Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4451

Appeal PA20-00460

Ministry of the Solicitor General

October 17, 2023

Summary: The appellant sought access to records from the OPP pertaining to an investigation it conducted regarding Correctional Service Canada's use of a cell- site simulator at the penitentiary at which the appellant worked. The appellant also challenged the reasonableness of the search for a videotape of his interview with a named OPP detective. The ministry released some information to the appellant but relied on a number of exemptions under the *Act* to deny access to the portions it withheld. The ministry also took the position that it conducted a reasonable search for the videotape, but none could be found. In this order the adjudicator partly upholds the ministry's decision. He finds that the ministry conducted a reasonable search for the videotape, but that certain claimed exemptions do not apply to some withheld information. He orders that this information be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 2(1) (definition of personal information), 14(1)(c), 14(1)(l), 19, 21(2)(a), 21(3)(b), 24, 49(a) and 49(b).

Orders Considered: P-1014, P-1618, PO-2380 and PO-3712

Case Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

Background

[1] This appeal arises out of Correctional Service Canada's use of a cell-site simulator for a fixed period of time at a penitentiary at which the appellant worked. The Ontario Provincial Police (OPP) provide law enforcement services to the penitentiary under an arrangement with Correctional Service Canada (CSC). The appellant seeks records from the OPP pertaining to an investigation it conducted regarding CSC's use of the cell-site simulator.

[2] As described in an investigation report prepared by the Office of the Privacy Commissioner of Canada[1], which stemmed from complaints about the collection of data at the penitentiary, a cell-site simulator mimics a cell tower in order to attract all nearby cellular phones and other cellular devices to connect to it. Unique identifiers are obtained from these devices and can subsequently be used to track the location of devices or to identify the owner of a device. Some cell-site simulators can also intercept the content of a message, such as a text message or a conversation. In this case it appears that six text messages were intercepted from CSC staff member's personal cellphones and logged. Cell-site simulators are sometimes referred to as "Stingray" devices.

[3] The Office of the Privacy Commissioner of Canada found that CSC had contravened the collection provisions of the *Federal Privacy Act*,[2] due to its use of the cell-site simulator to intercept six text messages. The CSC advised that it did not intend to use cell-site simulators in the future.

[4] The appellant subsequently made his own complaint to the Office of the Privacy Commissioner of Canada. After confirming that the appellant's nick name was included amongst the six intercepted texts, the appellant's complaint was upheld as well-founded.

[5] This OPP investigation of CSC's use of the cell-site simulator did not lead to any criminal charges.

[6] The appellant has his own theory regarding why the OPP is withholding information. The appellant asserts that this is because "law enforcement has been covering up the Stingray deployment for many years."

The request

[7] The appellant submitted a request under the *Freedom of Information and*

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[1] Titled Employee text messages intercepted without authorization at the [identified penitentiary], Dated June 4, 2018.
[2] RSC, 1985, c.P-21, as amended.

Protection of Privacy Act (the *Act*) with the Ministry of the Solicitor General (the ministry) for all records containing the appellant's name regarding the OPP investigation for a specified time period. He also requested access to a video recording of his interview with a specified OPP Detective (the detective) related to the investigation.

[8] The ministry located responsive OPP records and issued a decision to the appellant granting him partial access to them. The ministry withheld portions of the records under the discretionary exemptions in sections 49(a), read with sections 14(1)(a), (c), and (l) (law enforcement), 15(b) (relations with other governments) and 19 (solicitor-client privilege), as well as 49(b) (personal privacy). To support its personal privacy exemption claim, the ministry referred to the presumption against disclosure in section 21(3)(b) (investigation into a possible violation of law) and the factor weighing against disclosure in section 21(2)(f) (highly sensitive). The ministry also stated that it withheld some information because it was not responsive to the appellant's request. Finally, the ministry advised that it conducted a search for a video recording of the interview but could not locate one.

[9] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

Mediation

[10] During mediation, the appellant confirmed his interest in pursuing access to the video recording. The ministry undertook another search but was unable to locate a video recording of the interview. The appellant continued to believe that a video recording of the interview exists and reasonable search was added as an issue to this appeal.

[11] The appellant confirmed he does not seek access to police codes redacted under section 49(a), read with section 14(1)(l), or information withheld as not responsive. However, the appellant confirmed his interest in obtaining access to the remainder of the information withheld from disclosure.

[12] The ministry withdrew its reliance on section 49(a), read with section 15(b). Accordingly, the possible application of section 15(b) is no longer at issue in the appeal. The ministry also advised the appellant it withheld his date of birth and business address from page 41 in error, but the appellant confirmed he does not seek access to these two pieces of information. Accordingly, they are also no longer at issue.

Adjudication

[13] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*. The assigned adjudicator began her inquiry by inviting the ministry to make submissions in response to a Notice of Inquiry, which summarized the facts and issues under appeal. The ministry submitted representations. In its representations the

ministry advised that it is no longer relying on section 49(b) for pages 23 and 46 and section 14(1)(a) in its entirety. In addition, the ministry took the position that the IPC should notify CSC of the appeal and provide it with an opportunity to make submissions.

[14] The original adjudicator reviewed the records and decided to notify CSC and provide it with an opportunity to respond to a Notice of Inquiry, which she sent to CSC. CSC submitted representations.

[15] The original adjudicator then sent a Notice of Inquiry to the appellant along with the ministry's representations and the following summarized version of CSC's representations:

> The CSC takes the position that the records should be withheld in their entirety due to the sensitive nature of the information contained in the records, including the identification of CSC personnel and/or investigation techniques.

[16] The appeal was then reassigned to me to complete the inquiry.

[17] The appellant provided responding representations and a non-confidential version was shared with the CSC and the ministry for reply. No additional reply representations were provided.

[18] In this order I uphold the ministry's decision, in part. I find that the ministry conducted a reasonable search for the videotape, but that that certain claimed exemptions do not apply to some withheld information. I order that this information be disclosed to the appellant.

RECORDS:

[19] The pages at issue are numbered 3 to 23, 25 to 27, 41, 42, 46, 47 and 51 to 54. The ministry describes pages 3 to 22 as a Synopsis, and states that the remainder of the pages consist of records concerning a production order (pages 25 to 27 and 53 to 54) and emails and OPP officers' notes (pages 23, 25 to 27, 41, 42, 46, 47, 51 and 52).

ISSUES:

A. Did the ministry conduct a reasonable search for a video recording of an interview between the appellant and an identified police detective?

B. Do the records at issue contain personal information as defined in section 2(1), and if so, whose personal information is it?

C. Does the discretionary exemption at section 49(a) read with the solicitor-client privilege exemption at section 19 of the *Act* apply to information at issue in the appeal?

D. Does the mandatory personal privacy exemption at section 21(1) or discretionary personal privacy exemption at section 49(b) apply to the information at issue in the appeal?

E. Does the discretionary exemption at section 49(a) read with the law enforcement exemptions at sections 14(1)(c) and 14(1)(l) of the *Act* apply to information at issue in the appeal?

F. Did the ministry exercise its discretion under sections 49(a) and/or 49(b)?

DISCUSSION:

Issue A: Did the ministry conduct a reasonable search for a video recording of an interview between the appellant and an identified police detective?

[20] The appellant believes that the ministry's search failed to locate a responsive video recording of an interview between the appellant and an identified police detective.

[21] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[3]

[22] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[4]

[23] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[5] that is, records that are "reasonably related" to the request.[6]

[24] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[7]

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

The ministry's representations

[25] The ministry submits that it has conducted a full and complete search for all responsive records, including any video recording of an interview between the appellant and a named detective, but no video recording was found. In support of its position, the ministry included an affidavit from a Major Case Manager with the OPP (the case manager), who was responsible for overseeing the investigation that is the subject of this appeal.

[26] The case manager explains in his affidavit that the appellant alleges that an interview was conducted and recorded by a detective, who is no longer with the OPP.

[27] The case manager states that upon being notified of the appellant's access request, he conducted a search of the electronic records related to the investigation that were provided by the detective, but no video recording of the interview was located.

[28] He then asked that a search be conducted at the OPP detachment where the detective worked. He states that a search was conducted, but again, no video recording of the interview was found.

[29] The case manager then spoke directly to the detective who advised the case manager that he does not have a recollection of making a video recording of an interview with the appellant. The detective also advised the case manager that he has provided any records that he had in his possession to the OPP.

[30] The case manager takes the position that the searches that he conducted were diligent and thorough, but that no responsive video recording was found.

The appellant's representations

[31] The appellant submits that he seeks access to all information relating to the investigation of the surveillance conducted at the penitentiary, which includes a copy of a video recording of his interview with the detective. In his representations, he recounts the circumstances that gave rise to the interview and states that very little information was provided to him in response to his access request. He asserts that the interview "was terrible and laden with concerning issues." He further submits that despite his many inquiries, the whereabouts of his videotaped interview statement "remain unknown." He also adds that "much of the details of the unlawful privacy breach committed against myself and many others" has not been provided.

[32] He explains that in answer to his access request the ministry advised that no responsive video recording was found. He states:

> … Did they lose it? This was a very important interview video and there is very incriminating evidence on it that would expose wrongdoing by both the OPP and the Correctional Service of Canada.

[33] The appellant insists that the video recording is "definitely" in the custody or control of the OPP and his request for the video recording, and the investigation generally, has been subject to "an ongoing and recurring theme of cover ups, deny, defer and delay."

[34] The appellant submits that:

> This is not unique to my case. Law enforcement has been covering up the Stingray deployment for many years. It began to be revealed in 2014 with various agencies in Canada that had violated privacy of innocent individuals as well as surreptitiously gathering random information from unsuspecting victims.

[35] With respect the completed OPP investigation that gave rise to his access request, the appellant submits that:

> The investigation was over and nothing was ever resolved or explained. The many victims of the illegal phone taps who were originally interviewed were never called again nor given any explanation by the OPP why their phone was tapped.

[36] The appellant submits that the real reason for the secrecy "is an abuse of government power, and the secrecy around the violation of public privacy."

[37] He adds that:

> This particular case […] has been covered up since the very beginning with intent, malice, egregious malfeasance, willful neglect of fiduciary duty [which] now continues with the OPP [...].
>
> Officials that are responsible for this behave like nothing ever happened [which] continues to this date of this prepared representation. The video statement has disappeared, the transcribed notes have disappeared, the officer that did the video statement and interview has disappeared. […]

Analysis and finding

[38] In all the circumstances, I find that the ministry made a reasonable effort to locate the video recording. Based on the searches it conducted and who was tasked with conducting them, I find that the ministry has complied with its obligations under the *Act*.

[39] In reaching this conclusion, I acknowledge that it is possible that a video recording may have existed at one time but I am satisfied that a copy could not be found, despite reasonable efforts to locate one.

[40] I am not persuaded that the existence of the appellant's concerns about the conduct of the CSC, the OPP, or the OPP's investigation generally, alters my finding that the ministry conducted a reasonable search for responsive records. I have also considered whether these arguments establish a reasonable basis for me to conclude that further searches would yield additional records. When I consider the method and breadth of the search already undertaken, I am not able to conclude that further searches will yield the video recording that the appellant seeks.

[41] Accordingly, I find that the ministry has conducted a reasonable search that is in accordance with its obligations under the *Act*.

Issue B: Do the records at issue contain personal information as defined in section 2(1) and, if so, whose personal information is it?

[42] In order to decide which sections of the *Act* may apply to a specific record the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. If the record contains the requester's own personal information, their access rights are greater than if it does not.[8] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[9]

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

[44] 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.[10] See also sections 2(3) and 2(4), which state:

> (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

[8] 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.
[9] See sections 21(1) and 49(b).
[10] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> dwelling and the contact information for the individual relates to that dwelling.

[45] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[11]

[46] 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.[12]

[47] 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,
>
> (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

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[11] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

> (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.

[48] 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."[13]

The ministry's representations

[49] The ministry submits that the records contain the names of individuals, along with other information about them that was recorded as part of a law enforcement investigation, which qualifies as their personal information under section 2(1) of the *Act*.

[50] The ministry adds that although certain information in the records pertains to CSC staff, it nevertheless constitutes their personal information because it would reveal a staff member's involvement in a law enforcement investigation.

The appellant's representations

[51] The appellant does not specifically address whether personal information is contained in the records.

Analysis and finding

[52] I have reviewed the records. With the exception of pages 53 and 54, I find that all of the records where the pages are at issue contain the personal information of the appellant as well as other identifiable individuals. This personal information includes identifying numbers or other particular assigned to the individual [paragraph (c) of the section 2(1) definition of "personal information"], their telephone numbers and addresses [paragraph (d)], their views or opinions [paragraphs (e) and (g)] and their name which appears with other personal information relating to them or where the disclosure of their name would reveal other personal information about them [paragraph (h)].

[53] Pages 53 and 54 contain only the personal information of identifiable individuals other than the appellant.

[54] In making the finding above, I have considered that even though some information in the records pertains to CSC staff, its disclosure would reveal something of personal nature about them arising from their involvement in a criminal investigation, including some personal information relating to the content of the text messages, that they were the sender or receiver of text messages to or from their personal cellphones or that they were the subject of those text messages.

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[13] Order 11.

[55] I will now consider the application of the exemptions claimed by the ministry. I will first address the possible application of section 49(a) read with section 19.

Issue C: Does the discretionary exemption at section 49(a) read with the solicitor-client privilege exemption at section 19 of the *Act* apply to information at issue in the appeal?

[56] 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 some exemptions from this general right of access to one's own personal information.

[57] Section 49(a) of the *Act* 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[58] The discretionary nature of section 49(a) 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 own personal information.[14]

[59] In this appeal the ministry relies on section 49(a) read with sections 14(1)(c), 14(1)(l) and 19. I will first address the possible application of section 49(a) read with section 19.[15]

Solicitor Client Privilege

[60] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege,
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation or

[14] Order M-352. See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under sections 49(a) and 49(b).
[15] I address the possible application of section 49(a) read with sections 14(1)(c) and or 14(1)(l) as a separate issue, below.

> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[61] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[62] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*.

[63] The institution must establish that at least one branch applies.

Branch 1: common law privilege

Common law solicitor-client communication privilege

[64] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[16] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[17] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[18]

[65] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[19]

[66] Branch 1 also includes common law litigation privilege. This privilege is not at issue here.

Common law loss of privilege

[67] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[20]

[68] There may also be an implied waiver of solicitor-client privilege where fairness

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[16] Orders MO-1925, MO-2166 and PO-2441.
[17] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[18] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[19] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[20] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[21]

Branch 2: statutory privilege

[69] The branch 2 exemption is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[70] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

The representations

[71] The ministry takes the position that pages 3 to 22, and parts of pages 46, 51 and 52 of the records fall within the scope of sections 19(a) or 19(b).

[72] The ministry submits that all of page 46 (with the exception of the bottom 3 lines), the second bottom shaded portion on page 51 and the bottom half of page 52 (below the date) fall within section 19(a) (common law litigation privilege) because they record confidential communications between an investigative Officer of the OPP who was seeking advice from the then Deputy Legal Director at the ministry's Legal Services Branch as well as Crown counsel from the ministry.

[73] The ministry submits that the Synopsis in its entirety (pages 3 to 22) falls within the scope of section 19(b), because it was specifically prepared by the OPP for Crown counsel to consider whether charges should be laid.

[74] The ministry submits that privilege has not been waived, and that it continues to apply.

[75] The appellant makes no specific representations on this issue.

Analysis and finding

[76] I find that all of page 46 (with the exception of the bottom 3 lines), the second bottom shaded portion on page 51 and the bottom half of page 52 (below the date) fall within section 19(a) because they contain confidential communications between lawyer and client, made for the purpose of obtaining or giving legal advice, or the disclosure of which would reveal those communications. Accordingly, this information is solicitor-client communication privileged information. I find that privilege has not been waived

[21] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

with respect to this information.

[77] I also find that the synopsis in its entirety (pages 3 to 22) falls within the scope of section 19(b) because I am satisfied that it was prepared for Crown counsel for use in giving legal advice regarding whether charges should be laid. I find that the statutory privilege has not been waived with respect to this information.

[78] Accordingly, I find that all of pages 3 to 22, 46 (with the exception of the bottom 3 lines), the second bottom shaded portion on page 51 and the bottom half of page 52 below the date, qualify for exemption under section 49(a) read with sections 19(a) and/or 19(b).

[79] I will now address the balance of the information at issue.

Issue D: Does the mandatory personal privacy exemption at section 21(1) or discretionary personal privacy exemption at section 49(b) apply to the information at issue in the appeal?

[80] The ministry claims that withheld information on pages 25[22], 26, 41 (bottom portion) 42 (top portion), 46 (the bottom 3 lines), 47 (top portion) and 52 to 54 should qualify for exemption on the basis of section 21(1) or 49(b) as the case may be.

[81] Because I have found that pages 53 and 54 contain the personal information of individuals other than the appellant, I will consider the possible application of the mandatory personal privacy exemption at section 21(1) for the information at issue on those pages. For the remainder, I will consider section 49(b).

[82] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.

[83] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.[23]

[84] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution cannot disclose that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or the section 21(1)(f) exception applies, because disclosure would not be an "unjustified invasion" of the other individual's personal privacy.

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[22] This information is duplicated on page 27, and any finding I make on page 25 will apply to the duplicated portion on page 27.

[23] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under sections 49(a) and 49(b).

[85] Also, the requester's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.[24]

[86] In deciding whether either of the section 49(b) exemption or the section 21(1)(f) exception to the section 21(1) exemption applies, sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

[87] If any of sections 21(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. Section 21(2) lists other factors that help in deciding whether disclosure would be an unjustified invasion of personal privacy, and section 21(4) lists situations where disclosure would not be an unjustified invasion of personal privacy. If any of the section 21(4) situations is present, sections 21(2) and (3) need not be considered.

[88] For records claimed to be exempt under section 21(1) (that is, records that do not contain the requester's personal information), the factors outlined in section 21(2) cannot be used to rebut (disprove) a presumed unjustified invasion of personal privacy under section 21(3).[25] In other words, if disclosure of the other individual's personal information is presumed to be an unjustified invasion of personal privacy under section 21(3), section 21(2) cannot change this presumption.[26]

[89] If the personal information at issue does not fit within any presumptions in section 21(3), the decision-maker[27] considers the factors set out in section 21(2) to determine whether disclosure of the personal information would be an unjustified invasion of personal privacy. If no factors favouring disclosure in section 21(2) are present, the section 21(1) exemption applies because the section 21(1)(f) exception has not been proven.[28]

[90] For records claimed to be exempt under section 49(b) (that is, records that contain the requester's personal information), the decision-maker must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in deciding whether the disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.[29]

[91] In this appeal, the potential application of the presumption at section 21(3)(b), the factor favouring disclosure at section 21(2)(a) and the factor favouring non-

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[24] Order PO-2560.
[25] *John Doe*, *v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[26] In such a case, the personal information cannot be disclosed unless one of the circumstances listed in section 21(4) is present, or unless the public interest override at section 23 applies.
[27] The institution or, on appeal, the IPC.
[28] Orders PO-2267 and PO-2733.
[29] Order MO-2954.

disclosure at section 21(2)(f) are relevant considerations. Those sections read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The ministry's representations

[92] The ministry submits that the personal information on pages 25, 26, 41 (bottom portion), 42 (top portion), 46 (bottom 3 lines), 47 (top portion) and 52 to 54 has been withheld because it was compiled by the OPP in the course of an investigation into a possible violation of the law, thereby falling within section 21(3)(b) of the *Act*.

[93] Relying on Orders P-1618 and PO-3712, the ministry further submits that the withheld information is of complainants, witnesses or suspects and is highly sensitive, thereby falling within the scope of the factor favouring non-disclosure at section 21(2)(f).

The appellant's representations

[94] In his representations the appellant sets out his concerns about the OPP's conduct of the investigation and what he says is its withholding of information. As well, he expresses dismay about the CSC's use of the cell-site simulator and its conduct once concerns were raised.

[95] He asserts that the integrity of cell-site simulators has been compromised and that all agencies purchasing such machines from the manufacturer have been sworn to secrecy about anything to do with talking about the machine or disclosing anything about the machine. He adds that their customers can say nothing about the machine or be subject to contractual consequences.

[96] He also alleges that various agencies, including the ministry, have been instructed to use any excuse not to disclose anything about the machine and to dismiss

cases and release dangerous felons rather than provide any information about it.

[97] The appellant states that he requested anything and everything related to himself and "the illegal cell phone tapping of [his] personal cell phone" through the deployment of the cell site simulator. He submits that the OPP has gone to great lengths to not release information pertaining to him. He asserts that the OPP and the CSC have been using this machine and other similar devices for years "without warrants" and are improperly collecting unrelated information in "dragnet operations" which is stored and used in other situations when the police think they will "need it to assist/fabricate other cases."

[98] He submits that despite all the evidence the OPP had collected they refused to lay any criminal charges "because they assumed "a conviction would be unlikely" as reported by a named Inspector. The appellant asserts that the circumstances and the reason that a conviction would be unlikely was never explained, and the Crown refused to provide any information for this decision.

[99] He further alleges that there is currently a second police investigation of the unlawful cell-site simulator privacy breach at the penitentiary, arising out of a report resulting from his complaint.[30] He submits that:

> There have been great consequences for police since they started getting caught with the machine and using information to charge individuals with many crimes. Databases are collected and subsequently stored. This is what exactly occurred in my case, the OPP used stored and collected information to fabricate other cases...and got caught. … Such information is still very likely stored in a data base which I have a right to access and/or should be destroyed.

[100] The appellant further alleges that the OPP also conducted a third criminal investigation that is unrelated to its investigation of the CSC's use of a cell site simulator. He states that:

> In the process of collecting information the OPP collected actual logs from the Stingray Machine from many individuals' cell phones. They took this information and subsequently started their own investigation hoping to find individuals smuggling contraband into the [penitentiary]. They conducted a lengthy investigation of many correctional officers' phone data but subsequently were unable to find any smugglers. This investigation started when the OPP thought guards were smuggling in two things; "Potluck" and "[a name]." Pot luck was actually potluck dinners and [name] was a nick name for me.

[101] The appellant asserts that his fact-finding efforts have been interfered with and

[30] Discussed in the overview above.

asks the IPC assist him with bringing closure and provide a transparent conclusion for him and many others "that have been adversely effected by this outrageous overreach of many laws that are actually supposed to protect the public."

Analysis and finding

[102] I first address the withheld individuals' names on pages 42 and 47, as well as information that appears on pages 25 and 26. I find the names,[31] appear in a professional rather than personal capacity. Furthermore, the information[32] on pages 25 and 26 is an opinion about the appellant, which qualifies as the appellant's personal information, only. Accordingly, disclosure of the names and the highlighted information on pages 25 and 26 would not be an "unjustified invasion" of the other individual's personal privacy.

[103] I will now address the possible application of the factor favouring disclosure at section 21(2)(a) and the presumption against disclosure at section 21(3)(b) to the other information claimed to be subject to section 21(1) or 49(b).

21(2)(a): disclosure is desirable for public scrutiny

[104] This section supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[33] It promotes transparency of government actions.

[105] The issues addressed in the information that is being sought do not have to have been the subject of public debate in order for this section to apply, but the existence of public debate on the issues might support disclosure under section 21(2)(a).[34]

[106] An institution should consider the broader interests of public accountability when considering whether disclosure is "desirable" or appropriate to allow for public scrutiny of its activities.[35]

[107] The appellant does not specifically refer to the application of section 21(2)(a), however his representations discuss his concerns about the OPP's conduct of the investigation. I interpret this as a submission that disclosure of the information would be desirable for the purpose of subjecting the activities of the OPP to public scrutiny, a factor listed in section 21(2)(a). In my view, although there has been public interest in the use of cell-site simulator devices generally, the appellant primarily seeks access to the withheld information to ensure that justice was done in this particular investigation, in which he was personally involved.

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[31] Which I have highlighted in green on a copy of the pages provided to the ministry with this order.
[32] Which I have highlighted in green on a copy of the pages provided to the ministry with this order.
[33] Order P-1134.
[34] Order PO-2905.
[35] Order P-256.

[108] Accordingly, I find that to the extent the factor favouring disclosure applies, I give it little weight.

21(3)(b): investigation into a possible violation of law

[109] This presumption requires only that there be an investigation into a possible violation of law.[36] So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.[37]

[110] The ministry submits that the presumption against disclosure in section 21(3)(b) applies to the information in the records because it was gathered as part of an investigation into a possible violation of law, namely the *Criminal Code of Canada*.

[111] I accept the ministry's position. Even if the appellant takes issue with the adequacy or conduct of the OPP's investigation, based on the content of the records, it is clear that the personal information was compiled by the OPP and is identifiable as part of their investigation into a possible violation of law. I therefore find that the personal information in the records fits within the ambit of the presumption against disclosure in section 21(3)(b). I find that this presumption weighs heavily in favour of non-disclosure.

Conclusion

[112] I find that the information on pages 53 and 54, which do not contain the appellant's personal information, qualifies for exemption under section 21(1) of the *Act*. This is because the presumption at section 21(3)(b) applies and disclosure of the information would constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

[113] With respect to the remaining information, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[38]

[114] I concluded above that personal information in the records is subject to the presumption at section 21(3)(b) which weighs heavily in favour of non-disclosure and that section 21(2)(a) apples, but I have given it little weight. Furthermore, in my view, there are no other factors favouring disclosure. Considering and weighing the presumption and balancing the interests of the parties, including the interest of the appellant in obtaining the information and his expressed concerns about the conduct of the OPP investigation, while being mindful that the section 21(3)(b) presumption

[36] Orders P-242 and MO-2235.
[37] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).
[38] Order MO-2954.

weighs heavily against disclosure in the circumstances of this appeal, I find that disclosure of this information in the records, would be an unjustified invasion of personal privacy under section 49(b).[39]

[115] Accordingly, I find that only the balance of the withheld information on pages 25, 27, 41 (bottom portion, only), 46 (bottom 3 lines) and 47 (top 3 lines) qualifies for exemption under section 49(b).

Issue E: Does the discretionary exemption at section 49(a) read with the law enforcement exemptions at sections 14(1)(c) and 14(1)(l) of the *Act* apply to information at issue in the appeal?

[116] As a result of my findings to this stage, remaining at issue in this appeal is the remaining withheld information on pages 23, 41 (middle portion), 42, 51 (top portion) and 52 (top portion) that the ministry claims to be subject to section 49(a) read with sections 14(1)(c) and 14(1)(l).

[117] Section 14 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[118] Sections 14(1)(c) and (l) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[119] Sections 14(1)(c) and/or 14(1)(l) apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

[120] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.[40]

[121] However, the exemption does not apply just because a continuing law enforcement matter exists,[41] and parties resisting disclosure of a record cannot simply assert that the harms under section 14 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm

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[39] In light of this finding, it is not necessary for me to also consider whether the factor favoring non-disclosure at section 21(2)(f) might also apply.
[40] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[41] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 14 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[42]

[122] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[43] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[44]

[123] For section 14(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.[45]

[124] The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.[46]

[125] For section 14(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

The ministry's representations

[126] The ministry takes the position that the information on pages 23, 41 (middle portion), 42, 51 (top portion) and 52 (top portion) qualify for exemption under section 49(a) read with sections 14(1)(c) and/or 14(1)(l) of the *Act*.

Section 14(1)(c): Investigative techniques and procedures

[127] The ministry submits that those pages contain sensitive law enforcement related information, notably details about a production order and of the investigation in general, the disclosure of which would harm law enforcement operations.

[128] In particular, the ministry submits that the disclosure of page 23 would reveal correspondence with an organization named on page 23 and the disclosure of pages 41 and 42 would reveal details about the investigation.

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[42] Orders MO-2363 and PO-2435.
[43] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[44] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.
[45] Orders P-170, P-1487, MO-2347-I and PO-2751.
[46] Orders P-1340 and PO-2034.

[129] The ministry submits that:

> (a) The procedures or techniques contained in these pages are not known to the public. Indeed, their existence is probably known only to the party that cooperated with the production order, the party that is listed on page 23, as well as OPP law enforcement personnel, notably those who conducted the investigation;
>
> (b) The techniques and procedures described in the records are used as part of law enforcement investigations, so that the OPP can gather evidence in a manner that will protect the integrity of its investigation; and,
>
> (c) Disclosure of the records could potentially be expected to interfere with these types of techniques and procedures. The ministry is concerned that those who cooperate with the OPP, either through complying with production orders or otherwise might be less willing to do so, because of their reasonable expectation that details about their involvement with the OPP would not be disclosed in the manner contemplated by this appeal.

[130] The ministry relies upon Order PO-2380 where the Adjudicator found that section 14(1)(c) applied to records that described the procedures and techniques used to obtain a search warrant. The ministry submits that, like here, the records addressed in that order related directly to the investigation and behind the scenes activities of a law enforcement nature.

Section 14(1)(l): Facilitate Commission of an Unlawful Act or Hamper the Control of Crime

[131] The ministry asserts that those same pages listed above fall within the scope of section 14(1)(l). The ministry explains that it is concerned that the disclosure of the withheld information would discourage external parties, as well as members of the public from cooperating with the police, if it was generally believed that the confidentiality of the information they share with the police would not be safeguarded. The ministry submits that disclosure of the information could thereby facilitate the commission of crime or hamper its control.

The representations of the CSC

[132] The CSC submits that disclosing the withheld information is sensitive information and its disclosure could identify CSC personnel or investigation techniques.

The appellant's representations

[133] The appellant does not make any specific representations on the potential application of sections 14(1)(c) and/or (l) of the *Act*, although, as set out above, he

challenges the investigation generally and questions the motives of the ministry in withholding the information.

Analysis and finding

[134] I find that the ministry has failed to provide sufficient evidence to establish the application of sections 14(1)(c) and or (l) to the information at issue.

[135] In my view some of the portions of the pages that the ministry seeks to withhold under these sections, which mainly relate to communicating and reporting have nothing to do with the type of information the legislature intended to be captured by sections 14(1)(c) and/ or (l). I am also not satisfied that the disclosure of this information could reasonably be expected to cause harm under sections 14(1)(c) and/or (l).

[136] With respect to the balance of the information on those pages, it appears that the ministry is conflating the results of investigative techniques and procedures with the actual investigative techniques or procedures. In that regard, unlike in Order PO-2380 the remaining information at issue is for the most part the result of investigative techniques or procedures, and would not reveal the underlying investigative techniques or procedures. Furthermore, to the extent that there may be an investigative technique or procedure set out in the withheld portions of the records or revealed by their disclosure, the ministry has not established that these techniques or procedures are not generally known to the public.

[137] I therefore find that, in the circumstances of this appeal, the disclosure of the information remaining at issue would not reasonably be expected to cause harm under sections 14(1)(c) and/or (l).

[138] Accordingly, I am not satisfied the information on pages 23, 41 (middle portion), 42, 51 (top portion) and 52 (top portion) that I have highlighted in green on a copy of those pages that I have provided to the ministry along with a copy of this order, qualifies for exemption under section 49(a) read with sections 14(1)(c) and/or (l) and I will order that it be disclosed to the appellant.

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

[139] The section 49(a) and 49(b) exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[140] 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.

[141] In either case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations.[47] I cannot, however, substitute my own discretion for that of the ministry.[48]

[142] The ministry's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the ministry to reconsider the exercise of discretion.

[143] I am satisfied overall that the ministry properly exercised its discretion under sections 49(a) read with section 19 of the *Act* and under section 49(b).

[144] With respect to section 19, it should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[49].

[145] Furthermore, it is clear that the ministry understood the purpose of the appellant's request and attempted to disclose as much information to the appellant without revealing the personal information of the other individuals involved in the incident or disclosing solicitor-client privileged information. Notwithstanding the appellant's assertions and allegations, I am not satisfied that the ministry failed to consider relevant factors, took into account irrelevant factors, or otherwise exercised their discretion in an improper manner.

[146] Taking into consideration the significant level of disclosure the ministry has made to the appellant along with the information that I have ordered to be disclosed in this order, I am satisfied that the ministry exercised their discretion in accordance with the requirements of the *Act* with respect to the information that I have not ordered to be disclosed. In all the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion to withhold the information that I have not ordered disclosed in this order.[50]

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[47] Order MO-1573.
[48] Section 54(2).
[49] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.
[50] I have also considered whether the information that I have found to be subject to sections 49(a) (read with section 19) and/or 49(b) can be severed and portions of the withheld information be provided to the appellant. In my view, the records cannot be further severed without disclosing information that I have found to be exempt. Furthermore, an institution is not required to sever the record and disclose portions

ORDER:

1. I uphold the reasonableness of the ministry's search.

2. I order the ministry to disclose to the appellant the additional information that I have highlighted in green on a copy the pages of the records that I have provided to the ministry along with a copy of this order by sending it to him by **November 22, 2023**, but not before **November 17, 2023**.

3. In order to ensure compliance with paragraph 2, I reserve the right to require the ministry to send me a copy of the pages of records as disclosed to the appellant.

4. In all other respects I uphold the ministry's decision.

Original Signed by: October 17, 2023
Steven Faughnan
Adjudicator

where to do so would reveal only "disconnected snippets", or "worthless" or "meaningless" information, which any other severance would result in here.