Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2620

Appeal MA10-212

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Service (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to her dating from 2001. As well, the appellant requested the names of people who may have requested these records under the *Act*.

The Police located one responsive record and issued a decision in which they provided partial access to the record, severing information under section 38(b), in conjunction with section 14(1) (personal privacy) of the *Act*. In their initial decision letter, the Police did not address the second part of the appellant's request.

The appellant appealed this decision.

During mediation, the Police issued a second decision letter addressing the second part of the request, which was for the names of people who may have requested the records under the *Act*. In this decision, the Police refused to confirm or deny the existence of such a record pursuant to section 14(5) of the *Act*. In addition, the Police advised the appellant that an additional responsive record had been found, and provided partial access to it, citing section 8(1)(l) (law enforcement), in conjunction with section 38(a) (discretion to refuse requester's own information), and section 14(5) (refuse to confirm or deny the existence of a record) and 38(b) (personal privacy) of the *Act*. The Police later advised that the application of section 14(5) to the additional record was included in error.

Subsequently, the Police issued a third decision addressing the second part of the appellant's request. The Police stated that:

> … any individual who may have requested records involving yourself, would be denied under section 14(1)(f) and 14(3)(b) of the *Act* without your written authorization or the authorization of any other involved party to the incident.
>
> As such, your request for "the names of people that had requested these reports" if they existed, is being denied as personal information under the same [section] 14 exemptions noted above.

Because the third decision issued by the Police was unclear, the Police issued a fourth letter in which they clarified that the names of anyone who may have requested the records, if they existed, would be denied under section 14(1).

No other mediation was possible, and the file was forwarded to the adjudication stage of the appeal process. I sought and received representations from the Police, initially. In their representations, the Police appeared to have withdrawn their reliance on sections 8(1)(l) and 38(a) and 14(5). I then sought representations from the appellant and provided her with a complete copy of the representations of the Police, along with a Notice of Inquiry, revised to reflect the decision of the Police to withdraw their reliance on sections 8(1)(l), 38(a) and 14(5). The appellant submitted representations in response.

After reviewing all of the submissions made to date, it appeared to me that the Police had made a number of inconsistent and confusing statements in the submissions they provided. Accordingly, I sent the Police a supplementary Notice of Inquiry in which I asked them to clarify their position regarding the application of sections 8(1)(l), 38(a) and 14(5). I also asked the Police to explain the basis for their exercise of discretion in withholding the records at issue. In addition, I asked the Police to provide specific information relating to the second part in the appellant's request.

The Police provided supplementary representations in response. I shared the non-confidential portions of them with the appellant, and provided her with an opportunity to respond. In the letter I sent to the appellant, I noted that although the Police stated that they have withdrawn their reliance on section 14(5), the submissions they made appear to be arguing that it applies. Accordingly, I invited the appellant to comment on its application in the circumstances of this appeal. I also noted in my letter to the appellant that the Police clarified that they continue to rely on the discretionary exemptions at sections 8(1)(l) and 38(a). However, since the appellant stated in her initial representations that she did not wish to pursue the portions of the records that had been exempted under these sections, there was no need for her to respond to the submissions made by the Police on this issue.

The appellant provided supplementary submissions in response. In them, she appears to have changed her mind regarding the application of sections 8(1)(l) and 38(a). Accordingly, I will consider all of the issues originally identified as being at issue in this appeal.

RECORDS:

The records at issue comprise the withheld portions of a 2002 occurrence report and a 2001 occurrence report.

DISCUSSION:

The appellant's request can be divided into two parts. The first part relates to the application of exemptions to the two occurrence reports. The second part concerns the decision of the Police to refuse to confirm or deny the existence of records responsive to the second part of the appellant's request. I will begin with the first part of the request.

PART ONE OF THE REQUEST: RECORDS RELATING TO THE APPELLANT

As I indicated above, the Police have withheld portions of the two occurrence reports under sections 38(a), in conjunction with section 8(1)(l) and 38(b).

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information

relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police submit that the records contain the personal information of an identified individual. The appellant acknowledges that the records contain some identifying information of another individual, such as date of birth and telephone number, but takes the position that other information, such as this person's views and opinions of her relate only to the appellant.

The records refer to two incidents involving the appellant. As such, I find that they both contain the appellant's personal information. Much of the information contained in the two records at issue has already been disclosed to the appellant. I find that, except for the ten-codes, the withheld information pertains directly to another identifiable individual (the affected party) and/or relates to both individuals. The information at issue, therefore, also qualifies as the personal information of the affected party. I find further that the portions of the withheld information that pertain to both individuals is so intertwined that it is not severable.

PERSONAL PRIVACY

General principles

I have found that the records contain the personal information of the appellant and another identifiable individual. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If the presumptions contained in paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 14(4), or if the "public interest override" in section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Police submit that the presumption at section 14(3)(b) applies to the withheld portions of the records. This section states that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > 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;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

The Police state that the records were created as a result of allegations of criminal offences under the *Criminal Code* committed by the appellant. The Police note that the records relate to allegations of harassment and assault and a criminal charge of "surety to keep the peace" against the appellant.

The appellant states that the Police did not identify a particular section of the *Criminal Code*, and argues that this means there were no grounds on which to base a finding that an investigation was undertaken. She states further that she is not aware of any investigations conducted into her behaviour. Moreover, she takes the position that there are no criminal charges against her for harassment, and submits that the records are inaccurate. She does not believe that the Police have provided sufficient evidence to support their position that section 14(3)(b) applies in the circumstances.

The appellant also submits that the Police did not raise the application of section 38(b) in its decision letters, and that I should not consider it in this appeal.

With respect to the application of section 38(b), the appellant is not correct. The Police have clearly relied on this exemption in its decision letters and throughout the processing of the appeal. Moreover, it is in the appellant's interest that the personal privacy exemption be considered under section 38(b), rather than section 14(1). As I noted above, section 38(b) is discretionary. Even if the Police determined that disclosure of the personal information would constitute an unjustified invasion of another individual's privacy, they have the discretion to disclose the information. Under section 14, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

As I indicated above, the records are comprised of occurrence reports. These records relate to matters in which the Police responded to complaints. The records describe the complaints and the actions taken by the Police in responding to them. I am satisfied that the personal information contained in these records was compiled and is identifiable as part of an investigation into a possible violation of law. As noted above, even though charges were not laid in the circumstances, the presumption still applies since it only requires that there be an investigation into a possible violation of law.

Accordingly, I find that the presumption at section 14(3)(b) applies to the personal information of the individual other than the appellant who is identified in the records at issue. As a result, the records at issue qualify for exemption under section 38(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

As I noted above, section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

Section 38(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 [Order M-352].

Where access is denied under section 38(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. As I indicated above, in this case, the Police rely on section 38(a) in conjunction with section 8(1)(l).

Law enforcement

General principles

Section 8(1)(l) states:

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

> (l) facilitate the commission of an unlawful act or hamper the control of crime.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(1)(l)

The Police indicate that section 8(1)(l) was used to remove the ten-codes from page 4 of the 2001 occurrence report. The Police state:

> The 'ten code' is a method by which certain information is passed efficiently from one police source to another in an encoded form. The term 'code' itself indicates that the information is being conveyed in such a manner that anyone intercepting the message will be unable to determine the content or import of the message.

The Police describe a number of ten-code references and indicate that "some criminal elements go to great lengths to try to monitor police communications." The Police state that extensive amounts of money are invested in technologies to thwart the interception of Police communications 'for the primary purpose of preventing those who engage in illegal activities from being able to monitor the status of police personnel and equipment."

In her initial representations, the appellant states that she does not wish to pursue this information. In her supplementary representations, she appears to take the same position. However, she also goes on to state that the Police did not meet their onus in establishing the reasonableness of the harm identified in this exemption.

This office has issued many orders regarding the release of Police codes and has consistently found that section 8(1)(l) applies to this type of information (for example, see Orders M-93, M-757, MO-1715 and PO-1665). The appellant has not provided sufficient evidence to persuade me that a different result is warranted in the circumstances of this appeal.

Accordingly, I find that the ten-code information contained on page 4 of the 2001 record qualifies for exemption under section 8(1)(l) of the *Act*.

EXERCISE OF DISCRETION

The section 38(a), (b) and 8 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Police indicate that they balanced the appellant's right to access to her own personal information and the affected party's right to privacy, taking into account the relationship between the parties, the types of records at issue and the nature of the dispute. Noting that the matter described in the records at issue resulted in a charge of Criminal Harassment against the appellant and pertain to a Peace Bond against her, the Police submit that they properly exercised their discretion in exempting the affected party's personal information.

The submissions made by the Police regarding their decision to exempt the ten-codes reflect the factors they considered in exercising their discretion under sections 38(a) and 8(1)(l).

The appellant does not believe that the Police have taken into consideration factors specific to her situation. Of particular note is the appellant's concern about the information contained in background checks that she has requested in order to obtain certain types of employment.

I find that, in the circumstances, the Police have properly exercised their discretion in exempting the records at issue. In coming to this conclusion, I note that the Police have disclosed significant portions of the information in the records to the appellant. The portions of the records that have been disclosed are sufficient to apprise her of the information that the Police rely on in providing background checks on her. Accordingly, I find that the ten-codes are properly exempt under sections 38(a) and 8(1)(l). In addition, because the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy, I find that the remaining portions of the records are exempt from disclosure under section 38(b).

PART TWO OF THE REQUEST: NAMES OF INDIVIDUALS WHO HAVE REQUESTED THE RECORDS AT ISSUE UNDER THE *ACT*.

The second part of the appellant's request relates to the names of individuals who have sought access through the *Act* to the records identified above. As I indicated above, the Police have refused to confirm or deny the existence of any records responsive to this part of the request. I will address that issue in the following discussion.

CONCLUSION:

In this order, I do not uphold the refusal of the Police to confirm or deny the existence of records that relate to individuals acting in their professional or official capacities because, in my view, disclosure of the existence of such records does not reveal personal information, and for this reason, section 14(5) of the *Act* does not apply, as outlined below.

Accordingly, I confirm that no responsive records of requests made by individuals in their official or professional capacity exist. In keeping with the usual practice of this office in such cases, I am disclosing this order to the Police prior to disclosing it to the appellant, in order to preserve their ability to bring an application for judicial review or seek other relief if they deem it appropriate to do so before the order is disclosed to the appellant.

I uphold the decision of the Police to refuse to confirm or deny the existence of a record that relates to individuals acting in their personal capacity.

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 14(5) of the *Act* states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Section 14(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802]

Would the disclosure of the existence of the records reveal personal information?

Under part one of the section 14(5) test, the Police must demonstrate that disclosure of records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. As I noted above, under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Police take the position that if records existed, they would contain the personal information of the appellant and other identifiable individuals.

As noted above, the appellant has expressed concern about the impact of the information contained in the records at issue on her ability to obtain employment where police checks have been requested. She notes that any individual from one of the organizations to which she applied who might have requested the records under the *Act* would be doing so in their professional capacity. Referring to previous orders of this office, she submits that their identities would not qualify as their personal information in those circumstances. By virtue of the appellant's reasoning, the refusal to confirm or deny that a record exists could only apply to individuals whose information was recorded in their personal capacity.

I agree with the appellant's position on this point and find that if an individual requested a copy of the records in their official capacity or on behalf of an organization, the Police would not be able to rely on section 14(5) to refuse to confirm or deny that information. Accordingly, I will confirm in this order that no individual in their official of professional capacity has requested copies of the records at issue.

However, in her request, the appellant has named the affected person and is seeking information, in part, about him. Although she has made the second part of her request more general, it is apparent that she is continuing to seek information about this individual as well as others. A record responsive to the second part of the appellant's request, if it exists, would identify that an individual has or has not made an access request under the *Act* in their personal capacity. Having reviewed the confidential and non-confidential submissions of the Police and the representations made by the appellant, I am satisfied that, if such a record exists, it would contain the personal information of the appellant and other identifiable individuals.

Would disclosure of the record constitute an unjustified invasion of personal privacy?

I must now determine whether disclosure of such records, if they exist, would constitute an unjustified invasion of privacy of individuals other than the appellant. As I noted above, section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Section 38(b) provides that where a record contains the personal information of both the appellant and other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 14(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 14(4) or where a finding is made that section 16 of the *Act* applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the institution must consider the application of the factors listed in section 14(2) of the *Act*, as well as all other considerations that are relevant in the circumstances of the case.

The Police did not specifically identify any of the factors in section 14(2) or presumptions in section 14(3) in refusing to identify whether anyone other than the appellant had requested the records at issue. In explaining their decision, however, the Police state:

> This institution maintains that confidentiality of all individuals, including requesters cannot be breached. It is not possible to release further information to the appellant without violating the privacy of other parties. It is mandatory in accordance with the *Act*, to refuse disclosure of the appellant's personal information if such disclosure would constitute an unjustified invasion of another individual's personal privacy.
>
> During the mediation process, it was stressed that the main issue at hand, was access to the names of the parties requesting these reports under the *Act*. It should be noted that the very *form* that is used to request a report through this institution, reassures the party that any personal information contained on the form is being collected pursuant to the *Act* and will only be used for the purpose of responding to the request.
>
> The IPC has put forth Practice #16, which outlines basic principles and procedures that are to be used to maintain the confidentiality of requesters. These guidelines are set up to assure that everyone is entitled to exercise their right to access information without fear of negative repercussions. [emphasis in the original]

In her representations, the appellant notes the inconsistent approach that the Police have taken regarding this issue throughout the processing of this access request and appeal, as described above. She then goes on to explain why she believes a number of factors set out in section 14(2) apply in the circumstances of her request.

She submits that disclosure of the information requested is relevant to a fair determination of her rights pursuant to section 14(2)(d). The appellant's representations on this point relate primarily to her concerns about the impact the records at issue have had on her ability to obtain a favourable police check and her inability to obtain employment as a result. She refers to her rights under the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. She believes that in order to have a fair hearing, the information she has requested is necessary as part of the evidence. Moreover, noting that the charges against her were withdrawn, she submits that she has a right to be presumed innocent. She states further:

> Fair and appropriate procedures are critical when the state is making a decision with significant consequences related to the imposition of criminal stigma, as is clearly the case here where the Appellant is now carrying the burden of criminal

> stigma, without having the right also of correction from Section 36(2) of the *Act* in order to clear her name, and have access to the name of people, agencies, business, etc, that had requested the records, and that by now, may also impose the wrongful stigma on the Appellant, without correction being made in the records or information that they have.

Continuing with the above argument, the appellant submits that the factor in section 14(2)(e) is also relevant as she believes that if the records are disclosed to another party, she will be exposed unfairly to pecuniary and other judgment. The appellant refers to section 36(2) of the *Act*, which sets out the right of an individual who is given access to correct or attach a statement of disagreement to the information at issue.

She submits further that the factor in section 14(2)(i) is also relevant as disclosure of the records at issue may unfairly damage her reputation. In support of this position, the appellant attached a letter she received from the Ontario Court of Justice, which states that its ICON database indicates that the matter involving her was withdrawn in 2003. She expresses concern that anyone granted access to the police reports would be under the impression that she had been charged. She submits that this creates a situation that would damage her reputation. It would appear that she is suggesting that she requires the name of anyone who requested the records at issue in order to contact them and provide them with the additional information regarding the withdrawal of the charges.

Finally, referring to Order P-738, the appellant submits that any affected party should have been notified of her request pursuant to section 21(1) of the *Act*. She interprets this order as meaning that having failed to notify affected persons of the request, the Police cannot withhold the information as the personal privacy exemptions do not apply.

In their supplementary representations, the Police explain further why they refuse to disclose whether or not anyone has requested the records at issue. They state:

> The identity of an individual requester qualifies as the "personal information" of the requester under subsection 2(1) of [the *Act*] and is therefore subject to the rules on use and disclosure set out in Part II of [the *Act*]. As the criminal charge against the appellant was Criminal Harassment, by 'clearly stating' that a record may exist could serve to victimize anyone who may have requested records in relation to the appellant, in particular, anyone she has named in her request…

The Police submit that disclosure of the existence or non-existence of a record in the circumstances of this appeal would reveal personal information about an identifiable individual. Due to confidentiality concerns, I am not able to discuss the additional submissions made by the Police on this issue.

In response, the appellant submits that there is no proof of harm done by the appellant as described in the records at issue. She argues that, to her knowledge, the Police did not investigate the allegations made in the records and that the information contained in the records is inaccurate. She submits further that none of the factors favouring non-disclosure in section

14(2) nor the presumptions in section 14(3) applies to the information she is requesting in the second part of her request. The appellant also provides a number of arguments and observations regarding sections of the *Act* that are not at issue, nor relevant to the issues in this appeal, and I will not discuss them in this order.

Analysis and Findings

Before beginning my analysis on the issues, it is important to note that I have found that the presumption in section 14(3) applies to the portions of the records at issue. Once a finding is made that a presumption applies, the factors in section 14(2) cannot be used to override the presumption. Moreover, the current discussion pertains only to whether the Police can refuse to confirm or deny whether an individual has made an access request under the *Act* for copies of the records at issue.

Much of the appellant's argument relates to the content of the records at issue and her desire to obtain the withheld portions. Having already decided that issue, I will not consider it in this context in the ensuing discussion.

In addition, the appellant's interpretation of Order P-738 is not consistent with the *Act* as worded or with the findings of Order P-738, nor is it supportable in light of the numerous orders issued by this office on the personal privacy exemptions. In Order P-738, the appellant in that case had made the argument that the Ministry of the Attorney General's decision was flawed because the Ministry was obliged to contact affected parties. In rejecting this position, the decision-maker stated:

> Where the subject of a request is personal information, the requirement for an institution to notify affected persons arises from section 28(1)(b) of the Act, which applies to requests under Part III of the Act by virtue of section 48(2). Section 28(1)(b) states as follows:
>
> > Before a head grants a request for access to a record,
> >
> > > that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),
> >
> > the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.
>
> In my view, section 28(1)(b) only requires notification where an institution is considering granting access to personal information, in circumstances where disclosure might constitute an unjustified invasion of personal privacy. If, after reviewing the record, an institution decides not to disclose the personal information, or if it decides that disclosure would not constitute an unjustified invasion of personal privacy, notification is not required.

> In the circumstances of this appeal, the Ministry made partial disclosure of the requested information after determining that to do so would not be an unjustified invasion of personal privacy. It denied access to the remaining personal information. Accordingly, the Ministry was not **required** to notify the affected persons under section 28.

Based on my review of the representations submitted by both parties and consideration of the nature of the information requested, I find that none of the presumptions in section 14(3) would apply to the information, if it exists. In particular, although the records at issue pertain to a law enforcement investigation, the fact that someone requests them has nothing to do with that investigation. Accordingly, the presumption in section 14(3)(b) cannot apply to this information, if it exists.

The appellant has raised a number of factors which she believes favour disclosure, in particular, sections 14(2)(d), (e) and (i). These sections state:

> 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,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Section 14(2)(d)

For section 14(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

As I indicated above, the majority of the appellant's submissions on this issue relate to the content of the records at issue. Accordingly, having found that the presumption in section 14(3)(b) applies to this information, the factor in section 14(2)(d) cannot operate to rebut it.

With respect to the decision of the Police to refuse to confirm or deny the existence of a record relating to whether anyone has requested a copy of the records at issue, the appellant has not explained how this information relates to any of the parts of the test set out above. In particular, I find that, even if the appellant were contemplating a proceeding under the Ontario *Human Rights Code*, whether or not a request was made, the identity of anyone who may have requested the record is not necessary in order to prepare for the proceeding or to ensure an impartial hearing. I find, therefore, that the factor in section 14(2)(d) is not relevant in the circumstances of this appeal.

Section 14(2)(e)

In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. Typically, this factor is considered as one favouring non-disclosure of a record. In this case, the appellant claims that it is relevant as a factor favouring disclosure to her of the information requested.

Similar to my findings above, it is clear that the appellant's primary concern relates to the content of the records at issue, which I will not consider further for the reasons outlined above. I am not persuaded that disclosure of a record that identifies whether anyone has requested a copy of the records at issue, if it exists, would result in the harm identified by the appellant in section 14(2)(e).

Section 14(2)(i)

The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256]. Similar to my discussion above, this factor is generally considered as favouring non-disclosure. As the wording of this section states, it is "disclosure" of the information that may result in the identified harm. The appellant appears to be arguing that by not disclosing the information she requested, she may be harmed. In my view, the appellant's position is not tenable given the wording of this section. Accordingly, I find that it is not relevant in the circumstances.

Unlisted factors

Despite my finding that section 14(2)(i) is not relevant, as I noted above, it appears that the appellant is suggesting that she requires the name of anyone who requested the records at issue in order to contact them and provide them with the additional information regarding the withdrawal of the charges. In my view, this is an unlisted factor favouring disclosure of the requested information, if it exists. The appellant's evidence demonstrates that she wishes to use this information to counter the negative impact the existence of the records at issue has on her ability to obtain certain types of employment. In my view, her desire to make anyone who is given access to the record aware that the charges were withdrawn is a relevant factor in determining whether the information she has requested should be disclosed, or in this case, confirmed or denied.

That being said, I found above that the Police could not refuse to confirm or deny whether anyone in their official capacity requested the records because this does not constitute their personal information. I confirmed above that no-one has requested the records in their official capacity. As a result, given her stated reason for seeking the information, I do not give much weight to this factor.

In addition, as noted in Order P-738, section 28(1)(b) requires notification of an affected party where an institution is considering granting access to personal information, in circumstances where disclosure might constitute an unjustified invasion of personal privacy. Despite the appellant's concern that some unknown party might have been given access to her personal information through disclosure of the records at issue in response to an access request, if this were the case, the Police would be required to notify her under section 28(1)(b). The appellant has not indicated that she has ever received such a notification. Presumably, this means that any records that would identify her as a party to the investigation have not been disclosed and there is, therefore, no need to contact anyone to ensure that a complete story is told.

Accordingly, although I find that the unlisted factor favouring disclosure relating to the appellant's desire to ensure that any recipient of the records is provided with all information about the incident is relevant, I find that it carries very little weight in balancing the factors weighing in favour of disclosure or non-disclosure.

The Police have also raised an unlisted factor that favours non-disclosure of a record that would respond to her request, if it existed. I noted above that in her request, the appellant has named the affected person and is seeking information, in part, about him. I found that although the appellant has made the second part of her request more general, it is apparent that she is continuing to seek information about this individual as well as others. The Police point out that the records at issue in this appeal relate to a charge against the appellant of Criminal Harassment. They submit that "'clearly stating' that a record <u>may</u> exist could serve to victimize anyone who may have requested records in relation to the appellant…."

In my view, this is a relevant factor weighing in favour of privacy protection. In addition, given the nature of the allegations and charge, it carries significant weight in finding that disclosure of

a record responsive to the appellant's request, if it exists, would constitute an unjustified invasion of personal privacy.

Weighing the factor in favour of disclosure, to which I give little weight, and the factor favouring privacy protection, to which I give significant weight, I find that on balance, the factor favouring privacy protection outweighs the factor favouring disclosure.

Accordingly, I am satisfied that disclosure of a record, if a record exists, would constitute an unjustified invasion of privacy. After considering the submissions of the Police further, I am satisfied that they have properly considered all relevant factors in exercising their discretion and in arriving at their decision that access to a record, if it exists, would be denied under section 38(b) of the *Act*.

Would disclosure of the fact that the record exists (or does not exist) in itself convey information to the requester in such a way that disclosure would constitute an unjustified invasion of personal privacy?

Section 38 contains no parallel provision to section 14(5). Since I have found that the record does contain the appellant's personal information, the question arises whether the Police can rely on section 14(5) in this case. In Order M-615, senior adjudicator John Higgins stated:

> Section 37(2) provides that certain sections from Part I of the *Act* (where section 14(5) is found) apply to requests under Part II (which deals with requests such as the present one, for records which contain the requester's own personal information). Section 14(5) is not one of the sections listed in section 37(2). This could lead to the conclusion that section 14(5) cannot apply to requests for records which contain one's own personal information.
>
> However, in my view, such an interpretation would thwart the legislative intention behind section 14(5). Like section 38(b), section 14(5) is intended to provide a means for institutions to protect the personal privacy of individuals other than the requester. Privacy protection is one of the primary aims of the *Act*.
>
> Therefore, in furtherance of the legislative aim of protecting personal privacy, I find that section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met, even if the record contains the requester's own personal information.

I agree with the senior adjudicator's analysis and findings. Accordingly, I will consider whether section 14(5) may be invoked in the circumstances of this appeal.

As I indicated above, portions of the submissions made by the Police have been withheld as confidential. The dynamics of the incident described in the records responsive to part one of the request, and the appellant's continued interest in obtaining this information many years after the events lead me to conclude that there is the potential for continued contact between the appellant

and anyone identified in a record, if it exists, or anyone she perceives as being named in such a record, whether welcomed or not.

Based on all of the information before me, I am satisfied that disclosure of the fact that records exist (or do not exist) of individuals who may have requested the records in their personal capacity would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of privacy.
Accordingly, I find that the Police may refuse to confirm or deny the existence of records of this nature that might be responsive to the appellant's request.

ORDER:

1. I do not uphold the decision of the Police to refuse to confirm or deny the existence of a record relating to requests made by individuals in their official or professional capacity. If I do not receive an application for judicial review from the Police on or before **May 25, 2011** in relation to my decision that section 14(5) does not apply, I will send a copy of this order to the appellant on or before **May 30, 2011.**

2. I uphold the decision of the Police to refuse to confirm or deny the existence of a record relating to requests made by individuals in their personal capacity.

3. I uphold the decision of the Police to withhold the records at issue.

Original signed by: May 11, 2011
Laurel Cropley
Adjudicator