

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3993

Appeal PA17-93

Ministry of the Solicitor General

September 30, 2019

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all police incident reports that related to the requester. The ministry granted partial access to the records it located, taking the position that certain information in the records was not responsive to the request and that other information qualified for exemption from disclosure under the *Act*. The ministry denied access to some portions of the records pursuant to the discretionary exemption at section 49(a), read in conjunction with the law enforcement exemptions at section 14(1)(a) and 14(1)(l), and the solicitor-client privilege exemption at section 19, as well as the discretionary personal privacy exemption at section 49(b) of the *Act*. The requester appealed.

In this order, the adjudicator finds that certain information is not responsive to the request. She also finds that some information does not qualify as personal information and must be disclosed to the appellant. She upholds the ministry's decision to withhold the remaining personal information of individuals other than the appellant pursuant to section 49(b), and also upholds the ministry's decision with regard to section 49(a) in conjunction with section 19. The ministry's decision with regard to section 49(a) and the law enforcement exemption at section 14(1) is upheld in part, and some information is ordered to 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)(a), 14(1)(l), 19, 21(1), 49(a) and 49(b).

OVERVIEW:

[1] The Ministry of the Solicitor General¹ (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all police incident reports that related to the individual who made the request.

[2] The ministry located 42 pages of records and granted the requester partial access to them. The ministry denied the requester access to some parts of the responsive records pursuant to the exemptions in the *Act* at section 49(a) (discretion to refuse requester's own personal information) in conjunction with the law enforcement exemptions at sections 14(1)(a), 14(1)(l) and 14(2)(a) and the solicitor-client exemption at section 19. The ministry also relied on the discretionary personal privacy exemption at section 49(b), with reference to sections 21(2)(f) and 21(3)(b) of the *Act*.

[3] The ministry severed some information from the records on the basis that it was not responsive to the request. Copies of the redacted records were provided to the requester.

[4] The requester (now the appellant) appealed the ministry's decision. The appellant asked for the appeal to move forward without mediation and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[5] This office began the inquiry by seeking representations from the ministry and an affected party. In its representations, the ministry advised that it is no longer relying on the exemption at section 49(a) in conjunction with section 14(2)(a). The affected party did not submit representations.

[6] A copy of the ministry's representations was then provided to the appellant, along with a Notice of Inquiry and she was invited to submit representations in response. Portions of the ministry's representations were withheld from the appellant as they met this office's confidentiality criteria set out in *Practice Direction Number 7*. The appellant provided responsive representations and the appeal was then transferred to me to continue the inquiry.

[7] After reviewing the appellant's representations, I provided a copy to the ministry and invited it to make representations in reply, which it did. Upon reviewing the ministry's reply, I concluded that I had sufficient information to proceed with the inquiry and make determinations on the matters at issue.

[8] In this order, I find that some of the information at issue is not responsive to the

¹ Formerly the Ministry of Community Safety and Correctional Services.

request and I uphold the ministry's decision to withhold it. I also find that some information is not personal information and is not subject to any of the other exemptions claimed by the ministry and therefore must be disclosed to the appellant. I uphold the ministry's decision to withhold the remaining personal information of individuals other than the appellant pursuant to section 49(b), and also uphold the ministry's decision with regard to section 49(a) and section 19. I reject the ministry's claim that some of the information at issue is subject to section 49(a) and the law enforcement exemption at section 14(1)(a), but uphold its decision that some information is subject to sections 49(a) and 14(1)(l).

RECORDS:

[9] The information at issue is the withheld portions of 42 pages of police occurrence reports and summaries.

PRELIMINARY MATTER:

[10] To be considered responsive to a request, records, and information in the records, must "reasonably relate" to the request.² The ministry says that there is information in the records at issue about when the records were printed and who printed them. The ministry asserts that this information does not "reasonably relate" to the request and is therefore not responsive. It relies on Order PO-3742 in support of its position.

[11] I agree that the information about who printed the records and when they were printed is not responsive to the appellant's request and I uphold the ministry's decision to withhold it on this basis.

ISSUES:

- A. Do the records 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) (personal privacy) apply to the personal information at issue?
- C. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption (solicitor-client privilege) apply to the information at issue?

² Orders P-880 and PO-2661.

- D. Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(a) and/or 14(1)(l) law enforcement exemptions apply to the information at issue?
- E. Did the institution exercise its discretion under section 49(a) in conjunction with sections 14 and/or 19, and/or section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[12] 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. 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;

[13] 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.³

[14] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) 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.

(2.2) For greater certainty, subsection (2.1) 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.

[15] 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.⁴

The parties' representations

[16] The ministry says that parts of the records contain information that fits within the meaning of the definition of "personal information" in section 2 of the *Act*. Specifically, it submits that the following information is personal information:

- The names, dates of birth, addresses and similar details about affected third party individuals named in the records as witnesses or complainants;
- The statement on page 10 provided by an affected third party individual, who was the subject of an Ontario Provincial Police (OPP) investigation, which includes their personal opinions; and
- The "workplace identification numbers" (WIN) belonging to OPP employees.

[17] The ministry says that the WIN numbers provide a link to other personal

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

information about the employees, related to their employment. It relies on Order PO-3742, which it says concluded that the disclosure of WIN numbers, particularly when accompanied by an employee's name, which had already been disclosed to the appellant, "reveals something of a personal nature about the employee."

[18] Finally, the ministry submits that due to the subject matter of the records (i.e. OPP investigations where the appellant appears to know one or more of the affected third party individuals and vice-versa), severing some identifying information (such as names) might not serve to remove all of the personal information from the records. The ministry says that in these circumstances, it is reasonable to expect that affected third party individuals could be identified if other information in the records about them was disclosed.

[19] The appellant submits that the information in the records is her personal information. She does not make any representations about whether the records also contain the personal information of others.

Findings and analysis

[20] Based on my review of the records and the parties' representations, I find the records are generally about the appellant and therefore, they all contain her personal information.

[21] Some of the records also contain the personal information of others. I agree with the ministry that the names, dates of birth, addresses and similar information of affected third party individuals named in the records as witnesses or complainants is personal information within the meaning of the definition in section 2 of the *Act*. I also accept that, in some cases, given the appellant's knowledge of the parties whose personal information appears in the records, additional information qualifies as personal information since the appellant would be able to identify the individuals the information is about if that information was disclosed.

[22] I also agree with the ministry, and with Order PO-3742, that the employee WIN numbers qualify as personal information.

[23] For these records, which contain the personal information of individuals other than the appellant, I will consider the application of the personal privacy exemption in section 49(b) of the *Act* below at Issue B.

[24] However, there are some pages in which the information that the ministry has severed is not personal information. For example, on page 2, I find that some of the information about police officers that has been severed is not personal information because it is about the officers in their professional capacity and does not reveal anything of a personal nature about them. Therefore, the personal privacy exemption claimed by the police cannot apply to this information.

[25] Pages 3 and 10 also contain severed information that is not personal information. On page 3, I find that the line of information following the words “witness interviews” does not identify any individual personally or reveal anything of a personal nature about an individual. Similarly on page 10, there is some information that the ministry has withheld, such as the details about the type of report, the author’s details and some of the entry information which does not identify an individual personally or reveal anything of a personal nature about an individual.

[26] The ministry has also applied the law enforcement exemption at section 14(1)(l) to pages 2, 3 and 10 and as such, I will also consider the applicability of section 14(1)(l) to this information under Issue D.

[27] I find that the remaining information on pages 3 and 10 that the ministry has severed is personal information of other individuals that is so intertwined with the appellant’s personal information that the appellant’s personal information cannot be severed. Accordingly, I will consider whether the personal information of these other individuals is exempt from disclosure under the exemptions claimed.

[28] I also find that there is personal information of individuals other than the appellant on page 18. However, once the names of the individuals and other identifying information has been severed, I find that there is some remaining information that is not personal information. Given that the ministry has also applied section 14(1)(l) to this information, I will consider whether the ministry may withhold the information under that section in conjunction with section 49(a) later in this decision under Issue D.

[29] Finally, on pages 9, 16, 17, 21-23, 26, 29, 31 and 37 I find that the ministry has severed some personal information that relates only to the appellant and not any other individuals. As Order PO-2955 stated, it is not necessary for me to consider whether the appellant’s own personal information qualifies for exemption under section 49(b) since she has a general right to it under section 47(1) and its disclosure to her cannot be an unjustified invasion of another individual’s personal privacy, as required by that section. I will, however, consider whether the ministry has properly withheld this information pursuant to section 14(1) in conjunction with section 49(a), since it also applied that section to these pages.

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

[30] 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 this right.

[31] Under section 49(b), where 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.⁵

[32] I have found above that there is personal information of individuals other than the appellant on pages 2, 3, 5, 6, 10, 13, 14, 16-18, 23, 25, 26, 28, 31, 33 and 42. I will now consider whether the section 49(b) personal privacy exemption applies to that information.

[33] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 21(1) or (a) to (d) of 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under 49(b).

[34] If the information does not fit within any of subsections (a) to (e) of section 21(1) or (a) to (d) of 21(4), sections 21(2) and (3) assist in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). In making this determination, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁶

Overview of the parties' positions

[35] The ministry says that disclosing the personal information in the records would constitute an unjustified invasion of the privacy of affected third party individuals identified in the records who have not consented to the disclosure.

[36] The ministry says that the presumption in section 21(3)(b) (investigation into violation of law) applies to the personal information it has withheld. It also says that the factor at 21(2)(f) (highly sensitive) weighs in favour of not disclosing the personal information. With regard to the employee WIN numbers, the ministry says that these numbers are used predominantly for human resources purposes, that they are linked to personal information held about employees, and should not be disclosed.

[37] The majority of the appellant's representations do not directly relate to the issues set out in the Notice of Inquiry she was sent at the start of this inquiry. However, I understand her to be asserting that the records contain information that will assist her in establishing that the police improperly diagnosed her with a medical condition mentioned in the records. She also asserts that the records are relevant to a concern she has with a number of hospitals and her medical records.

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

⁶ Order MO-2954.

[38] The appellant provided a number of additional police occurrence reports that she says contain similar information to what she believes is in the withheld information.

Findings and analysis

[39] Based on my review of the records and the parties' representations, I find that all of the personal information in the records at issue is exempt under the discretionary personal privacy exemption at section 49(b) for the reasons that follow.

[40] First, I find that none of paragraphs (a) to (e) of section 21(1) apply to the information at issue and section 21(4) is not applicable. As such, I will turn to the presumptions in section 21(3).

The presumption in section 21(3)(b): investigation into violation of law

[41] I agree with the ministry that the presumption against disclosure in section 21(3)(b) applies to some of the personal information at issue.

[42] Section 21(3)(b) says, in part, that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information was compiled and is identifiable as part of an investigation into a possible violation of law.

[43] As set out in the Notice of Inquiry sent to the parties at the beginning of this inquiry, section 21(3)(b) may apply even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁸ However, section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁹

[44] The ministry submits that all of the records that have been withheld under this exemption relate to various police investigations initiated as a result of complaints involving the appellant. The ministry says that while no charges resulted, the presumption still applies because if the police had found, as a result of their investigations, that one or more offences had been committed, they could have laid charges pursuant to the relevant law.

[45] Based on my review of the records, I find that section 21(3)(b) applies to the personal information on pages 5, 6, 10, 14, 16 to 18 because that information was

⁷ Orders P-242 and MO-2235.

⁸ Orders MO-2213, PO-1849 and PO-2608.

⁹ Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

compiled and is identifiable as part of an investigation into a possible violation of the law. While I cannot describe the information on these pages without revealing the contents, I am satisfied that the withheld portions on these pages relate to various police investigations that were initiated as a result of complaints involving the appellant.

[46] I note that there is some personal information on pages 2, 3 and 13 that relates to activities other than investigations carried out by the police, such as requests for information or assistance. As a result, I find that section 21(3)(b) does not apply to the personal information on these pages.

[47] I find that no other presumptions in section 21(3) apply and will now consider and weigh the factors that may be relevant in section 21(2).

Section 21(2)(d): fair determination of rights

[48] As noted earlier, the appellant asserts that the information at issue would reveal that the police inappropriately diagnosed her with a medical condition. She also says that the information at issue would assist her in resolving an issue with her hospital medical records. I understand her to be asserting that the information in the records could assist her in resolving an issue affecting her rights.

[49] Section 21(2)(d) says that when determining whether a disclosure of information constitutes an unjustified invasion of personal privacy, a head shall consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request.

[50] As set out in the Notice of Inquiry provided to the appellant at the start of this inquiry, in order to prove that section 21(2)(d) applies, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[51] Although it is clear from the appellant's representations that she is asserting that the information at issue would assist her in resolving multiple matters that may affect her rights, she has not established that any of the criteria in the four-part test set out above apply. As a result, I find that section 21(2)(d) does not apply. However, as noted earlier, the factors in section 21(2) are not exhaustive and as such, I will consider whether the appellant has raised an inherent fairness issue that should be given weight along with any other relevant factors that may apply later in this decision.

Section 21(2)(f): highly sensitive

[52] The ministry says that section 21(2)(f) applies to the personal information it has withheld.

[53] Section 21(2)(f) specifies that when determining whether a disclosure of information constitutes an unjustified invasion of personal privacy, a head shall consider whether the personal information is highly sensitive. Previous orders of this office have established that in order to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹

[54] The ministry relies on Order P-1618, where it says an adjudicator concluded that 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). The ministry submits that this reasoning should be applied to the current appeal, particularly because the third party individuals are described in the records as being either witnesses, suspects or complainants.

[55] The ministry further submits that because some of the records are over 20 years old, it would be distressing for affected third party individuals to learn that personal information about themselves has been disclosed so long after the occurrence in question.

[56] I have reviewed the personal information the ministry has withheld that identifies third party individuals as complainants, witnesses or suspects in police investigations and I find that the factor weighing against disclosure in section 21(2)(f) applies. I agree with the ministry that the personal information is sensitive in nature and given the amount of time that has passed, re-opening these matters by disclosing the information

¹⁰ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

at issue could reasonably be expected to cause significant personal distress to the individuals identified who believe the matters discussed within the records have concluded. This factor weighs in favour of not disclosing their personal information.

Other factors/relevant circumstances

[57] I find that none of the other listed factors under section 21(2) apply. However, the list is not exhaustive and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹²

[58] The ministry says that there are other relevant circumstances that weigh in favour of withholding the information it refers to as employee "WIN numbers." It says these numbers are tied to employees and used predominantly for human resources purposes. It says the numbers are linked to personal information held about the employee relating to their employment. The ministry submits that as a result, any disclosure could be expected to increase the possibility of personal information being disclosed in an unauthorized manner, especially where (as in this instance) the appellant has been provided with the employee's name. The ministry says it relies on Order MO-2134 and asserts that it contains similar reasoning for not disclosing this type of information.

[59] I have reviewed Order MO-2134 and agree that the circumstances are similar to the facts in this appeal. In Order MO-2134, the information at issue was the employee numbers of firefighters. The adjudicator concluded that, in the absence of any relevant factors in favour of the disclosure of the employee numbers, disclosure would constitute an unjustified invasion of personal privacy of the firefighters as the numbers could be used to access sensitive and confidential personal information.

[60] In my view, the same reasoning applies here. I accept the ministry's submission that the employee WIN numbers are tied to human resources information and that their disclosure could make it easier for information of that nature to be accessed. This factor weighs in favour of non-disclosure.¹³

[61] I noted earlier that the appellant raised fairness issues with regard to whether the information at issue might assist her in resolving matters related to the police and her medical records. In previous orders, inherent fairness issues have been found to be relevant in determining whether disclosure of information would be an unjustified invasion of personal privacy.¹⁴

[62] Having reviewed the personal information that has been severed by the ministry,

¹² Order P-99.

¹³ These WIN numbers referred to are on pages 13, 16, 17, 20-23, 25, 26, 28, 31, 33 and 42.

¹⁴ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

I am satisfied that the parts of the records that it has withheld would not assist her in resolving either of these issues as the information is not relevant to those matters. As such, I am satisfied that there are no inherent fairness issues that would weigh in favour of disclosure of the personal information at issue.

Conclusion

[63] I find that all of the personal information at issue is subject to either the section 21(3)(b) presumption or the factor weighing in favour of non-disclosure at section 21(2)(f). I also find that an additional factor weighs in favour of non-disclosure of the WIN numbers. Given that there are no factors favouring disclosure of the remaining personal information, and after balancing all the interests set out above, I am satisfied that the disclosure of the withheld personal information would constitute an unjustified invasion of another individual's personal privacy.

[64] I am also satisfied that the undisclosed portions of the records that contain the personal information of those other than the appellant cannot be reasonably severed, without revealing information that is exempt under section 49(b).

[65] Accordingly, I find that all of the personal information is exempt from disclosure under section 49(b) of the *Act*, subject to my consideration of the ministry's exercise of discretion below under Issue F.

C: 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?

[66] 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

[67] 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. 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.

[68] The ministry claims that solicitor-client communication privilege under section 19(a) applies to some of the information on pages 9, 10 and 12 of the records. Section

19(a) states a head may refuse to disclose a record that is subject to solicitor-client privilege.

[69] Solicitor-client communication privilege 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.¹⁵ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁶ 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.¹⁷

[70] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁸

[71] 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.¹⁹ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.²⁰

The parties' representations

[72] The ministry says that the information at issue contains the substance of advice provided by a crown attorney to OPP investigating officers, and was recorded in a confidential OPP investigative record.

[73] The ministry submits the information is protected under solicitor-client communication privilege because it relates to direct communications of a confidential nature between the crown attorney and a member of the OPP for the purpose of giving legal advice. The ministry says the advice was provided to ensure that police were informed of the opinion of the crown attorney with respect to a specific legal matter.

[74] The appellant made no representations about whether section 19(a) applies to any of the information at issue.

Findings and analysis

[75] Based on my review of the records and the ministry's representations, I am satisfied that section 19(a) applies to some of the information the ministry withheld on

¹⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁶ Orders PO-2441, MO-1925 and MO-2166.

¹⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁰ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

pages 9 and 10 and all of the information it withheld on page 12.²¹ I am satisfied that if this information were disclosed, it would reveal the content of the police's confidential communications with its legal counsel. While I cannot say anything more about the information without revealing the substance, it is evident that the ministry sought and received advice from its lawyer, that the entries relating to the communications with the lawyer were intended to be confidential, and that revealing the information would reveal advice that is subject to section 19(a).

[76] This office has previously applied solicitor-client privilege to internal client communications not involving a lawyer where the exchange of information contained in the communication is either in the context of planning to seek legal advice from counsel, processing and implementing the privileged legal advice or where it would directly or indirectly reveal the content of communications with legal counsel.²² I find that this analysis applies to some of the information on pages 9 and 10 and all of the information the ministry withheld on page 12. Accordingly, I uphold the ministry's decision to exempt the withheld information from disclosure under section 49(a) read in conjunction with section 19(a) of the *Act*, subject to my review of the ministry's exercise of discretion below.

[77] The ministry also asserts that section 14(1)(l) applies to information on pages 9 and 10, therefore I will consider whether that section applies to the remaining information on pages 9 and 10 that does not reveal the content of legal advice provided to the police.

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

[78] The ministry relies on section 49(a) in conjunction with the law enforcement exemptions at sections 14(1)(a) and 14(1)(l) to exempt the remaining information at issue. It claims that the law enforcement exemption at section 14(1) applies to some of the information at issue in the records because the records at issue were created during law enforcement investigations.

[79] The appellant did not make any representations about the application of section 14(1).

[80] The relevant portions of section 14(1) state:

²¹ Although the ministry did not refer to pages 9 or 10 in its representations, it identified section 19 as applying to those pages in the copy of the severed records it provided to this office.

²² Order MO-3326.

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

...

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[81] 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).

[82] The term "law enforcement" has been found to apply in police investigations into a possible violation of the Criminal Code.²³

[83] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.²⁴

[84] 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.²⁵ 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.²⁶

²³ Orders M-202 and PO-2085.

²⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

²⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Section 14(1)(a): law enforcement matter

[85] The ministry says that section 14(1)(a) applies to some of the information on page 14. As set out in the Notice of Inquiry provided to the parties at the start of this inquiry, in order for section 14(1)(a) to apply, the matter in question must be ongoing or in existence.²⁷ The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.²⁸

[86] The ministry stated in its representations that the information it withheld on page 14 contains details about communications with a particular organization and that if the information were revealed, it would impair the OPP’s ability to collect information from the organization and conduct investigations.

[87] The ministry provided additional representations and evidence about its relationship with the organization and details about why it believes the information is exempt pursuant to 14(1)(a). It also directed me to another order from this office that it says concluded similar information was properly withheld pursuant to section 14(1)(a).²⁹ I have considered these submissions but cannot reveal any further details about them without revealing either the content of the information at issue or portions of the ministry’s submissions that were kept confidential because they met this office’s *Practice Direction Number 7*.

[88] In my view, the information at issue on page 14 is not similar to that discussed in the order referenced by the ministry, and I do not agree that the evidence the ministry provided supports a finding that the disclosure of the information on page 14 could reasonably be expected to interfere with a law enforcement matter.

[89] First, I note that the information at issue in the order the ministry referenced is different from that which is at issue in this appeal. In the order the ministry referenced, it was a policy-type document that was at issue and the adjudicator concluded that because the policy was intended to apply to all ongoing investigations, they were satisfied that it was not necessary that there exist a “specific” or ongoing investigation.

[90] In this appeal, the information at issue is a portion of a note in a “General Occurrence Report” that is over ten years old. The note is general in nature and the ministry has not satisfied me that it has any broad implications for other investigations, as was the case with the policy.

[91] I note the ministry’s concern that revealing the information could cause harm to

²⁷ Order PO-2657.

²⁸ Orders PO-2085 and MO-1578.

²⁹ I have not identified the order number as it would reveal the name of the organization, which the ministry says is information subject to section 14(1)(a).

its relations with the related organization and may result in OPP officers hesitating to create records of this nature for fear that the notes may be disclosed through access to information processes. However, when considered in the context of the remaining information in the records that the ministry has already disclosed, I am unable to conclude that its disclosure could reasonably be expected to have the effect the ministry describes.

[92] This is not to say that the type of scenario the ministry describes could not occur, I simply say that in this case, the information at issue is generic and innocuous and I am not convinced that its disclosure could reasonably be expected to have the consequences described by the ministry.

[93] Furthermore, I note that the organization was provided with a Notice of Inquiry and invited to make representations regarding the information at issue and it declined to do so. As a result, I find that it is not reasonable to expect that the relationship between the OPP and the organization would be harmed by the disclosure of the information.

[94] I therefore find that disclosure of the information could not reasonably be expected to interfere with a law enforcement matter and section 14(1)(a) does not apply to any of the information at issue. The ministry has also claimed that section 14(1)(l) applies to page 14 so I will consider the application of that section to that page below.

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

[95] The ministry says that section 14(1)(l) applies to some of the information on pages 1-3, 5, 6, 9, 10, 12-14, 16-18, 20-23, 25, 26, 28, 29, 31, 37 and 42. 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 must provide evidence to establish a reasonable expectation of harm.

[96] The ministry says that it applied section 14(1)(l) to internal police codes, to information that would discourage public cooperation with police if disclosed, and to internal communications.

[97] The ministry says that the internal police codes it withheld are widely used as part of OPP operations and that previous decisions of this office have held that they qualify for exemption under 14(1)(l).³⁰ The ministry says that the disclosure of the

³⁰ The ministry refers me to Orders PO-2409, which it says refers to a long line of orders which have found that police codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release.

codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate.

[98] The ministry submits that the codes could be used to track the activities of OPP officers carrying out law enforcement activities in the community. It says the public disclosure of these codes would leave police officers more vulnerable and it would compromise their ability to provide effective policing services.

[99] The ministry submits that if individuals engaged in illegal activities were monitoring police radio communications, and had access to the meanings of the various police codes, it would be easier for them to carry out criminal activities and it would jeopardize the safety of police officers. The ministry asserts that knowledge of the whereabouts of a given officer and the activities that he or she is involved with at any given time would be a powerful aid to individuals involved in criminal activities.

[100] I accept the ministry's submission that internal police codes that would allow individuals engaged in illegal activities to more easily locate officers could reasonably be expected to cause the type of harm described in section 14(1)(l). This type of information is found on pages 1, 2, 5, 13, 16, 20-22, 25, 26, 28, 31 and 42.

[101] However, there is other information in the records that the ministry has withheld pursuant to this section that I am not satisfied are "internal codes." In some circumstances, information the ministry has withheld under this section appears unsevered in other instances in the records, or in the evidence provided by appellant in support of her representations. Furthermore, some of the information the ministry has severed is either an acronym, or a term that it is reasonable to expect would be known by the general public and not an internal code that is in any way unique or specific to the OPP or policing.

[102] As a result, I am not satisfied that the disclosure of this type of information could reasonably be expected to cause the type of harm described in section 14(1)(l) and I do not uphold the ministry's decision to withhold the information I have highlighted on pages 1-3, 5, 9, 10, 13, 16, 20, 21-23, 25, 26, 28, 29, 31 and 42.

[103] Next, the ministry says that the records contain information related to affected third party individuals who are identified in OPP investigative records. It says that this information is sensitive and should not be disclosed without the parties' consent. It explains that it is concerned that the disclosure of the records would discourage members of the public from cooperating with the OPP, if the public believes the confidentiality of the information they provide will not be safeguarded. The ministry submits that this type of outcome could be expected to hamper the ability of the OPP to interfere with its law enforcement operations, which in turn would either facilitate the commission of crime or hamper its control of crime.

[104] I have reviewed the remaining information at issue. In my view, it is not necessary to consider this argument further due to my findings under section 49(b).

Since I have already concluded that section 49(b) applies to the personal information of individuals other than the appellant, it is not necessary to also consider whether section 14(1)(l) would apply to the same information.

[105] Finally, the ministry says that the records include confidential and candid enforcement information documenting investigations, and which, when placed in the shared records data base, could be used for communications purposes with other OPP law enforcement personnel conducting investigations. The ministry says that by recording this information, members of the OPP can subsequently retrieve it in the event that there are future interactions with the appellant, or the records are otherwise relevant for a law enforcement purpose.

[106] The ministry says it is concerned that members of the OPP will be less likely to record information and to communicate candidly with one another, if the records that they create are disclosed in the manner contemplated by this appeal. The ministry says that this outcome would also have the subsequent result of facilitating crime or hampering its control.

[107] I have reviewed the remaining information at issue and am not persuaded that section 14(1)(l) applies to anything further. In the copy of the severed records the ministry provided to this office, it specified that it withheld the information on page 37 pursuant to section 14(1)(l). Page 37 contains a summary of actions taken by a particular police officer with regard to the appellant and the potential next step that the officer intended to take.

[108] In my view, there is nothing in the information on this page that could reasonably be expected to cause the type of harm referred to by the ministry above. Furthermore, the information on page 37 is similar to information on other pages in the records that has not been withheld. Absent any explanation of how this specific information could result in police officers being less likely to record information and communicate candidly with one another, I find that section 14(1)(l) does not apply.

[109] The ministry has also withheld the number of a particular occurrence report on page 17. It has not explained why this number was withheld and as such, I am unable to conclude that the section 14(1)(l) exemption applies.

[110] On pages 21, 22, 23, 26, 29 and 31, the ministry withheld an abbreviation. I have already determined that this information is not an "internal police code," as described above. I also find that there is no basis to conclude that officers would be less likely to record this type of information if they knew it may be disclosed. The ministry has disclosed the same type of information on other occasions in the records and I see no reason to conclude that it should be withheld on the pages noted here.

[111] Finally, for the reasons I have already set out above about why section 14(1)(a) does not apply to the information on page 14, I also find that there is no reasonable basis upon which I could conclude that section 14(1)(l) could apply to the information

on that page.

[112] I have highlighted the information that I have determined is not subject to section 14(1)(l), and which must be disclosed to the appellant, in the copy of the records I will provide to the ministry with this order.

F: Did the institution exercise its discretion under section 49(a) in conjunction with sections 14(1) and 19 and section 49(b)? If so, should this office uphold the exercise of discretion?

[113] 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) and 49(b) exemptions are discretionary, which means that the ministry could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[114] In applying the section 49(a) and 49(b) exemptions, 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.³¹ According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the ministry.

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

[116] The ministry submits it has exercised its discretion properly, with an aim to protecting the integrity of law enforcement investigations. It also considered the following factors:

- a. The public policy interest in safeguarding the privacy of affected third party individuals, and in particular those whose personal information is collected as part of a law enforcement investigation;
- b. The concern that the disclosure of the records would jeopardize public confidence in the OPP; and that

³¹ Order MO-1573.

- c. The OPP acted in accordance with its usual practices, in severing law enforcement records containing affected third party personal information.

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

[118] I find that the reasons provided by the ministry for exercising its discretion to withhold the information at issue are appropriate. I see no evidence that the ministry took into account irrelevant considerations, or that it failed to take into account relevant considerations.

[119] As a result, I uphold the ministry's exercise of discretion and find that the information is exempt from disclosure pursuant to the discretionary exemptions at sections 49(a) and 49(b) of the *Act*.

ORDER:

1. I uphold the ministry's decision in part. I order the ministry to disclose the information I have highlighted in the copy of the records I am providing with this order by **November 5, 2019** but not before **October 31, 2019**. To be clear, only the highlighted information should be disclosed.
2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records sent to the requester pursuant to order provision 1.

Original signed by _____
Meganne Cameron
Adjudicator

September 30, 2019 _____