Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3880

Appeal PA17-7

Ministry of Community Safety and Correctional Services

September 25, 2018

Summary: The Ministry of Community Safety and Correctional Services received a request under the *Freedom of Information and Protection of Privacy Act* for access to all Ontario Provincial Police (OPP) reports pertaining to the requester, from the Lambton OPP detachment, for a given period of time. The ministry issued a number of access decisions, and ultimately granted partial access to the responsive records with severances pursuant to section 49(a) (discretion to refuse access to one's own personal information) in conjunction with the law enforcement exemptions at sections 14(1)(d), (e) and (l), and the solicitor-client privilege exemption at section 19. During the course of the appeal, the appellant narrowed the scope of the request by advising that he is not interested in seeking access to other individuals' personal information, police codes, or information that the ministry deemed not responsive to the request. The adjudicator upholds the ministry's application of section 49(a) in conjunction with section 19, and upholds, in part, the ministry's application of section 49(a) in conjunction with sections 14(1)(d) and (l). The adjudicator orders that the remaining 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"), 14(1)(d), 14(1)(l), 19 and 49(a).

Orders and Investigation Reports Considered: Orders PO-2790, PO-3330 and PO-3662.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to all Ontario Provincial Police (OPP) reports pertaining to the requester, from the Lambton OPP detachment, for the period of January 1, 2000 to the date of the request, October 26, 2016.

[2] The ministry identified responsive records and issued a decision granting partial access upon payment of a fee. The ministry initially relied on section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement report), as well as section 49(b) (personal privacy) 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 ministry subsequently provided the requester with a revised access decision accompanied by the records in the form that it was prepared to disclose. In the decision, the ministry advised that it was now relying on section 49(a) in conjunction with sections 14(1)(a) (law enforcement matter), 14(1)(c) (reveal investigative techniques and procedures), 14(1)(l) and 14(2)(a), as well as 49(b) to deny access to a portion of the records it withheld. It further advised that it was also withholding information that it viewed as non-responsive to the request and would be waiving the fee it initially sought to charge the requester.

[4] The ministry's revised decision disclosed to the appellant the entirety of pages 2, 86, and 160 of the records, which are identified as containing non-responsive information. Presumably, these disclosures were made because the only non-responsive information that would have been withheld pertained to when the particular record was printed.

[5] The ministry did not claim that any exempted or non-responsive information was contained in pages 7, 9 or 175, and they were also disclosed in their entirety.

[6] The requester (now the appellant) appealed the ministry's access decision to this office.

[7] At mediation, the appellant advised that he was not seeking the information of other identifiable individuals that may be contained in the records, nor did he want them notified of his request. Accordingly, that information and the application of section 49(b) of the *Act* is no longer at issue in the appeal.

[8] The appellant also advised that he was not seeking access to the information the ministry identified as being non-responsive to the request, such as information about when the records were printed.

[9] Also during mediation, the ministry issued another revised access decision granting partial access to two records that it had previously withheld. The ministry further advised that it was also relying on sections 14(1)(d) (confidential source of information), 14(1)(e) (endanger life or safety) and 19 (solicitor-client privilege) in conjunction with section 49(a), to deny access to responsive information.

[10] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator commenced an inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. The ministry provided representations and asked that a portion of them not be shared due to confidentiality concerns. The ministry advised in its representations that it was no longer claiming that sections 14(1)(a), 14(1)(c) or 14(2)(a) applied to information it withheld. Accordingly, the application of those sections is no longer at issue in the appeal.

[11] The adjudicator then sent a Notice of Inquiry to the appellant along with the non-confidential portions of the ministry's representations. Portions of the ministry's representations were withheld from the appellant as they met the confidentiality criteria set out in *Practice Direction Number 7*. The appellant provided representations, which were then shared with the ministry for the purposes of reply. The ministry provided reply representations.

[12] The appeal file was then transferred to me to complete the inquiry. For the reasons that follow, I uphold the ministry's application of section 49(a) in conjunction with section 19. I also uphold, in part, the ministry's application of section 49(a) in conjunction with sections 14(1)(d) and 14(1)(l). I order the ministry to disclose the remaining portions of the records to the requester.

RECORDS:

[13] The ministry identified 185 pages of responsive records consisting of Occurrence Summaries, General Occurrence Reports, Supplementary Reports, Arrest Reports, a Case File Synopsis, a Show Cause Hearing Report, and other associated records. The records remaining at issue are those for which redactions have been made pursuant to section 49(a) read in conjunction with sections 14(1)(d), (e), (l), and section 19 of the *Act*.

[14] The majority of the ministry's redactions are based on section 49(a) read in conjunction with section 14(1)(l), pursuant to which information can be withheld if its disclosure could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of a crime.

[15] Pages 107 to 109 and 165 to 168 were also withheld on the basis that information contained in those records was qualified for exemption under section 49(a)

in conjunction with sections 14(1)(d), (e) and (l). In other words, the ministry withheld those pages of records on the basis that their disclosure may reveal a confidential source, endanger life or safety, or facilitate commission of an unlawful act or hamper the control of a crime.

[16] Pages 142 to 148 were withheld under section 49(a) of the *Act*, applied in conjunction with the solicitor-client privilege exemption under section 19.

PRELIMINARY MATTER:

[17] During mediation, the appellant advised that he was not pursuing access to the information the ministry identified as being non-responsive to the request, such as information about when the records were printed. He also advised that he was not seeking access to personal information of other identifiable individuals, nor did he want them notified of his request.

[18] Further, the representations submitted by the appellant during the inquiry indicate that he does not seek access to "the confidential/generic police tactics or codes nor [is this] an issue he wishes to pursue in this appeal."

[19] Accordingly, non-responsive information, police codes, and other individuals' personal information is no longer at issue in this appeal. As a result, any records disclosed to the appellant pursuant to this order will have the non-responsive information, personal information of other individuals, and information that constitutes police codes, withheld.

ISSUES:

A. Do the records contain the appellant's "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 49(a) in conjunction with the solicitor-client privilege exemption at section 19 apply to the information at issue?

C. Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemptions at sections 14(1)(d), 14(1)(e), and/or 14(1)(l) apply to the information at issue?

D. Did the institution exercise its discretion under section 49(a) in conjunction with sections 14 and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain the appellant's "personal information" as defined in section 2(1)?

[20] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain the appellant's "personal information". In addition, in order to determine which portions of the record the appellant no long seeks, it is necessary to decide whether the records contain the personal information of other individuals. That term is defined in section 2(1) as follows:

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

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

personal information.[1]

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

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (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.
>
> (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.

[23] 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.[2]

[24] 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.[3]

The ministry's representations

[25] The ministry submits that it made the following assumptions regarding personal information:

> Workplace Identification Numbers of Ministry employees, who are not OPP officers (e.g., the CAD operator on page 23), constitutes their personal information and therefore is not responsive. We have based this assumption in reliance on Order PO-3742 (at paragraph 37). We note that the name of the employees has already been disclosed, thereby rendering them identifiable; and,
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> Any information about individuals acting in a business capacity (e.g., the business owner identified on page 18) constitutes that individual's personal information because it would reveal something inherently

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

> personal about them, namely, their involvement in a law enforcement investigation.

[26] The ministry maintains that if the appellant's personal information is intertwined with personal information of identifiable third parties, that information is no longer within the scope of the appellant's request, given his position during mediation. On this basis, the ministry submits that the remaining responsive records are those that contain personal information belonging solely to the appellant.

The appellant's representations

[27] The appellant maintains that this is an appeal of the ministry's[4] refusal to inform him of the existence, use, and disclosure of his personal information, and to provide access to that information. He explains that his access request was to be considered a full audit for the purposes of confirming accuracy and completeness of records containing his personal information.

[28] The appellant submits that in *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*[5] the Court ruled that "personal information" is information "about" an identifiable individual, meaning that the information is not just the subject of something but also relates to or concerns the subject.

[29] The appellant submits that Canadian courts treat access to personal information laws as quasi-Constitutional legislation pursuant to which exceptions to access should be narrowly construed.

[30] The appellant states that access to personal information serves an important role in ensuring a degree of accuracy with respect to the personal information. He cites paragraph 13 of the Supreme Court of Canada's decision in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*,[6] which states:

> Individuals are often unaware of the nature and extent of information about themselves being collected and stored [...] Some of this information may be quite inaccurate. [...] Accordingly, Parliament recognized that a corollary to the protection of privacy is the right of individuals to access information about themselves held by others in order to verify its accuracy.

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[4] The appellant's representations refer to "The Crown"; however, given that the institution involved in this appeal is the Ministry of Community Safety and Correctional Services, throughout this order, where I summarize the appellant's submissions, I have referred to "the ministry" to reflect the parties in the appeal before me.
[5] 2006 FCA 157.
[6] 2008 SCC 44.

[31] With regard to the "business information" contained in the records mentioned by the ministry, the appellant submits the following:

> […] the [ministry] suggests that a "competing business" provided information to the police however the fact that there is competing business does not exempt access to that information on the basis that the [ministry] now claims over it. In any event, this information ought to have been disclosed under *R v Stinchcomb*e procedure regardless of the exception the [ministry] now selectively claims, nevertheless, such information was originally concealed by omission under *Stinchcombe* disclosure which suggests an abuse of process was not simply an oversight.

[32] The appellant submits that the ministry withheld this information knowing that it would prejudice him in proceedings.

Analysis and finding

[33] Upon my review of the records at issue, I am satisfied that they contain the personal information of the appellant and other identifiable individuals as defined in section 2(1) of the *Act*. Specifically, the type of information contained in the records that qualifies as personal information includes:

- information about an individual's race, national or ethnic origin, colour, age and sex (paragraph (a));
- information relating to the criminal history of the individual (paragraph (b));
- the address and telephone number of the individual (paragraph (d));
- the personal opinions or views of the individual (paragraph (e));
- the personal views and opinions of another individual about the individual (paragraph (g)), and
- 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 (paragraph (h)).

[34] As described above, the personal information of other identifiable individuals is no longer at issue, as the appellant has advised that he is not interested in obtaining access to this information and he did not want those individuals notified of this appeal. Therefore, where the appellant's personal information is intertwined with personal information of other identifiable individuals to the point that it has become mixed personal information of both the appellant and the other individual, that information is no longer sought by the appellant and no longer at issue.

[35] Based on my review of the records, I find that the following pages contain the personal information of identifiable individuals other than the appellant: 1, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33-36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48-51, 52-53, 54, 56-59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119-120, 121-122, 124, 126, 127, 128, 129, 130, 131, 134, 135, 136, 138, 139, 141, 149, 150, 151, 152, 153, 154, 157, 158, 161, 162, 163, 164, 165, 166, 169, 170, 171, 172, 173, 174, 177, 178, 179, 180, 181, 182, 183, and 185. Given that the appellant is not interested in receiving this information, it is no longer at issue in this appeal.

[36] The ministry has claimed the application of section 49(a) in conjunction with sections 14(1)(d), (e) and (l), and section 19 for some other information in these records. I address those exemptions below.

[37] As all of the records contain the appellant's personal information, I will now consider whether the withheld information qualifies for exemption under Part III of the *Act*.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the solicitor-client privilege exemption at section 19 apply to the information at issue?

[38] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information

[39] 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] When access is denied under section 49(a), an institution must demonstrate that, in exercising its discretion, it considered whether it should release the record to the requester because the record contains his or her personal information.

[40] In this case, the ministry claims that the statutory privilege under section 19(b) applies to pages 142 to 148 of the records at issue, and that those pages are thereby

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[7] Order M-352.

exempt under section 49(a). Section 19(b) states:

> A head may refuse to disclose a record,
>
> > that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation

[41] Section 19(b) is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges (contained in section 19(a)), although not identical, exist for similar reasons.

[42] The statutory solicitor-client privilege is similar to the common law privilege, which protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[8] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[9] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[10]

[43] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[11]

[44] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[12] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[13]

[45] The statutory litigation privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[14]

[46] Records that form part of the Crown brief, including copies of materials provided

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[8] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[9] Orders PO-2441, MO-2166 and MO-1925.
[10] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[11] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[13] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[14] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.[15] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[16] However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief.[17]

[47] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[18]

[48] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[19]

The ministry's representations

[49] The ministry submits that section 19(b) of the *Act* applies to pages 142 to 148, which contain a Show Cause Hearing Report. The ministry submits that this report was prepared by the OPP for Crown Counsel to be used as part of a bail hearing. The ministry states that page 147 indicates the name of the OPP officer who submitted the report, and it specifically directs the OPP officer to include specific information in the report, which the OPP officer believed the Crown Counsel should be made aware of. In addition, the ministry maintains that the report was prepared for use in a bail hearing, and was therefore prepared in contemplation of litigation. As a result, the ministry submits that this report fits within the continuum of communications that is within the scope of section 19(b).

The appellant's representations

[50] The appellant submits that an adjudicator cannot simply defer to the ministry's assertion that certain information is confidential or privileged. Where privilege is claimed, the appellant maintains that the onus is placed on the ministry to specifically set out for verification why each withheld record is considered confidential. The appellant submits that where it is possible to redact confidential portions of reports, documents, or data, access may still be provided to the remainder of the information.

[51] The appellant states that the ministry's privilege claims are *prima facie* baseless. He submits that it should be plain for the adjudicator to determine that the records are not, in fact, privileged.

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[15] Order PO-2733.
[16] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[17] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[18] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[19] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

[52] The appellant goes on to submit that denying access to information under an unverified privilege claim is not supported under the legislation. He maintains that the ministry's decision could amount to "an end run on the regulation to possibly conceal evidence of an abuse of process."

[53] The appellant maintains that there is reason to suspect that the information at issue is not privileged, accurate, or complete. He submits that he requires access to the responsive information in order to verify its accuracy and completeness.

The ministry's reply representations

[54] In response to the appellant's representations, the ministry submits that the right to correct one's own personal information under section 47 of *FIPPA* only applies where one has a right of access to that information in the first instance. The ministry states that it has steadfastly maintained that the appellant does not have a right to access to records it has withheld, and therefore the appellant does not have a right to correct them.

[55] The ministry states that the appellant appears to be confusing criminal law processes with the process for obtaining records under the *Act*. The ministry notes that the appellant refers to "The Crown" (as in Crown Attorney) throughout his representations. The ministry submits that the records have been withheld because they are eligible to be withheld within the statutory framework of the *Act*. This ministry maintains that it is not claiming "privilege" (among other exemptions) as the appellant asserts because it is the Crown (or Crown Attorney), but because of its status as an institution applying the *Act*.

Analysis and finding

[56] The ministry submits that the statutory solicitor-client communication and litigation privileges apply to pages 142 to 148 of the records at issue. In order to find that the information identified by the ministry is subject to the privilege exemption at section 19(b), I must be satisfied that the records were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[57] Upon review of the records, I find that pages 142 to 148 consists of a report created by an OPP investigator for Crown Counsel to use as part of a bail hearing. This information fits within the continuum of communication that is within the scope of solicitor-client privilege pursuant to section 19(b). In addition, I am satisfied that the information contained in pages 142 to 148 was prepared in contemplation of litigation, and therefore falls within the scope of the statutory litigation privilege in section 19(b).

[58] This is consistent with the adjudicator's findings in Order PO-2790, where a record prepared by a police officer for use by the Crown at the appellant's bail hearing was found to be exempt from disclosure pursuant to section 49(a) in conjunction with section 19.

[59] Accordingly, I uphold the ministry's decision to exempt pages 142 to 148 from disclosure under section 49(a) read in conjunction with section 19(b) of the *Act*, subject to my review of the ministry's exercise of discretion, below.

Issue C: Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemptions at sections 14(1)(d), 14(1)(e), and/or 14(1)(l) apply to the information at issue?

[60] The ministry claims that the law enforcement exemption at section 14 applies to all of the information severed from the records, which is thereby exempt under section 49(a) of the *Act*. The ministry submits that all the records at issue were prepared by the OPP in the course of investigating offences involving the appellant in some capacity. Specifically, the ministry relies on section 49(a) in conjunction with sections 14(1)(d), 14(1)(e), and 14(1)(l) to exempt all of the information remaining at issue. The relevant portions of section 14 state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[61] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
> >
> > (c) the conduct of proceedings referred to in clause (b)

[62] The term "law enforcement" has been found to apply in police investigations into

a possible violation of the *Criminal Code*.[20]

[63] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[21]

[64] The ministry must do more than argue 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.[22] The ministry 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.[23]

The ministry's representations

[65] The ministry submits that the records contain confidential law enforcement information that is exempt from disclosure pursuant to section 14(1)(l). The ministry submits that the OPP uses this confidential information for the purpose of documenting their investigations, and for internal communications. For example, the ministry notes that certain pages contain descriptions of investigations. The ministry maintains that by recording this information, members of the OPP know about the status of, and the steps taken as part of, an investigation.

[66] The ministry submits that members of the OPP could be less likely to communicate frankly with one another if the records are likely to be disclosed in the manner contemplated by this appeal. The ministry submits that this outcome would have the subsequent result of facilitating crime or hampering its control as contemplated by section 14(1)(l).

[67] The ministry expresses concern that disclosing the records could lead the appellant to alter his actions, thereby hampering the police's control of crime. In support of its position that disclosure could lead to the harms envisioned by section 14(1)(l), the ministry points to the number of records at issue in this appeal reflecting the number of interactions the appellant has had with the OPP.

[68] The remainder of the ministry's submissions on the application of section 14(1)(l) are confidential in nature; however, I have considered them in conducting my analysis.

[69] In addition to section 14(1)(l), the ministry claims the exemptions at sections 14(1)(d) and (e) for pages 107-109 and 165-168. The ministry takes the position that

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

these records overlap with the provisions in section 21 which protect third party personal privacy, and therefore are likely no longer at issue. However, the ministry maintains that if the records are responsive, they should be exempt from disclosure as they reveal, or could possibly reveal, one or more confidential sources who provided information to the police.

[70] The ministry submits that the nature of the records is such that they are highly sensitive. The ministry submits that releasing the records could bring some form of retribution to the affected third parties named or possibly identifiable in the records. The ministry also maintains that using this appeal to identify individuals who provide information to the police would have a chilling effect on individuals who have information that may be of use to the police, resulting in them not coming forward. The ministry submits that this outcome would cause enormous harm to law enforcement operations. The ministry made additional confidential representations on the application of section 14(1)(d), which I have also considered.

[71] The ministry's submissions on the application of section 14(1)(e) to pages 107-109 and 165-168 of the records are predominantly confidential in nature; however, I have taken them into consideration.

The appellant's representations

[72] The appellant challenges the ministry's reliance on confidential sources. He submits that this must be verified for each record for which this ministry is claiming the exemption.

[73] The appellant submits that the confidential informants were called as defence/appellant witnesses during criminal and administrative proceedings. The appellant maintains that any concerns about the informants' safety was rendered moot by calling the informants as witnesses, as their identity is now public. He also submits that on cross-examination, an OPP officer testified that the informants, "had never proven reliable given their very close relationship to [the appellant]."

[74] The appellant submits that the Crown applied for and was denied a judicial sealing order on information relating to the confidential informants as the court was not persuaded that "privilege had ever been granted or established over the information provided by the [individuals] the Crown subjectively submitted were 'confidential informants.'"

[75] The appellant also questions the existence, use, disclosure and possible destruction of certain emails that were sent between a named OPP constable and another named individual. The appellant claims that the Crown Disclosure file that was provided to him mentioned the named individual as a witness who was questioned by an OPP officer. The appellant submits that under sworn testimony, the OPP officer said that he could not disclose the emails because he had inadvertently deleted them. The

appellant maintains that if these records exist, there is no basis to claim "privilege" over them. If the records do not exist, the appellant requests verification or confirmation of why and when they were deleted.

[76] The appellant did not provide submissions relevant to the application of the exemptions at sections 14(1)(l) or 14(1)(e), nor did he address the ministry's position that the records for which the ministry claims sections 14(1)(d) and (e) are likely no longer at issue.

Analysis and findings

[77] The personal information of other identifiable individuals on pages 107-109 and 165-166 is no longer at issue. Such information includes the names and addresses of involved persons, as well as the summaries of their interactions with police. Therefore, I do not need to consider the application of section 14 to that information.

Section 14(1)(d): confidential source, and section 14(1)(e): life or physical safety

[78] To establish the application of section 14(1)(d), I must be satisfied that disclosure of the information could reasonably be expected to reveal the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.[24] The ministry was required to provide evidence of the circumstances in which the information was provided to establish that there was a reasonable expectation that the identity of the source or the information given by the source would remain confidential.[25] The ministry did not describe the circumstances of how the information was provided to the OPP in its representations; however, based on my review of the records, I accept that the source of the information contained in pages 107-109, 165-166, and 167-168 had a reasonable expectation of confidentiality in the circumstances.

[79] In order for section 14(1)(e) to apply, I must be satisfied that disclosure of the information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. The ministry was required to provide evidence to demonstrate a risk of harm that is well beyond the merely possible or speculative. A person's subjective fear, while relevant, may not be enough to justify the exemption.[1] The ministry submits that section 14(1)(e) is applicable because if the appellant is able to determine the identity of the complainants, it will potentially jeopardize those individuals' safety.

[80] Based on my review of the records and as noted above, I find that pages 107, 165, and 167 contain personal information of the appellant that can be reasonably severed and disclosed to the appellant. I also find that the document title, the name of

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[24] Orders MO-1416 and PO-3052.
[25] Orders MO-1383, MO-1416, and PO-3075.

the investigating institution, UCR clearance status, template subheadings, some of the occurrence details, and the name, badge number and role of the involved officers can reasonably be severed for disclosure. I am not satisfied that the disclosure of this information or the appellant's personal information in pages 107, 165, and 167 could reasonably be expected to reveal the identity of a confidential source of information, disclose information furnished only by the confidential source, or endanger the life or physical safety of a law enforcement officer or any other person. Accordingly, I find that this information is not exempt from disclosure under sections 49(a) in conjunction with sections 14(1)(d) or (e).

[81] With respect to the remaining withheld information in pages 107-109 and 165-166, I am satisfied that it constitutes other identifiable individuals' personal information, information that is non-responsive, and police code information, which the appellant has indicated he is not seeking access to.

[82] Unlike pages 107-109 and 165-166, pages 167-168 do not, on their face, contain personal information of anyone other than the appellant; however, the ministry submits that if pages 167-168 are disclosed, the appellant may be able to infer the identity of the anonymous source. The ministry refers to Order PO-3330 in support of its claim that section 14(1)(d) applies to anonymous complaints in law enforcement matters.

[83] I have reviewed Order PO-3330, and find that it can be distinguished from the facts before me. The adjudicator in Order PO-3330 found that the record at issue clearly revealed the identity of the complainant and included information that could only have been furnished by that indiviudal. In contrast, pages 167-168 do not clearly identify the anonymous complainant. However, with the exception of the appellant's personal information and the other information on page 167 that I have mentioned above, I accept the ministry's assertion that if the records are disclosed, then the appellant could reasonably be expected to infer the identity of the anonymous complainant based on his personal experience and the nature of the information contained in the record.

[84] The appellant maintains that the ministry's section 14(1)(d) arguments are "moot" given that the confidential informants were called as witnesses during prior proceedings; however, I have not been provided with any evidence to substantiate this claim.

[85] Accordingly, I find that the exemption at section 49(a) in conjunction with 14(1)(d) is applicable to the remaining information on page 167 and the entirety of page 168.

[86] Given my finding that the remaining information in pages 107-109 and 165-166 is no longer at issue, and that the remaining information in pages 167-168 is exempt from disclosure pursuant to section 49(a) in conjunction with section 14(1)(d), it is unnecessary for me to consider whether the exemption in section 14(1)(e) also applies

to those pages.

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

[87] Section 14(1)(l) may apply if disclosure of the withheld information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Since section 14(1)(l) contains the words "could reasonably be expected to," the ministry was required to provide evidence to establish a reasonable expectation of harm.

[88] As discussed under the "Preliminary matters" subheading, the appellant is not seeking access to police code information. Accordingly, information including 10-codes,[26] and other numerical information, such as patrol zone codes,[27] that the ministry originally withheld under section 49(a) in conjunction with section 14(1)(l) is not at issue and will not be considered in the following analysis. The ministry has withheld information on this basis on pages 1, 5, 6, 10, 11, 12, 14, 19, 23, 25, 27, 28, 30, 31, 32, 37, 38, 41, 42, 43, 44, 48, 52, 60, 61, 63, 65, 67, 69, 71, 73, 74, 75, 76, 79, 80, 81, 83, 84, 85, 87, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 104, 105, 107, 110, 111, 113, 114, 115, 116, 117, 118, 119, 121, 123, 129, 132, 133, 134, 136, 140, 149, 150, 151, 153, 154, 155, 156, 157, 159, 161, 163, 164, 165, 167, 169, 171, 172, and 176.

[89] For the remainder of the information withheld under section 14(1)(l), the ministry submits that disclosure of the information could reasonably be expected to jeopardize the confidence of OPP members to communicate frankly with one another through the records they generate during investigations, which could hamper its control of crime. The ministry refers to specific portions of the records and provides an explanation as to how the disclosure of that particular information could reasonably be expected to result in these harms.

[90] The ministry also submits that some information has been withheld on the basis that its disclosure may cause the appellant to change his actions now or in the future thereby facilitating the commission of an unlawful act or hampering the police's ability to control crime.

[91] I have considered the representations of the ministry and the portions of the records at issue withheld under section 49(a) in conjunction with section 14(1)(l), including those for which I have found that section 14(1)(d) and (e) do not apply.[28] I am satisfied that the ministry has provided sufficient evidence to establish a risk of harm beyond the merely possible or speculative with regard to some discrete portions of the records. I find that disclosure of certain parts of the records describing the

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[26] 10-codes are codes that represent common police phrases, particularly in radio transmissions and other communications between individuals employed in law enforcement.
[27] Zone codes identify the particular areas of a community being patrolled.
[28] On pages 107, 165, and 167.

investigating officers' analysis and assessment during various investigations could reasonably be expected to result in the harms that section 14(1)(l) seeks to prevent in terms of facilitating the control of an unlawful act or hampering the control of a crime. Such information appears on pages 8, 15, 19, 20, 26, 78, 82, 101, 126-128, 133, 149, 150, 163, 173-174, 178-181, 182, 183-184, and 185. Accordingly, I uphold the ministry's application of the law enforcement exemption to that information.

[92] However, I am not persuaded by the ministry's section 14(1)(l) submissions with regard to the majority of the information that it seeks to withhold. First, I find that the ministry's assertion that the disclosure of the records could negatively affect communication between officers is untenable. In Order PO-3662, the adjudicator found "the keeping of written records is an integral part of policing". The adjudicator did not accept that the disclosure of officers' notes would somehow facilitate the commission of an unlawful act or hamper the control of crime. Similarly, I find that the disclosure of the information subject to the ministry's section 14(1)(l) claim could not reasonably be expected to discourage OPP officers from preparing accurate, detailed and comprehensive occurrence summaries, general occurrence reports, and other similar documents during their investigations. The ministry failed to provide sufficient evidence to support this claim in this appeal.

[93] In addition, while the ministry expresses concern that disclosing certain information to the appellant may be inflammatory or cause him to alter his behavior, I have not been provided with sufficient evidence of the risk of these harms occurring beyond the merely possible or speculative. I find that the confidential evidence provided by the ministry in this appeal with respect to the application of section 14(1)(l) is highly speculative. The appellant may not be aware of the existence of or the circumstances leading to the creation of certain records; however, I do not accept that disclosure of the remaining information at issue could reasonably be expected to lead the appellant to change his behavior thereby facilitating the commission of an unlawful act or hampering the control of crime.

[94] In reaching this conclusion, I have taken into account the age of the records – a large number of which are over ten years old – as well as the status of the occurrences, a number of which are "complete." I also take into consideration the type of information that would be disclosed to the appellant, given that he is not interested in receiving other people's personal information or police code information. For the most part, the information remaining at issue consists of document template information, such as headings and subheadings, the appellant's personal information, and information regarding the officers involved in the investigation.

[95] In some instances, I acknowledge that the information sought to be withheld may be more sensitive than stated above. For example, some records that the ministry seeks to withhold pursuant to section 49(a) in conjunction with section 14(1)(l) contain information relating to CPIC checks. However, these records do not contain information relating to the transmission access codes or other similar types of CPIC database

information that this office has found to be exempt under section 14(1)(l) of the *Act*.[29] Without further evidence establishing a reasonable expectation that the harm described in section 14(1)(l) could occur if CIPC check information is disclosed, I find that section 14(1)(l) does not apply to prevent the appellant from obtaining access to that information.

[96] Other records contain information relating to a particular investigative technique that was used by the OPP. I have upheld the ministry's application of section 49(a) in conjunction with section 14(1)(l) to some of the information contained in those records, such as information that would reveal the officers' strategies behind using the technique; however, I am not satisfied that disclosing the fact that the technique was used, or that the appellant was somehow connected to its use, could reasonably be expected to lead to the harms envisioned by section 14(1)(l). In reaching this conclusion, I have considered the age of the records, which date from 2001 to 2013. In other words, the most recent record is now over five years old. In addition, I have taken into consideration the type of information that would be disclosed to the appellant, given the redactions that I have already upheld.

Issue D: Did the institution exercise its discretion under section 49(a) in conjunction with sections 14 and 19? If so, should this office uphold the exercise of discretion?

[97] After deciding that a record or part of a record falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 49(a) exemption is discretionary, which means that the ministry could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[98] In applying the section 49(a) exemption, the ministry was required to exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; 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.[30] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the ministry.

[99] As I have upheld the ministry's decision to apply section 49(a) in conjunction with with sections 14(1)(d) and (l), and section 19, in part, I must review its exercise of discretion under those exemptions.

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[29] Or section 8(1)(l) the *Municipal Freedom of Information and Protection of Privacy Act*, the municipal counterpart to section 14(1)(l). See, for example, Orders M-933, MO-1004, MO-1293, P-1214, and MO-3622.
[30] Order MO-1573.

Representations

[100] The ministry submits that it exercised its discretion correctly in not releasing additional information, in light of the harms that it maintains could be expected to occur should additional responsive records be disclosed. The ministry submits that its exercise of discretion was informed by the large number of records, their high sensitivity, and existing ministry practices, all of which favour non-disclosure.

[101] The appellant did not provide representations on the ministry's exercise of discretion.

Analysis and findings

[102] Based on the parties' representations and my review of the information at issue, I am satisfied that the ministry considered relevant factors in exercising its discretion, and did not take into account irrelevant factors.

[103] In particular, I am satisfied that in exercising its discretion under section 49(a), the ministry considered the sensitivity of the information contained in the records, the number of records, and the harms that could reasonably be expected to occur should the additional records be disclosed. There is no evidence before me to suggest that the ministry took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose.

[104] Accordingly, I am satisfied that the ministry did not err in exercising its discretion to withhold exempt information and I will not interfere with it on appeal.

ORDER:

1. I uphold the ministry's application of section 49(a) in conjunction with section 19 to pages 142 to 148 of the records.

2. I do not uphold the ministry's application of section 49(a) in conjunction with sections 14(1)(d), (e), or (l) to the appellant's personal information, or the document title, name of the investigating institution, UCR clearance status, template subheadings, certain occurrence details, or the name, badge number and role of the involved officers in pages 107, 165, and 167. I order the ministry to disclose that information to the appellant.

3. I uphold ministry's application of section 49(a) in conjunction with section 14(1)(d) to the remainder of the information in pages 167-168.

4. I uphold the ministry's application of section 49(a) in conjunction with section 14(1)(l) to some of the information on pages 8, 15, 19, 20, 26, 78, 82, 101, 126-128, 133, 149, 150, 163, 173-174, 178-181, 182, 183-184, and 185.

5. I do not uphold the ministry's application of section 49(a) in conjunction with section 14(1)(l) to the remainder of the information contained in the records, and I order the ministry to disclose that information to the appellant.

6. With the ministry's copy of this order, I have provided a copy of records on which I have highlighted the portions to be disclosed to the appellant.

7. The disclosure referred to in this order is to take place by **October 26, 2018.**

8. In order to ensure compliance with the provisions of this order, I reserve the right to require the ministry to send me a copy of the information that I have ordered to be disclosed to the appellant.

Original Signed by: September 25, 2018

Jaime Cardy
Adjudicator