

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER PO-3903-R

Appeal PA16-247

Ministry of Community Safety and Correctional Services

November 23, 2018

**Summary:** The ministry requested a reconsideration of Order PO-3848 on the basis that there was a fundamental defect in the adjudication process under section 18.01(a) of the IPC's *Code of Procedure*. Specifically, the ministry submitted that the personal information contained on page 300 of the records should not have been ordered to be disclosed. The adjudicator allows the reconsideration on the basis of section 18.01(a) and finds the information at issue on page 300 of the records to be exempt under section 49(b) (personal privacy) of the *Act*. The ministry's exercise of discretion in withholding this information under section 49(b) is upheld.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1998, c. F.31, as amended, section 49(b). IPC's *Code of Procedure*, section 18.01(a).

**Orders and Investigation Reports Considered:** Order PO-3848.

### 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 all records related to her.

[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). 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 confirmed her interest in pursuing access to the information the ministry withheld from disclosure. The appellant also raised the issue of the reasonableness of the ministry's search.

[6] I conducted an inquiry into the issues in the appeal. After I completed the inquiry, I issued Order PO-3848, upholding the ministry's decision in part and ordering the disclosure of portions of the records that relate solely to the appellant and an affected party that provided their consent. I upheld the ministry's application of section 49(b) to the personal information that remained at issue. I upheld the ministry's application of section 49(a), read with sections 14(1)(c) and (l), in part. I ordered the ministry to disclose some information that I found to be not exempt under section 49(a), read with section 14(1)(l). Finally, I upheld the ministry's search as reasonable.

[7] Following the issuance of Order PO-3848, I received a reconsideration request from the ministry arguing that there was a fundamental defect in the adjudication process which is a ground for reconsideration described in section 18.01(a) from the IPC's *Code of Procedure*.

[8] I invited the appellant to respond to the ministry's reconsideration request. The appellant did not make submissions.

[9] In this decision, I reconsider my finding in Order PO-3848 about page 300 of the records, and I uphold the ministry's decision to withhold the information at issue in page 300 under section 49(b) of the *Act*.

## **RECORDS:**

[10] The information at issue consists of the portions of a General Occurrence Report, that I ordered the ministry to disclose on page 300 of the records.

## **ISSUES:**

- A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3848?

- B. Does page 300 contain personal information within the meaning of section 2(1) of the *Act*?
- C. Does the discretionary exemption at section 49(b) apply to the information at issue?
- D. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3848?**

[11] In Order PO-3848, I addressed the ministry's decision to withhold portions of page 300 under various exemptions, including the personal privacy exemption in section 49(b).

[12] The ministry submits there are three fundamental defects in Order PO-3848 in relation to my findings regarding page 300. Specifically, the ministry states,

(a) Paragraph 21 of the Order contains a fundamental defect when it indicates that the information ordered disclosed on page 300 is personal information, which belongs only to the appellant;

(b) The Order contains a fundamental defect in not considering the wishes of the affected third party individual who advised the police that they did not wish to be identified; and

(c) The Order contains an internal contradiction, which the ministry submits is a fundamental defect. The same information I ordered to be disclosed on page 300 was found to be exempt from disclosure in the officer's notes on pages 338 and 339.

[13] At Paragraph 21 of Order PO-3848, I stated, "I reviewed these portions of the records [including the portions ordered to be disclosed in page 300] and find that the ministry can disclose them to the appellant without revealing the personal information of other identifiable individuals." The ministry submits my finding lacks an evidentiary foundation to support it, thereby rendering it defective. The ministry submits the information at issue in page 300 contains a detailed statement, the contents of which were provided by an individual to a member of the OPP as part of the police officer's investigative activities. The ministry submits the information I ordered to be disclosed would likely result in the identity of the individual becoming known to the appellant. In the confidential portions of its representations, the ministry identifies the specific types of information contained in page 300 that would constitute personal information within the meaning of section 2(1) of the *Act*. The ministry further states that the information

at issue in page 300 contains enough contextual detail for the appellant to reasonably be able to identify this individual.

[14] Section 18.01(a) of the IPC's *Code of Procedure* (the *Code*) states the following:

The Commissioner may reconsider an order or other decision where it is established that there is:

a fundamental defect in the adjudication process.

[15] In Order PO-3848, I considered the records and the representations submitted by the ministry on the issues of whether the records contain personal information within the meaning of section 2(1) of the *Act*. I note the ministry did not address page 300 specifically in its representations on this issue. However, in its request for reconsideration, the ministry provides a more detailed explanation of why the information in page 300 constitutes the personal information of an identifiable individual even though the OPP did not name the individual in the report. I note the ministry ought to have provided these arguments during the inquiry. However, in my failing to consider the full context of the information in page 300, I find there was a fundamental defect in the adjudication process within the meaning of section 18.01(a). I will now proceed to consider whether the information at issue in page 300 contains personal information within the meaning of section 2(1) of the *Act* and, if so, whether it is exempt under section 49(b).

**Issue B: Does page 300 contain personal information within the meaning of section 2(1) of the *Act*?**

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether page 300 contains personal information and, if so, to whom that personal information relates. The term *personal information* is defined, in part, in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

...

(e) the personal opinions or views of the individual except where they relate to another individual,

...

(g) the views or opinions of 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, personal information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>1</sup>

[17] To qualify as personal information, the information must be about the individual in a personal capacity.

[18] In Order PO-3848, I found that all the records at issue contained the appellant's personal information. Specific to this reconsideration, I find the information at issue in page 300 contains an individual's views and opinions about her (paragraph (g) of the definition of personal information) and her name where it appears with other personal information about her (paragraph (h)).

[19] In addition, I found that page 300 contains the personal information relating to another identifiable individual, including an individual's views and opinions about them and their name where it appears with other personal information about them. I found that this information is exempt under section 49(b) in Order PO-3848. This information is not subject to the ministry's reconsideration request. Accordingly, I will not consider it further in this order.

[20] In its reconsideration request, the ministry submits page 300 contains the personal information relating to yet another identifiable individual. The ministry states page 300 contains this individual's detailed statement. The ministry submits the disclosure of the information at issue would likely result in the identity of the individual becoming known to the appellant given the nature of the information at issue. In the confidential portions of its representations, the ministry identifies the specific types of information contained in page 300 that would identify the individual. The ministry further submits that the information I ordered to be disclosed on page 300 contains enough contextual detail for the appellant to reasonably be able to identify the individual. Finally, the ministry states the individual told the police that they did not wish to be identified.

[21] Based on my review of page 300 and the ministry's representations, I find the information that remains at issue constitutes the personal information of an identifiable individual. The personal information includes information that falls within paragraph (e) of the definition above as well as the introductory wording of the definition of personal information in section 2(1) of the *Act*. Given the circumstances in which the individual provided their statement, I will not describe the personal information that relates to them in the record further. Even though the individual's name and contact information is not contained in page 300, I find the individual is identifiable from the nature of the information.

[22] Therefore, I find the information at issue in page 300 contains the personal information of both the appellant and another identifiable individual. Because page 300 contains the appellant's personal information, I will consider whether the personal

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<sup>1</sup> Order 11.

information that remains at issue qualifies for exemption under section 49(b) of the *Act*.

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

[23] 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.<sup>2</sup>

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

[25] 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). I reviewed the information that remains at issue in page 300 and find that none of the exceptions in sections 21(1)(a) to (e) apply.

[26] To determine whether the disclosure would or would not constitute an unjustified invasion of privacy, the IPC also examines the factors listed at section 21(2), the presumptions at section 21(3) and the exceptions listed in section 21(4).

[27] In the representations it submitted during the original inquiry, the ministry referred to the factor in section 21(2)(f) and the presumption in section 21(3)(b) in support of its decision.

[28] 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,

the personal information is highly sensitive.

The ministry referred 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 submitted that this reasoning should be applied to the records because many of the individuals identified in the records were complainants, persons of interest or witnesses in the records. The ministry submitted it is reasonable to expect these individuals would be distraught to discover their personal information was disclosed to

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<sup>2</sup> See "Issue D" below for a more detailed discussion of the institution's discretion under section 49(b).

the appellant. In its request for reconsideration, the ministry states the identifiable individual advised the OPP they did not want to be identified to the appellant.

[29] 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 submitted that all the information withheld under section 49(b) relates to OPP investigations.

[30] In Order PO-3848, I made the following findings:

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.

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.<sup>3</sup> Therefore, I find that the factor favouring non-disclosure in section 21(2)(f) applies to all of the personal information remaining at issue.

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<sup>3</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

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

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.

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<sup>4</sup> or where the information is clearly within the requester's knowledge.<sup>5</sup>

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).

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.

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

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<sup>4</sup> Orders M-444 and MO-1323.

<sup>5</sup> Orders M-444 and P-1414.



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.<sup>6</sup>

[31] I adopt this analysis for the purpose of this Reconsideration Order. Based on my review of the information at issue in page 300, I find it is subject to the presumption in section 21(3)(b). In addition, I find the factor at section 21(2)(f) applies in favour of non-disclosure of the information at issue. Weighing the factor at section 21(2)(f) and the presumption at section 21(3)(b) and balancing the interests of the appellant and other parties to the appeal, I find that disclosure of the personal information at issue in page 300 would be an unjustified invasion of personal privacy. Therefore, I find the personal information at issue in page 300 is exempt under section 49(b) because it would result in an unjustified invasion of the personal privacy of an individual other than the appellant. I will now review the ministry's exercise of discretion.

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

[32] Where an institution decides that records or portions thereof fall within the scope of a discretionary exemption, it is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Section 49(b) is a discretionary exemption, which means the ministry may choose to disclose the information to the appellant, despite the fact it may be withheld under the *Act*.

[33] In applying section 49(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.<sup>7</sup> However, according to section 54(2) of the *Act*, I may not substitute my own discretion for the ministry's.

[34] As I upheld the ministry's decision to apply section 49(b) to withhold the personal information at issue in page 300, I must review its exercise of discretion under that exemption.

[35] In the representations it submitted during the inquiry, the ministry claimed it exercised its discretion properly. The ministry submitted that it based its exercise of discretion on the following considerations:

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<sup>6</sup> Order PO-3848, paras 34-40.

<sup>7</sup> Order MO-1573.

- 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.

[36] Based on the ministry's representations and my review of the information at issue on page 300, I am satisfied the ministry considered relevant factors in exercising its discretion and did not take into account irrelevant considerations in applying section 49(b). On review of page 300, I find the appellant will have obtained access to as much of her personal information as possible through the ministry's access decision and Order PO-3848. The information I found to be exempt under section 49(b) consists of the appellant's and another identifiable individual's personal information. I found above that the appellant's personal information is intertwined with the personal information of this other identifiable individual in a manner that does not permit reasonable severance. I am satisfied the ministry considered the appellant's right to her own personal information and balanced that against the importance of other individual's personal privacy. 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.

[37] Therefore, in the circumstances before me, I am satisfied the ministry appropriately exercised its discretion under section 49(b) to withhold the information at issue on page 300.

**ORDER:**

I reconsider Order PO-3848, in part, and uphold the ministry's decision to withhold the personal information at issue in page 300 of the records.

Original Signed by: \_\_\_\_\_

Justine Wai  
Adjudicator

November 23, 2018