

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3776

Appeal PA16-468

Ministry of Community Safety and Correctional Services

October 24, 2017

Summary: The appellant seeks access to records relating to an incident at his residential address. The ministry located three responsive records and granted the appellant partial access to them. The ministry claimed various exemptions to withhold portions of the records, including sections 49(a), read with section 19 (solicitor-client privilege), and 49(b) (personal privacy). The appellant appealed the ministry's decision. In this order, the adjudicator finds that the majority of the information that remains at issue consists of personal information relating to identifiable individuals other than the appellant, which the appellant does not pursue access to. The adjudicator also finds that section 49(a), read with section 19, does not apply to the records and orders the ministry to disclose the information subject to this exemption claim to the appellant.

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*), 19 and 49(a)

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for access to records relating to the "trespass, tree cutting and theft case" at his residential address. The appellant stated that he also seeks access to a specific attending Ontario Provincial Police (OPP) officer's notes regarding the site visit and meeting with the Coburg Crown Attorney's staff relating to the potential laying of charges. Finally, the appellant asked the ministry to return the statement and all supporting materials he submitted.

[2] The ministry located an Occurrence Summary, a General Occurrence Report and an OPP officer's notes. The ministry issued an access decision granting the appellant partial access to the records. The ministry advised the appellant that it withheld portions of the records under the discretionary exemptions in sections 49(a), read with sections 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report) and 19 (solicitor-client privilege), and 49(b) (personal privacy). The ministry raised the application of the factor weighing against disclosure in section 21(2)(f) (highly sensitive) and the presumption in section 21(3)(b) (investigation) in support of its section 49(b) claim. The ministry also advised the appellant that it withheld some information as not responsive to his request.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the appellant expressed concerns about certain inaccuracies in the records at issue. The mediator explained the process for submitting a request for correction under section 47(2). The mediator advised the appellant that if he is not satisfied with the ministry's decision in response to his correction request, he could appeal that decision to the IPC. I confirm that I did not address the appellant's concerns regarding the alleged inaccuracies in the records in my inquiry and will not in this order.

[5] The appellant confirmed he does not pursue access to any of the information marked as not responsive to his request. In addition, the appellant confirmed that he does not pursue access to any information withheld under section 49(a), read with section 14(1)(l). Accordingly, the information withheld as not responsive or under section 49(a), read with section 14(1)(l), is not at issue in this appeal.

[6] The appellant also advised the mediator that he does not pursue access to any personal information contained in the records. However, the appellant confirmed that he seeks access to the remainder of the information at issue, including references to any actions taken by the identified police officer, such as discussions or meetings, with respect to the occurrence in question without revealing the personal information of any identifiable individuals. The appellant confirmed that he seeks access to the dates of these actions.

[7] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process. I began my inquiry by inviting the ministry to submit representations on the issues to be decided. The ministry submitted representations. In its representations, the ministry stated that it no longer claims section 14(2)(a) to withhold portions of the records. As a result, section 14(2)(a) is no longer at issue in this appeal and I will not consider it further.

[8] I then invited the appellant to make representations in response to the ministry's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[9] In the discussion that follows, I find that the records contain personal

information within the meaning of section 2(1) of the *Act*. I am not required to decide whether the records are exempt under the personal privacy exemption because the appellant confirmed that he does not pursue access to personal information. Nonetheless, I find that they are exempt under section 49(b) of the *Act*. In addition, I find that section 49(a), read with section 19, does not apply to the records and order the ministry to disclose the information subject to their exemption claim to the appellant.

RECORDS:

[10] The records at issue consist of an Occurrence Summary (page 1), a General Occurrence Report (pages 2 to 5) and an OPP officer's notes (pages 6 to 17).

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 at section 49(a), read with section 19, apply to the information at issue?

DISCUSSION:

Preliminary Issue

[11] In his representations, the appellant takes issue with the appeals process and the issues under inquiry. The appellant asserts that he does not seek access to any personal information in the records. Rather, the appellant seeks a "determination of fact" that a meeting or discussion occurred between an OPP officer and other individuals. The appellant submits that this should be a matter of record. I confirm that the IPC does not have the jurisdiction to confirm the existence of a meeting or discussion between the OPP officer and other individuals. My jurisdiction in this matter is limited to whether the information at issue is exempt from disclosure.

[12] It appears that the appellant believes that the information at issue may help address his questions. Therefore, I will consider whether the information at issue is exempt from disclosure.

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

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain *personal information* and, if so, to whom it relates. The term *personal information* 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 where they relate to another individual,

(f) correspondence sent to an individual 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;

[14] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.³ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] OJ No. 4300 (C.A.).

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

something of a personal nature about the individual.⁴

[16] The ministry submits that the records contain personal information relating to three affected individuals. In particular, the ministry submits that the personal information belonging to the affected individuals includes their names, address, phone numbers and dates of birth. In addition, the ministry submits that the records contain the information these affected individuals provided about themselves to the OPP as part of the OPP's investigation. The ministry submits that the information relates to the affected individuals in a personal capacity, namely as subjects of a law enforcement investigation. In addition, the ministry submits that severing the names of these individuals would not serve to remove personally identifiable information from the records, given the fact that the appellant and affected individuals appear to know each other.

[17] The appellant did not make submissions on whether the records contain *personal information* with the meaning of section 2(1). However, the appellant confirmed that he does not seek access to "any personal or personnel information" in the records.

[18] I reviewed the records at issue and find that they contain personal information relating to the appellant and other identifiable individuals.

[19] Specifically, I find that the records contain the appellant's personal information, including

- his age and sex (paragraph (a));
- his address and telephone number (paragraph (d));
- his personal views or opinions (paragraph (e));
- views or opinions of other individuals relating to him (paragraph (g)); and
- his name where it appears with other personal information relating to him (paragraph (h)).

I note all the records at issue relate to an investigation conducted by the OPP in relation to a complaint filed by the appellant concerning an alleged theft on his property. As a result, I find that all the records relate to the appellant in a personal capacity.

[20] In addition, I find that the records contain the personal information of three other individuals. The information contained in the records relating to these individuals include their dates of birth and sex (paragraph (a)), their addresses and telephone numbers (paragraph (d)), their personal views or opinions (paragraph (e)) and their names where they appear with other personal information relating to them (paragraph (h)). I find that the information relating to these three individuals relates to them in a

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

personal capacity and not in a professional capacity.

[21] Therefore, I find that the records contain the personal information relating to the appellant and three other individuals as that term is defined in section 2(1) of the *Act*. In addition, I find that the personal information at issue in this appeal either relates solely to three identified individuals or is inextricably intertwined with that of the appellant and cannot be reasonably severed from the appellant's personal information. As such, it is not possible to sever the appellant's personal information, without revealing other individuals' personal information or resulting in disconnected snippets of information being revealed.⁵

[22] I note the appellant claims that he does not seek the *personal information* relating to other individuals. However, during mediation, the appellant confirmed his interest in the information remaining at issue, specifically references to any actions taken by the identified police officer, such as discussions or meetings, with respect to the occurrence in question without revealing the personal information of any identifiable individuals. The appellant also confirmed that he seeks access to the dates of these actions.

[23] It appears that the appellant takes the position that *personal information* is limited to the names and contact information of an individual. However, this is not the case. As discussed above, *personal information* includes a myriad of types of information, including the personal views or opinions of that individual and the view or opinions regarding that individual made by another. Based on my review of the information withheld under the personal privacy exemption in section 49(b), I find that it consists of *personal information* that relates to three identifiable individuals other than the appellant. Furthermore, I note that it is not possible to sever these individuals' names and contact information from the records to de-identify them. It is likely that the appellant is aware of these individual's identities given his involvement in the matter. As such, these individuals would be identifiable if the personal information at issue, with the exception of their names and contact information, is disclosed to the appellant.

[24] The appellant confirmed multiple times that he does not pursue access to any personal information. As such, the personal information at issue in the records is no longer at issue in this appeal and I am not required to consider whether that information is exempt under the personal privacy exemption in section 49(b) of the *Act*. However, the OPP collected the personal information at issue and prepared the records as part of an investigation in response to the appellant's complaint. As such, the presumption in section 21(3)(b) of the *Act* would apply to that personal information due to the nature of the records. The appellant did not provide any representations on the application of section 49(b) or on the ministry's exercise of discretion. Therefore, given the nature of the records and in the absence of any representations from the appellant on the issue, the personal information at issue in the records is exempt from disclosure under section 49(b).

⁵ See Orders PO-1663 and *Ontario (Minister of Finance v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[25] I will now consider whether section 49(a), read with section 19, applies to portions of the records. I am considering whether the records qualify for exemption under Part III of the *Act* because they contain the appellant's personal information.

Issue B: Does the discretionary exemption at section 49(a), read with section 19, apply to the records?

[26] 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. 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.

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.⁶

[27] Where it denies access under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether it should release the record to the requester because the record contains his personal information.

[28] In this case, the ministry relies on section 49(a) in conjunction with section 19 to withhold portions of pages 14 and 15 of the records. Section 19 of the *Act* reads as follows:

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

(c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[29] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The ministry must establish that one or the other (or both) branches apply.

[30] The ministry claims that portions of pages 14 and 15 are subject to solicitor-

⁶ Order M-352.

client communication privilege. The ministry submits that these pages contain information that reflect communications between a Crown Attorney and an OPP officer concerning the OPP investigation. The ministry submits that solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice.

[31] The ministry submits that it applied section 49(a), read with section 19, to pages 14 and 15 because the disclosure of the records would reveal that an OPP officer chose to consult with a Crown Attorney in respect of their investigation.⁷ The ministry submits that solicitor-client privilege was not waived. The ministry concedes that a portion of page 12 relating to the communications between solicitor and client was disclosed to the appellant. However, the ministry submits that the information at issue on pages 14 and 15 was not disclosed and, as such, the privilege continues to apply.

[32] The appellant did not address the solicitor-client privilege exemption in his representations.

[33] In order for me to find that solicitor-client privilege applies to the portions at issue on pages 14 and 15, I must be satisfied that the records contain written communications of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.⁸

[34] Pages 14 and 15 of the records consist of an OPP officer's notes. I agree with the ministry that the portions at issue relate to communications between Crown counsel and the OPP. However, as the ministry states, the privilege protects the *direct* communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice.⁹ The information at issue in pages 14 and 15 do not contain these direct communications. Rather, the notes subject to the ministry's section 19 claim are administrative in nature and relate to a prospective meeting between Crown counsel and the OPP officer. The notes do not contain any specific details regarding the legal advice sought, formulated or received. Moreover, the notes do not contain any information regarding the communications that took place between the Crown counsel and the OPP officer.

[35] Further, the ministry disclosed the portion relating to the communications between Crown counsel and the OPP on page 12 to the appellant. While this fact is not determinative of whether the information at issue on pages 14 or 15 is exempt, the ministry's concern that the disclosure would reveal the fact that an OPP officer chose to consult with a Crown Attorney regarding the investigation is no longer valid. In any case, given the nature of the information withheld from pages 14 and 15, I find that it is not subject to section 49(a), read with section 19, of the *Act*.

⁷ I note that the ministry consented to sharing its representations, which include this statement, with the appellant.

⁸ *Decôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

⁹ *Ibid.*

[36] In conclusion, I find that section 49(a), read with section 19, does not apply to the records. I will order the ministry to disclose these portions to the appellant.

ORDER:

I order the ministry to disclose the information withheld under section 49(a), read with section 19, to the appellant by **November 22, 2017**. I find that this information is not exempt from disclosure under that exemption.

Original signed by _____

Justine Wai
Adjudicator

October 24, 2017