they were not pursuing access to the information that was deemed to be not responsive to the request. Accordingly, the non-responsive information is no longer an issue in this appeal.

[7] 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 and the affected person initially. The affected person provided confidential representations and did not consent to disclosure of their information in the records.

[8] In its representations, the ministry advised that it was no longer relying upon section 14(2)(a), therefore, this exemption¹ is no longer at issue. I provided the appellant with a copy of the ministry's representations. The appellant provided confidential representations in response.

[9] Neither the appellant nor the affected person responded directly to the issues in the Notice of Inquiry.

[10] In this order, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[11] The records remaining at issue consist of an occurrence summary and an occurrence report.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

¹ The ministry was claiming section 49(a) in conjunction with sections 14(1)(l) and 14(2)(a).

- 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), in conjunction with the section 14(1)(l) law enforcement exemption, apply to the information at issue?
- D. Did the institution exercise its discretion under sections 49(a) and (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?

[12] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

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

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

[13] 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.²

[14] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[15] 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.⁴

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[17] The ministry states that the records are an Occurrence Summary and a General Occurrence Report prepared by the Ontario Provincial Police (the OPP) involving the appellant and the affected person, as well as another individual.

[18] The ministry claims that the records contain personal information about the affected person, including his name, addresses, and phone number, dates of birth and opinions or factual statements.

Analysis/Findings

[19] I find that the records contain the personal information of the appellant, the affected person and another individual in their personal capacity. This personal information includes these individuals' names, home address and phone numbers, and views and opinions in accordance with paragraphs (c), (d), (e) and (g) of the definition of personal information in section 2(1) of the *Act*.

[20] As well, the records contain the personal information of the appellant and other

² Order 11.

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

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

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individuals. I will consider whether the discretionary personal privacy exemption in section 49(b) applies to this information.

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

[21] 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.

[22] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁶

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

[24] 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 this appeal, the information does not fit within these paragraphs of sections 21(1) or (4).

[25] 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.⁷

[26] 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).

[27] 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

⁶ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 49(b).

⁷ Order MO-2954.

necessary to prosecute the violation or to continue the investigation;

[28] The ministry provided both confidential and non-confidential representations on this issue. In its non-confidential representations, the ministry states that all of the personal information withheld under this exemption was compiled by the OPP, and relates to a law enforcement investigation.

Analysis/Findings

[29] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[30] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹⁰

[31] The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹¹ and violations of environmental laws or occupational health and safety laws.¹²

[32] 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. Therefore, the presumption in section 21(3)(b) applies to the personal information in the records.

[33] 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.¹³

[34] 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).¹⁴

[35] The ministry relies on the factor in section 21(2)(f). This section reads:

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

¹⁰ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹¹ Order MO-2147.

¹² Orders PO-1706 and PO-2716.

¹³ Order P-239.

¹⁴ Order P-99.

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;

[36] The ministry relies on Order P-1618, where the IPC found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f). It submits that this reasoning should be applied to the records, especially given that the affected person has not consented to the disclosure of their personal information.

[37] Taking into account all of the parties' representations, I agree with the ministry that the information at issue is highly sensitive information of the affected person and another individual. I find that the factor favouring privacy protection in section 21(2)(f) applies.

[38] 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, this information is exempt under section 49(b).

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

[39] 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.

[40] 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.

[41] 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.¹⁵

[42] 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

¹⁵ Order M-352.

the requester because the record contains his or her personal information.

[43] In this case, the institution relies on section 49(a) in conjunction with section 14(1)(l).

[44] Section 14(1)(l) states:

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

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

[45] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁶

[46] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁷ 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.¹⁸

[47] The ministry states that it has applied section 14(1)(l) to parts of the records on the basis that they contain police codes, which are widely used internally as part of OPP operations. The ministry maintains that it has withheld these codes in accordance with its usual practice, and in particular because the disclosure of these codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate. The ministry maintains that disclosure of internal police codes could jeopardize the security of law enforcement systems and the safety of the OPP staff associated with them. It states:

The records include confidential law enforcement information that members of the OPP use for documentation purposes, and for communicating with other OPP law enforcement personnel. By recording this information, members of the OPP know about individuals when they are called upon to investigate an incident. This is of critical importance so

¹⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁷ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

as to enable officers to be prepared when they are summoned to the scene of an incident, involving an individual with whom they have had prior interactions.

The ministry is concerned that members of the OPP will be less likely to record information and to communicate candidly with one another, if the records that they create are more likely to be disclosed in the manner contemplated by this appeal. The ministry submits that this outcome would have the subsequent result of facilitating crime or hampering its control.

Analysis/Findings

[48] The Occurrence Summary contains police codes, specifically codes that identify specific police zones and beats. Several orders, including Order PO-3013¹⁹ cited by the ministry, have found that these types of codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm which may result from their release. These orders have found that disclosure of police patrol zone information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, engaging the application of section 14(1)(l).²⁰

[49] Accordingly, subject to my review of the ministry's exercise of discretion the police codes contained in the Occurrence Summary are exempt under section 49(a), in conjunction with section 14(1)(l).

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

[50] 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, the Commissioner may determine whether the institution failed to do so.

[51] 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

¹⁹ See, for example, Orders M-393, M-757, M-781, MO-1428, MO-2795, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339.

²⁰ See for example, Order MO-2795 which found that section 8(1)(l) of the *Municipal Freedom of Information and Protection of Privacy Act*, the municipal equivalent to section 14(1)(l) of *FIPPA*, applied to this information.

- it fails to take into account relevant considerations.

[52] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[53] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

- 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.

[54] The ministry states that in exercising its discretion, it considered the public policy interest in safeguarding the privacy of the other individuals in the records. It states that

²¹ Order MO-1573.

²² Section 54(2).

²³ Orders P-344 and MO-1573.

disclosure of the records would jeopardize public confidence in the OPP, especially in light of the expectation that information the public provides to the police during the course of a law enforcement investigation will be kept confidential. The ministry further states that the OPP has acted in accordance with its usual practices, in severing law enforcement records containing affected third parties' personal information

Analysis/Findings

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

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

[57] 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) and section 49(a), read with section 14(1)(l), is exempt.

ORDER:

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

Original Signed by: _____
Diane Smith
Adjudicator

_____ July 28, 2017