

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4594

Appeal PA22-00258

Ministry of the Attorney General

January 23, 2025

Summary: An individual requested access from the Ministry of the Attorney General (the ministry) for records of a Special Investigations Unit investigation of his complaint against a police officer. The ministry provided access to some of the records but denied access to others. The appellant determined that he wanted to pursue access to audio recordings of witness interviews that the ministry denied access to, claiming the personal privacy exemption.

In this order, the adjudicator finds the records are exempt under the personal privacy exemption because disclosure of the personal information in those records would be an unjustified invasion of personal privacy. She upholds the institution's decision not to disclose them and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1), 2(3), 21(1)(a), 21(3)(b), and 49(b) and *Special Investigations Unit Act, 2019*, S.O. 2019, c. 1, Sched. 5, sections 2(1) and 34.

Orders Considered: Orders PO-1959, PO-2524, PO-3169, and PO-4215.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records of the Special Investigations Unit (the SIU) relating to an incident that involved him. The appellant asked for the full report of the SIU's investigation of allegations he made against officers of a municipal police service.

[2] The Ministry of the Attorney General (the ministry) granted partial access to the records.¹ The appellant appealed the decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to explore the possibility of resolution.

[3] During mediation, the ministry provided an index of records, and the appellant narrowed his request to four audio witness statements that the ministry fully withheld under section 49(b) of the *Act*, leaving only the application of that section at issue in this appeal.

[4] As mediation did not resolve the appeal, it was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[5] I decided to conduct an inquiry and sought and received representations from the ministry and the appellant.²

[6] In this order, I uphold the ministry's decision that the audio recordings are exempt by reason of section 49(b) of the *Act*.

RECORDS:

[7] At issue are four audio recordings, consisting of four individuals' statements to the SIU.

ISSUES:

- A. Do the audio recordings contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 49(b) apply to the audio recordings?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

¹ The ministry withheld some information pursuant to sections 49(a) (discretion to refuse requester's own information) read with sections 14(2)(a) (law enforcement matter), 17(1)(b) (third party information) and 19 (solicitor-client privilege), and section 49(b) (personal privacy) of the *Act*.

² The representations provided by the police were shared with the appellant in accordance with the IPC's *Code of Procedure*.

DISCUSSION:

Issue A: Do the audio recordings contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

[8] The records at issue consist of four audio recordings of witness interviews conducted by the SIU. The ministry relies on the discretionary personal privacy exemption at 49(b) of the *Act* to withhold them in their entirety. Before I consider whether this exemption applies, I must first determine whether the records at issue contain “personal information.” If a record does, I must determine whether the personal information belongs to the appellant, to other identifiable individuals, or both.

[9] 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.³

[10] Section 2(1) of the *Act* gives a list of examples of personal information.⁴ 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.”⁵

[11] Section 2(3) also addresses the definition of personal information. This section states:

³ Order PO-1880, upheld on judicial review in Ontario (*Attorney General*) v. *Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴ Section 2(1) of the *Act* reads, in part:

“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 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.

⁵ Order 11.

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.

Representations of the parties

[12] The ministry states that, in addition to the appellant's personal information, the records also include the personal information of the four interviewed witnesses, including a subject official,⁶ a witness official, and two civilian witnesses, as well as two individuals who were not interviewed but witnessed the appellant's arrest.

[13] The ministry states that the four witnesses who were interviewed were all acting in the context of their employment when they encountered the appellant in the incident that preceded the SIU investigation. Two were on-duty police officers, while the other two were civilian witnesses. The ministry notes that the two civilian witnesses were not subject to a statutory duty to provide the SIU with a statement, and that it is doubtful that appearing as a witness for the purposes of a police oversight investigation could be seen as a normal part of their employment duties. The ministry also states that the appellant has made a broad complaint of institutional corruption, including making allegations against "all involved," such that the civilian witnesses' conduct may also be characterized as being in issue.

[14] Similarly, for the subject official and the witness official, the ministry states that the information is of a personal nature because the conduct of those officials is at issue, and because the information includes statements that these officials expressed in their personal capacity, and not on behalf of their employer.

[15] The ministry notes that the IPC has previously emphasized a distinction between categories of police officers involved in SIU investigations when determining if the information relating to those officers is personal or professional. That distinction is between those who the SIU has designated as subject officials and witness officials pursuant to the *Special Investigations Unit Act*⁷ (the *SIU Act*). The ministry states that under the definition in that legislation, subject officials appear to be the cause of the death, serious injury, firearm discharge, or alleged sexual assault under investigation.⁸ Given this, the ministry states that the conduct of the subject official is always in issue in its investigations. In addition, the subject official in this case was the subject of a criminal investigation, and the ministry states that this also argues in favour of his information taking on a personal quality.

⁶ The terms "subject official" and "subject officer" are used interchangeably throughout this order, as are "witness official" and "witness officer."

⁷ 2019, S.O. 2019, c. 1, Sched. 5.

⁸ Section 2(1) of the *SIU Act* states that "subject official" means, with respect to an incident under SIU investigation, "an official whose conduct appears, in the opinion of the SIU Director, to have been a cause of the incident."

[16] The ministry states that under the *SIU Act*, a “witness official” is an official involved in an incident but who is not a subject official in relation to that incident. The ministry states that this role does not preclude circumstances in which records of an incident investigation include information of a personal nature about a witness official. The ministry’s position is that whether a witness official’s information is of a personal or professional nature must be considered on a case-by-case basis. The ministry notes that there have been circumstances in which the IPC has found that a witness official’s information in SIU records was that witness’s personal information.

[17] A further argument the ministry makes for the records containing the witness official’s personal information is that the appellant has made various accusations against the witness official, including accusations of wrongful or malicious arrest, use of force, and fabrication of evidence, as well as commenting on the witness official’s character.

[18] The appellant, in his representations, alleges that the police officers involved in the underlying incident engaged in criminal conduct, including sexual assault, torture, and unlawful confinement. He also alleges that these officers falsified police reports and engaged in perjury in later proceedings. The appellant states that he has included evidence with his representations demonstrating that the police have lied to the SIU, as well as committing other crimes. The appellant refers to numerous statements by these police officers in recordings – seemingly the recordings at issue⁹ – as well as within court transcripts and sets out why he believes these statements to be untrue. He also provided a transcript of what appears to be his initial interaction with the police officers. The appellant states that he is seeking that the SIU investigation be reviewed or appealed based on new evidence.

[19] The appellant’s position is that the records do not contain personal information, stating as follows:

The police and the other witnesses who spoke to the SIU did so in regards to their positions of trust in relation to the public. In the interest of transparency, accountability and public safety the lies and wrong-doings of those working in a public capacity in trust should be made public and is not personal information.

Analysis and finding

[20] Collectively, the audio recordings describe two different incidents occurring on the same date. The first incident was a vehicle collision following which the appellant was arrested and transported to hospital. The second occurred at the hospital, when the appellant alleges that the subject officer sexually assaulted him while removing an object from his person. Both the subject officer and the witness officer were present for the

⁹ The ministry’s representations state that the appellant was provided with an unsevered copy of the recordings at issue via a court order, but the court order included conditions restricting the appellant’s use of these recordings.

second incident, which was the subject of the SIU investigation.

[21] Personal information is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, including enumerated categories of information set out in the various paragraphs of that definition.

[22] The audio recordings contain information relating to several identifiable individuals including: the appellant, the subject official, the witness official, the two civilian witnesses who gave interviews to the SIU, two additional witnesses (not interviewed by the SIU), and the SIU investigators. Of these categories enumerated in the definition of "personal information" at section 2(1), the records include witnesses' information related to their race, age, and sex (paragraph (a)), employment history (paragraph (b)), personal opinions or views of witnesses other than the appellant and not related to the appellant (paragraphs (e) and (g)), and names of individuals together with other personal information about them or in circumstances where the disclosure of the names would reveal other personal information about the individuals (paragraph (h)).

[23] Information is "about" an individual when it refers to them in their personal capacity, revealing 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 However, 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

[24] The information relating to the witnesses who were not interviewed clearly refers to them in their personal capacity and is their personal information. Similarly, the audio recordings, while addressing events that the interviewed civilian witnesses had knowledge of through their employment, are not "about" those individuals in their business capacity. The appellant's assertion that those individuals were in a position of trust with the public, whether true or not, does not affect whether the information at issue is their personal information.

[25] Conversely, information regarding the SIU investigators conducting the interviews relates to them only in their professional capacity and is not their personal information. The only exception is information recorded during a brief interruption in one interview, which does reveal something of a personal nature regarding that SIU investigator, and which I find to be his personal information.

[26] As noted by the ministry, previous orders of this office have found that there are times when information relating to an on-duty police officer may be their personal information, despite occurring during the course of their employment. This was set out in Order PO-2524, in which the adjudicator found that such records would reveal

¹⁰ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

something personal about a subject officer, stating:

Although the information ... relates to an examination into the conduct of the subject officers while at their work, in my view, because they were the focus of an investigation into whether their conduct in dealing with the appellant was appropriate, it has taken on a different, more personal quality.

[27] Similar analysis has been applied to information relating to the conduct of subject officers in subsequent IPC orders.¹² I adopt that reasoning and apply it here. The information included in the records describes the subject officer's interactions with the appellant, including detailing the events that were the subject of the complaint and the SIU's subsequent investigation. Accordingly, I find that the information in the audio recordings relating to the subject officer's conduct reveals something of a personal nature regarding that individual and is his personal information as defined in section 2(1) of the *Act*.

[28] The remaining question is whether the records contain the personal information of the witness officer. In previous orders, this office has made that determination on a case-by-case basis, based on the information within the records at issue. However, this office has often found that information within SIU records relating to witness officers is not their personal information. For example, in Order PO-3169, the adjudicator noted that information in the records indicated that witness officers involved in that SIU investigation were acting strictly in their professional capacities. The adjudicator found that the records did not contain the witness officers' personal information and noted that "there was nothing inherently personal about these individuals included in the records that would take the information from the professional to the personal sphere."¹³

[29] In Order PO-4215, an adjudicator considered the finding in PO-3169 and agreed that information relating to witness officers involved in SIU investigations is their professional information, rather than their personal information. However, that adjudicator also found that the records at issue in that matter did contain the personal information of one witness officer. The adjudicator found that the records revealed something of a personal nature about that witness officer, because "although not directly involved in the incident in question, [the witness officer] had a tangential connection to the actions of the subject officer."¹⁴

[30] In this case, the witness officer was present for and had direct involvement in the events surrounding the alleged sexual assault. The ministry states that the appellant has questioned the conduct of both the subject officer and the witness officer. This is consistent with the appellant's own representations, which include allegations against both officers regarding the events of the relevant day. In a letter written by the appellant

¹² See, for example, Orders PO-3169 and PO-4125

¹³ Order PO-3169 at paragraph 59.

¹⁴ Order PO-4125 at paragraph 67.

(provided within his representations), he refers to his sexual assault complaint being made against the police and both the subject and witness officers. Later in his representations, the appellant refers to both officers attacking him “mentally, physically, unlawfully and... sexually.”

[31] The SIU investigation related to the actions of the subject officer. However, the witness officer also had direct involvement in the events surrounding the alleged incident. I view this as much more than a “tangential connection” to the actions of the subject officer, which was sufficient in PO-4215 to find that the information revealed something of a personal nature. In this case, the information in the audio recordings is of a more personal quality as it relates to the witness officer, and I find that the records contain the witness officer’s personal information.

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

[32] 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 right.

[33] 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.

[34] 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 other individual’s personal privacy.¹⁵

[35] If disclosing another individual’s personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b).

[36] Sections 21(1) to (4) provide guidance in deciding whether the personal information is exempt under section 49(b). If any of the exceptions in section 21(1)(a) to (e) apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b).

[37] Sections 21(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Section 21(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 21(2) or (3) apply. In this appeal, the parties did not argue that section 21(4) applies and

¹⁵ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s exercise of discretion under section 49(b).

from my review of the records, I find that it does not.

[38] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the decision-maker¹⁶ must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹⁷

[39] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.¹⁸ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[40] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 21(2).¹⁹

Representations of the parties

[41] The ministry notes that the personal information in the records at issue was compiled during an SIU investigation, an investigation into a possible violation of law. Therefore, the ministry states that its disclosure would constitute an unjustified invasion of personal privacy pursuant to section 21(3) of the *Act*. The ministry cites previous IPC orders²⁰ that have found that this section applies to SIU investigations, as the SIU has the mandate to determine whether criminal charges are appropriate to the incidents it investigates.

[42] The appellant did not specifically address the application of section 49(b) in his representations, which largely relate to his allegations of misconduct against the police. He did state that “in the interest of transparency, accountability and public safety the lies and wrong-doings of those working in a public capacity in trust should be made public.” The appellant states that the police made falsified statements to the SIU, and that these should not be concealed.

Analysis and findings

[43] For the following reasons, I find that the personal information in the audio recordings is exempt under section 49(b).

[44] The ministry claims that the section 21(3)(b) presumption applies to all of the withheld personal information. This section states:

¹⁶ The institution or, on appeal, the IPC.

¹⁷ Order MO-2954.

¹⁸ Order P-239.

¹⁹ Order P-99.

²⁰ Orders PO-1959 and PO-4125.

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(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;

[45] This presumption only requires that there be an investigation into a possible violation of law.²¹ Even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.²²

[46] The ministry states that, as part of its mandate, the SIU can determine whether criminal charges are appropriate for the incidents it investigates. Based on my review of the records, I am satisfied that the personal information at issue for which the section 49(b) exemption is claimed was compiled and is identifiable as part of the SIU investigation into a possible violation of law. It therefore falls within the presumption in section 21(3)(b).

[47] The ministry did not claim that any of the section 21(2) factors apply to the personal information in the audio recordings. The appellant's representations do not cite any of the specific factors set out in section 21(2). However, in his representations, the appellant did raise a need for government transparency.²³ As such, I will consider the application of the section 21(2)(a) factor.

[48] This section supports disclosure of personal information when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.²⁴ It promotes transparency of government actions.

[49] 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).²⁵

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

²¹ Orders P-242 and MO-2235.

²² 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).

²³ The appellant also stated that false statements had been made to the SIU, potentially raising the application of the factor in section 21(2)(g): "the personal information is unlikely to be inaccurate or reliable." However, this factor is intended to weigh against disclosure where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the subject: see Order PO-2271. As such, I will not consider this as one of the factors regarding disclosure in this instance.

²⁴ Order P-1134.

²⁵ Order PO-2905.

its activities.²⁶

[51] The appellant states that the SIU interviews in the audio recordings are “pieces of the puzzle of the crimes and liabilities committed by institutions responsible and held in trust by the public.” He further states that to conceal “these wrong-doing[s] and falsified statements” made by the police officers would amount to collusion and conspiracy to conceal corruption.

[52] I have considered the appellant’s arguments. The malfeasance alleged by the appellant is largely that those giving the interviews provided false statements. Even if I were to accept that was the case, I do not see how disclosing the personal information provided by the subject officer and witnesses would subject the activities of the ministry – or, by extension, the SIU – to public scrutiny. Providing this information would, if anything, open up the views or actions of these private individuals to public scrutiny, which would not support the application of this factor favouring disclosure. Accordingly, I find that the section 21(1)(a) factor does not apply.

[53] The presumption at section 21(3)(b) applies and weighs in favour of non-disclosure of the personal information at issue. I have found that the factor at 21(2)(a) does not apply, and neither of the parties have claimed that any of the other factors favouring disclosure apply. I therefore find that disclosure of the personal information would amount to an unjustified invasion of privacy of the identifiable individual other than the appellant.

[54] Accordingly, subject to my consideration of the ministry’s exercise of discretion below, I find that disclosure of the records at issue would constitute an unjustified invasion of the personal privacy of the various affected parties whose personal information is contained in the records.

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

[55] The exemption at section 49(b) is discretionary, meaning that the institution can decide to disclose information even if it qualifies for exemption. The institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[56] In addition, the IPC may find the institution erred in exercising its discretion. This can occur, for example, if the institution does so in bad faith or for an improper purpose, takes into account irrelevant considerations, or fails to consider relevant ones. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ The IPC cannot, however, substitute its own discretion

²⁶ Order P-256.

²⁷ Order MO-1573.

for that of the institution.²⁸

[57] The ministry states that it recognizes principles enshrined in the *Act*, including that information should be accessible to the public, that individuals should have a right of access to their personal information, and that exemptions from the right of access should be limited and specific. The ministry notes that the *Act's* purposes also encompass protecting the privacy of individuals whose information is held by institutions. The ministry states that it considered that the nature of the information is sensitive to the witnesses, given that the conduct of at least some of these witnesses has been placed into issue by the appellant.

[58] The ministry also states that it considered that the release of witness statements would be contrary to the SIU's historic practices, as well as contrary to the witnesses' expectations. The ministry states that SIU investigators inform civilian witnesses that, subject to some limitations, their statements will be kept confidential. While police witnesses are not given the same assurances, the SIU takes care to ensure confidence in their investigations.

[59] The ministry cites the adjudicator's consideration of the ministry's exercise of discretion in Order PO-1959 as relevant to the present matter. The ministry states that in that case, it argued that protecting the information of witnesses to investigations was key to those witnesses' willingness to come forward, noting that there had been many cases where witnesses would only provide a statement if they believed that all communications will be held in confidence. The ministry in that case also noted that confidentiality was important to ensuring that police officers cooperate as required under the relevant police oversight legislation. The adjudicator in Order PO-1959 was satisfied that the ministry had properly exercised its discretion to deny access to the personal information.

[60] The ministry also states that the *SIU Act* provides its own framework for the release of information following SIU investigations, requiring the release of a report to interested parties, including the appellant.²⁹ The ministry states that the provision of this report largely meets the *Act's* principle of increasing transparency in government decision making.

[61] The appellant did not make representations on the ministry's exercise of discretion.

[62] Based on the evidence before me, I am satisfied that the ministry exercised its discretion to deny access to the records in a proper manner, taking into account relevant considerations and without taking into account irrelevant considerations. Accordingly, I uphold the ministry's exercise of discretion to withhold the audio recordings under section 49(b) of the *Act*.

²⁸ Section 43(2) of the *Act*.

²⁹ Report publication requirements are set out in section 34 of the *SIU Act*.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by _____
Jennifer Olijnyk
Adjudicator

January 23, 2025