

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3904-F

Appeal PA16-175

Ministry of the Attorney General

November 26, 2018

Summary: The appellant sought access to the Special Investigation Unit's Director's Report regarding a complaint made by her. In Interim Order PO-3820-I, the adjudicator found that the record is a report within the meaning of the law enforcement exemption in section 14(2)(a). However, Interim Order PO-3820-I required the ministry to re-exercise its discretion under section 49(a).

In this order, the adjudicator upholds the ministry's re-exercise of discretion in withholding the report under section 49(a) in conjunction with section 14(2)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a) and 14(2)(a).

Orders Considered: Interim Order PO-3820-I.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following:

SIU¹ investigation pertaining to [an assault]. Accused [name], all statements, video, audio, investigative documents/notes & decision.

[2] The ministry issued a decision granting partial access to the records pursuant to sections 14(2)(a) (law enforcement report) and 21(1) (personal privacy).

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

[4] During mediation, the exemptions claimed were clarified to be section 49(a) (discretion to refuse requester's own information) in conjunction with section 14(2)(a) and the discretionary personal privacy exemption in section 49(b), as the records contain the personal information of the appellant and other individuals.

[5] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[6] I sought the representations of the ministry and the individuals whose personal information may be contained in the records (the affected persons), initially.

[7] In their representations, the ministry only provided submissions on the applicability of section 49(a), with section 14(2)(a), to the one record remaining at issue, the SIU Director's Report to the Attorney General (the report).

[8] In Interim Order PO-3820-I, I found that the record at issue is a report within the meaning of section 14(2)(a) and therefore qualified for exemption under the discretionary exception at section 49(a) in conjunction with section 14(2)(a).² I found, however, that the ministry had not properly exercised its discretion under these sections and ordered it to re-exercise its discretion.

[9] In this order, I uphold the ministry's re-exercise of discretion in withholding the report under section 49(a) in conjunction with section 14(2)(a).

RECORD:

[10] There is only one record at issue in this appeal, the SIU Director's Report.

¹ Special Investigation Unit (SIU). As set out in Interim Order PO-3820-I, according to the SIU's website: Once the SIU has laid a charge against a police officer, the Unit refers the matter to Justice Prosecutions of the Criminal Law Division at the Ministry of the Attorney General, which prosecutes the charge. The SIU, as an investigative agency, is not involved in the prosecution, although it does participate by preparing the Crown brief and assisting the Crown. See <https://www.siu.on.ca/en/faq.php>

² As I found the record subject to section 49(a), together with section 14(2)(a), it was not necessary for me to also consider whether it was exempt under section 49(b) in Interim Order PO-3820-I.

DISCUSSION:

Did the ministry re-exercise its discretion in a proper manner?

[11] In Interim Order PO-3820-I, I found that the record at issue was a law enforcement report within the meaning of section 14(2)(a). This section reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[12] I found that the record was prepared in the course of a law enforcement investigation into the allegations made by the appellant against a police officer and that it was prepared by the SIU, which is an agency that has the function of enforcing and regulating compliance with a law.

[13] Accordingly, I found that, subject to my review of the ministry's exercise of discretion, the record is exempt by reason of section 49(a), in conjunction with section 14(2)(a). Section 49(a) reads:

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, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[14] In Interim Order PO-3820-I, I made the following findings regarding the ministry's exercise of discretion:

The record is a report that summarizes the investigative brief and concludes with the Director's reasons regarding the laying of charges. The appellant has received access to the documents that form the basis of the report, including all of the personal information of other individuals in the record.

Specifically, from my review of the records disclosed to the appellant, other than the Director's determination as to whether to lay charges, all of the other information in the record is information that originates from the appellant or is information that she would be aware of from the disclosure she has already received.

The affected persons have directed me to “The Report of the Independent Police Oversight Review”,³ also known as the Tulloch Report, and have indicated that its findings may be relevant to the determination made in this appeal. This report focuses on recommendations to improve the transparency, accountability, and effectiveness of Ontario’s three civilian police oversight bodies, including the SIU.

Based on my review of the record at issue, the Director’s Report, and the representations of the ministry and the affected persons, I find that the ministry exercised its discretion in an improper manner and failed to take into account the following relevant considerations:

- the appellant is seeking her own personal information,
- the record is a compilation of the information obtained during the course of the investigation of the incident and that all of the investigative brief has been disclosed to the appellant,
- the applicable recommendations in favour of disclosure of SIU Director’s Reports in the Tulloch Report,
- whether disclosure will increase public confidence in the operation of the institution, and
- the nature of the information and the extent to which it is significant to the appellant.

I find that the ministry did not exercise its decision in a proper manner under section 49(a). As such, I will order the ministry to re-exercise its discretion, taking into account the considerations listed above.

[15] The order provisions in Interim Order PO-3820-I read:

1. I order the ministry to re-exercise its discretion under section 49(a) in accordance with the analysis set out above.
2. I order the ministry to advise the appellant, the affected persons’ counsel and this office of the result of this re-exercise of discretion, in writing. If the ministry continues to withhold information from the Director’s Report, I also order it to provide the appellant, the affected persons’ counsel and this office with an explanation of the basis for re-exercising its discretion to do so.

³ See https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/

3. The ministry is required to send to the appellant, the affected persons' counsel and this office the results of its re-exercise of discretion, and its explanation, by no later than March 30, 2018.

4. If the appellant and/or the affected persons' counsel wish to respond to the ministry's re-exercise of discretion, and/or its explanation for re-exercising its discretion to withhold information, they must do so within 21 days of the date of the ministry's correspondence by providing this office with written representations.

[16] The ministry did re-exercise its discretion and maintained its decision to not disclose the record. It provided this office, the appellant, and the affected persons with a letter explaining its reasons for this decision, which reads as follows:

With respect to the considerations which the ministry was asked to review in re-exercising its discretion under section 49(a):

- The appellant is seeking her own personal information

The ministry acknowledges that the appellant is seeking her own personal information, but that is not the full extent of the information she is seeking. She is also seeking, through her request for the Director's Report, the personal information of other individuals she knows, including the subject officer and witnesses to the events in questions.

At least as far as the witnesses are concerned, their information would have been provided on the understanding that it was to be used solely for purposes for which it was collected, namely, the SIU's investigation. Disclosing their personal information, to someone they know, would not only be at odds with their reasonably held expectations at the time they provided the information, but also risks deterring future witnesses, similarly positioned, from being as candid and forthright as possible with the SIU, detracting from the ability of the SIU to effectively discharge its public interest mandate as civilian overseers of police conduct in certain cases.

- The record is a compilation of the information obtained during the course of the investigation of the incident and that all of the investigative brief has been disclosed to the appellant

While it is true that the investigative brief has already been disclosed to the appellant, it is important to note that disclosure occurred within the framework of a hearing before [name of

tribunal] and was made for the strict purpose of assisting the appellant at the hearing. That is, disclosure would have been accompanied by strict limits imposed on the appellant as to the manner and use of the information in question. In contrast, disclosure under the Act would not be accompanied by any terms or conditions governing the appellant's use of the personal information of other persons.

In addition, the record is not merely a compilation of the information obtained in the course of the SIU investigation; it includes a legal analysis of that information by the SIU director. That analysis was largely informed by sensitive assessments of witnesses' credibility, the disclosure of which could reasonably be expected to cause those witnesses embarrassment, particularly as the witnesses and the appellant are known to each other.

Again, the ministry is concerned that disclosure of this type of information could chill future witnesses from providing candid accounts to the SIU for fear that judgements informed by those accounts could be made privy to third parties.

- The applicable recommendations in favour of disclosure of SIU Director's Reports in the Tulloch Report

It bears noting that the Tulloch Report had not been issued at the time the SIU initially exercised its discretion in this case. Be that as it may, while the report recommended the release of SIU Director's Reports, it recognized that they would have to be crafted in a manner that respected the privacy rights of persons whose information was contained in the report. The advice contained in the report has resulted in a transformation in the way Director's Reports are presently being prepared, such that they may, consonant with Justice Tulloch's recommendation, be posted publicly. With this in mind, two points are important to consider.

First, the record in question was prepared before the Tulloch Report was issued and the new practice of publicly posting Director's Reports was instituted, at a time when the expectation was that the reports would remain completely confidential in the hands of the ministry. Consequently, the scope and nature of the information contained in the report was not scrutinized ahead of time with a view to protecting various privacy interests, including, most emphatically, those relating to the privacy of witnesses.

Second, it bears noting that even today, under the new public reporting scheme implemented in the wake of the Tulloch Report, the ministry does not publicly post Director's Reports related to sexual assault investigations. In so doing, it acknowledges the risks associated with the unnecessary invasion of privacy, including concerns about the potential re-victimization of affected persons.

- Whether disclosure will increase public confidence in the operation of the institution

The ministry submits that it is unclear whether the release of this particular report to this particular appellant would increase public confidence in the institution. That is, while the appellant herself might or might not gain greater confidence in the work of the SIU were she granted access to the report, it is not certain what the impact of her opinion would be with respect to the general public's confidence in the institution.

- The nature of the information and the extent to which it is significant to the appellant

The ministry submits that the information contained in the record is highly sensitive, having been gathered in the course of a criminal law enforcement investigation and subjected to a credibility assessment undertaken by the SIU director in deciding that charges were not warranted in the matter. Indeed, this is precisely the type of information, insofar as it relates to persons other than the appellant, for which access is presumed to constitute an unjustified invasion of personal privacy pursuant to the combined operation of sections 21(1)(f) and 21(3)(b) of the Act.

Thus, while the information may be significant to the appellant, it is incumbent on the ministry to weigh in the balance the privacy interests of other persons who provided information to the SIU, as well as the vital public interest in ensuring that witnesses are encouraged to provide fulsome accounts to the SIU by protecting what they have said from being released to third parties without limits or restrictions.

Accordingly, having re-exercised its discretion under section 49(a) of the Act with a view to the considerations set out in the interim order, the ministry affirms its decision to withhold access to the record in question.

[17] The affected persons rely on the submissions of the ministry.

[18] The appellant did not provide representations in response to the ministry's representations, other than stating that she still wants to receive a copy of the record.

Analysis/Findings

[19] As set out in Interim Order PO-3820-I, the section 49(a) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[20] 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
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[21] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴ This office may not, however, substitute its own discretion for that of the institution.⁵

[22] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁶

- the purposes of the *Act*, including the principles that:
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

⁴ Order MO-1573.

⁵ Section 54(2).

⁶ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution.

[23] Based on my review of the ministry's detailed representations on the re-exercise of its discretion, and in the absence of representations from the appellant, I find that the ministry re-exercised its discretion in a proper manner taking into account the relevant considerations listed above, particularly those listed in Interim Order PO-3820-I, which were:

- the appellant is seeking her own personal information,
- the record is a compilation of the information obtained during the course of the investigation of the incident and that all of the investigative brief has been disclosed to the appellant,
- the applicable recommendations in favour of disclosure of SIU Director's Reports in the Tulloch Report,
- whether disclosure will increase public confidence in the operation of the institution, and
- the nature of the information and the extent to which it is significant to the appellant.

[24] I find that the ministry did not take into account improper considerations in its re-exercise of discretion.

[25] Therefore, after reviewing the record and taking into account the ministry's representations on the re-exercise of its discretion, I uphold the ministry's re-exercise of discretion in deciding to withhold the record under section 49(a) in conjunction with section 14(2)(a).

ORDER:

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

Original Signed by: _____
Diane Smith
Adjudicator

_____ November 26, 2018

