Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3809

Appeal PA17-11

Ministry of Community Safety and Correctional Services

January 23, 2018

Summary: An individual sought access to OPP records related to incidents involving him. The ministry located responsive records and granted partial access to them. The ministry relied on sections 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(l) (law enforcement) and 14(2)(a) (law enforcement report) as well as section 49(b) (personal information) to deny access to the portions it withheld. The ministry also took the position that certain information in the records was not responsive to the request. In the course of adjudication, the possible application of sections 14(1)(e) (endanger life or safety) and/or 20 (danger to safety or health), in conjunction with section 49(a), was raised by the adjudicator as an issue in the appeal. In this order, the adjudicator finds that, except for a small amount of information, the responsive withheld information is exempt under sections 49(a), in conjunction with sections 14(1)(e), 14(l)(l) and 20, as well as 49(b). The adjudicator orders that the non-exempt information be disclosed 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"), 2(3), 10(2), 14(1)(e), 14(1)(l), 20, 21(2)(a), 21(2)(d), 21(3)(b), 24, 49(a) and 49(b).

Orders Considered: Orders MO-2114, P-1014, P-1618, PO-1854 and PO-3228.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received the following request under the Freedom of Information and Protection of

Privacy Act (the Act or FIPPA):

> I would like records and Police (OPP) disclosure of all materials related to the following: 1) assault with a weapon, 2) assault 3) threatening 4) theft over $5000 5) breach of recognizance, occurring approximately [specified date range]. I further would like records and Police disclosure for a 15-month conviction [specified date] for violating a restraining order. The restraining order(s) have never been served on me nor are they included in the family court file in [specified location].

[2] The ministry located responsive records and granted partial access to them. The ministry relied on sections 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(l) (law enforcement) and 14(2)(a) (law enforcement report) as well as section 49(b) (personal information) to deny access to the portion it withheld. The ministry also took the position that certain information in the records was not responsive to the request.

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

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. In the interim, the ministry issued a supplementary decision disclosing additional information to the appellant. The ministry maintained its position that the remaining information should not be disclosed.

[5] I commenced my inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. Based on my review of the records and the circumstances in which the records were created, I decided to raise the possible application of sections 14(1)(e) (endanger life or safety) and/or 20 (danger to safety or health) of the *Act*. The ministry provided responding representations and asked that portions be withheld due to confidentiality concerns. In its representations, the ministry advised that it would not be relying on section 14(2)(a) of the *Act* to withhold information. As a result, the application of section 14(2)(a), in conjunction with section 49(a), is no longer at issue in the appeal. I then sent a Notice of Inquiry along with a copy of the ministry's non-confidential representations to the appellant. The appellant provided representations in response.

[6] The appellant's representations are wide-ranging and describe, more generally, the sequence of events that led to the creation of some of the records at issue in this appeal from his own perspective as well as his concerns regarding the conduct of the Ontario Provincial Police (OPP) and other individuals. His representations were accompanied by attachments which included a court transcript and reports. Some of his representations address the issues set out in the Notice of Inquiry, portions of which I have set out in this order.

[7] In this order, I uphold, for the most part, the decision of the ministry. I order that a small amount of non-exempt information be disclosed to the appellant.

RECORDS:

[8] The records at issue in the appeal include general occurrence reports, occurrence summary reports, supplementary occurrence reports, arrest reports, victim's reports and witness statements.

ISSUES:

A. Do the records contain "personal information" and, if so, to whom does it relate?

B. Does the discretionary exemption at section 49(a), in conjunction with sections 14(1)(e) and/or 14(l)(l) and/or 20, apply to certain information in the records?

C. Does the discretionary exemption at section 49(b) apply to the information for which it is claimed?

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

DISCUSSION:

Preliminary Matter

Responsiveness

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

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

> assistance in reformulating the request so as to comply with subsection (1).

[10] To be considered responsive to the request, information must "reasonably relate" to the request.[1]

[11] The ministry withheld brief portions of the records as "non-responsive," explaining in its non-confidential representations that:

> The appellant advises that he is seeking access to records that we claimed are non-responsive. The ministry adopted a liberal interpretation of the request. However, we have withheld records that we do not believe reasonably relate to the request. The records that we claim are non-responsive contain information which reveal when the OPP retrieved and printed the records from applicable databases for the purpose of this appeal. They therefore do not form part of the actual record. It is the ministry's long standing practice not to release these non-responsive records. We rely upon past orders, including Order PO-1854, which has upheld our practice in this regard.

[12] The appellant challenged this reason for not disclosing information to him.

[13] Past orders of this office have upheld the severance of strings of retrieval information or computer code that appear in records as non-responsive because the information does not reasonably relate to the real subject matter of the appellant's interest.[2] In this appeal, I am satisfied that the withheld information is, in fact, not responsive to the appellant's request. Therefore, I find that the information has been properly withheld as non-responsive.

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

[14] 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,

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[1] See, for example, Orders P-880 and PO-2661.
[2] See, for example, Orders MO-2877-I and PO-1854.

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[3]

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

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
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> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[17] To qualify as personal information, the information must be about the individual

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[3] Order 11.

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.[4] 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.[5] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

The ministry's representations

[18] According to the ministry, the records contain the personal information of the appellant as well as numerous identifiable individuals other than the appellant, including their names and other identifying information about them. The ministry submits that:

> … the disclosure of personal information would reveal the identities of the affected third party individuals, because their names are listed in connection with other identifying information about them. We further submit that as the appellant was directly involved in the incidents which led to the creation of the records, disclosing any part of the records, even if the names have been severed, could be expected to identify affected third party individuals.
>
> The ministry notes that there are a number of records, which identify individuals […]. We submit that business related information about them still qualifies as their personal information because they are identified as witnesses or as potential victims and they are otherwise involved in a law enforcement investigation. The ministry submits that this information crosses the threshold from professional to personal information, because it reveals something inherently personal about them, namely their involvement in a law enforcement investigation, involving the appellant.

The appellant's representations

[19] With respect to whether the records contain personal information, the appellant submits that, "[t]he records are about me, my business, community reputation and psychological status."

Analysis and findings

[20] Based on my review of the records, I find that they contain the personal

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information of the appellant as well as that of other identifiable individuals that falls within the scope of the definition of personal information set out at section 2(1) of the *Act*.

[21] However, I also find that some information in the records does not constitute "personal information" under the definition in section 2(1) because it falls within the scope of section 2(3) of the *Act.* Section 2(3) provides that the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" does not constitute personal information for the purposes of the *Act*.

[22] While it is possible for information provided by individuals in a professional or business context to cross the threshold from professional to personal information, this is not, for the most part, one of those situations. There are several categories of information in this appeal that I find fit within the parameters of section 2(3), including the identities of employees of the police, and police and correctional officers involved in the occurrences and their contact information.

[23] That said, I also find that certain information about identifiable individuals which relates to these individuals as they were carrying out professional duties or business activities, reveals something of a personal nature about them due to the specific context in which it appears. Therefore, I find that that information qualifies as their personal information.

[24] Having found that the records contain the mixed personal information of the appellant and other identifiable individuals, I will consider the appellant's right to access the remaining withheld information under sections 49(a) and 49(b) of the *Act*.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with sections 14(1)(e) and/or (l) and/or 20 apply to certain information in the records?

[25] 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.[7]

[26] In this case, I must consider whether section 49(a), in conjunction with sections 14(1)(e) and/or 14(1)(l) and/or 20, applies to certain information at issue in this appeal.

[27] Sections 14(1)(e) and 14(1)(l) read:

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

[7] Order M-352.

> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[28] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[29] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) of the *Act.* The term "law enforcement" has been found to apply to an investigation into a possible violation of the *Criminal Code*.[9] Accordingly, I am satisfied that the records at issue in this appeal were created in relation to law enforcement matters.

[30] 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.[10] With respect to both sections 14(1) and 20, 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. [11] Regarding the application of section 20, an individual's subjective fear, while relevant, may not be enough to justify the exemption.[12]

The ministry's representations

[31] In its non-confidential representations in support of the application of section 14(1) the ministry states that it was "especially concerned by the following potential outcomes of disclosure":

> The appellant has a lengthy history of violent behaviour towards others.

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[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[9] Orders M-202 and PO-2085.
[10] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[12] Order PO-2003.

> The records contain sensitive personal information provided by members of the public. [The ministry is] concerned that disclosure of the records could result in members of the public hesitating to assist the OPP with their investigations. The public would be concerned that any personal information they provided to the OPP would be subject to disclosure in the manner contemplated by this appeal, an outcome that we submit would have a chilling effect on the ability of the OPP to conduct investigations ….

[32] The ministry submits in particular that section 14(1)(e) applies to "any records which contain personal information which might identify any of the affected third party individuals".

[33] The ministry submitted that it withheld operational codes under section 14(1)(l) in accordance with its usual practices, and in particular because the disclosure of the operational codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate.

[34] The ministry further submits in its non-confidential representations that section 14(1)(l) was applied to withhold information other than the operational codes because of the following concerns:

> … the disclosure of personal information to the appellant belonging to people who he victimized, as well as witnesses, would cause members of the public to cease to cooperate with police investigations. The OPP questions why anyone would want to provide evidence as part of a law enforcement investigation knowing that such information would just end up being disclosed to the person who they feared; …
>
> …. the ministry has applied section 14(1)(l) to the records out of concern that disclosure of the records will discourage the meticulous and candid record-keeping that is required to conduct law enforcement investigations, thereby hampering the control of crime. The ministry submits that if law enforcement officers knew that if records they created pursuant to an investigation were subject to disclosure in the manner contemplated by this appeal, they might be less willing to create them in the first place out of concern that they would be subsequently disclosed. The ministry maintains such an outcome would make law enforcement investigations much more difficult to conduct.

[35] The ministry further submits that there is a reasonable basis for believing that endangerment will result from disclosure of the withheld information. The ministry's confidential representations are accompanied by information about the surrounding circumstances, as well as supporting documentation.

[36] In its non-confidential submissions on the application of section 20, the ministry

submitted that:

> In Order PO-3228, the ministry's decision to claim section 20 was upheld (at paragraph 43) on the basis that the ministry's "representations clearly and directly link specific behaviour of the appellant to the information at issue and a corresponding, reasonable expectation of harm with its disclosure". The ministry submits that the representations at issue have met this threshold, and therefore are sufficient to support our decision to exempt records on the basis of section 20.

The appellant's representations

[37] The appellant made no specific representations regarding the withheld operational codes but generally submitted that:

> … The alleged third party individuals along with the OPP have not proven that the individuals of concern would become victims of any nature or would be in danger.
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> …
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> … The parties involved have used speculative fear and risk of harm as a manipulative measure to engage the OPP to gain an unfair advantage without regard to the law or justice and to circumvent their lack of proof to label me as a criminal, absent of credibility. … I committed no unlawful act and have never imposed any threat to the alleged victims or police. … I have never offended, reoffended or am I a criminal as alleged by the OPP and disclosure of the records does not pose any threat to anyone other than those individuals including the OPP who do not want to deal with the truth in this matter and made responsible for their wrong doing and misconduct.

[38] The appellant also submits:

> … when did I ever have any contact with anyone in their office or initiate threats outside of the jail system. Any discussions that I entered into took place in provincial jails, which I was illegally held in without the privilege of bail, probation, advocacy or any other type of release or professional interaction. I had no one acting on my behalf and taking into consideration my mental health status I will not take any personal responsibility given the level of frustration, anxiety and depression for anything that I said during my time of incarceration. …

Analysis and findings

Sections 14(1)(e) and 20

[39] Past orders relating to the application of sections 14(1)(e) and 20 have emphasized the need to consider both the type of information at issue and the behaviour of the individual who is requesting the information.[13]

[40] In Order PO-1940,[14] Adjudicator Laurel Cropley wrote:

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Minister of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

[41] In the current appeal, based on the materials before me, as well as the context and the nature of the relationships set out in the records, I conclude that with respect to certain specific information in the records there is a reasonable basis for a finding that disclosing this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person and/or seriously threaten the safety or health of an individual. This is information that, if disclosed, would provide information that could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person and/or seriously threaten the safety or health of an individual. I find that the evidentiary standard set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* for establishing the application of sections 14(1)(e) and/or 20 has been met with respect to this information.

[42] Accordingly, I find that this information qualifies for exemption under section 49(a) of the *Act*, in conjunction with sections 14(1)(e) and/or 20.

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[13] For example, see Order PO-1939.
[14] A similar test is often applied when considering the section 14(1)(e) and 20 exemptions.

[43] I will now address the other information at issue.

Section 14(1)(l)

[44] A long line of orders[15] has found that police operational codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release. I make the same finding here.

[45] I do not agree, however, with the ministry's assertion that releasing the balance of the withheld information would facilitate the commission of an unlawful act or hamper the control of crime in the manner contemplated by section 14(1)(l) of the *Act*. The ministry's position casts the net far too widely and in my view the ministry fails to provide sufficient evidence to support its bald assertions that disclosing the other information that the ministry asserts is subject to section 14(1)(l), which is the type of information typically found in police records, could reasonably be expected to result in the section 14(1)(l) harms alleged.

[46] Accordingly, I find that only the police operational codes (including the "ten" codes) qualify for exemption under section 49(a) in conjunction with section 14(1)(l) of the *Act*.

[47] I will address the balance of the information at issue below.

Issue D: Does the discretionary exemption at section 49(b) apply to the information for which it is claimed?

[48] 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.

[49] 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 21(3) and balance the interests of the parties.[16] 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). Section 21 of the *Act* provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the paragraphs of sections 21(1) or 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

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[15] For example, Orders M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, PO-2339 and PO-2409.
[16] Order MO-2954.

[50] The ministry's representations in this appeal raise the possible application of the presumption in section 21(3)(b), the factor favouring non-disclosure at section 21(2)(f) and an unlisted factor favouring non-disclosure, that individuals in the records are identified as being victims of crime. Although not specifically cited by the appellant, the tone and content of the appellant's representations appear to raise the possible application of the factors favouring disclosure at sections 21(2)(a) and 21(2)(d) of the *Act*.

[51] Sections 21(2)(a), 21(2)(d), 21(2)(f) and 21(3)(b) of the *Act* read:

> 21 (2) 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
>
> (3) 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.

The ministry's representations

[52] The ministry submits that it relied on the presumption at section 21(3)(b) to withhold most of the information remaining at issue because the records were created by the OPP, which is a law enforcement agency, they were compiled and are identifiable as part of various OPP law enforcement investigations and they describe acts which led to *Criminal Code* charges being laid.

[53] In addition, relying on Order P-1618, the ministry further submits that the personal information in the records is "highly sensitive" under section 21(2)(f) and in its non-confidential representations states that the disclosure of the responsive records would cause significant personal distress to identifiable individuals (other than the appellant). The ministry submits, amongst other things, that:

> … affected third party individuals implicitly expect that their personal information will not be disclosed, given the context in which it was created, and given the violent behaviour exhibited by the appellant. The ministry submits that when individuals provide statements to, and otherwise cooperate with the OPP, they do not expect that the personal information they provide will subsequently be disclosed in the manner contemplated by this appeal.

[54] The ministry also suggests an unlisted factor favouring non-disclosure, that a number of individuals identified in the records can be characterized as victims of crime. It submits that the disclosure of these individuals' personal information would be fundamentally inconsistent with the first principle of the *Victims' Bill of Rights, 1995*[17] which states that "[v]ictims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials". The ministry also submits that:

> We note additionally that the preamble to the *Victims' Bill of Rights, 1995*, states that victims of crime should "be treated with compassion and fairness" and in a manner that does not increase their suffering. In the circumstances, we submit that it is neither compassionate nor fair to order the disclosure of victims' personal information to the appellant, who the records allege caused them to fear for their safety in the first place.

The appellant's representations

[55] In his representations, the appellant takes issue with characterizing the individuals whose personal information appears in the records as victims. He takes the position that section 21(3)(b) does not apply because certain individuals, with the assistance of the OPP, used "the system to their advantage" and engaged in a "cover up".

[56] The appellant also asserts that the ministry is improperly relying on section 21(2)(f) because "the records were created illegally and those responsible for doing so don't want to be sued and held accountable for taking this illegal action, including the OPP".

[57] The appellant submits that:

> The information illegally put forward by them in a deliberate act of revenge and anger cannot be supported. This information is necessary to prove my innocence and initiate civil action to sue these parties for their libellous conduct.

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[17] Section 2(1)1 of the the *Victims' Bill of Rights, 1995*, S.O, 1995, c.6.

[58] He submits that in order for him to obtain justice and clear his name as well as receive financial compensation for the harm committed to him, the information must be disclosed.

[59] With respect to the unlisted factor favouring non-disclosure, that individuals in the records are identified as victims of crime, the appellant argues that it should be applied to him, and further that "[t]his matter involves money, assets and ownership of property and really has nothing to do with the criminal law or the OPP."

Analysis and findings

Information relating to the appellant only

[60] I found above that certain information does not qualify for exemption under section 49(a). Of that information, there are discrete portions that appear on pages 64 and 67 of the records that relate to the appellant only. In my view, disclosing this information would not be an unjustified invasion of another individual's personal privacy and thereby would not qualify for exemption under section 49(b) of the *Act*. Accordingly, I will order that this information be disclosed to the appellant.

[61] I have highlighted this information in green on a copy of pages 64 and 67 of the records that I have provided to the ministry along with this order.

[62] I will now address the balance of the information at issue.

Factor favouring disclosure: section 21(2)(a) (public scrutiny)

[63] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[18] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a).[19]

[64] In Order P-1014, Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, Adjudicator Higgins concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a

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[18] Order P-1134.
[19] Order P-256.

private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Adjudicator Higgins found that the factor at section 21(2)(a) did not apply.

[65] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature to satisfy him that the conduct of the OPP in relation to him and its investigation of the matters involving him were appropriate. As in Order P-1014, this is a private interest, and I therefore find that section 21(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 21(2)(a) does not apply to the information in the records that remains at issue.

Factor favouring disclosure: 21(2)(d) (fair determination of rights)

[66] For section 21(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[20]

[67] Although the appellant alludes in his representations to being involved in "estate litigation" and to a possible defamation, libel and/or slander claim, he has not provided anything to indicate that any proceedings have been commenced. Furthermore, the appellant asserts that he is in need of the information in the records generally, but has not provided a great deal of evidence about exactly how the withheld information in the records that he seeks will have some bearing on or is significant to the determination of any estate or defamation proceeding that may be commenced. Nor has he fully explained how the withheld personal information is *required* in order to prepare for any proceeding or to ensure an impartial hearing.

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20 Order PO-1764; see also Order P-312, upheld on judicial review in Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

[68] In my view, considering all the circumstances, I find that the factor in section 21(2)(d) does not apply to the personal information in the records that remains at issue.

Factor favouring non-disclosure: Section 21(2)(f) (highly sensitive)

[69] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[21] Based on my review of the records at issue and the representations, I find that due to its subject matter and the context in which it was gathered, the personal information remaining at issue is inherently highly sensitive and, therefore, that the consideration at section 21(2)(f) is relevant to the determination of whether or not it should be disclosed. In my view, this factor applies in this case and is a factor weighing in favour of a finding that disclosure would constitute an unjustified invasion of personal privacy when balancing the appellant's access rights against the privacy interests of other identifiable individuals.

Unlisted Factor Favouring non-disclosure: Victims Bill of Rights

[70] The ministry relied on provisions of the *Victims' Bill of Rights, 1995* as an unlisted factor favouring non-disclosure.

[71] In light of my finding above that the factor at section 21(2)(f) applies and/or my finding below that the presumption at section 21(3)(b) applies, and no factors favouring disclosure have been established, it is not necessary for me to also consider whether this unlisted factor favouring non-disclosure also applies.

Presumed unjustified invasion of personal privacy: section 21(3)(b) (investigation into violation of law)

[72] 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.[22] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[23]

[73] The ministry submits that the presumption against disclosure in section 21(3)(b) applies to the remaining information at issue because it was gathered as part of investigations into possible violations of law, namely the *Criminal Code of Canada*.

[74] I accept the ministry's position. Based on the content of the records, it is clear that the remaining undisclosed personal information was compiled by the OPP and is identifiable as part of their investigations of possible violations of the law. I find that

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[21] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[22] Orders P-242 and MO-2235.
[23] Orders MO-2213 and PO-1849.

this personal information fits within the ambit of the presumption against disclosure in section 21(3)(b).

Weighing the factor and presumption and balancing the interests of the parties

[75] As set out above, in determining whether the disclosure of the remaining undisclosed 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.

[76] I have found that the presumption at section 21(3)(b) and the factor at section 21(2)(f) favour non-disclosure and that there are no factors that favour disclosure. Considering and weighing the factor and presumption and balancing the interests of the parties, I therefore find that disclosure of the remaining personal information at issue would be an unjustified invasion of personal privacy under section 49(b).

Absurd result

[77] 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.[24] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[25]

[78] The appellant submits that what has happened to him as reflected in the records is "absurd". He also forwarded correspondence to this office with an attached letter from the Ministry of Correctional Services to demonstrate that he is aware of the identity of individuals whose names have been withheld.

Analysis and finding

[79] In Order MO-2114, Adjudicator Cropley addressed a situation regarding information that an appellant may already be aware of. She wrote:

> With respect to the information that the appellant may already be aware of, that information is also about identifiable individuals other than the appellant. In Order MO-1524-I, I made the following comments regarding a similar situation, which I find to be equally applicable to the case before me:

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[24] Orders M-444 and MO-1323.
[25] Orders MO-1323, PO-2622 and PO-2642.

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others…I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

[80] The records contain the personal information of identifiable individuals other than the appellant relating to matters involving them. Due to the nature of the information and the relationship between the appellant and the affected parties, I find in these circumstances that the sensitivity of the remaining undisclosed personal information of other identifiable individuals, which was collected in the course of investigations into possible violations of law, constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this remaining personal information at issue would be inconsistent with the purpose of the section 49(b) exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

Conclusion

[81] I have found that disclosure of the remaining withheld personal information would be an unjustified invasion of personal privacy under section 49(b) and the absurd result does not apply.

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

[82] Sections 49(a) and 49(b) are discretionary exemptions. In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute their own discretion for that of the institution.[26]

[83] The ministry submits it has exercised its discretion fairly, and in its non-confidential representations set out the factors it considered in exercising its discretion.

[84] The appellant asserts that the ministry did not consider relevant factors in the exercise of its discretion. He submits:

> … This process has been fundamentally flawed from the very beginning. It is time for justice, fairness and democracy to be the governing factors behind who, what and when this evidence must be turned over. …
>
> …
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> The IPC must act in an accountable and legal manner with their involvement in this matter. The indiscretion to call me a criminal, liar and not a credible witness, etc. are unconscionable. I am asking for fairness for everyone. I am requesting my own information. I have not only a sympathetic and compelling need for this information, I have the right to my inheritance. …
>
> …
>
> Disclosing the evidence would only support and help the OPP's reputation in our community and go a long way in dispelling the bad faith and improper purposes they are guilty of using and also take into account all relevant and fair factors for everyone. …

Analysis and finding

[85] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[27] It is

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[26] Section 54(2); see also Order MO-1573.
[27] Order MO-1287-I.

my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[28]

[86] In my view the appellant has failed to provide sufficient evidence in support of his assertion that the "process has been fundamentally flawed from the very beginning", that the OPP's reputation in the community needs help, or that the OPP acted in bad faith or used "improper purposes". I find that there is insufficient evidence before me to establish that the ministry exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations or that the ministry was withholding the information for a collateral or improper purpose.

[87] I am satisfied that the ministry was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information to him. I am satisfied that in proceeding as it did, and based on all the circumstances, the ministry considered why the appellant sought access to the information, and whether the appellant had a sympathetic or compelling need to receive the information. In addition, the ministry considered whether the appellant was an individual or an organization and also provided the appellant with significant portions of the records. The information was relatively recent, so, in my view, the age of the information was not a relevant factor. In all the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion with respect to the information that I have not ordered to be disclosed to the appellant as a result of this order.

Severance

[88] In this appeal the appellant already received a great deal of information before his appeal was commenced, although he did not receive information from witness statements, or the names of certain persons involved in the matters that resulted in the creation of the records. In making my findings in this appeal, I have considered the nature of the information at issue and the circumstances in which it was generated. I have also considered section 10(2) of the *Act*, which requires a head to disclose as much of a record as can reasonably be severed without disclosing the exempt information. The key question raised by section 10(2) is one of reasonableness. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[29] Considering the above, and in light of my findings in this appeal, with respect to the information that I have not ordered to be disclosed, I find that the

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[28] Order P-58.
[29] Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

ministry's severances were appropriate and the ministry fulfilled its obligations under the *Act*.

ORDER:

1. I order the ministry to disclose to the appellant the additional information that I have highlighted in green on a copy of pages 64 and 67 of the records that I have provided to the ministry along with a copy of this order by sending it to him by **March 1, 2018**, but not before **February 23, 2018**.

2. In order to ensure compliance with paragraph 1, I reserve the right to require the ministry to send me a copy of the pages of records as disclosed to the appellant.

Original Signed by: January 23, 2018

Steven Faughnan
Adjudicator