

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4284

Appeal PA20-00205

Ministry of the Solicitor General

July 27, 2022

**Summary:** This order 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 two parts of a video/audio recording. The ministry granted partial access to the video, but withheld other portions, on the basis of the discretionary exemption in section 49(a) (discretion to refuse requester's own information), read with section 14(1)(l) (facilitate commission of an unlawful act). In this order, the adjudicator finds that the information in the video consisting of police codes is exempt under section 49(a), read with section 14(1)(l) and she upholds the ministry's exercise of discretion. However, the adjudicator orders the ministry to disclose the remaining portions of the video clip at issue to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 14(1)(l) and 49(a).

**Orders Considered:** Orders MO-2871 and PO-1665.

### OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of an access decision made by the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for audio/video recordings of an interaction between the requester and an Ontario Provincial Police (the OPP) Officer at a named OPP Detachment on a specified date.

[2] The ministry issued a decision to the requester, granting partial access to two specified portions of an OPP video (with audio) of an interaction involving the requester and an OPP Officer. The ministry refers to the video as having two parts covering the same time period and has identified these portions as part one and part two. The ministry withheld portions of both parts of the video, claiming the application of the discretionary exemptions in section 49(a) (discretion to refuse requester's own information) in conjunction with section 14(1)(l) (facilitate commission of an unlawful act) to police ten- codes, as well as section 49(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). After the conclusion of mediation, the appeal moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I conducted an inquiry in which I sought and received initial representations from the ministry and the appellant, as well as reply representations from the ministry and sur-reply representations from the appellant. Representations were shared in accordance with the IPC's *Practice Direction 7*.

[4] In his representations, the appellant narrowed the scope of the request to 10 seconds of the video commencing at the 3:38 minute mark in each of part 1 and part 2. The ministry does not claim the exemption at section 49(b) to the portions of the video remaining at issue and section 49(b) is therefore no longer at issue in this appeal.

[5] For the reasons that follow, I find that the police ten-codes contained within the video at issue are exempt from disclosure under section 49(a), read with section 14(1)(l) and I uphold the ministry's exercise of discretion. I accordingly order the ministry to disclose the portions of the video at issue that do not contain police ten-codes to the appellant.

## **RECORDS:**

[6] At issue are the portions of video from 3:38-3:48 of each of part one and part two of a video recording. I will refer to these ten second portions respectively as the part one video clip and the part two video clip.<sup>1</sup>

## **ISSUES:**

- A. Do the video clips at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption apply to the video clips?

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<sup>1</sup> These portions are referred to by the ministry as Video Part 1 (Copy of Unedited Audio Video Recording) and Video Part 2 (Copy of Unedited Audio Video Recording).

- C. Did the ministry exercise its discretion under section 49(a)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Issue A: Do the video clips at issue contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?**

[7] In order to decide which sections of the *Act* may apply to this appeal, I must first decide whether parts one and two of the video contain “personal information,” and if so, to whom the personal information relates.

[8] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”

[9] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>2</sup>

[10] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.<sup>3</sup>

[11] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.<sup>4</sup>

[12] Section 2(1) of the *Act* gives a list of examples of personal information:

“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,

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<sup>2</sup> See the definition of “record” in section 2(1).

<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- (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 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 a complete list. This means that other kinds of information could also be "personal information."<sup>5</sup>

[14] It is important to know whose personal information is in the record. If a record contains the requester's own personal information, their access rights are greater than if it does not.<sup>6</sup> Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>7</sup>

### ***Representations***

[15] Both the ministry and the appellant acknowledge that the video contains the personal information of the appellant, as it involves an interaction between the appellant and the OPP at an OPP Detachment.

### ***Analysis and findings***

[16] I have listened to and viewed the video clips and I find that they contain the personal information of the appellant. In particular, the video clips consist of recorded information about the appellant. I also find that this video qualifies as the appellant's personal information because it falls under paragraph (h) of the definition of personal

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<sup>5</sup> Order 11.

<sup>6</sup> Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

<sup>7</sup> See sections 21(1) and 49(b).

information, as it contains the appellant's name with other personal information about him, namely that he was involved in an interaction with an OPP Officer at an OPP Detachment.

[17] Further, I find that the video clips that are at issue do not contain the personal information of other individuals.

[18] Having found that the video clips contain the appellant's personal information, I will now determine if section 49(a) in conjunction with section 14(1)(l) apply to them.

**Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 14(1)(l) exemption apply to the video clips?**

[19] 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.

[20] 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.

[21] 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.<sup>8</sup>

[22] 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.

[23] In this case, the ministry is claiming the application of section 49(a) in conjunction with section 14(1)(l) to the video clips

[24] Section 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.

[25] Generally, the law enforcement exemption must be approached in a sensitive

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<sup>8</sup> Order M-352.

manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>9</sup>

[26] 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.<sup>10</sup> 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.<sup>11</sup>

### ***Representations***

[27] The ministry submits that the OPP is a law enforcement agency and that the video was created by the OPP as part of their policing operations. The ministry further submits that it applied the law enforcement exemption in section 14(1)(l) to the “police ten-codes” in the video in order to protect the integrity and confidentiality of its law enforcement activities. The ministry goes on to state:

The Ministry maintains that it has withheld these codes in accordance with its usual practice, and because disclosure of these codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate. The Ministry maintains that the disclosure of police ten-codes could jeopardize the security of policing operations by revealing internal communications. The Ministry relies on an established body of jurisprudence, which has consistently upheld these codes as being exempt pursuant to section 14(1)(l) based on the reasonable expectation of harm were they to be disclosed. . .<sup>12</sup>

[28] As previously stated, the appellant submits that is seeking only the video clips, 10 seconds from each of part 1 and 2 of the video, and that he does not think there are police ten-codes in these portions of the video. The appellant further submits that police ten-codes are available on the Internet and there is no need to “protect” the appellant from hearing them, and that their disclosure would not facilitate the commission of an unlawful act or hamper the control of crime. The appellant is also of the view that during these 10 seconds, an OPP Officer can be heard telling the appellant to “shut up and do what he says.” The appellant seeks this alleged statement of the OPP Officer in the 10 seconds of the video.

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<sup>9</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>10</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>11</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>12</sup> The ministry relies on Order PO-3742 in claiming that the police ten-codes are exempt from disclosure under section 14(1)(l).

[29] In reply, the ministry submits that the appellant has narrowed the scope of his request. The ministry further submits that it reviewed the video clips and that they contain at least a few references to police ten-codes. The ministry further submits that it is willing to disclose the video clips in a redacted form, so that references to the police ten-codes are removed. The ministry's position is also that any other portions of the part 1 or 2 video that were withheld from the appellant are no longer responsive to the appellant's narrowed access request, and that the ministry is not prepared to "entertain" any further requests for other parts of the video in this appeal.

[30] In sur-reply, the appellant submits that it is not his fault that there was a radio dispatch with police ten-codes audible in the room he was interrogated in. The appellant further submits that if he needs to file freedom of information access requests in the future, he retains his right to do so.

### ***Analysis and findings***

[31] Numerous orders issued by the IPC have considered the application of the law enforcement exemption in section 14(1)(l) to police-code information.<sup>13</sup> In Order MO-2871, Adjudicator Diane Smith found that the disclosure of ten-codes could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. She stated:

This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l)<sup>14</sup> applies to "10- codes" (see Orders M-93, M-757, MO-1715 and PO-1665), as well as other coded information such as "900 codes" (see Order MO-2014). These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:

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...

[32] For the purposes of this appeal, I agree with and adopt these findings that police ten-code information is subject to the exemption at section 14(1)(l) of the *Act*.<sup>15</sup> As previously stated, I have viewed and listened to both parts one and two of the video.

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<sup>13</sup> The equivalent to section 14(1)(l) in the Municipal Freedom of Information and Protection of Privacy is section 8(1)(l).

<sup>14</sup> Section 8(1)(l) of the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act) is the equivalent of section 14(1)(l) of the Freedom of Information and Protection of Privacy Act.

<sup>15</sup> See also Orders MO-3640, MO-3682, MO-3773, MO-4073 and PO-4017 in which similar findings were made with regard to police ten-codes.

[33] Concerning part one of the video clip, I find that it clearly contains ten-code information. I accept that disclosure of this type of information has consistently been found to reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. I also accept that the disclosure of this information could reasonably be expected to compromise the ability of OPP Officers to provide effective policing services by enabling individuals engaged in illegal activities to conduct such activities. Subject to my review of the ministry's exercise of discretion, I find that this information is exempt under section 49(a), read in conjunction with section 14(1)(l) of the *Act*.

[34] I also find that, given the ministry's statement in its representations that the police ten-codes represent only a portion of the part one video clip and that it has claimed no other exemptions, I will order the ministry to disclose the part one video clip to the appellant, withholding only the police ten-codes.

[35] Conversely, I find that the part two video clip does not contain any police ten-codes. As a result, section 49(a), read with section 14(1)(l) cannot apply to this information. As no other exemptions have been claimed by the ministry with respect to the part two video clip, I will order the ministry to disclose it to the appellant in its entirety.

[36] Lastly, as previously stated, the ministry's position is that any other portions of the video that were withheld from the appellant are no longer responsive to the appellant's narrowed access request, and that the ministry is not prepared to "entertain" any further requests for other parts of the video on that basis in this appeal. I remind the parties that my finding on access in the appeal relates to the portions of the video specified by the appellant. The appellant is not precluded from making a new request for other portions of the video not dealt with in this order.

**Issue C: Did the ministry exercise its discretion under section 49(a)? If so, should the IPC uphold the exercise of discretion?**

[37] The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[38] In addition, the IPC 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.

[39] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>16</sup> The IPC may not, however,

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<sup>16</sup> Order MO-1573.



substitute its own discretion for that of the institution.<sup>17</sup>

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>18</sup>

- 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,
- 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***

[41] The ministry submits that it properly exercised its discretion to not disclose the law enforcement information contained in the video, acting in accordance with its usual long- standing practices. The ministry also submits that it provided the appellant with as much of his own personal information as possible, and in doing so achieved an appropriate balance consistent with the principles of the *Act*.

[42] The appellant infers that the ministry did not properly exercise its discretion in that he should have not been exposed to radio "chatter" in the first place and should not be punished for the OPP's mistake in exposing him to radio chatter. He also submits that the OPP is using the radio chatter as an excuse not to disclose the recording of the

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<sup>17</sup> See section 54(2).

<sup>18</sup> Orders P-344 and MO-1573.

OPP Officer being unprofessional in his interaction with the appellant.

***Analysis and findings***

[43] Based on the ministry's representations, I am satisfied that it properly exercised its discretion because it took into account relevant considerations and did not take into account irrelevant considerations. I am satisfied that the ministry balanced the appellant's interests in the disclosure of the records with the importance of the law enforcement exemption. I also note that the ministry disclosed the majority of the information contained in the video to the appellant, including the majority of his own personal information. In doing so, I find that the ministry took into consideration the purposes of the *Act*, including the principle that exemptions from the right of access should be limited and specific. Consequently, I uphold the ministry's exercise of discretion under section 49(b) to the information that I have found to be exempt from disclosure under section 14(1)(l).

**ORDER:**

1. I uphold the ministry's access decision, in part.
2. I order the ministry to disclose the portion(s) of the 10 seconds of part one of the video commencing at the 3:38 minute mark that do not contain police ten-codes to the appellant by **September 1, 2022** but not before **August 27, 2022**. To be clear, the police ten-codes are to be withheld.
3. I order the ministry to disclose the 10 seconds of part two of the video commencing at the 3:38 minute mark to the appellant in its entirety by **September 1, 2022** but not before **August 27, 2022**.
4. I uphold the ministry's exercise of discretion under section 49(a) in conjunction with section 14(1)(l) in not disclosing the police ten-codes to the appellant.
5. I reserve the right to require the ministry to provide the IPC with a copy of the information it discloses to the appellant in accordance with this order.

Original signed by: \_\_\_\_\_  
Cathy Hamilton  
Adjudicator

\_\_\_\_\_ July 27, 2022