Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4037

Appeal PA17-334-2

Ministry of the Solicitor General

March 9, 2020

Summary: This appeal deals with a request made to the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified Ontario Provincial Police investigation. The ministry granted partial access to the records, withholding some records, in whole or in part. The ministry claimed the application of the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1) (law enforcement) and 19 (solicitor-client privilege), and section 49(b) (personal privacy), as well as the mandatory exemption in section 21(1) (personal privacy). During the mediation of the appeal, the appellant raised the issues of scope of the request, reasonable search and a number of other allegations against the ministry.

During the inquiry, the ministry advised that it was willing to disclose further records to the appellant. In this order, the adjudicator finds that the ministry did not unilaterally narrow the scope of the appellant's request, as alleged by the appellant. She also finds that the ministry's search for records responsive to the request was reasonable. Lastly, she allows the late raising of a discretionary exemption, upholds the application of the exemptions in sections 21(1), 49(a) and 49(b), as well as the ministry's exercise of discretion. The ministry is ordered to disclose the records it indicated it is willing to disclose to the appellant, if it has not already done so.

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)(c), (d), (h) and (l), 19, 21(1), 24, 49(a) and (b).

OVERVIEW:

The Ministry of the Solicitor General (formerly, the Ministry of Community Safety and Correctional Services) (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to an Ontario Provincial Police (OPP) investigation of the requester, including the names of "confidential" informants, as well as a copy of the Information to Obtain (ITO) in this matter.

This office subsequently received an appeal from the requester, in which he indicated that he had not received a decision in response to his request. Appeal PA17-334 was opened in response to the ministry's deemed refusal. The ministry then issued a final decision in response to the request and appeal PA17-334 was closed.

In its decision, the ministry granted the requester partial access to the records it identified as responsive to the request. The ministry denied access to other information, claiming the application of the discretionary exemptions in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(a) (law enforcement matter), 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (confidential source of information), 14(1)(h) (confiscated from a person by a peace officer) and 14(1)(i) (endanger security), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report), 15(b) (relations with other governments), 18(1) (economic and other interests), 19 (solicitor-client privilege), as well as section 49(b) (personal privacy). The ministry also relied on section 21(1), as well as the exclusion in section 65(6) (employment or labour relations) of the *Act*. The ministry also stated that "some information, such as computer printing details or references to other law enforcement matters, has been removed from the records as non-responsive."

The requester, now the appellant, appealed the ministry's decision to this office and appeal file PA17-334-2 was opened.

During the course of mediation, the ministry provided the mediator and the appellant with an index of records, and issued a supplemental decision letter, indicating that it was no longer relying on sections 14(1)(c) or 14(1)(h) for specified pages. The ministry further stated that it was applying section 49(a), in conjunction with sections 14(1)(c), 14(1)(h), and 49(b), with reference to sections 21(2)(f) and 21(3)(b) to specified additional pages of the records. The ministry provided an updated index of records with its supplemental decision.

The appellant provided the mediator with an index of documents obtained from proceedings involving himself and the College of Veterinarians of Ontario (the CVO Index). The appellant stated that he was in possession of the documents listed in that index, and that he was not seeking access to records which were duplicates of records

he was already in possession of. The CVO Index was shared with the ministry, with the consent of the appellant.

The mediator reviewed the records and the CVO Index, and communicated to the appellant that a number of the documents in the records appeared to be duplicates of the CVO records. The appellant stated that he was not seeking access to the duplicate records, and as such, they were removed from the scope of this appeal.

The appellant stated that based on his review of the index the ministry provided, additional documents responsive to his request should exist at the ministry. As a result, reasonable search was added as an issue in this appeal.

Following the completion of mediation and subsequent to the issuing of the mediator's report, the ministry issued an additional decision in which it applied the personal privacy exemptions in sections 21(1) and 49(b) to information it was already withholding under the discretionary exemption in section 14(1) on pages 799, 806, 833, 837 and 918. The ministry also indicated that it had decided to apply the discretionary exemption at section 14(1) to information on page 11.

The file was then transferred to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act.* As the period for adding new discretionary exemptions had expired, the adjudicator assigned to the appeal added the issue of whether the ministry should be permitted to raise a new discretionary exemption at a late stage.

The ministry then wrote another letter to this office and provided an updated index, listing the records that remained at issue. Based on that index, some sections of the *Act* were no longer at issue, including sections 14(1)(a), 14(1)(i), 14(2)(a) and 15(b). Sections 14(1)(c), (d), (h) and (l), 18(1), 19, 21(1), 49(a), 49(b) and 65(6) remained at issue.

The adjudicator assigned to the appeal initially sought representations from the ministry.

In its representations, the ministry advised that:

- it was no longer relying on the law enforcement exemption in section 14(1)(l) for page 11;
- it was no longer relying on the labour relations exclusion in section 65(6). The ministry advised that it had decided that the discretionary exemption in section 19 (solicitor client privilege) applies to the information it previously believed was excluded from the *Act* by section 65(6);
- it was no longer relying on the discretionary exemption in section 18(1); and

- it was prepared to disclose further records to the appellant.

The adjudicator then sought and received representations from the appellant. The file was then transferred to me to continue the inquiry. I sought, and received reply representations from the ministry. I also sought, and received supplementary representations on whether I should allow the ministry to raise the application of section 49(a) in conjunction with section 19 late.

For the reasons that follow, I find that the ministry did not unilaterally narrow the scope of the appellant's request, as alleged by the appellant in his representations. I also find that the ministry's search for records responsive to the request was reasonable. Lastly, I allow the late raising of the discretionary exemption, I uphold the ministry's application of the exemptions in sections 21(1), 49(a) and 49(b), as well as its exercise of discretion. The appeal is dismissed.

RECORDS:

The information at issue in this inquiry is comprised of officers' notes, surveillance-related records, third party records, occurrence summaries and other records generated by the Ontario Provincial Police (OPP). There were approximately 210 full or partial pages at issue, but given that the ministry has now decided to disclose further records, there are approximately 130 pages at issue.

Based on the ministry's representations, it is now willing to disclose to the appellant the following pages: 104, 138-139, 149, 154-155, 392, 454-481, 483, 485-486, 767-771, 798, 800, 805, 807, 832, 834-836, 838-839, 916-917, 920, 929, 931-933 and 936.

The pages remaining at issue either in whole, or in part, are the following: 1-13, 39-41, 52, 79-103, 134-135, 231-261, 304, 375, 482, 484, 736-757, 772-788, 799, 806, 833, 837, 901-905, and 918-919, 921-928, 930, 934-935 and 937-945.

PRELIMINARY ISSUE

In his representations, the appellant makes a number of allegations regarding the interactions between the ministry and the College of Veterinarians and comes to a number of conclusions that he would like me to affirm. I will not be making any findings regarding the appellant's claims that the ministry, for example, obstructed justice, committed an offence under the *Criminal Code of Canada*, breached the appellant's rights under the *Charter of Rights and Freedoms*, or any other allegations he has made unrelated to the his access rights under the *Act*. To be clear, my jurisdiction in this matter is limited to deciding whether the withheld information at issue is exempt from disclosure under the *Act*, whether the ministry properly exercised its discretion in withholding exempt information, what the scope of the request was, and whether the ministry conducted a reasonable search for records responsive to the request.

ISSUES:

A. What is the scope of the request?

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

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

D. Does the discretionary exemption at section 49(a) apply, in conjunction with the sections 14(1)(c), (d), (h) or (l) exemptions to the information at issue?

E. Should the ministry be permitted to raise the discretionary exemption in section 49(a), in conjunction with section 19 late? If so, does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the information at issue?

F. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

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

DISCUSSION:

Issue A: What is the scope of the request?

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

To be considered responsive to the request, records must "reasonably relate" to the request.[2]

The ministry was asked to respond to the following questions: If the ministry did not contact the requester to clarify the request, did it:

a. choose to respond literally to the request?

b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

Representations

The ministry submits that the access request provided sufficient detail for it to search for and identify responsive records. The ministry further submits that the request was for all records gathered with respect to an investigation of the appellant, including the names of confidential informants and the information to obtain. The ministry goes on to argue that it chose to respond "literally" to the request, in that it chose to respond to the request based on its plain language, which clearly described what the appellant was seeking. The ministry further submits that it did not narrow the request, and did advise the appellant in its decision letter that some of the records were not responsive and the reason why. Lastly, the ministry submits that a portion of page 921 is not responsive to the request because the withheld portion does not pertain to the investigation that is the subject matter of this appeal.

The appellant submits that the ministry did not contact him to clarify the scope of his request and unilaterally defined the scope of the request, as opposed to taking a balanced approach to responding to the request. In addition, the appellant submits that the ministry has not provided a complete written summary of the steps taken to respond to the request.

Analysis and findings

I have reviewed the appellant's access request, and find that it was clearly defined. As previously stated, the request was for access to all records relating to an investigation

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

of the appellant, including the names of "confidential" informants, as well as a copy of the Information to Obtain (ITO) in this matter.

I also find that the ministry responded to the request based on its plain language and did not unilaterally define or narrow the scope of the request, which the appellant alleges. I further find that the appellant has not provided evidence that the ministry unilaterally defined or narrowed the scope of the request. I also note that during the mediation of the appeal, the appellant himself narrowed the scope of the request by removing records from the appeal that he already had copies of through the CVO proceeding. Lastly, with respect to page 921, I find that the portions the ministry withheld are not responsive to the request, as they relate to another matter altogether unrelated to the investigation involving the appellant.

Issue B: Did the ministry conduct a reasonable search for records?

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 24.[3] 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.

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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

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.[6]

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.[7]

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.[8]

The ministry was asked to provide a written summary of all steps taken in response to the request. In particular:

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.

1. Did the ministry contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the ministry did not contact the requester to clarify the request, did it:

    a. choose to respond literally to the request?

    b. choose to define the scope of the request unilaterally? If so, did the ministry outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the ministry inform the requester of this decision? Did the ministry explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations

The ministry advises that the officer in charge of the OPP investigation conducted the search for the records responsive to the access request. However, it further advises that the officer has since retired from the OPP and, as a result, he would not be able to provide an affidavit regarding the search. The ministry did provide an affidavit, sworn by the Manager of the ministry's Freedom of Information Office. While he did not conduct the actual search for records, he has knowledge of the search that took place.

The affiant submits that his notes indicate that the access request in this appeal was received by the Business Services Branch of the Ministry of Agriculture, Food and Rural Affairs. That ministry subsequently forwarded the request to the Ministry of the Attorney General which, in turn, forwarded the request to the Ministry of the Solicitor General.[9] The ministry submits that it requested a records search from the Investigation and Enforcement Bureau of the OPP. An acting OPP Sergeant on temporary assignment coordinated the search for records. The initial search was conducted and a number of records responsive to the request were identified. The ministry issued a fee decision,

[9] At that time, the Ministry of the Solicitor General was referred to as the Ministry of Community Safety and Correctional Services.

but the appellant did not respond by the due date and the file was then closed as abandoned.

The ministry submits that, some months later, the appellant paid the fee, the ministry re- opened the file, and the ministry's Freedom of Information Office requested that the OPP provide a copy of all the records to its office.

The appellant submits that the ministry has not provided the date that the officer who conducted the search retired, and that the ministry could have sought an affidavit from the retired officer. The appellant goes on to state:

> The Ministry gives no indication that attempts were made to contact the officer, nor does the Ministry provide evidence that the officer was unavailable. Subsequently, the assumed intent of this document is to demonstrate that the Ministry conducted a search that satisfied the requirements of the IPC. The affidavit can strictly be used to identify the timeline only, without any comment on the issue of adequate search. Had the Ministry provided an affidavit of [the retired officer], it may have contained sufficient detail that would support that an adequate search had been conducted. Since the Ministry did not do this, the issue of adequate search remains on the table.

The appellant further submits that it was known to him that there existed almost 1000 pages of documents as part of the CVO proceeding, and the ministry produced only a small portion of these records. Lastly, the appellant submits that a justice of the Superior Court of Ontario ordered that an Information to Obtain be disclosed to him. This record, the appellant argues, is not listed in the ministry's index of records, which leads him to conclude that the ministry's search for records responsive to his request was inadequate.

Analysis and findings

Having reviewed the representations of the parties, I find that, in these circumstances, the ministry conducted a reasonable search for records and, in particular, it would serve no useful purpose for me to order the ministry to conduct a further search for records responsive to the appellant's request. The appellant argues that the CVO proceeding involved almost 1000 pages of records. I have reviewed the CVO index and note that many of the records listed in it are records that were created by the CVO and not the ministry, which would explain why the CVO index contains more records than the ministry's index. In addition, as previously discussed, the appellant narrowed the scope of his request by removing the records that are already in his possession, as a result of the CVO proceeding. Lastly, I note that the appellant advises that a justice of the Superior Court of Ontario ordered that an Information to Obtain be disclosed to him. Given that the appellant has a copy of the Information to Obtain, I find that it would

serve no useful purpose to order the ministry to conduct a further search for that record.

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

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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;

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.[10]

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) 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.
>
> (4) For greater certainty, subsection (3) 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.

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.[11]

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[12]

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[13]

Representations

The ministry submits that the records contain a significant amount of personal information belonging to numerous individuals, some of whom were identified as witnesses. The ministry further submits that the personal information includes the names, home addresses, telephone numbers, and related personal information. The ministry goes on to argue that even if identifying information such as the names were

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[10] Order 11.
[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[12] Orders P-1409, R-980015, PO-2225 and MO-2344.
[13] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

removed from the records, it is reasonable to expect that these individuals could still be identified, given that the appellant may know them.[14]

The appellant submits that personal information concerning many individuals has already been disclosed in a public forum by the College of Veterinarians of Ontario, and that the ministry has not adequately identified to whom the personal information in the records may relate. The appellant goes on to argue that the Information to Obtain he previously referred to[15] contains personal information, and yet the Court disclosed this information without concern for the personal information contained within.[16]

Analysis and findings

I have reviewed the records and I find that they contain both the personal information of the appellant, as well as that of a number of other individuals. In particular, I find that many of the records contain the appellant's personal information, as he is the subject matter of the OPP investigation at issue. The types of personal information relating to the appellant includes information relating to:

- his age and marital status, which qualifies as personal information under paragraph (a) of the definition of "personal information" in section 2(1) of the *Act*;
- information relating to his education and employment history, as well as information relating to financial transactions in which he was involved (paragraph (b));
- an identifying number assigned to him (paragraph (c));
- his address (paragraph (d)); and
- his name where it appears with other personal information relating to him, including the nature of the allegations against him (paragraph (h)).

As stated above, the records also contain the personal information of a number of other individuals, including the following types of personal information:

- their age and, in one case, their marital status, which qualifies as personal information under paragraph (a) of the definition of "personal information" in section 2(1) of the *Act*;

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[14] See Orders PO-2955, PO-3766 and PO-3897.
[15] See Issue B.
[16] I will not be addressing the appellant's argument on this issue. Disclosure by a court is different from disclosure under the *Act*, with different considerations applying in each forum. See Orders M-852 and MO- 3900.

- information relating to financial transactions in which they were involved (paragraph (b));
- an identifying number assigned to them (paragraph (c));
- their addresses (paragraph (d)); and
- their names where it appears with other personal information relating to them (paragraph (h)).

Some of the records contain the personal information of both the appellant and other individuals in the same record. Other records contain only the personal information of individuals other than the appellant. Having found that the records contain both the personal information of the appellant and other individuals, I will now determine whether the exemptions claimed by the ministry under sections 21(1), 49(a) and 49(b) apply to them.

Issue D: Does the discretionary exemption at section 49(a) apply, in conjunction with the sections 14(1)(c), (d), (h) or (l) exemptions to the information at issue?

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:

> 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.

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.[17]

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.

The relevant portions of sections 14(1) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

[17] Order M-352.

> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> . . .
>
> (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
>
> . . .
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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)

The term "law enforcement" has applied to a police investigation into a possible violation of the *Criminal Code*.[18]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[19] It is not enough for an institution to take the position 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.[20] 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

[18] Orders M-202 and PO-2085.
[19] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[20] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

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. [21]

Representations

The ministry submits that it has applied the exemption in section 49(a), in conjunction with sections 14(1)(c), (d), (h) and (l) to pages 1-2, 5-10, 11-13, 52, 79-90, 96-103, 231- 261, 482, 736-757, 788, 799, 806, 833, 837, 901-905, 919, 921-928, 934-935 and 941- 945, either in whole or in part. It goes on to submit that the OPP is a law enforcement agency, and the records at issue were created during an OPP law enforcement investigation. Previous orders of this office have held that the OPP is an agency which has the function of enforcing and regulating compliance with the law under section 14(1).

Section 14(1)(c) – investigative techniques and procedures

The ministry submits that it is claiming the application of section 14(1)(c) to records relating to surveillance techniques and procedures that the OPP relied on as part of its investigation. The ministry acknowledges that while the public is aware of the fact that police conduct surveillance, they would not likely know the details of how surveillance is conducted.

The ministry goes on to state:

> The Ministry submits that surveillance is by its nature inherently confidential. The suspect who is the subject of surveillance does not know it. If they did, surveillance would cease to be effective. We submit that for this reason, the disclosure of the records, especially if they subsequently became publicized, could be exploited by suspects in a law enforcement investigation. As a result, disclosure could reasonably be expected to hinder the usefulness of surveillance as a technique or procedure.

The ministry further submits that in Order PO-2380, this office found that section 14(1)(c) applied to records that described the procedures and techniques used to obtain a search warrant, finding in particular that the records related directly to the investigation and behind the scenes activities of a law enforcement nature. The same reasoning, the ministry argues, applies to the records for which section 14(1)(c) has been claimed.

The appellant submits that the ministry has not detailed the surveillance techniques and procedures in the records, and that, in any event, he already has significant records that detail police investigative details, for example, warrant searches, observation and following, and the use of production orders. In addition, the appellant argues that many

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

of the "behind the scenes" activities of law enforcement agencies are already within his knowledge and, therefore, any exemption claimed would have to pertain specifically to a technique or activity that he is unaware of.

Section 14(1)(d) – confidential source of information

The ministry submits that page 80 of the records lists information provided by an individual identified as a confidential informant, and that it relates to a possible offence. The ministry further submits that the record could either identify the confidential source of information in respect of a law enforcement matter or disclose information that only the confidential source could have furnished. The ministry goes on to argue that it is clear that the confidential source provided the information to an OPP investigator with the expectation that it would remain confidential.[22]

The appellant submits that some of the information furnished under the "guise" of a confidential informant came from the Ontario Racing Commission, as a result of second hand information. Therefore, the appellant argues, the Ontario Racing Commission is not the first hand source of information supplied to the OPP, but rather simply passed the second hand information along to the OPP. In addition, the appellant submits that he is aware of the information that was passed along and that he is also aware of other confidential informants through the ITO. As a result, the appellant argues, the exemption does not apply to this information and it should be disclosed to him.

Section 14(1)(h) – record confiscated by a peace officer

The ministry submits that some of the records were third party records that were confiscated by the OPP as part of the investigation.

Section 14(1)(l) – facilitate the commission of an unlawful act or hamper the control of crime

The ministry submits that it has claimed section 14(1)(l) (facilitate commission of an unlawful act) to the patrol zone codes on page 1 of the records and that a long line of orders from this office have applied this exemption to police codes, finding that there would be a reasonable expectation of harm to occur, should they be disclosed.

The ministry has also claimed section 14(1)(l) to other records, arguing that these records contain the personal information of individuals other than the appellant, and that the disclosure of these records would discourage members of the public from cooperating with the police, if they believe that their confidentiality will not be safeguarded. The ministry further submits that this type of outcome, i.e. individuals no longer cooperating with the police, could be expected to harm the OPP's ability to

[22] The ministry relies on Order PO-3330 to support its position regarding the application of section 14(1)(d).

engage in law enforcement operations, which in turn would either facilitate the commission of crime or hamper its control.

The appellant's representations do not address this exemption.

In addition to the appellant's representations regarding the specific exemptions relied upon by the ministry, the appellant also provided more general representations regarding section 14(1). He argues that because he was already provided with a number of records from the CVO, the exemption under the *Act* does not apply. He further argues that the public interest override in section 23 applies to these records.[23]

In reply, the ministry submits that the appellant is entitled to records in accordance with the provisions of the *Act*, that is has applied specific exemptions to the records, and that the *Act* does not provide automatic access to records simply because of pending litigation.

Analysis and findings

Section 14(1)(c) - reveal investigative techniques and procedures

Based on my review of the ministry's representations, and the records themselves, the ministry is claiming the application of section 14(1)(c) to pages 79-90, 96-103, 231-261, 799, 806, 833 and 837.

In order to meet the investigative technique or procedure test, the ministry must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[24]

The ministry submits that during the course of this investigation, the OPP conducted surveillance, and that there is information in the records regarding the manner in which surveillance techniques are conducted. The appellant's position is that the ministry has not detailed the surveillance techniques and that many of these techniques are within his knowledge.

Past orders of this office have held that, generally speaking, disclosure of records to an individual is tantamount to disclosure to the world. I am satisfied that the disclosure of the above listed pages of records would reveal investigative techniques that are not generally known to the public, and that the disclosure of these techniques to the public could reasonably be expected to hinder or compromise their effective utilization. As a result, I find that these records are exempt from disclosure under section 49(a), in conjunction with section 14(1)(c), subject to my findings regarding the ministry's exercise of discretion. Given that I have found page 80 to be exempt under section

[23] I note that section 23 cannot apply to records found exempt under section 14.
[24] Orders P-170, P-1487, MO-2347-I and PO-2751.

14(1)(c), it is not necessary for me to consider the possible application of section 14(1)(d) to this record.

Section 14(1)(h) - record confiscated by a peace officer

The ministry is claiming the application of section 14(1)(h) to pages 5-11, 736-757, 926- 928 and 941-943.

The purpose of this section is to exempt records that have been confiscated or seized by search warrant.[25] This exemption applies where the record at issue is itself a record which has been confiscated from a person by a peace officer, or where the disclosure of the record could reasonably be expected to reveal another record which has been confiscated from a person by a peace officer.[26]

I find that the pages that the ministry has claimed are exempt under section 14(1)(h) consist of records that the OPP confiscated by way of search warrant as part of the investigation and are, therefore, exempt from disclosure under section 49(a), in conjunction with section 14(1)(h), subject to my findings regarding the ministry's exercise of discretion.

Section 14(1)(l) - facilitate the commission of an unlawful act or hamper the control of crime

The ministry is claiming the application of section 14(1)(l) to pages 1-2, 12-13, 52, 482, 788, 901-905, 919, 921-925, 934-935 and 944-945.

Past orders of this office have held that disclosure of "ten codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services, As a result, I find that the "ten code" information in the records is exempt from disclosure under section 49(a), in conjunction with section 14(1)(l), subject to my findings regarding the ministry's exercise of discretion. I further find that disclosure of the remaining law enforcement information in the records could reasonably be expected to facilitate the commission of an unlawful act, as it consists of information that was gathered by the OPP from third parties that could provide individuals with sufficient information to facilitate the commission of an unlawful act. As a result, I find that this information is also exempt from disclosure under section 49(a), in conjunction with section 14(1)(l), subject to my findings regarding the ministry's exercise of discretion.

[25] Order PO-2095.
[26] Order M-610.

Issue E: Should the ministry be permitted to raise the discretionary exemption in section 49(a), in conjunction with section 19 late? If so, does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the information at issue?

The ministry is claiming the application of section 49(a), in conjunction with section 19(b) to part of page 918 and to pages 135 and 304, in whole. Section 19(b) of the *Act* states:

> A head may refuse to disclose a record,
>
> > that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

This privilege applies to records prepared by or for Crown counsel "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[27]

In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[28]

Representations

The ministry submits that page 918 is subject to statutory solicitor-client communication and litigation privilege. The notes on this page reflect discussions that took place between a Crown Attorney and members of the OPP in contemplation of potential litigation. The ministry refers to the remaining pages as the "McNeil reports," and claims that they are subject to statutory litigation privilege. The ministry submits that these reports were prepared as a result of the Supreme Court of Canada's decision in *R. v. McNeil*,[29] in which the Court found that the police must disclose to the prosecuting Crown Attorney findings of serious misconduct by police officers. These findings, the

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[27] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[28] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[29] 2009 SCC 3.

ministry argues, are then vetted by the Crown Attorney, who exercises discretion in determining whether to disclose the findings to the defense.

Lastly, the ministry submits that there has been no waiver of the privilege in section 19(b).

With respect to whether the ministry should be permitted to raise this discretionary exemption late, the appellant's position is that an institution may only claim new discretionary exemptions within 35 days of being notified of the appeal and that the ministry's delay in claiming this exemption, which was far past the 35 days, is unreasonable. He is also of the view that he would be prejudiced by the late raising of the exemption, submitting that the ministry's actions have already prejudiced him in his regulatory hearings before the OCV, as well as the appeals to the Divisional Court and the Court of Appeal.

The appellant further submits that the ministry would not be prejudiced by the refusal to allow it to claim the discretionary exemption late, and that allowing the exemption at such a late stage would bring the appeals process into disrepute.

Concerning the actual application of section 19, the appellant submits that he is entitled to access to the "McNeil reports" because they specifically detail OPP officers' information that may be relevant to his proceedings before the OCV disciplinary tribunal.

With respect to page 918, the appellant notes that the Crown Attorney stayed the charges against him, and that if the notes at page 918 reveal discussions and the reasons that the prosecution stayed the charges, then this information has bearing on the OCV hearing. The appellant goes on to state:

> By raising the issue of the officer notes and the McNeil reports, the evidence of the investigating officers, or even the investigatory techniques used, could have been scrutinized before the tribunal. With that, the evidence and their testimony may have been struck/deemed inadmissible, thus having bearing on the outcome of the tribunal proceedings.

The appellant also argues that the public interest override in section 23 applies to the information the ministry claimed to be exempt under section 19. Lastly, the appellant then goes on to submit that the ministry has not identified the specific portions of the records for which it is claiming section 19 and, as a result, there cannot be a determination if there is privilege associated with the records, as there are no records to refer to.

Analysis and findings

Before I determine whether section 19 applies to the above referenced records, I note that the ministry originally claimed the employment or labour relations exclusion in

section 65(6) for these records. During the inquiry, the ministry advised in its initial representations that it was claiming section 19 instead of the exclusion, thus raising the issue of whether the ministry should be permitted to raise a discretionary exemption late.

The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[30]

In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[31] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[32]

I have decided that, despite the late raising of the exemption in section 19, because the appellant was given an opportunity during mediation to consider whether these records should not be disclosed, albeit by way of an exclusion rather than an exemption, I am satisfied that the appellant is not prejudiced by the ministry's decision to apply section 19, rather than section 65(6) to these records. I find that the inquiry was not delayed and the appellant had a full opportunity to make representations on the application of section 19. As a result, I will now consider whether these records are exempt from disclosure under section 49(a), in conjunction with section 19.

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[30] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[31] Order PO-1832.
[32] Orders PO-2113 and PO-2331.

I have reviewed the parties' representations, as well as the records and I am satisfied that they are subject to the statutory solicitor-client privilege of branch 2 set out in section 19(b) and, as a result, are exempt from disclosure. In particular, I find that the records at pages 135 and 304 were prepared by the OPP solely for Crown Counsel for use in contemplation of litigation, and that these records were not created outside the "zone of privacy" intended to be protected by the litigation privilege. Turning to the withheld information on page 918, I find it is also exempt from disclosure under section 19(b). This information consists of a summary of information prepared by the OPP solely for Crown counsel for use in contemplation of litigation.

I also find that the ministry has not, either explicitly or implicitly waived the statutory litigation privilege in section 19(b). Consequently, subject to my findings regarding the ministry's exercise of discretion, I find that pages 135 and 304 are exempt from disclosure, in full, and that page 918 is exempt, in part, under section 49(a), in conjunction with section 19. I also note that the public interest override in section 23 cannot apply to section 19.[33]

Issue F: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

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.

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.

In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 21(1)(f) exception applies.

In applying either the section 49(b) exemption or the section 21(1)(f) exception to the section 21(1) exemption, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[33] Section 19 is not listed in section 23 as an exemption to which the public interest override applies.

For records claimed to be exempt under section 21(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[34]

If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[35]

For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[36]

In this case, the ministry is claiming that the presumption in section 21(3)(b) (compiled as part of an investigation into a possible violation of law) applies. 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.[37] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[38]

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[39]

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 21(1) or 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[40]

The absurd result principle has been applied where, for example the requester sought access to his or her own witness statement,[41] the requester was present when the information was provided to the institution,[42] or the information is clearly within the requester's knowledge[43]

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[34] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[35] Order P-239.
[36] Order MO-2954.
[37] Orders P-242 and MO-2235.
[38] Orders MO-2213, PO-1849 and PO-2608.
[39] Orders M-734, M-841, M-1086, PO-1819 and MO-2019.
[40] Orders M-444 and MO-1323.
[41] Orders M-444 and M-451.
[42] Orders M-444 and P-1414.
[43] Orders MO-1196, PO-1679 and MO-1755.

However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[44]

Representations

The ministry submits that the personal privacy exemption in section 21(1) applies to the records that contain the personal information of individuals other than the appellant and that the disclosure of this personal information would constitute an unjustified invasion of their personal privacy. This personal information, the ministry argues, was compiled and is identifiable as part of an OPP investigation into a possible violation of law, and, therefore, the presumption in section 21(3)(b) applies to this information.

In the alternative, the ministry claims that the factor in section 21(2)(f), which does not favour disclosure, applies, in that the personal information is highly sensitive and there would be a reasonable expectation of significant personal distress should this information be disclosed. In addition, the ministry argues that in Order P-1618, this office found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f).[45]

With respect to the possible application of the absurd result principle, the ministry submits that it is not clear how much knowledge the appellant has of the records at issue. In any event, the ministry submits that the absurd result principle does not apply because disclosure of the personal information would be inconsistent with the purpose of the exemption, which is to protect the privacy of affected third parties whose personal information has been collected as part of an OPP investigation.[46]

The appellant submits that since he was facing an ongoing investigation and prosecution before the CVO, the disclosure of the records is necessary and the presumption in section 21(3)(b) does not apply. The appellant also raises, for the first time, the possible application of the public interest override in section 23, arguing that there is a public interest in the disclosure of the records in order to prevent the administration of justice from falling into disrepute.

Concerning the factor in section 21(2)(f), the appellant submits that the ministry has failed to describe how the disclosure of specific records may cause significant personal distress and that the sensitivity of the information was not a concern when a Court ordered the production of the ITO. In addition, the appellant submits that confidential informants made false statements to investigators and the failure to disclose the records to him would cause him significant personal distress. He states:

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[44] Orders M-757, MO-1323 and MO-1378.
[45] The ministry notes that the reasoning in Order P-1618 was more recently applied in Orders PO-3659, PO-3766 and PO-3897.
[46] See, for example, Order PO-3013.

> The Ministry has not provided any details as to how the affected third parties may be distressed, and how the distress would trump the distress caused to the applicant by their actions.

Lastly, the appellant argues that the absurd result principle does apply, as he has significant knowledge of the contents of the CVO records and, therefore, the records at issue.

In reply, the ministry submits that information that may be available through litigation, for example, a College proceeding, does not negate the freedom of information process, and the application of exemptions, when an access request is made under the *Act*. In other words, the ministry submits, the *Act* does not provide automatic access to records simply because of pending litigation. The ministry also argues that the public interest override is not part of the scope of this appeal, and that, in any event, section 23 cannot apply to what essentially is a private matter relating to the appellant.

Analysis and findings

The remaining records at issue for which the ministry is claiming the application of section 21(1) or section 49(b) are pages 1, 3-4, 10, 40-41, 375, 484, 772-787, and 937-940 either in whole or in part.

I have reviewed these pages and I find that the withheld information consists of the personal information of individuals other than the appellant, the disclosure of which would constitute an unjustified invasion of their personal privacy under section 49(b) or section 21(1).[47] In coming to this conclusion, I find that this personal information was collected by the OPP as part of an investigation into a possible violation of law and, therefore, the presumption in section 21(3)(b) applies. I also find that the presumption in section 21(3)(f) applies to some of the information, as some of the records contain information about the financial activities of an identifiable individual.

Turning to the factors in section 21(2), I find that the factor in section 21(2)(f), which weighs against disclosure, applies. The personal information of the individuals other than the appellant is, I find, highly sensitive. The appellant has stated that he requires the records to assist with the ongoing proceedings at the CVO. However, I note that the proceeding and all avenues of appeal have, at this time, concluded. Therefore, the factor in section 21(2)(d) (fair determination of rights), which the appellant raised by inference, and which favours disclosure, does not apply.

As previously stated, for records claimed to be exempt under section 49(b), that is, records that contain the requester's personal information, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3).

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[47] As previously stated, some of the above-referenced records contain both the personal information of the appellant and other individuals, while other records listed above contain only the personal information of individuals other than the appellant.

I find that, balancing the presumptions in section 21(3) and the factors in section 21(2), the disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. As a result, I find that this information is exempt from disclosure under section 49(b), subject to my findings regarding the ministry's exercise of discretion.

Lastly, the appellant's position is that the public interest override in section 23 applies to the information I have found to be exempt under section 21(1) or 49(b). I disagree. I find that there is no public interest in the disclosure of the personal information of the individuals referred to in the records compelling or otherwise, that would outweigh the purpose of the exemption, which is to protect the personal privacy of individuals. Moreover, any interest in this personal information would be a private one.

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

The sections 49(a) and (b) exemptions are discretionary, and permit 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.

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, or it fails to take into account relevant considerations.

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[48] This office may not, however, substitute its own discretion for that of the institution.[49]

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[50]

- 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, and 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;

[48] Order MO-1573.
[49] See section 54(2).
[50] 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;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations

The ministry submits that it properly exercised its discretion to withhold the records that are at issue, acting in accordance with its usual practices, including withholding the personal information of individuals other than the appellant, sensitive law enforcement information, and information subject to solicitor-client privilege. In addition, the ministry argues that it has provided the appellant with as much information as possible, including his own personal information.

The appellant submits that the ministry has exercised its discretion in bad faith, or for an improper purpose. For example, the appellant submits, the ministry failed to take into account the purpose of the access request, which was, first, to obtain the evidence in the ministry's possession for his use in a tribunal proceeding. The second purpose of the access request, according to the appellant, was to identify that the evidence the CVO had from the ministry was not disclosed in accordance with the *Act*. The third purpose of the access request was to identify evidence which was not disclosed as part of the CVO's disclosure. The appellant further submits that if the CVO can have evidence pertaining to him, then he should have the right to the same information.

Analysis and findings

In this instance, I am satisfied that the ministry properly exercised its discretion in not disclosing the records that I have found to be exempt from disclosure under the law enforcement exemption. I find that the ministry took relevant factors into consideration, including the purpose of the law enforcement exemption in section 14(1).

The extent to which law enforcement information should be protected under freedom of information legislation was discussed in Public Government for Private People: The

Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queens Printer, 1980) pp. 294 - 295 (the Williams Commission Report):

> The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality.
>
> Interviews with law enforcement personnel conducted by our research staff indicate concerns similar to those manifested in typical exemptions for law enforcement information. Interviewees stressed the need to protect confidential informants and to ensure the continued flow of information from other law enforcement agencies. Concerns were expressed to the effect that disclosure of law enforcement techniques would reduce their effectiveness.
>
> …

Further, I find that other relevant factors were taken into consideration in the exercise of discretion. Based on the ministry's representations, I am satisfied that it took into consideration that the appellant is an individual who is seeking his own personal information, the age of the information, the historic practice of the ministry with respect to similar information, the importance of the solicitor-client privilege exemption in section 19 and the protection of the personal privacy of individuals. I also find that the ministry disclosed as much of the appellant's personal information to him as possible. I further find that the ministry did not take any irrelevant factors into consideration in exercising its discretion, nor did it exercise its discretion in bad faith. Lastly, I note that during this inquiry the ministry re-exercised its discretion and decided to disclose further records to the appellant, which I list in Order Provision 1.

In sum, with respect to the exemptions claimed by the ministry, I uphold the ministry's exercise of discretion to not disclose the records to the appellant under section 49(a), in conjunction with sections 14(1) and 19, as well as section 49(b). I also uphold the ministry's decision to not disclose personal information under the mandatory exemption in section 21(1).

ORDER:

1. I order the ministry to disclose pages 104, 138-139, 149, 154-155, 392, 454-481, 483, 485-486, 767-771, 798, 800, 805, 807, 832, 834- 836, 838-839, 916-917, 920, 929, 931-933 and 936 to the appellant in their entirety by **April 15, 2020** but not before **April 8, 2020**, if it has not already done so.

2. I uphold the ministry's decision to withhold certain personal information under the mandatory exemption in section 21(1).

3. I uphold the ministry's application of the discretionary exemptions in sections 49(a) and 49(b), as well as its exercise of discretion to withhold information under these exemptions.

4. I find that the ministry did not narrow the scope of the request, as alleged by the appellant and that the ministry's search for records responsive to the request was reasonable.

5. The appeal is dismissed.

Original Signed by: March 9, 2020

Cathy Hamilton
Adjudicator