Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-2891

Appeal MA12-556

London Police Services Board

May 30, 2013

**Summary:** The appellant requested records containing any domestic or complaint-related information relating to him. The police refused to confirm or deny the existence of a record pursuant to section 14(5). The appellant appealed this decision. The decision of the police to refuse to confirm or deny the existence of a record was upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) definition of personal information, sections 14(2)(e), (h), 14(3)(b), 14(5).

## OVERVIEW:

[1] The appellant has been attempting to pursue a career in law enforcement. His application for employment with the London Police Services Board (the police) was unsuccessful. He also applied to another police service and was advised that his application would not be considered as a result of the comprehensive background investigation that was conducted, including information it obtained from the police. The appellant subsequently submitted a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "[a]nything related to me domestic related or complaint related" as he believes this information is affecting his ability to obtain employment in the law enforcement field.

[2] The police issued a decision in which they refused to confirm or deny the existence of a record pursuant to section 14(5) of the *Act*.

[3] The appellant appealed this decision.

[4] Mediation was not possible and the file was forwarded to the adjudication stage of the appeal process. I sought, and received, representations from the police and the appellant. These representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[5] The sole issue in this appeal is whether the police can refuse to confirm or deny the existence of a record.

[6] In this decision, I find that a record, if it exists, would contain the personal information of the appellant and other identified individuals. I find further that the disclosure of a record, if it exists, would constitute an unjustified invasion of the privacy of another individual under section 38(b). I conclude that the police may refuse to confirm or deny the existence of records that might be responsive to the appellant's request.

## DISCUSSION:

### REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

[7] 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.

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

[9] 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.[1]

[1] Order P-339.

[10] 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.

[11] 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.[2]

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

[12] 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. 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.[3]

[13] 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.[4]

[14] 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

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[2] 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]
[3] paragraph (h).
[4] Order 11.

professional, official or business capacity will not be considered to be "about" the individual.[5]

[15] 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.[6]

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

[17] The police submit that if a record exists, it would contain the personal information of the appellant and other identifiable individuals, such as addresses, telephone numbers, dates of birth and statements of involved individuals. Noting that the appellant specifically requested a record relating to a "domestic related or complaint related" police report, and then later identified a particular individual as the possible complainant, the police submit that a responsive record, if it exists, would contain the personal information of an identifiable individual.

[18] The appellant does not dispute this characterization of a record, should one exist. He submits, however, that if a record exists, "it may be redacted to satisfy any concerns over an unjustified invasion into another individual's privacy." The appellant indicates that he is not seeking the details of any complaint, just the fact that a complaint against him exists.

[19] Based on the specificity of the appellant's request and the attachment to his representations, which contains a communication between the appellant and another police force regarding the appellant's suspicions that the police had been in contact with his ex-girlfriend (the named individual), I am satisfied that a record, if it exists, would contain the personal information of the appellant, as any complaint would be about him, and another identifiable individual. Moreover, given the nature of the appellant's request, I find that even if certain identifying information were removed from a record, if one exists, the fact of its existence as being responsive to his request would reveal the personal information of an identified individual.

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

[20] I must now determine whether disclosure of such records, if they exist, would constitute an unjustified invasion of the privacy of individuals other than the appellant. Section 36(1) of the *Act* gives individuals a general right of access to their own personal

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[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225.
[6] Orders P-1409, R-980015, PO-2225.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information held by an institution. Section 38 provides a number of exceptions to this general right of access.

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

[22] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. After considering the representations submitted by the police and the appellant, I am satisfied that sections 14(1) and (4) do not apply to a record, if it exists, in the circumstances of this appeal.

[23] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[8]

[24] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[9]

[25] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Cropley*,[10] the Divisional Court said the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[26] The police submit that the factor in section 14(2)(h) (the personal information has been supplied by the individual to whom the information relates in confidence) would be relevant to such a record, if it exists:

> [A]reasonable assumption by any individual who may speak to the police and provide information/personal information to police, is that they are doing so in confidence the information will not be disclosed … [and that] the police will act responsibly in the manner in which it deals with recorded personal information. The [police] must be able to maintain the

[8] Order P-239.
[9] Order P-99.
[10] [2001] O.J. 749.

> trust bestowed upon us by the public to protect the personal information we obtain from them during investigations.

[27] The police point out that in this case, "the appellant 'believes' a report exists and is attempting to identify if one does and further the appellant has identified someone who the appellant believes may have made the report." The police also note that the appellant has identified a possible record as pertaining to a "domestic related or complaint related" matter.

[28] Referring to the Ontario Ministry of the Attorney General's website which describes what constitutes domestic violence, the police submit that if such records exist, their disclosure "could perceivably generate fear of physical harm and create emotional distress all of which is contrary to the supports put in place to end domestic violence." In this regard, the police claim that the factor in section 14(2)(e) (the individual to whom the information relates will be exposed unfairly to pecuniary or other harm) would be relevant.

[29] Finally, the police submit that disclosure of the personal information in a record, if it exists, would be a presumed unjustified invasion of privacy under section 14(3)(b). Referring to previous orders of this office[11], the police state:

> In this case, the type of record at issue, if it existed, would be information about a domestic situation that required police involvement. Domestic reports can range from police being involved to investigate physical or sexual force, actual or threatened, by a partner or ex-partner, threatening, hitting, kicking, punching, pushing, stalking and harassing. It can also be psychological/emotional abuse, verbal abuse. Such reports depending on the nature of the complaint can result in arrests and charges or may result in advice.

[30] The police note further that the presumption at section 14(3)(b) can apply even if no criminal proceedings were commenced.[12]

[31] The appellant submits that although some individuals may report matters to the police with an expectation of confidentiality, there is no evidence that this is the case in the circumstances of this appeal, suggesting that the factor in section 14(2)(h) is not relevant. With respect to the factor in section 14(2)(e), the appellant states:

> Any suggestion that the disclosure of any such record could perceivably generate fear of physical harm and create emotional distress is speculative, particularly in the absence of any information regarding the content of the record, if the record exists.

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[11] See, for example: Order PO-1878.
[12] See: for example, Order MO-2785.

[32] The appellant does not address the presumption at section 14(3)(b).

[33] The appellant raises an unlisted factor that he believes should be considered in determining this issue. As I noted above, the appellant indicates that he does not need to know the content of a record, if it exists. Rather, he simply wishes to determine whether a record exists in order to assist him in understanding why he has been unable to secure employment in his chosen field. In framing his request in this way, the appellant raises a fairness issue in being able to obtain enough information to understand the reasons behind the decisions of the police forces he has applied to not to offer him employment. He believes that certain information, unknown to him, is being communicated to others and that he has a right to know what it is.

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

[34] Sections 14(2)(e), (h) and 14(3)(b) state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

*14(2)(e): pecuniary or other harm*

[35] 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.

[36] The appellant speaks to the speculative nature of any discussion under section 14 in the circumstances where a record may or may not exist. To a certain extent, he is correct. However, previous decisions of this office have considered the types of

situations in which this factor has been found to be relevant and are instructive in considering this issue in the abstract.

[37] These past decisions found that where the disclosure of personal information could expose an individual unfairly to unwanted contact[13] or could expose the individual to repercussions,[14] or a fear of harm such as harassment,[15] section 14(2)(e) will be found to be relevant. When viewed in context, I am persuaded that there is evidence that establishes the relevance of this factor.

[38] The appellant has requested information relating to "domestic" or other complaints. The representations submitted by the police demonstrate that domestic complaints are regarded in a very different light than other types of complaints. I accept the argument put forth by the police that if such records exist, their disclosure "could perceivably generate fear of physical harm and create emotional distress all of which is contrary to the supports put in place to end domestic violence." Some of the concerns raised by the police are similar to those identified in previous orders of this office. Accordingly, I find that the factor in section 14(2)(e) is relevant in the circumstances.

[39] After reviewing the appellant's submissions and the copy of an e-mail he attached to them, it is clear that he believes that the individual named by him may be the source of his problems in obtaining employment. This e-mail also demonstrates that the appellant has attempted to contact the named individual several times. In the circumstances, I give this factor considerable weight.

*14(2)(h): supplied in confidence*

[40] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[16]

[41] Not all information collected by the police may be held in confidence.[17] Moreover, this expectation need not be absolute in order for the factor to be relevant in the circumstances of a particular situation. The context in which personal information has been provided and received by an institution can lead to a reasonable expectation that it will be treated confidentially.[18]

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[13] Order M-1147.
[14] Order P-597.
[15] Order P-213.
[16] Order PO-1670.
[17] Order M-167.
[18] See, for example: Orders P-274, PO-1910 and, P-434.

[42] Contrary to the appellant's assertion that there is no evidence that any individual had (or would have had) an expectation of confidentiality, I am satisfied that individuals contacting the police to complain and/or provide their personal information would have a reasonable expectation that the police would retain this information in confidence. Accordingly, I find that if a record were to exist, the person to whom the personal information relates would have a reasonable expectation that their personal information would have been received and maintained in a confidential manner. As a result, I find that the factor in section 14(2)(h) is relevant. Referring back to the context in which a record is being sought, I find that there would be a heightened expectation of confidentiality on the part of a complainant. In these circumstances, I give this factor considerable weight.

*Unlisted factor favouring disclosure*

[43] A number of orders of this office have recognized an unlisted factor relating to fairness in administrative and legal processes.[19] It has been recognized that there is an inherent fairness issue where one individual provides personal information about another to an institution. These orders reflect the importance of the autonomy of the individual and his ability to control the dissemination and use of his own personal information.

[44] The appellant's situation is not dissimilar from these previously decided cases. In the current appeal, the appellant has been seeking employment as a police officer; he has undergone the requisite training and cannot understand why his applications for employment are being rejected. In my view, this unlisted factor is relevant to the issues on appeal. Moreover, given the serious consequences to the appellant in his efforts to secure employment with a police force, that such a record, if one exists, would have, I find that it carries significant weight in balancing the appellant's right to know and another individual's interest in retaining their privacy rights.

*14(3)(b): investigation into violation of law*

[45] The presumption at section 14(3)(b) only requires that there be an investigation into a possible violation of law. Therefore, even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply.[20] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[21]

[46] The presumption can apply to a variety of investigations, including those relating to by-law enforcement[22] and violations of the Ontario Human Rights Code.[23]

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[19] Orders P-1014, M-1162, PO-1767, P-111.
[20] Orders P-242 and MO-2235.
[21] Orders MO-2213, PO-1849 and PO-2608.
[22] Order MO-2147.

[47] As I noted above, in his access request, the appellant indicated that he was seeking access to "domestic related or complaint related" information about him in the custody or control of the police. It is apparent, upon review of the appellant's representations that this request was made in the context of his attempt to seek employment with a police force. In Order MO-1261, I considered whether investigations undertaken as part of background checks for employment purposes constituted "law enforcement". Although the analysis in this order was conducted under the law enforcement provision of section 8, I find that it is relevant in considering whether the presumption at section 14(3)(b) would apply to a record, if it exists:

> **Definition of "Law Enforcement"**
>
> In order for the Police to rely on section 8(1)(c) of the Act, they must establish that disclosure of the records at issue could reasonably be expected to reveal investigative techniques and procedures ... **used in law enforcement**. For section 8(1)(g) to apply, the Police must establish that disclosure of the information could reasonably be expected to interfere with the gathering of or reveal **law enforcement intelligence** information. "Law enforcement" is defined in section 2(1) of the Act as:
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> > "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, and
> >
> > (c) the conduct of proceedings referred to in clause (b).
>
> The Police acknowledge that the records at issue were created during the routine background check performed on all police service applicants. The Police state that such checks are undertaken solely to investigate the kind of persons with whom a prospective employee associates and is conducted pursuant to section 43(1) of the Police Services Act (the PSA), which states:

[23] Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

> No person shall be appointed as a police officer unless he or she,
>
> (a) is a Canadian Citizen or a permanent resident of Canada;
> (b) is at least eighteen years of age;
> (c) is physically and mentally able to perform the duties of the position, having regard to his or her own safety and the safety of members of the public;
> (d) is of good moral character and habits; and
> (e) has successfully completed at least four years of secondary school education or its equivalent.

While I appreciate that in evaluating the ability and desirability of an individual for the position of a police officer, the Police are required to take greater care in investigating the "background" of the prospective employee than would be expected from many other employers, I do not accept that this activity, in and of itself, constitutes "policing", or that it relates to any of the other activities referred to in the definition of "law enforcement".

Rather, such an "investigation" primarily relates to human resources issues and the hiring process. In my view, this type of activity does not fall within the definition of "law enforcement".

That being said, however, the Police indicate that the source material for much of the information at issue in this appeal originates from their Intelligence Unit and was obtained pursuant to their policing function. The Police note that, in having his application declined, the appellant was simply told that "something in his background check was the reason". The Police submit that the information in the four pages at issue was withheld because to disclose it would reveal law enforcement intelligence information.

Because of the unique position of the Police and the resources available to them in conducting background checks on prospective employees, it is possible that information which was obtained as part of their policing function would turn up as a result of their queries relating to an employment background check…

…

In my view, apart from the reference to section 43(1) of the PSA, the Police have provided insufficient evidence which links the performance of a human resources function with their law enforcement mandate…

[48] I agree with this analysis and conclude that if a complaint-driven record exists that resulted in a law enforcement investigation, the presumption at section 14(3)(b) would apply to it because it would pertain to the "policing" function.

[49] However, if a record exists that was obtained as part of the human resources "background" check of the prospective employee, the presumption at section 14(3)(b) would not apply to it.

[50] Referring to the specific wording of the appellant's request, I interpret the intent of it to relate to the policing function of the police. Accordingly, if a record exists that would respond to the appellant's request, the presumption at section 14(3)(b) would apply to it because any personal information contained in such a record would have been compiled and identifiable as part of an investigation into a possible violation of law.

[51] Although the appellant is seeking the requested information to assist him in understanding why he has been unable to obtain employment, and has thus raised a significant fairness issue, I find, in balancing his interests against those of the individual named during the processing of this appeal, that the factors favouring privacy protection outweigh his interests. It is clear that the appellant is seeking answers and has made a number of assumptions regarding the named individual as the source of his inability to obtain employment. After considering the submissions of the police and the appellant, I am satisfied that the police have properly considered all relevant factors in exercising their discretion and in arriving at their decision that access to a record that is responsive to the request, if it exists, should be denied.

[52] The e-mail the appellant has attached to his submissions, which I have not referred to in detail in this order as it contains significant personal information of both the appellant and the named individual, supports my conclusion that disclosure of the personal information in a record, if it exists, would constitute an unjustified invasion of the other individual's personal privacy 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?**

[53] Section 38 contains no parallel provision to section 14(5). Since I have found that if a record exists it would 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.

[54] 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.

[55] The police point out in their submissions that the appellant requested access to police information about a specific type of record that he believes exists and then identified a particular individual that he believes initiated a complaint. Referring to the comments made in Order M-615 (cited above), the police state:

> If the Police were to disclose if a record exists or does not exist, due to the fact the appellant has identified an individual who he believes made a report, it would clearly be an invasion of personal privacy as it would specifically identify whether or not they have been involved with the police in the context of a law enforcement matter.

[56] As I indicated above, the appellant states that he does not need to know the content of a record, if it exists and submits that any record that might exist could be redacted to protect the personal information of any other individual identified in it. He affirms that he simply wishes to determine whether a record exists in order to assist him in understanding why he has been unable to secure employment in his chosen field. He believes that certain information, unknown to him, is being communicated to others, to his detriment, and that he has a right to know what it is.

[57] Based on all of the information before me, I am satisfied that disclosure of the fact that records exist or do not exist would in itself convey information to the appellant. The appellant has requested domestic or complaint-related records and has made it clear that he believes they would have originated from the named individual. A decision that records exist or do not exist would essentially confirm this fact for him. I

find that the nature of the information conveyed is such that its disclosure would constitute an unjustified invasion of privacy, as it would confirm whether or not the named individual has made a complaint about him to the police.

[58] Accordingly, I find that the police may refuse to confirm or deny the existence of records that might be responsive to the appellant's request.

## ORDER:

I uphold the decision of the police to refuse to confirm or deny the existence of records.

Original signed by: May 30, 2013
Laurel Cropley
Adjudicator