Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4006

Appeal PA18-185

Ministry of the Solicitor General

November 19, 2019

Summary: The ministry received an access request, pursuant to the *Freedom of Information and Protection of Privacy Act*, for records relating to a specified incident involving the requester, including a restraining order and an arrest warrant. The ministry granted access, in part, and relied on the exemptions at sections 14(1)(l) (facilitate commission of an unlawful act), 49(a) (discretion to refuse requester's own information) and 49(b) (personal privacy) of the *Act* to withhold the remaining information. The requester appealed and, during mediation, she raised the issue of reasonable search.

In this order, the adjudicator upholds the ministry's application of section 49(b) to the personal information in the records. She finds that section 49(a) in conjunction with section 14(1)(l) is applicable to the police codes and location codes only and orders the non-exempt information disclosed to the appellant. The adjudicator also finds that the ministry properly exercised its discretion with respect to the records withheld under section 49(a) and 49(b). Finally, she finds that the ministry conducted a reasonable search for records.

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)(l), 17, 49(a) and 49(b).

Orders and Investigation Reports Considered: Orders P-1618 and MO-3224.

OVERVIEW:

[1] The Ministry of the Solicitor General[1] (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for the following records relating to a specified incident:

> I would like all information on file from Paris OPP regarding the disobey court order, as well as the alleged "Restraining Order". Also documents that were allegedly sent by myself to [a named individual], in 2006. Any communication efforts made by OPP to contact me to advise they had issued an "Arrest Warrant" for myself.

[2] The ministry issued a decision providing access, in part, to the responsive records. The ministry denied access to the withheld portions pursuant to the exemptions at sections 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), 19 (solicitor-client privilege), 21(1) (personal privacy), 49(a) (discretion to refuse requester's own information) and 49(b) (personal privacy) of the *Act*. Some information was also withheld on the basis that it was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision to this office.

[4] During mediation, the appellant expressed her belief that additional court orders exist. The ministry provided additional information regarding the search that had been conducted and record retention periods. The appellant advised that she continues to believe that the ministry has additional records responsive to her request. As a result, reasonable search has been added as an issue in this appeal.

[5] The appellant advised that she was seeking all of the information that was withheld by the ministry, but she was not seeking the information withheld on the basis that it was not responsive to the request. As such, that issue has been removed as an issue in this appeal.

[6] As further mediation was not possible, the appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the ministry and the appellant. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a copy of the ministry's representations (in their entirety) was shared with the appellant.

[8] The ministry confirmed that it is no longer relying on sections 14(2)(a) and 19.

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[1] Formerly the Ministry of Community Safety and Correctional Services.

As such, these issues have been removed from the appeal.

[9] In this order, I uphold the ministry's application of section 49(b) to the personal information in the records. I find that section 49(a) in conjunction with section 14(1)(l) is applicable to the police codes and location codes and order the non-exempt information disclosed to the appellant. I also find that the ministry properly exercised its discretion with respect to the records withheld under section 49(a) and 49(b). Finally, I find that the ministry conducted a reasonable search for records.

RECORDS:

[10] The records at issue consist of an occurrence summary, a general report, three supplementary occurrence reports, an arrest report, and an officer's notes, located at pages 1-10 and 13-25.

[11] I have removed page 24 of the officer's notes from the appeal as it is not responsive to the appellant's request. I have also removed the various equipment serial numbers of the officer on page 13 of the officer's notes from the appeal for the same reason. As stated earlier, the appellant is not interested in information that is not responsive to her request.

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) apply to the information at issue?

C. Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemption at sections 14(1)(l) apply to the information at issue?

D. Did the ministry exercise its discretion under sections 49(a) and/or 49(b)? If so, should this office uphold the exercise of discretion?

E. Did the ministry conduct a reasonable search for records?

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 whether section 49(b) of the *Act* applies, it is necessary to decide whether the records contain "personal information" and, if so, to whom it

relates.

Relevant paragraphs of the section 2(1) definition of "personal information" are as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (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;

[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.[2]

[14] Sections 2(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.[3]

[16] Even if information relates to an individual in a professional, official or business

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

capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[18] The ministry submits that the records contain personal information within the meaning of the definition in section 2(1) of the *Act*. It submits that the personal information includes the name of individuals (along with other personal information relating to the individual), birth date, age, gender and sensitive details regarding an OPP investigation in which one of the individuals is identified as being primarily involved.

[19] Although the appellant provided representations, her representations do not directly address this issue.

[20] Analysis and findings

[21] On my review of the records, I find that they contain the personal information of the appellant and another individual. I find that the information that qualifies as the appellant's personal information includes her name, address, telephone number, age, gender and birthdate, which falls within paragraphs (a), (d) and (h) of the definition of personal information in section 2(1) of the *Act*.

[22] I also find that the records contain the personal information of another individual, including their name, address, telephone number, age, gender and birthdate, which falls within paragraphs (a), (d) and (h) of the definition of personal information in section 2(1) of the *Act*. Further, this individual's name combined with the other information in the records show that this person was involved in a police matter, which is their personal information.

[23] In addition, I find that the records contain information relating to a business, including its name, address and phone number. I find that this information along with the name of the affected party qualified as the personal information of that individual. The information relating to the business cannot be severed and if disclosed it would serve to identify the affected party.

[24] Lastly, I note that the ministry has withheld the appellant's own personal information on pages 14, 15, and 25 of the officer's notes. The personal privacy exemption cannot apply to exempt the appellant's own personal information from her to

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[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

which she has a general right under section 47 (unless it is inextricably intertwined with other exempt information, which is not the case here). As such, I will order the ministry to disclose her personal information to her in accordance with the highlighted records enclosed with this order.

[25] Having found that the records contain the personal information of the appellant, I will now determine whether the discretionary exemptions in sections 49(a) and 49(b) apply to the portions of the records the ministry withheld from disclosure.

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

[26] Since I found that the records contain the personal information of the appellant and another individual, section 47(1) of the *Act* applies to the appellant's access request. 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.

[27] Under section 49(b), where a record contains personal information of both the appellant 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 appellant.[6]

[28] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 49(b).

[29] 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.[7] However, if the information fits within any of paragraphs (a) to (e) of section 21(1) or within 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[30] If the information fits within any of paragraphs (a) to (h) of section 21(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[8] Some of the factors listed in section 21(2), if present, weigh in favour

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[6] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[7] Order MO-2954.
[8] Order P-239.

of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[9]

Analysis and findings

[31] I note that the withheld personal information at issue does not fit within the exceptions set out in section 21(1)(a) to (e) nor section 21(4) of the *Act*. As such, I will turn to consider whether any of the presumptions under section 21(3) apply or any of the factors in section 21(2) apply.

[32] The ministry claims that sections 21(3)(b) (investigation into possible violation of law) and 21(2)(f) (highly sensitive) are relevant to my consideration.

[33] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[10] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[11]

[34] Based on my review of the records, I agree with the ministry that the presumption at section 21(3)(b) applies in this circumstance. The records concern information about investigations relating to an identified offence. The withheld personal information was compiled and is identifiable as part of the police investigations into a possible violation of the *Criminal Code of Canada*. It is unclear whether charges were laid. In any event, there need only have been an investigation into a possible violation of law for the presumption at section 21(3)(b) to apply.[12] Section 21(3)(b) therefore weighs in favour of non-disclosure of the withheld information.

[35] Besides relying on the section 21(3)(b) presumption, the ministry submits that the factor at section 21(2)(f) (highly sensitive) is relevant in this appeal. The ministry submits that disclosure of the withheld personal information could cause personal distress to the affected party. It relies on Order P-1618 in which former Assistant Commissioner Tom Mitchinson found that personal information of individuals who are "complainants, witnesses or suspects" due to their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f).

[36] From my review of the withheld personal information, and considering the evidence before me, I find that no section 21(2) factors weighing in favour of disclosure whether listed or unlisted apply. I find that the factor listed in paragraph 21(2)(f)

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[9] Order P-99.
[10] Orders P-242 and MO-2235.
[11] Orders MO-2213, PO-1849 and PO-2608.
[12] Orders P-242 and MO-2235.

applies to the withheld personal information because the information about the affected party being involved in a police matter is highly sensitive to this individual, weighing against the disclosure of this information. I have also found that the presumption at section 21(3)(b) applies to the withheld personal information. As such, given the application of this presumption, and the fact that no factors favouring disclosure in section 21(2) were established, and balancing all the interests of the parties, I am satisfied that the disclosure of the personal information of the individual other than the appellant would constitute an unjustified invasion of their personal privacy. I also note that all of the appellant's personal information, which was reasonably severable, was already disclosed to her, excluding pages 14, 15 and 25 of the officer's notes, which I will order disclosed to her.

[37] Accordingly, I find that the disclosure of the withheld personal information would result in an unjustified invasion of personal privacy for the individual in question. As such, I find that the withheld personal information is exempt under section 49(b) of the *Act*, subject to my finding on the ministry's exercise of discretion below.

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

[38] Section 49(a) is another exemption from an individual's general access right to their own personal information.

[39] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > 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.

[40] 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.[13]

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

[42] In this case, the ministry relies on section 49(a) in conjunction with section 14(1)(l).

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[13] Order M-352.

Sections 14(1)(l) states:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[43] 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

The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[14]
- a police investigation into a possible violation of the *Criminal Code*.[15]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings[16]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997.*[17]

[44] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[18]

[45] It is not enough for an institution to take the position that the harms under

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[14] Orders M-16 and MO-1245.
[15] Orders M-202 and PO-2085.
[16] Order MO-1416.
[17] Order MO-1337-I.
[18] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[19] The institution must provide detailed evidence about the potential for harm. It 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.[20]

Parties' representations

[46] The ministry submits that it relied on section 14(1)(l) for two reasons. First, the records at issue contain internal police codes, which are widely used as part of the OPP operations. It relies on a long line of orders[21] from this office where adjudicators have found that police codes qualify for exemption under section 14(1)(l) because of the reasonable expectation of harm from their release. It submits that it withheld the police codes in accordance with the usual practice of the OPP, and, in particular, the disclosure of these codes could interfere with internal communications. The ministry submits that, therefore, disclosure of the codes could jeopardize the security of law enforcement systems and the safety of OPP officers.

[47] Second, the ministry submits that if third party personal information is ordered disclosed, individuals may be hesitate to come forward, out of concern that their personal information would also be ordered without their prior consent or notification. It submits that there is a relationship of trust between the police and individuals who come forward, which could be severely impaired and harm the ability of the police to control crime.

[48] Although the appellant provided representations, her representations did not directly address the application of this exemption.

Analysis and findings

[49] The police relies on section 14(1)(l) to withhold internal policing codes (such as the 10-codes and location codes) from the records.

[50] This office has issued many orders regarding the release of police codes, location codes and certain other types of internal communications and has consistently found that section 14(1)(l) applies to this type of information.[22] I have reviewed the records at

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[19] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[21] See Orders M-393, M-757, M-781, MO-1428, MO-3224, PO-1665, PO-1777, PO-1877, PO-2209 and PO-2339.
[22] See Orders M-93, M-757, MO-1715, MO-3224, PO-1665 and MO-2607.

issue and find that they contain numerical codes identifying 10-codes, and location codes.

[51] Several orders have applied the following reasoning stated in order PO-1665 by Adjudicator Laurel Cropley:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

[52] I adopt the above reasoning for the purposes of this analysis. As such, I find the 10-codes and location codes to be exempt under section 49(a) in conjunction with section 14(1)(l) of the *Act*.

[53] For the remaining information withheld under section 14(1)(l), the ministry argues that disclosure of it would severely impair the relationship of trust between the police and the individuals who come forward to provide information.

[54] I have already found that the personal information of the individual other than the appellant is exempt under section 49(b). I am not convinced that disclosure of the remaining withheld information[23] could reasonably be expected to result in this type of harm or result in any harms. The remaining withheld information is mainly about the appellant and basic information about a named police officer, such as their badge number, location and equipment. As such, I find that the ministry has failed to provide sufficient evidence to support the application of section 49(a) in conjunction with section 14(1)(l) for the remaining withheld information. Subject to my findings under Issue E, I will order the ministry to disclose the remaining withheld information in accordance with the highlighted records enclosed with this order.

D: Did the ministry exercise its discretion under sections 49(a) and/or 49(b)? If so, should this office uphold the exercise of discretion?

[55] The sections 49(a) and 49(b) exemptions are 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.

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

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[23] Withheld portions on pages 6, 7, 8 and 13 of the records.

- 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.

[57] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[24] This office may not, however, substitute its own discretion for that of the institution.[25]

[58] The ministry submits that it properly exercised its discretion in applying sections 49(a) and 49(b). It submits that it considered two factors in exercising its discretion. First, the records are highly sensitive. Second, it is concerned about the potential distress their disclosure would cause on the affected party.

[59] Based on my review of the parties' representations and the records at issue, I find that the ministry properly exercised its discretion. I find that the ministry took into account the above-noted two factors. It also appears that the ministry took into consideration the privacy rights of the affected party and the interests sought to be protected under section 14(1)(l) exemption. I am satisfied that it did not act in bad faith or for an improper purpose. I am also satisfied from my review of the ministry's representations that the ministry took into account the fact that the records contain the personal information of the appellant. Accordingly, I uphold the ministry's exercise of discretion in deciding to withhold the personal information pursuant to the sections 49(a) and 49(b) exemptions.

E: Did the ministry conduct a reasonable search for records?

[60] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[26] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[61] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[27]

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[24] Order MO-1573.
[25] Section 43(2).
[26] Orders P-85, P-221 and PO-1954-I.
[27] Orders P-624 and PO-2559.

To be responsive, a record must be "reasonably related" to the request.[28]

[62] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[29]

[63] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[30]

[64] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[31]

[65] The ministry submits that it had conducted a reasonable search. In support of its assertion, it attached an affidavit sworn by a named sergeant, whose responsibilities include coordinating access requests under the *Act* for the Brant Detachment, which includes Paris, Ontario.

[66] In his affidavit, the named sergeant states that the appellant's request was sufficiently clear that he did not require additional clarification before commencing his search. He states that he searched Niche, the shared database where all OPP records are electronically stored, for records relating to the specific occurrence and printed off the responsive records. His Niche search indicated that four officers were likely to have responsive officers' notes, which were not stored in Niche. As one of the officers stored their notes at the detachment, he retrieved them and made copies of the responsive portions of the notes. As another officer stores his notes in a separate, secure location, the sergeant requested and received the notes from this officer. For the remaining two officers (who are no longer working at the OPP), he submitted an electronic request for their records at the OPP Notebook Vault in Orillia, where such records are stored. Once he received a response from OPP Note Vault, he printed them off.

[67] In addition, the affiant states that he has no evidence to suggest that any of the responsive records would have been destroyed. He also attested that he would expect them to be in the locations where he searched for them or requested that a search took place. Finally, the affiant states that he believes that if any responsive records existed, they would be in the OPP's possession.

[68] The appellant submits that the ministry did not conduct a reasonable search. She

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[28] Order PO-2554.
[29] Orders M-909, PO-2469 and PO-2592.
[30] Order MO-2185.
[31] Order MO-2246.

states that, in the OPP's arrest warrant document, there is a statement about a bench warrant being issued by a named justice of the peace during a specified time period. The appellant points out that the bench warrant is primarily supported by the restraining order, which was never served on her.

Analysis and findings

[69] Based on my review of the ministry's evidence and the parties' representations, I find that the ministry has conducted a reasonable search for responsive records. I find that the appellant has not provided me with a reasonable basis for concluding that additional records exist *with* the OPP. I agree with the appellant that the specified bench warrant and restraining order exist, but not with the OPP. As the ministry points out in its representations, it has custody or control over records held by the OPP but *not* necessarily records which are in the custody or control of the court. I agree with the ministry that these records likely exist with the court, and, therefore, the Ministry of the Attorney General would have custody or control over them.

[70] In the circumstances, I am satisfied that the ministry provided sufficient evidence to demonstrate that it made a reasonable effort to address the appellant's request and locate all records reasonably related to it. Therefore, I uphold the ministry's search for responsive records.

ORDER:

1. I uphold the ministry's application of the personal privacy exemption at section 49(b).

2. I order the ministry to disclose to the appellant her personal information contained on pages 14, 15, and 25 of the officer's notes and the withheld information on pages 6, 7, 8 and 13 of the records by **December 24, 2019** but not before **December 19, 2019** in accordance with the highlighted record I have enclosed with the ministry's copy of this order. To be clear, the highlighted information should be disclosed to the appellant.

3. I find the ministry's search to be reasonable.

4. I also find that the ministry properly exercised its discretion under sections 49(a) and 49(b).

5. 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 as disclosed to the appellant.

November 19, 2019

Lan An
Adjudicator