Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3889

Appeal PA18-59

Ministry of Community Safety and Correctional Services

October 12, 2018

Summary: 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*) for copies of the Ontario Provincial Police (OPP) incident and investigation reports, witness statements, police notes, and any other records regarding a specified incident number. The ministry located an officer's notes in response to the request, and issued a decision to partially disclose the responsive records on the basis of a number of exemptions from the right of access. At mediation, the dispute was narrowed to information that was withheld on specified pages pursuant to the discretionary personal privacy exemption at section 49(b) of the *Act*. This order upholds the ministry's access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) and 49(b).

Orders Considered: Orders P-1618 and PO-3013.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received the following request for records held by the Ontario Provincial Police (OPP), pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> I want to acquire copies of incident and investigation reports, witness statements, if any, police officer's notes, and any other documents not mentioned which I would be entitled to regarding the incident [on a specified date]. The Occurrence no. is [specified number number]. Nature

> of incident was Opening Mail, sec. 48, contrary to the Canada Post Act, which happened at [named address] in [specified] Township. The names of the parties involved was myself – the complainant against [named individual]. The OPP Detachment that was involved is OPP [specified detachment] in [specified location], Ontario.

[2] The ministry located an OPP officer's notes that were responsive to the request.

[3] The ministry issued a decision granting partial access to the officer's notes and denying access to some of them. It withheld information on the basis of a number of exemptions, and identified some information as non-responsive to the request.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] During mediation, the request was narrowed to the responsive information on pages 8, 9, and 10 the records. As a result, the remaining issues at adjudication concern the discretionary personal privacy exemption at section 49(b) with reference to the presumption in section 21(3)(b) (investigation into possible violation of law) and the factor in section 21(2)(f) (highly sensitive personal information), and the ministry's exercise of discretion under section 49(b).

[6] I sought written representations from the ministry, the affected party, and the appellant. The ministry and the appellant provided written representations in response, which were shared between these parties (except at the sur-reply stage), in accordance with *Practice Direction 7* of this office's *Code of Procedure*. The affected party indicated to our office that they did not wish to participate in the adjudication of this case and re-iterated that they did not consent to disclosure of their personal information.

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

RECORDS:

The information at issue consists of portions of an OPP officer's notes on pages 8, 9, and 10 of the records.

ISSUES:

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

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

C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] The records in this case contain personal information belonging to the appellant and an affected party, as explained below.

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. "Personal information" is defined, in part, 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,
> >
> > . . .
> >
> > (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,
> >
> > . . .
> >
> > (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;

[10] 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]

[11] If it would be reasonable to expect that an individual in a personal capacity may be identified by the disclosure of information, that information qualifies as personal information.[2]

[12] Having reviewed the record and the ministry's confidential representations, I find

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[1] Order 11.
[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

that the record contains the personal information of both the appellant and an affected party. The personal information at issue includes information that falls within paragraphs a, d, e, g, and h above, and the introductory wording of the definition of "personal information" at section 2(1) of the *Act*.

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

[13] As discussed above, the information at issue exists in a record that contains the personal information of both the appellant and an identifiable individual. Therefore, I will consider the information at issue under section 49(b).

[14] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. If the records contain the requester's own personal information, access to the records is addressed under Part III of the *Act* and the discretionary exemptions at section 49 may apply.

[15] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from that right.

[16] Under section 49(b), if a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[3]

[17] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), sections 21(2) to (4) provide guidance. For records covered by section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties to determine whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[4] Any unlisted factors that may also be relevant must be considered, too. Additionally, if any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not considered to be an unjustified invasion of personal privacy. Section 21(4) is not relevant here.

Section 21(3)

[18] The ministry submits, and I find, that the presumption at section 21(3)(b) applies to the information at issue, as explained below.

[19] Section 21(3)(b) says:

[3] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).
[4] Order MO-2954.

> 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;

[20] Unless disclosure of the information at issue is necessary to prosecute a violation of law or continue an investigation, disclosure will be presumed to be an unjustified invasion of personal privacy if these three requirements are met:

- the information at issue is personal information;
- that information was compiled as part of an investigation into a possible violation of law; and
- that information is identifiable as part of an investigation into a possible violation of law.

[21] These requirements are met in this case:

- the information at issue is the personal information of the affected party;
- that information was compiled as a part of an OPP law enforcement investigation initiated by the appellant's complaint regarding a criminal offence that the appellant believed may have been committed; and
- the information is identifiable as part of an investigation into a possible violation of law because the OPP investigating officer created the records at the time of, and for the purpose of, the investigation into that possible violation of a specified section of the *Criminal Code of Canada*.

[22] The ministry submits, and I find, that these circumstances clearly bring the record within the scope of the presumption at section 21(3)(b). The presumption applies even though no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.[5]

[23] The fact that section 21(3)(b) applies to the information withheld in the responsive record is a factor that weighs heavily toward finding that disclosure of the withheld personal information would be an unjustified invasion of personal privacy.

Section 21(2)

[24] On the basis of the following, I find that the factor weighing against disclosure at

[5] Orders P-242 and MO-2235.

section 21(2)(f) applies.

[25] Section 21(2) lists non-exhaustive factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy.[6] Any circumstances that are relevant, even if they are not listed under section 21(2), must be considered.[7]

[26] Section 21(2) states, in part:

> 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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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> . . .
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> . . .
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

No factors favouring disclosure

[27] Based on my review of the representations and evidence before me, I find that there is insufficient evidence to demonstrate that there are any listed section 21(2) factors, or unlisted factors or circumstances, favouring disclosure.

Factor weighing against disclosure

[28] I agree with the ministry's position that section 21(2)(f) (highly sensitive) applies.

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[6] Order P-239.
[7] Order P-99.

[29] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed,[8] and here there is.

[30] In this case, it is key to remember that the personal information of the affected party appears in a record created to investigate a possible violation of the *Criminal Code of Canada*. The ministry submits, and I find, that the principle stated in Order P-1618 is applicable here: that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f).

[31] In addition, as the ministry argues, if disclosure were ordered, the affected party's personal information would no longer be protected and could be publicized without restrictions, at the discretion of the appellant. This prospect could reasonably be expected to cause the affected party significant personal distress.

[32] Taken together, these considerations lead me to conclude that disclosure could be expected to cause the affected party significant distress.

Absurd result

[33] The appellant argues that the absurd result principle applies in this case, but I do not agree.

[34] If the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[9]

[35] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement,[10] or the information is clearly within the requester's knowledge.[11]

[36] However, as it is in this case, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[12] The ministry argues, and I find, that disclosure of the type of information withheld would be inconsistent with the purpose of the personal privacy exemption, to protect the privacy of an affected party whose personal information was created. This finding is consistent with past IPC orders that have also found that the absurd result principle does not apply.[13]

[37] In addition, I find that it would not be absurd to withhold the information in the

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[8] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[9] Orders M-444 and MO-1323.
[10] Orders M-444 and M-451.
[11] Orders MO-1196, PO-1679 and MO-1755.
[12] Orders M-757, MO-1323 and MO-1378.
[13] See, for example, Orders PO-3013 and MO-1378.

circumstances despite evidence that the appellant is knowledgeable about certain aspects of the withheld information because there is insufficient evidence that she is aware of all of it. I cannot elaborate without disclosing withheld content in the record.

[38] Therefore, since the absurd result principle does not apply, there are no factors favouring disclosure, and there are two factors weighing heavily against disclosure, I find that the exemption at section 49(b) applies to the personal information withheld, subject to my review of the ministry's exercise of discretion.

Issue C: Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[39] On the basis of the following, I uphold the ministry's exercise of discretion.

[40] The section 49(b) exemption is discretionary, and permits a ministry to disclose information, despite the fact that it could withhold it. The ministry must exercise its discretion. On appeal, the Commissioner may determine whether the ministry failed to do so.

[41] In addition, the Commissioner may find that the ministry erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[42] In either case this office may send the matter back to the ministry for an exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the ministry [section 54(2)].

[43] The ministry submits that it properly exercised its discretion to withhold the personal information at issue, in particular, based on the following considerations:

- the public policy interest in safeguarding the privacy of an affected party whose personal information was created in the course of an OPP law enforcement investigation, and who has not consented to disclosure;
- the concern that disclosure could jeopardize public confidence in the OPP, especially given the lack of consent to disclosure;
- withholding this personal information in the OPP investigation records is consistent with OPP usual practices when the affected party has not consented to disclosure of their personal information.

[14] Order MO-1573.

[44] I find that these are all relevant factors for the ministry to have considered in exercising its discretion.

[45] The appellant argues that the ministry could have disclosed a lot more information to her with careful consideration, but I disagree. The ministry has already disclosed a significant portion of the responsive record. What relatively minor portions of the record that remain withheld consist of the personal information of an affected party that could not be further severed without disclosure being an unjustified invasion of the personal privacy of that affected party.

[46] The appellant also disputes the accuracy of information that was disclosed to her (as opposed to the information withheld from her), and points to this as evidence of bad faith on the part of the ministry. However, the subject of this appeal is whether the appellant has a right of access to the personal information of an affected party that has been withheld from her. The accuracy of her own personal information that has been released to her has no bearing on whether the ministry properly exercised its discretion to withhold the personal information of another identifiable individual. I find that there is no evidence that the ministry exercised its discretion in bad faith or for an improper purpose, or took into consideration any irrelevant factors.

[47] For these reasons, I uphold the ministry's exercise of discretion.

ORDER:

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

Original Signed by: October 12, 2018

Marian Sami
Adjudicator