Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3848

Appeal PA16-247

Ministry of Community Safety and Correctional Services

May 30, 2018

Summary: The appellant seeks access to all records relating to her. The ministry located responsive records and granted the appellant partial access to them. Relevant to this order, the ministry claimed that portions of the records were exempt under section 49(a), read with sections 14(1)(c) (reveal investigative techniques and procedures) and (l) (facilitate commission of an unlawful act), and section 49(b) (personal privacy). The ministry also withheld portions of the records as not responsive to the original request. The appellant appealed the ministry's decision and claimed that additional responsive records ought to exist. The adjudicator upholds the ministry's decision, in part. The adjudicator orders the ministry to disclose to the appellant her personal information and that of an affected party who provided their consent. The adjudicator upholds the ministry's application of section 49(b) to the remaining personal information at issue. The adjudicator upholds the ministry's application of section 49(a), read with sections 14(1)(c) and (l), in part. The adjudicator orders the ministry to disclose some information that she finds is not exempt under section 49(a), read with section 14(1)(l). Finally, the adjudicator upholds the ministry's search as reasonable.

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*), 14(1)(c) and (l), 21(1), 21(2)(f), 21(3)(b), 24, 49(a) and (b).

Orders and Investigation Reports Considered: P-1618, PO-2955, PO-3013

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 the following:

> All records – anything with my name attached. Any emails, recordings, video, any phone calls any type of communication (e.g. some OPP [Ontario Provincial Police] were contacting mental health and other organizations). They were also contacting hospitals etc. – search is for all OPP detachments. Examples of email – in one instance in 2010, [a named OPP officer] sent email to [a second OPP officer]. It was sent [an identified OPP detachment]. Also info held at OPP Victim Services.

[2] After locating responsive records, the ministry issued an access decision granting the appellant partial access to them. The ministry advised the appellant it withheld portions of the records under the discretionary exemption in section 49(a), read with sections 14(1)(c) (reveal investigative techniques and procedures), (d) (confidential source of information), (l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement report). In addition, the ministry advised it withheld portions of the records under the discretionary personal privacy exemption in section 49(b). The ministry claimed the application of the presumption in section 21(3)(b) (compiled as part of an investigation) and the factor in section 21(2)(f) (highly sensitive) to support its section 49(b) claim. Finally, the ministry withheld portions of the records as not responsive to the appellant's request.

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

[4] During mediation, the mediator attempted to notify a number of affected parties to obtain their consent to the ministry's release of their personal information. One affected party consented to the disclosure of their personal information. Accordingly, the ministry issued a supplementary decision letter to the appellant granting her additional access to the records.

[5] The appellant raised a concern that some records were missing, incomplete or were modified by the ministry, thereby raising the issue of whether the ministry's search for responsive records was reasonable. The ministry provided the appellant with some additional details regarding its searches in the supplementary decision letter. The appellant was not satisfied with the ministry's response and reasonable search remains at issue in this appeal.

[6] The appellant confirmed her interest in pursuing access to the information the ministry withheld from disclosure.

[7] Mediation did not resolve the appeal and the appeal moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues under appeal. I began my inquiry by inviting the ministry to submit representations in response to a Notice of Inquiry. The ministry submitted representations. The ministry also issued a supplemental decision addressing additional responsive records. The ministry advises that these records were not identified as a result of further searches. Rather, the ministry submits it located these records in its original search, but it

inadvertently withheld them in full due to an administrative oversight.

[8] I invited the appellant to make submissions in response to the ministry's representations, which I shared in accordance with Practice Direction Number 7 and the IPC's *Code of Procedure*. The appellant did not make submissions.

[9] In the discussion that follows, I uphold the ministry's decision, in part. I order the ministry to disclose to the appellant the personal information that relates solely to her and an affected party that provided their consent. I uphold the ministry's application of section 49(b) to the personal information that remains at issue. I uphold the ministry's application of section 49(a), read with sections 14(1)(c) and (l), in part. I order the ministry to disclose some information that I find to be not exempt under section 49(a), read with section 14(1)(l). Finally, I uphold the ministry's search as reasonable.

RECORDS:

[10] The records consist of 464 pages of various law enforcement records, including OPP Occurrence Summary Reports and Officer's Notes.

PRELIMINARY ISSUE:

Responsiveness

[11] During mediation, the appellant advised the mediator she pursues access to all the records withheld from disclosure. The ministry withheld some information from disclosure under the law enforcement and personal privacy exemptions. The ministry also withheld some information as non-responsive to the request. The Mediator's Report did not identify responsiveness as an issue to be resolved in the inquiry and neither the ministry or appellant raised concerns with the Mediator's Report.

[12] For the sake of completeness, I reviewed the information the ministry identified as non-responsive and confirm that this information does not *reasonably relate* to the appellant's original request[1]. The portions the ministry withheld as non-responsive concern other investigations or incidents unrelated to the appellant. Therefore, I find that the information the ministry identified as non-responsive is not responsive to the appellant's request and is not within the scope of this appeal.

ISSUES:

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

[1] Orders P-880 and PO-2661.

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

C. Does the discretionary exemption at section 49(a), read with sections 14(1)(c) or (l), apply to the information at issue?

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

E. Did the ministry conduct a reasonable search for records?

DISCUSSION:

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 that personal information 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 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 or another individual about the individual, and
>
> (h) the individual's name if 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;

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] However, this professional or business information may still qualify as personal information if it reveals something of a personal nature about the individual.[4]

[15] The ministry submits that the majority of the records contain *personal information* within the meaning of section 2(1) of the *Act*. The ministry submits that the personal information includes: identifying information such as names, address and phone numbers of identifiable individuals; information that would reveal communications between the police and identifiable individuals; and the opinions or views provided by or about identifiable individuals. The ministry submits that these individuals would be identifiable even if their names are not disclosed.

[16] The ministry submits there is information contained in the records relating to individuals in their professional capacity. However, the ministry submits that the information qualifies as these individuals' personal information because it identifies them in their role as witnesses or subjects of an OPP investigation. In other words, the ministry submits that the information relating to these individuals would reveal something inherently personal about them.

[17] The appellant did not make submissions in response to the Notice of Inquiry.

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

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

- Her age, sex, marital or family status (paragraph (a) of the definition of *personal information*),

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[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.

- Information relating to her medical, psychiatric, psychological and employment history (paragraph (b)),
- Her address and telephone number (paragraph (d)),
- Her personal opinions or views (paragraph (e)),
- The views or opinions of other individuals about her (paragraph (g)), and
- Her name where it appears with other personal information relating to her, or where the disclosure of the name would reveal other personal information about her (paragraph (h)).

[20] In addition, I find that the records contain personal information relating to other identifiable individuals (the affected parties), including the affected party that provided their consent. Specifically, I find some of the records contain the following information relating to the affected parties:

- their ages, sex, marital or family status (paragraph (a)),
- information relating to their medical, psychiatric, psychological, criminal or employment history (paragraph (b)),
- identifying numbers, symbols or other particulars assigned to them (paragraph (c)),
- their addresses and telephone numbers (paragraph (d)),
- their personal views or opinions (paragraph (e)),
- the views or opinions of other individuals about them (paragraph (g)),
- their names where they appear with other personal information relating to them (paragraph (h)); and
- the fact that these individuals spoke to the police as part of an investigation (this is these individuals' personal information under the introductory wording of the definition).

I note that some of the personal information contained in the records relates to both the appellant and the affected parties.

[21] I note that some of the information withheld from disclosure contains *personal information* that relates solely to the appellant. Specifically, certain portions the ministry withheld from Records 97, 167, 168, 170, 173, 174, 300, 312, 313, 339, 351, 355, 356, 357, 359-360 (duplicated at 365-366), 362, 366, 368, 374 and 384 contain personal information that relates only to the appellant, such as officers' or other individuals'

views or opinions about her.[5] I reviewed these portions of the records and find that the ministry can disclose them to the appellant without revealing the personal information of other identifiable individuals. This information is the appellant's personal information and is not intertwined with the personal information of other individuals. The appellant has a right to access those parts of the records because they contain her own personal information. I note the ministry applied the exemption in section 49(a), read with section 14(1)(l), to withhold some of the appellant's personal information. I will consider whether these portions are exempt under section 49(a), read with section 14(1)(l), below. However, I will order the ministry to disclose the portions of the records that contain the appellant's personal information and no other identifiable individual's personal information to her and are not otherwise subject to an exemption claim.

[22] In addition, I find that portions of the records, including those withheld from Records 13 and 133, do not contain any *personal information* as that term is defined in section 2(1) of the *Act*. The ministry is not entitled to apply the personal privacy exemption to these portions of the records because they do not contain personal information. I will consider whether these portions are exempt from disclosure under section 49(a), read with section 14(1)(l), below.

[23] Because the records contain the appellant's personal information, the relevant exemptions to consider are found in Part III of the *Act*. I will now consider whether the records qualify for exemption under Part III.

Issue B: Does the discretionary exemption at section 49(b) apply to the information at issue?

[24] 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. Under section 49(b), where a record contains the 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]

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

[26] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

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[5] Paragraph (g) of the definition of *personal information* in section 2(1).

[6] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

Section 21(1)(a) – consent

[27] Because one of the affected parties consented to the ministry's disclosure of his personal information to the appellant, I must consider the application of section 21(1)(a). Section 21(1)(a) states that "[a] head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, … upon the prior written consent of the individual, if the record is one to which the individual is entitled to have access."

[28] During mediation, the mediator attempted to notify a number of affected parties regarding the disclosure of information relating to them to the appellant. One affected party consented to the disclosure of their personal information to the appellant. The ministry issued a supplementary decision letter to the appellant, granting her access to additional portions of the records.

[29] I reviewed the records. I find that some of the information at issue contains the consenting affected party's personal information and is not mixed with other individuals' personal information. Specifically, portions of Records 306, 312-313, 404, 409 and 410 contain personal information that relates to the affected party, such as other individuals' views or opinions about them. I confirm that the ministry can disclose these portions of the records without revealing the personal information of other identifiable individuals. Therefore, the exception to the personal privacy exemption in section 21(1)(a) applies to this information and section 49(b) does not apply to it. I note that some of this information is subject to the ministry's section 49(a) claim and I will consider the application of that exemption below.

Sections 21(2) and (3)

[30] The ministry states that section 49(b) applies to the personal information remaining at issue. The ministry refers to the factor in section 21(2)(f) and the presumption in section 21(3)(b) in support of its decision.

[31] Section 21(2)(f) reads,

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > the personal information is highly sensitive;

The ministry refers to 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 purposes of section 21(2)(f). The ministry submits that this reasoning should be applied to the records, especially because many of the affected parties are specifically identified as complainants, persons of interest or witnesses in the records. The ministry submits it is reasonable to expect the affected

parties would be distraught to discover their personal information was disclosed to the appellant.

[32] Section 21(3)(b) reads,

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The ministry submits that all the information withheld under section 49(b) relate to OPP investigations. One of these investigations resulted in charges. The ministry submits that the others did not, but the information nevertheless falls within the scope of this presumption because if the OPP officers had found that an offence had been committed they could have laid charges. The ministry refers to Order PO-2955, which states that section 21(3)(b) may apply even if no criminal proceedings were commenced against any individuals.

[33] The appellant did not make submissions in response to the Notice of Inquiry.

[34] I reviewed the information subject to the ministry's section 49(b) claim. I find that the presumption against disclosure in section 21(3)(b) applies to the majority of the information subject to the ministry's section 49(b) claim. Upon review of the records, it is clear that the personal information contained in most of the records was compiled and is identifiable as part of various investigations into possible violations of law. The majority of the reports, officers' notes and other records were created by the police as part of their investigation into various complaints relating to the appellant and allegations regarding possible violations of law. Based on my review, I find that section 21(3)(b) weighs in favour of non-disclosure of the records that were created as part of investigations into possible violations of law. However, I note that there are a small number of records that were created to log complaints or to summarize interactions with individuals for information purposes only, rather than as part of investigations into possible violations of law. I find that section 21(3)(b) does not apply to these records.

[35] The records contain the appellant's personal information. As such, I must consider and weigh any applicable factors in balancing the appellant's and affected parties' interests. Given the nature of the complaints and the dynamics between the parties involved, I find it reasonable to expect that certain parties would experience significant personal distress if personal information relating to them was disclosed to the appellant.[7] Therefore, I find that the factor favouring non-disclosure in section 21(2)(f) applies to all of the personal information remaining at issue.

[7] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[36] I reviewed the remainder of the factors in section 21(2) and find that none apply.

[37] I considered whether there is any possibility of severing the personal information at issue from the records to provide the appellant with further access to her own personal information. I note that the ministry disclosed a significant amount of the appellant's personal information to her and in my discussion in "Issue B", above, I ordered the ministry to disclose additional personal information that relates solely to the appellant to her, pending my consideration of the ministry's section 49(a) claim below. I reviewed the personal information that remains at issue and find that the appellant's personal information is intertwined with the personal information of other identifiable individuals in a manner that does not permit reasonable severance.

[38] Finally, I considered the possible application of the absurd result principle to the personal information that remains at issue. The absurd result principle may apply in circumstances where denying access to information would yield manifestly absurd or unjust results. The absurd result principle has applied, for example, where the requester was present when the information was provided to the institution[8] or where the information is clearly within the requester's knowledge.[9]

[39] The ministry submits that it is unclear how much knowledge the appellant has of the contents of the responsive records. Regardless, the ministry claims that the absurd result principle does not apply because disclosure of the personal information that remains at issue would be inconsistent with the purpose of section 49(b).

[40] I reviewed the records at issue and it appears that some of the personal information that remains at issue may have been provided to the appellant or are within her knowledge. However, while this may be the case, this alone does not establish that denying the appellant access on the basis of section 49(b) would yield manifestly absurd or unjust results, or be inconsistent with the purposes of the exemption. In the circumstances of this appeal, I find that denying the appellant access to the discrete portions of the records she may be aware of would not yield manifestly absurd or unjust results. Accordingly, I find the absurd result principle does not apply in these circumstances.

[41] Weighing the factor at section 21(2)(f) and the presumption at section 21(3)(b) and balancing the interests of the parties, I find that disclosure of the personal information remaining at issue would be an unjustified invasion of personal privacy. Therefore, I find that, subject to my review of the ministry's exercise of discretion below, the personal information remaining at issue is exempt under section 49(b) because its disclosure would result in an unjustified invasion of the personal privacy of individuals other than the appellant.

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[8] Orders M-444 and MO-1323.
[9] Orders M-444 and P-1414.

Issue C: Does the discretionary exemption at section 49(a), read with sections 14(1)(c) or (l), apply to the information at issue?

[42] Under section 49(a) of the *Act*, an institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

[43] The ministry takes the position that sections 14(1)(c) and (l) apply to portions of the records remaining at issue. Sections 14(1)(c) and (l) read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[44] The term *law enforcement* is used in several parts of section 14 and is defined in section 2(1). The definition includes policing, investigations or inspections that could lead to proceedings in a court or tribunal and proceedings in relation to those investigations or inspections.

[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.[10] However, it is not sufficient 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.[11] The ministry must provide sufficiently detailed evidence to establish a risk of harm well beyond the merely possible or speculative although it does not need to prove that disclosure will, in fact, result in such harm. How much and what kind of evidence is required will depend on the type of issue and seriousness of the consequences.[12]

Section 14(1)(c) – investigative techniques or procedures

[46] In its representations, the ministry submits that section 14(1)(c) applies to Records 202, 361 and 362. The ministry submits that these pages contain a checklist of information on a form known as the InterRAI Brief Mental Health Screener (the Screener). The ministry submits that police forces use the Screener to identify individuals with suspected mental health conditions. The ministry submits that the Screener assists police officers to properly communicate mental health observations to

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[10] *Ontario (Attorney General) v. Fineberg* (1994), 19 OR (3d) 197 (Div. Ct.).
[11] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

appropriate health care professionals. The ministry submits that the purpose of the Screener is to ensure the police can properly discharge their duties in accordance with section 17 of the *Mental Health Act*.

[47] The ministry relies on Order PO-3013 to support its section 14(1)(c) claim. In Order PO-3013, the adjudicator considered a checklist used by the OPP in investigating alleged domestic violence and found that the checklist was exempt from disclosure under section 49(a) in conjunction with section 14(1)(c). The ministry relies on this finding in Order PO-3013 and asserts that the information contained in the Screener is not currently publicly available.

[48] On my review of the ministry's representations and the information in Records 202, 361 and 362 for which section 14(1)(c) is claimed, I find that disclosure of these portions of the Screener could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. The Screener identifies a number of risk factors for officers to consider when communicating with individuals with suspected mental health conditions. The police assert that the information contained in the Screener is not available publicly. As a result, I find that this information qualifies for exemption under section 49(a) read with section 14(1)(c), subject to my review of the ministry's exercise of discretion below.

Section 14(1)(l) – commission of an unlawful act

[49] The ministry takes the position that portions of the records are exempt from disclosure under section 14(1)(l) of the *Act*. Specifically, the ministry submits it applied section 14(1)(l) to the following information that remains at issue:

- Police ten codes: the ministry states it applied section 14(1)(l) to some of the records, such as the top shaded lines on Records 72 and 74. The ministry refers to Order PO-2409 which found that police codes qualify for exemption under section 14(1)(l). The ministry submits that it withheld the ten codes in accordance with its usual practice and because the disclosure of the ten codes would make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate.

- Information that members of the OPP use for the purpose of documenting their investigations and or internal communications: the ministry states it withheld portions of Records 133, 167 and 168 because they contain background information relating to individuals they had prior interactions with. The ministry submits that this information provides the OPP with information about individuals when they are called to investigate an individual. The ministry submits that members of the OPP will be less likely to record information and communicate candidly with one another, if the records they create are likely to be disclosed in the manner contemplated by this appeal. The ministry submits that this outcome would have the result of facilitating crime or hampering its control.

[50] I note the ministry also submits that information relating to individuals identified

as a complainant, person of interest or witness is exempt under section 14(1)(l). There is no need for me to consider whether this type of information is exempt under section 14(1)(l) as I found that it is exempt under section 49(b), above.

[51] A number of previous orders have found that police codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm which may result from their disclosure.[13] This includes ten codes, as well as codes which reveal identifiable zones from which officers are dispatched for patrol and other law enforcement activities. In the circumstances of this appeal, I am satisfied that the ministry provided sufficient evidence to establish that disclosure of the ten codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Therefore, I find that the ten codes and other operational codes in the records are exempt under section 49(a), in conjunction with section 14(1)(l), subject to my review of the ministry's exercise of discretion below.

[52] I reviewed the remainder of the information at issue and am not satisfied that the ministry provided sufficient evidence to demonstrate that there is a reasonable expectation that the harms in section 14(1)(l) will result from its disclosure.

[53] For example, the portion of the notes withheld from Record 13 contains a description of the officer's actions in response to an incident. The ministry did not address the application of section 14(1)(l) to this portion of the record. In the absence of representations on this portion and upon review, I find that the ministry did not demonstrate that there is a reasonable expectation the harms contemplated by section 14(1)(l) could result from the disclosure of this portion of Record 13.

[54] The ministry withheld Record 133, in full, under the sections 49(a), read with section 14(1)(l), and 49(b) exemptions. The ministry also claimed that portions are not responsive to the appellant's request. I upheld the ministry's section 49(b) claim, in part, and also removed the information that is non-responsive from the scope of the appeal. I reviewed Record 133 and the ministry's representations and find that section 49(a), read with section 14(1)(l), does not apply to the remaining information at issue. The ministry claims that the information includes confidential law enforcement information that the OPP uses to document their investigations and for internal communications and that the disclosure of this information would result in facilitating crime or hampering its control. However, the ministry does not provide an explanation as to how the disclosure of the information in Record 133 would, if disclosed, reasonably be expected to result in the harm contemplated by section 14(1)(l). From my review, the information contained in Record 133 consists of a summary of the OPP and another ministry's interactions with the appellant and opinions regarding the appellant. It is not evident to me, nor do the ministry's representations demonstrate, that the disclosure of the information that remains at issue in Record 133 could reasonably be expected to result in the harms contemplated by section 14(1)(l). I find the ministry did not provide me with sufficient evidence to establish a risk of harm

[13] See, for example, M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209 and PO-2339.

beyond the merely possible or speculative. Therefore, I find that the information that remains at issue in Record 133 is not exempt under section 49(a), read with section 14(1)(l).

[55] The ministry claims that portions of Records 167 and 168 are exempt under section 14(1)(l). The ministry did not identify the precise portions of the records to which it applied section 14(1)(l), but I note that I found portions to be exempt under section 49(b) or not responsive to the appellant's request. I reviewed the records and find that the ministry did not provide me with sufficient evidence to demonstrate that there is a reasonable expectation that the harms contemplated in section 14(1)(l) will result from the disclosure of the information that remains at issue. The information that remains at issue relates to a general conversation between two OPP officers regarding their location at a particular time and views or opinions about the appellant, which constitutes her personal information. I reviewed this information and am not satisfied that the disclosure of this information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Further, I find the ministry did not provide me with sufficient evidence to establish a risk of harm beyond the merely possible or speculative. Therefore, I find that section 49(a), read with section 14(1)(l) does not apply to Records 167 and 168.

[56] Similarly, I find that the information I found to not be exempt under section 49(b), but which the ministry applied section 49(a), read with section 14(1)(l), from Records 170, 173, 306, 308, 312-313, 342, 351-352, 359-360 (duplicated at 365-366), 362, 384, 404, 409 and 410 is not exempt from disclosure. The ministry did not make any submissions regarding its application of this exemption to these specific records. Further, from my review of the records themselves, it is not evident that the disclosure of the information that remains at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. The majority of this information relates to the appellant and it is not evident that the disclosure of it will reasonably result in the harms contemplated by section 14(1)(l). Therefore, I find that these portions are not exempt under section 49(a), read with section 14(1)(l), and will order the ministry to disclose them to the appellant.

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

[57] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Sections 49(a) and (b) are discretionary exemptions, which means that the ministry could choose to disclose the information, despite the fact it may be withheld under the *Act*.

[58] In applying sections 49(a) and (b), the ministry was required to exercise its discretion. On appeal, the IPC may determine whether the ministry failed to do so. In addition, the IPC may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant

considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.[14] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for the ministry's.

[59] As I upheld the ministry's decision to apply sections 49(a) and (b), in part, I must review its exercise of discretion under those exemptions.

[60] The ministry submits it exercised its discretion properly. The ministry submits it based its exercise of discretion on the following considerations:

- The public policy interest in safeguarding the privacy of affected third party individuals, particularly those who are or may be victims of crime, and who seek out the protection of or cooperate with law enforcement;
- The concern that 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; and,
- The OPP acted in accordance with its usual practices, in severing law enforcement records containing the personal information of affected third parties.

[61] Based on the ministry's representations and my review of the information I found to be exempt under sections 49(a) and (b), I am satisfied the ministry considered relevant factors in exercising its discretion and did not take into account irrelevant considerations. On review of the records, I find the ministry disclosed the majority of the information to the appellant. In fact, I find the appellant will have obtained access to as much of her personal information as possible through the ministry's access decision and this order. I reviewed the information at issue and it consists primarily of other individuals' personal information and information exempt from disclosure under sections 14(1)(c) or (l). I find the ministry considered the appellant's right to her own personal information and balanced that against the importance of other individuals' personal information and relevant law enforcement considerations. Finally, the ministry made the effort to maximize the amount of disclosure while considering the nature and type of personal information contained in the records.

[62] Therefore, in the circumstances before me, I am satisfied the ministry appropriately exercised its discretion under sections 49(a) and (b) to the portions of the records that I found to be exempt from disclosure.

Issue E: Did the ministry conduct a reasonable search for records?

[63] Where a requester claims additional responsive records exist beyond those

[14] Order MO-1573.

identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 24.[15] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ministry's search. If I am not satisfied, I may order further searches.

[64] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.[16] To be responsive, a record must *reasonably relate* to the request.[17]

[65] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[18] I will order a further search if the ministry does not provide sufficient evidence to demonstrate that it made a reasonable search to identify and locate all of the responsive records within its custody or control.[19]

[66] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[20]

[67] The ministry submits it conducted a reasonable search for records responsive to the appellant's request. The ministry provided two affidavits sworn by a Freedom of Information Analyst (the analyst) and a Freedom of Information Liaison (the liaison) describing the searches conducted.

[68] The analyst advises she has over 10 years experience with the ministry's Freedom of Information Office. The analyst states that when she received the appellant's request, she contacted the appellant in an attempt to reduce the scope of her request as it overlapped with an earlier request she filed. The appellant did not agree to reduce the scope of her request and the analyst proceeded to process the request. The analyst contacted the former Freedom of Information liaison for the North-West Region (the former liaison), who proceeded to search for responsive records. The analyst assisted the former liaison in locating responsive officers' notes by contacting bureaus outside of the North-West Region, where North-West Region officers were transferred to see if they had responsive records. The analyst confirmed that, at the time of the request, officers who transferred from one region to another took their notes with them. The analyst contacted the Criminal Investigations Bureau, the Professional Standards Bureau, the Highway Safety Division, West Region, North-East Region, Central Region and East Region. The analyst confirmed that she received responsive officers' notes from each of these bureaus. The analyst submits that she conducted a diligent and thorough search. The analyst also states that she has no

[15] Orders P-85, P-221 and PO-1954-I.
[16] Orders P-624 and PO-2559.
[17] Order PO-2554.
[18] Orders M-909, PO-2469 and PO-2592.
[19] Order MO-2185.
[20] Order MO-2246.

reason to believe that any responsive records were destroyed.

[69] The liaison states that the original search was conducted by the former liaison. The liaison reviewed the former liaison's records and confirmed that the former liaison searched the following areas:

- The Niche RMS database using the appellant's name. Niche is the OPP's database that stores policing records. The former liaison located numerous records on Niche and forwarded them all to the analyst.

- The OMPPAC database, which is the database used prior to the introduction of Niche. The former liaison identified some responsive records and forwarded them to the analyst.

The liaison also states that the former liaison contacted the Thunder Bay Provincial Communications Centre (PCC) to determine if there were responsive recordings of telephone calls placed to the PCC. The PCC provided responsive records to the analyst. The liaison and the ministry state that audio recordings created prior to 2011 are archived and are not part of operational record keeping. The ministry takes the position that producing audio recordings created prior to 2011 would unreasonably interfere with the ministry's operations and it should not be required to produce these records.

[70] The liaison also confirms that the former liaison contacted a number of OPP officers for their notes and other related records.

[71] The liaison stated that she contacted an additional search of the Niche RMS database using the name of the appellant for the purposes of the search. The liaison confirms that she did not identify any additional responsive records. The liaison submits that the searches for records were diligent and thorough.

[72] The appellant did not make representations.

[73] Based on my review of the ministry's representations, I am satisfied that it conducted a reasonable search for responsive records. As set out above, the *Act* does not require the ministry to prove with absolute certainty that additional records do not exist, but only to provide sufficient evidence to establish that they made a reasonable effort to locate responsive records. I find that the analyst, the liaison and the former liaison are experienced employees knowledgeable in the subject matter of the request. Further, I find that they expended a reasonable effort to identify and locate responsive records. I find that the analyst and liaison provided me with detailed descriptions of their searches for responsive records. With regard to the audio recordings created before 2011, the appellant did not confirm her interest in these records to me. Given the circumstances, I will not order the ministry to make further efforts to locate such records. In conclusion, I am satisfied that the police conducted a reasonable search for records responsive to the appellant's request.

ORDER:

1. I uphold the ministry's application of section 49(b) to withhold portions of the records. However, I order the ministry to disclose the appellant's personal information and the personal information relating to the individual who provided their consent to the appellant.

2. I uphold the ministry's application of section 49(a), read with section 14(1)(c). I uphold the ministry's application of section 49(a), read with section 14(1)(l), in part.

3. I order the ministry to disclose the information that I found to not be exempt from disclosure to the appellant by **July 5, 2018** but not before **June 29, 2018**. For the sake of clarity, I enclose a highlighted copy of the relevant records to the ministry. The ministry is *not* to disclose the information that I highlighted in green. I order the ministry to disclose the remainder of these records to the appellant.

4. I uphold the ministry's search for records as reasonable.

Original signed by: May 30, 2018

Justine Wai
Adjudicator