Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2909-I

Appeal MA11-122

Durham Regional Police Services Board

June 28, 2013

Summary: The appellant made a request for the police investigation file relating to her sister, who disappeared almost fifty years ago. The police denied access to the records, in whole, claiming the application of the discretionary exemptions in section 38(a), read with the law enforcement exemptions in sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation), 8(1)(f) (right to a fair trial), 8(2)(a) (law enforcement report) and 8(2)(c) (exposure to civil liability), and section 38(b), read with section 14(1) (personal privacy). In this order, the adjudicator upholds the police's decision, in part, and orders the police to re-exercise their discretion under section 38.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 8(1)(a), 8(1)(b), 14(1), 14(3)(b), 38(a), 38(b).

Orders Considered: MO-1171, MO-2443 and PO-3117.

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an access decision made by the Durham Regional Police Services Board (the police) in response to a request for all records relating to an individual who went missing almost fifty years ago. The requester is the sister of the missing individual.

[2] The police denied access to approximately 60 pages of responsive records, in their entirety, citing section 38(a), read with the law enforcement exemptions in sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation), 8(1)(f) (right to a fair trial), 8(2)(a) (law enforcement report) and 8(2)(c) (exposure to civil liability), and section 38(b), read with section 14(1) (personal privacy). In support of its reliance on the section 38(b)/14(1) exemption claim, the police indicated that they were relying on the presumption in section 14(3)(b) (investigation into a possible violation of law).

[3] The requester (now the appellant) appealed the police's decision to this office.

[4] In her letter of appeal, the appellant stated that she was appealing because she was seeking closure regarding the unsolved disappearance of her sister.

[5] During the mediation stage of the appeals process, the appellant indicated that she believed there were further responsive records. The police conducted an additional search and located a further 900 pages of responsive records. The police issued a supplementary decision, denying access to all of these records, in their entirety, pursuant to section 38(a), read with sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a), 8(2)(c) and 38(b), read with section 14(1). As with the initial set of records, the police relied on the presumption in section 14(3)(b) in support of their section 38(b)/14(1) exemption claim.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the police and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[7] In seeking representations from the police, the adjudicator noted the police's reliance on the discretionary exemptions in sections 38(a) and 38(b) in respect of all of the records at issue. However, on his review of the records, he found only two references to the appellant. Accordingly, he invited the police to address the application of the section 38(a) and (b) discretionary exemptions only to these two records and to comment on how these exemptions are relevant to his analysis of the remaining records at issue. For records that do not contain references to the appellant, he asked the police to address the application of the section 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c) law enforcement exemptions and the section 14(1) mandatory exemption.

[8] The appeal was then transferred to me for final disposition.

[9] For the reasons that follow, I uphold the police's decision, in part, and order the police to disclose some records as set out in the order provisions. I also order the

police to re-exercise their discretion with respect to the records I found exempt under section 38.

RECORDS:

[10] There are approximately 60 pages of paper records and 900 pages of records on CD, consisting of occurrence reports authored by the police, one of its predecessor police services, the Bowmanville Police and the Ontario Provincial Police, witness statements, transcripts of interviews, correspondence, officer's notes, photographs, maps, tips, media releases and newspaper articles.

ISSUES:

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

B: Does the discretionary exemption at section 38(a), read in conjunction with the exemptions in sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c), apply to some or all of the information at issue? Alternatively, do the discretionary exemptions in sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c) apply to all or portions of the records at issue?

C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

D: Did the police properly exercise their discretion under sections 38(a) and 38(b)?

DISCUSSION:

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

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name 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;

[12] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) 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.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] 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.[1]

[14] 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.[2]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[16] The police submit that the records contain the personal information of the appellant's sister and other family members, friends, suspects and persons of interest. Specifically, the police state that the records contain names, addresses, dates of birth, and personal accounts surrounding the disappearance of the appellant's sister, and that this information encompasses personal information within the meaning of paragraphs (a) to (h) of the definition.

[17] Further, the police submit that although the *Act* contemplates that any information about an individual who has been deceased for over 30 years does not qualify as personal information, the appellant's father's[4] information should not be released, as it also consists of the personal information of other individuals.

[18] The appellant submits that:

- there must be records at issue that do not contain personal information;
- given the historical nature of the records, it could no longer be reasonably expected to identify an individual if information such as an address was disclosed;
- to the extent that the records contain sufficient information that it could reasonably be expected to identify an individual, those specific details could be redacted from the records;
- many of the individuals interviewed would have been friends or relatives of the appellant's sister, and would not object to their statements being disclosed to the appellant, given the passage of time;

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[4] The appellant's father has been deceased for more than 30 years.

- the appellant's father's statements are no longer his personal information, as he has been deceased for over 30 years. In addition, his references to other individuals do not constitute personal information under the *Act*, and if it did, this information could be severed; and

- it is possible that many other individuals that are identified in the records may have been dead for more than 30 years. It is incumbent upon the police to satisfy the adjudicator that the individuals do not fall within the exception of section 2(2) of the *Act*.

[19] In reply, the police submit that severing the personal identifiers, as suggested by the appellant, does not necessarily mean that the information will remain anonymous. The police state:

> There are ample amounts of sufficiently detailed information, which could lead to the identification of individuals, even if their names, addresses, telephone numbers etc. are redacted.

[20] In sur-reply, the appellant states that the redaction of personal information can include more than an individual's name, address and telephone number.

[21] I have reviewed the records and I find that the vast majority of them contain the personal information of several individuals, including the appellant's sister, other family members, friends, witnesses, persons of interest and other members of the public.[5] In particular, the records relate to various investigating police officers' actions in contacting and interviewing named individuals in the context of conducting an investigation. Most of these portions include statements made by these individuals, or other information recorded by the officers about these named individuals, including suspects, as well as the appellant's sister, witnesses and persons of interest. On my review of this withheld information, I find that the personal information includes the named individuals' marital or family status [paragraph (a)], their criminal and/or medical histories [paragraph (b)], their address and telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinion of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

[22] The records at issue include a very limited amount of the appellant's personal information, namely a one paragraph summary of a telephone interview with the police, and a reference in one record to her name and age at the time of her sister's disappearance.

[5] Collectively, I refer to them as the affected parties.

[23] As previously stated, the appellant indicates in her representations that some of the personal information could be severed from the records. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[24] I find on my review of the records that the affected parties' personal information is co-mingled with that of the appellant's sister and each other, and that even if their identities and contact information was severed, the other personal information in the records relates to the appellant's sister. Further, I agree with the police that there are several individuals who would be identifiable even with most of their personal information severed.

[25] With respect to the appellant's father, the information about him is no longer considered to be personal information, as he has been deceased for over 30 years. As this information is not personal information, it is not exempt under section 14(1). However, I will consider whether this information is exempt under my analysis of the exemption in section 8.

[26] I also find that, in the absence of evidence from either party, it is not possible for me to make a finding that any of the other individuals contained in the records is deceased, including the appellant's sister.

[27] I acknowledge that some of the information in the records may be known to the appellant and/or in the public domain. However, the issue for me to decide is whether the records contain the affected parties' personal information and the extent to which some of the affected parties' personal information may be known to the appellant and/or in the public domain is irrelevant to a determination of that issue.

[28] Therefore, I find that the records contain the personal information of identifiable individuals, as described above.

Issue B: Does the discretionary exemption at section 38(a), read in conjunction with the exemptions in sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c), apply to some or all of the information at issue? Alternatively, do the discretionary exemptions in sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c) apply to all or portions of the records at issue?

[29] 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.

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

[30] 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.

[31] 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.[7]

[32] 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.

[33] In this case, the police relies on section 38(a) in conjunction with sections 8(1)(a), 8(1)(b), 8(1)(f), 8(2)(a) and 8(2)(c).

[34] The relevant portions of sections 8(1) and (2) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;
> >
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> >
> > . . .
> >
> > (f) deprive a person of the right to a fair trial or impartial adjudication;
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[7] Order M-352.

. . .

(c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

[35] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[36] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.[8]

[37] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[9]

[38] Where section 8(1)(a), (b) and (f) use 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.[10]

[39] 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* fulfilment of the requirements of the exemption.[11]

[40] The police claim that sections 8(1)(a) and 8(1)(b) apply to exempt the records

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[8] Orders M-202, PO-2085.
[9] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[10] 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.).
[11] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

from disclosure. In particular, the police submit that the disappearance of the appellant's sister remains an ongoing law enforcement matter which continues to be investigated. The police state that work has been completed on the file each decade since her disappearance almost fifty years ago, and provides specific examples as follows:

- in August of 2011, a mitochondrial DNA profile of the appellant's sister was developed from a hair sample located in the file. This profile was used to compare the appellant's sister's DNA to that of unidentified female remains in the Durham Region;

- the file has been entered into the Ontario Major Case Management database (MCM), which may assist in the ability to solve the case. The software in the database has a component that compares data against other province-wide cases in order to identify similarities. Should the MCM identify a match, further investigation would be required;

- in February of 2011, a local reporter published an article concerning the disappearance of the appellant's sister. As a result of the article, the police received various tips, which members of the homicide unit continue to investigate.

[41] The police further submit that disclosure of the records would interfere with a law enforcement matter/investigation because a premature release of the records would reveal potential suspects and/or persons of interest still being investigated by them. This disclosure, the police argue, would create a significant risk of compromising the integrity of the recollection of witnesses. In addition, the police submit that disclosure of the records would have a "catastrophic" impact on the case, revealing details of statements made to the police, investigative techniques and future avenues of investigation. Moreover, the police submit, additional witnesses would be hesitant to come forward, as they could not be assured that their statements would be kept confidential.

[42] The appellant submits that one of the reasons she is seeking the records is to determine what efforts the police made to solve the case. The appellant states:

> According to [the police's] submissions, there was work completed on the file in 1963 but, following that year, it ceased until 1973. The investigation lay dormant after that year until 1996. The inference that can be drawn from these dates is that the police closed the investigation after a remarkably short period of time (approximately 3.5 months) and did nothing further for 10 years. Whatever occurred in 1973 could not have had much of an impact on the investigation because it was neglected for another 23 years.

[43] The appellant also submits that disclosure of the records would not compromise the investigation or reveal a confidential investigative technique for the following reasons:

- given that the disappearance and the records are decades old, only one avenue of investigation has the potential for success, which is that someone confesses either to the police or a third party;

- it is "ludicrous" to suggest that individuals who were identified as persons of interest or suspects have retained that status after several decades. If they have eluded arrest for that period of time, nothing will now change by reason of disclosure of the records;

- public appeals for more information on the case were made in 2003 and 2005, resulting in no tips. If no information was received in those years, it is questionable that any tips provided as a result of the 2011 article would be of any significance to the investigation;

- given that the case has been entered into the MCM database, the police should have been able to confirm by now whether this entry has aided their investigation. If it has not, the entry of the case in the MCM system is irrelevant;

- to the extent that there is an ongoing investigation in which there are persons of interest or suspects, the records can be severed so that the investigation is not compromised in any way; and

- if witnesses have not come forward in almost 50 years, it is unlikely that the disclosure of the records will have any impact on their decision to withhold or give evidence to the police at this time.

[44] In reply, the police submit that the disappearance of the appellant's sister continues to be an ongoing law enforcement matter/investigation. The police also state that despite the appellant's position that the investigation has been neglected for 23 years, they continue to investigate "to this day" the disappearance of the appellant's sister and that they consider the file to be "active".

[45] The police go on to state:

> It is irresponsible to suggest that the only realistic way that this case will be solved is if a person on their own volition confesses to the police. The police use a variety of investigative techniques to solve cases and are in the best position to determine which techniques are the most effective in

> this case. Any disclosure of the records has the potential to disrupt the police service's goal of solving this disappearance.

[46] In sur-reply, the appellant submits that if I accept the police's argument on the law enforcement exemption, it means that the police will always be able to deny access to records based on the assertion that an investigation is ongoing. An investigation, the appellant argues, may be ongoing when the alleged crime is only a few years old, but not when the half-century mark is passed.

Analysis and findings

[47] The term "matter" in section 8(1)(a) may extend beyond a specific investigation or proceeding.[12] This exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.[13]

[48] To satisfy section 8(1)(b), the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed. The investigation in question must be ongoing or in existence.[14]

[49] I find that the records at issue were created in circumstances that fall within the definition of "law enforcement."

[50] This office has found in previous orders that records similar to the ones at issue in this appeal qualify for exemption under sections 8(1)(a) and (b) of the *Act* if an ongoing investigation is taking place. For example, in Order MO-1171, the appellant was seeking records relating to the police's investigation of an arson attack on an abortion clinic that had taken place eight years earlier. Adjudicator Laurel Cropley found that the records at issue qualified for exemption in their entirety under sections 8(1)(a) and (b) for the following reasons:

> The Police express the concern that premature disclosure of the information concerning the current investigation could, either intentionally or inadvertently, cause an obstruction of justice insofar as it could reasonably be expected to tip an involved party or suspect as to the direction of the investigation, provide an opportunity for individuals involved to tamper with evidence which the police may uncover at a later time and effectively cover their tracks and evade charges.

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[12] *Ontario* (*Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).
[13] Orders PO-2085 and MO-1578.
[14] Order PO-2657.

> The records relate to an event which occurred approximately eight years ago. However, based on the representations and my review of the records, I am satisfied that they contain information which relates to an ongoing law enforcement investigation and/or matter, and that disclosure of this information could reasonably be expected to interfere with the investigation and/or matter. Therefore, I find that the records are properly exempt under sections 8(1)(a) and (b) of the *Act*.

[51] Similarly, in Order MO-2443, Adjudicator Colin Bhattacharjee made a determination regarding records relating to the murder of the appellant's son. He found that the murder, which had taken place six years prior, remained unsolved and was therefore characterized as a "cold case." He also found that it was evident, based on the police's representations, that there was an ongoing investigation taking place.

[52] I agree with and adopt the approach taken by Adjudicators Bhattacharjee and Cropley in the above orders.

[53] I have had an opportunity to review the records at issue in detail, and note that work was done on the case throughout the years[15] since the disappearance of the appellant's sister. Based on my review of the records and the police's representations, I am satisfied that the investigation of the appellant's sister's disappearance is ongoing.

[54] The records contain sensitive information about the investigation. Many of these records set out the specific evidence collected by the police, including occurrence reports, interviews with family, friends and other individuals, police officers' notes and other evidence gathered by the police. In addition, the records identify potential suspects in the disappearance of the appellant's sister.

[55] In Order PO-3117, Adjudicator Bhattacharjee made a determination regarding records relating to a murder that took place in a federal penitentiary. In deciding whether the disclosure of the records would interfere with the investigation, he took into account a number of factors. He stated:

> The IPC has found in previous orders that disclosing records to a requester under the access scheme in Part II of *FIPPA* is deemed to be disclosure to the world.[16] *FIPPA* does not impose any restrictions or limits on what a requester can do with records disclosed to him or her. Consequently, disclosing the OPP, Coroner's office and CFS records would move them into the public domain where they can be freely disseminated.

[15] Notably, 1963-68, 1971-73, 1981, 1986-90, 1994, 2003, 2005 and 2010-11.
[16] e.g., Orders M-96, P-169, P-679, MO-1719 and MO-1721-F.

[56] He went on to find that such disclosure could reasonably be expected to interfere with the murder investigation because it could make any suspects aware of the evidence that the OPP had collected against them. This awareness could lead these individuals to take steps to further cover their tracks, or otherwise hinder the investigation.

[57] He also found that disclosing the records could taint the quality of new evidence that could be gathered. For example, he stated that if an individual approached the OPP and presented information about the murder, the investigators might have no way of knowing whether that individual learned of the information from murder investigation records that came into the public domain or if that individual had firsthand knowledge of the information.

[58] In Order MO-2443, Adjudicator Bhattacharjee found that the records at issue qualified for exemption under sections 8(1)(a) and (b) of the *Act*, with one exception, being news releases issued by the police relating to the murder investigation. He stated:

> In my view, disclosing these news releases to the appellant could not reasonably be expected to lead to the harms contemplated by any of the exemptions in the *Act*, including sections 8(1)(a) or (b). These news releases were publically available at some point, and I find that disclosing them could not reasonably be expected to interfere with a law enforcement matter or interfere with an investigation undertaken with a view to a law enforcement proceeding.

[59] Some of the records at issue in this appeal are press releases and articles. Applying the approach taken by Adjudicator Bhattacharjee in Order MO-2443, I find that the disclosure of the press releases and articles would not interfere with a law enforcement matter or investigation. Similarly, one of the records contains a summary of a statement made by the appellant to the police in March of 2005. Given that the information contained in the statement is already known to the appellant, as she provided it to the police, and that she could publicly discuss this information in any event, I find that the disclosure of this statement would not interfere with a law enforcement matter or investigation.

[60] Turning to the remaining records at issue, based on my review of them, I accept the police's submission that disclosing these records could reasonably be expected to interfere with a law enforcement matter [section 8(1)(a)] or interfere with an investigation undertaken with a view to a law enforcement proceeding [section 8(1)(b)], with the exception of the press releases articles and the appellant's own brief statement to the police. I will consider whether the press releases, articles and the appellant's own statement to the police are exempt under section 14(1) later in this order.

[61] Having found that section 8(1)(a) and (b) apply to exempt the majority of the records, subject to my finding on the police's exercise of discretion, it is not necessary to determine whether sections 8(1)(f) or 8(2)(a) apply.

Issue C: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[62] 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.

[63] 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.

[64] 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.

[65] Under section 14(1)(f), 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."

[66] Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2).[17]

[17] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[67] The police submit that the personal information in the records is exempt under section 14(1), as its disclosure would constitute an unjustified invasion of personal privacy as set out in section 14(1)(f). In their representations, the police rely on the "presumed unjustified invasion of personal privacy" at section 14(3)(b) of the *Act* in support of its decision that section 14(1) applies. This section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

[68] The records, the police argue, contain the personal information of witnesses, suspects and persons of interest collected as part of an ongoing law enforcement investigation into a possible violation of law, specifically kidnapping and/or murder.

[69] The police also cite two of the factors weighing against disclosure of personal information, namely sections 14(2)(h) and 14(2)(i). The police state that the personal information in the records is highly sensitive[18] and that its disclosure will unfairly damage the reputation of any person referred to in the records.[19]

[70] In addition, the police submit that section 14(4) does not apply, including the compassionate grounds set out in section 14(4)(c), as the appellant's sister has not been classified as deceased by the police.

[71] Lastly, the police argue that the absurd result principle should not be considered in these circumstances, as the information contained in the records was not provided by the appellant, nor was she present when the information was given to the police.

[72] The appellant submits that other than those individuals identified as being persons of interest, the individuals identified in the records would not object to the disclosure of their personal information to a family member. The appellant states:

> Those who assisted the police, or became involved in the investigation, would probably want the family to know that they cared enough about [the appellant's sister] and her family that they did what they could to help find her or solve her disappearance.

[18] Section 14(2)(f).
[19] Section 14(2)(i).

[73] The appellant also submits that if the police have decided not to classify the appellant's sister as deceased and thus assert that section 14(4)(c) of the *Act* does not apply, then the "corollary" must be true. The appellant argues that if her sister is not dead, then it is highly unlikely that a crime was committed. The appellant states:

> People do not remain kidnapped for 49 years. The [police] cannot have it both ways; either it has to admit that [the appellant's sister] is dead and therefore a victim of a crime or she remains alive, having decided to leave her family at age 13 and never return. If the latter, no crime was committed; their investigation should end; and the records be disclosed.

[74] In reply, the police argue that their responsibility is to investigate what happened to the appellant's sister and they are under no obligation to make a definitive determination whether she is deceased or alive, unless the evidence conclusively points in that direction.

[75] In sur-reply, the appellant states that it cannot seriously be suggested that the appellant's sister is still alive, or that the police consider this a reasonable possibility.

Analysis and findings

[76] Previous orders of this office have established that, 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.[20]

[77] As previously stated, the records at issue consist of the police investigation file of the appellant's sister's disappearance. On its face, this information fits within the presumption in section 14(3)(b), as this information was clearly compiled and is identifiable as part of an investigation into a possible violation of law.

[78] As set out above, the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2).[21] Consequently, I find that the presumption against disclosure in section 14(3)(b) has been established and that disclosure of the requested information would constitute an unjustified invasion of privacy. In addition, I find that none of the factors favouring disclosure in section 14(2) are applicable. Therefore, the information qualifies for exemption under the exemption in section 14(1), subject to my finding with respect to the police's exercise of discretion, and with two notable exceptions.

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[20] See Orders P-242 and MO-2235.
[21] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[79] In 2005, the appellant made a statement to the police via telephone, providing information to them regarding her sister's disappearance. Consequently, it would be absurd to withhold this statement from the appellant, as she provided the information to the police and would be aware of its contents. I find that this statement is not exempt under section 14(1) of the *Act* and I will order the police to disclose this statement to the appellant.

[80] In addition, the information in the police's press statements, releases and articles has already been publicly disclosed by the police. I find that its disclosure would not constitute an unjustified invasion of personal privacy and it is, therefore, not exempt under section 14(1) of the *Act*. I will order the police to disclose the press statements, releases and articles to the appellant.

[81] I note that the appellant's father, who has been deceased for over 30 years, made a statement to the police. As previously noted, the information about him is no longer his personal information. However, contained in the father's statement is the personal information of other individuals, including the appellant's sister and others. This personal information is co-mingled, such that severing the statement would result in meaningless snippets of information being disclosed. Therefore, I find that it is also exempt under section 14(1) of the *Act*.

[82] Lastly, I cannot apply section 14(4)(c) to the records, as I am unable to make a determination that the appellant's sister is deceased.

Issue D: Did the police properly exercise their discretion?

[83] The sections 38(a), 38(b) and section 8 law enforcement 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.

[84] 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.

[85] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution.[23]

[86] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[24]

- the purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[87] The police state that they exercised their discretion in good faith, taking into consideration all relevant factors. In particular, the police argue, they recognize that section 38(b) introduces a balancing principle. The police also state that they acknowledge that the appellant has a sympathetic need to receive the information at issue, and that members of the homicide unit have met with her and spoken with her by telephone in order to "assist her in dealing with this tragic situation."

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[22] Order MO-1573.
[23] Section 43(2).
[24] Orders P-344, MO-1573.

[88] The police also submit that the protection of other individual's privacy rights and the protection of the integrity of the sensitive information should be paramount while the investigation is open and ongoing, and that they properly considered the appellant's right to her own information, the affected persons' right to privacy, and the factors listed in section 14.

[89] Further, the police note that they also considered the fact that members of the appellant's family frequently participate on various internet blog sites, where they openly exchange commentary regarding the investigation and that publishing information in the records in a public forum would constitute a further invasion of privacy.

[90] The appellant submits that it is troubling that her use of the internet and the dissemination of information about the case through this medium was considered a factor in denying her request, in light of the fact that there have been published articles about the case in newspapers. The appellant also argues that the police do not want the appellant to have the records, not because disclosure would compromise an ongoing investigation, but because it would expose a "shoddy and incomplete" investigation in 1963 that ended prematurely and, as a result, precluded any reasonable prospect of solving the case.

[91] In reply, the police reiterate that they exercised their discretion in good faith, taking into consideration all relevant factors and disagree with the appellant's position that they conducted an incomplete investigation. The police state that the case continues to be investigated.

[92] In sur-reply, the appellant states:

> Based on the evidence that has been disclosed to date, the only investigation that the [police] has undertaken in the last several decades are occasional appeals, via the media, for tips about the case. If this is now the principle investigative technique employed by the police, it is quite possible that the disclosure of more information about the case could trigger tips or other relevant information. Absolute secrecy will surely not.

[93] An institution'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.[25] 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 institution to reconsider the exercise of discretion.[26]

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[25] Order MO-1287-I.
[26] Order 58.

[94] Based on the police's representations, I am not satisfied that they properly exercised their discretion. In particular, I find that the police did not consider the age of the information in the records, the fact that exemptions from the right of access should be limited and specific, and the nature of the relationship between the appellant and the affected parties.

[95] Further, given that disclosure of records is essentially disclosure to the world, I find that the police's consideration of the appellant's involvement in internet blogs was an irrelevant consideration. Accordingly, I will order the police to re-exercise their discretion.

ORDER:

1. I order the police to disclose the appellant's statement to her by **August 6, 2013** but not before **July 30, 2013**. For ease of reference, I have included a copy of the record. Only the highlighted area is to be disclosed.

2. I order the police to disclose all media articles and releases to the appellant by **August 6, 2013** but not before **July 30, 2013**.

3. I order the police to re-exercise their discretion under sections 38(a) and (b) of the *Act* and to provide me with representations on their exercise of discretion by **August 6, 2013**.

4. I may share the police's representations with the other party to this appeal unless they meet the confidentiality criteria identified in *Practice Direction 7*. If the police believes that portions of their representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions they seek to withhold.

5. I remain seized of this appeal to deal with the police's exercise of discretion.

Original signed by: June 28, 2013
Cathy Hamilton
Adjudicator