Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2978

Appeal MA12-163

London Police Services Board

November 14, 2013

Summary: The appellant, a member of the media, sought records from the police regarding the involvement of a named RCMP Superintendent in a prostitution sting operation conducted by the police. The police refused to confirm or deny the existence of a record pursuant to section 14(5). The appellant appealed this decision claiming that the public interest override in section 16 applied in the circumstances. In this order, the adjudicator finds that the public interest override does not apply in the circumstances, and upholds the decision of the police to refuse to confirm or deny the existence of a record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 14(2)(f), 14(3)(b), 14(5), 16.

OVERVIEW:

[1] The appellant is a member of the media. He submitted a request to the London Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for the following information:

> [A]ll notes (electronic or in notebooks) for the female undercover officers working in a London Police "John" sting that took place in 2005 and/or

> 2006 which mention or refer to in any way [named RCMP Superintendent]. Please also provide me with all the notes (electronic or in notebooks) of the undercover officers of the vice squad that mention or refer to in any way [above-named Superintendent]. Please also provide me with all correspondence (electronic or otherwise), all notes (electronic or otherwise) and all documents that in any way mention or refer to [above-named Superintendent]. Please also provide me with all correspondence (electronic or otherwise), all notes (electronic or otherwise) and all documents that in any way mention or refer to [above-stated name] and a London Police "John" sting in 2005 and/or 2006.

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

[3] The appellant appealed the decision of the police.

[4] During mediation, the police reiterated their position that the existence of a record cannot be confirmed or denied, and that even if records exist, they would be exempt from disclosure as this would constitute an unjustified invasion of personal privacy. Further mediation could not be effected and the file was forwarded to the adjudication stage of the appeal process.

[5] During the inquiry into this appeal, I sought and received representations from the police and the appellant. In his representations, the appellant raised the possible application of the public interest override in section 16 of the *Act*. I subsequently sought representations from the police on this issue. The representations were shared in accordance with section 7 of the *IPC Code of Procedure* and *Practice Direction 7*.

[6] In this order, I uphold the decision of the police to refuse to confirm or deny the existence of records responsive to the appellant's request.

ISSUES:

A: Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

B: Is there a compelling public interest in disclosure of whether or not records exist that clearly outweighs the purpose of the section 14(5) exemption?

DISCUSSION:

A: Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

[7] Section 14(5) reads:

> 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 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]

[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]

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[1] Order P-339.

[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.

Part one: disclosure of the record (if it exists)

Definition of personal information

[12] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information.

[13] The term "personal information" 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;

[14] 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.[3]

[15] 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.

[16] 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.[4]

[17] 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.[5]

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[19] The police submit that if a record exists, it would likely contain information such as addresses, telephone numbers, dates of birth and other similar types of information that fall within the definition. In addition, given the specific nature of the request, the

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[3] Order 11.
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

police submit that if a record exists, it would contain the personal information of the individual named in the request. The police take the position that although the named individual has been identified in his professional capacity, if a record exists, they would deem the type of information requested to be about the individual in his personal capacity in the circumstances.

[20] The appellant does not address this issue in his representations.

[21] It is very clear that the appellant is seeking information about a specifically identified member of the RCMP and his involvement in a "john" sting conducted by the police in 2005 and 2006. In my view, the request cannot be interpreted as referring to this individual's actions in his professional capacity. Rather, it is clear that the appellant is seeking information about the RCMP Superintendent being caught or in some way being involved in the sting operation in his personal capacity. On this basis, I conclude that if a record exists, it would contain the personal information of an identifiable individual other than the appellant.

Unjustified invasion of personal privacy

[22] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

Section 14(4): disclosure not an unjustified invasion of privacy

[23] If any of paragraphs (a), (b) or (c) of section 14(4) apply to the record, if it exists, disclosure would not be an unjustified invasion of privacy. The appellant does not address this issue. In my view, the type of information that the appellant is seeking, if it were contained in a record, would not fall within the section 14(4) exceptions.

Section 14(3): disclosure presumed to be an unjustified invasion of privacy

[24] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[7]

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

[25] The police submit that if a record exists, it would fall within the presumption at section 14(3)(b). This section states:

> 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.

[26] The appellant does not address this issue.

[27] The request is for records that relate to a specific police operation. The police state that, in enforcing the laws of Canada, their duties include "investigating possible law violations and apprehending criminals and others who may be taken into custody and crime prevention." Previous orders of this office have found 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.[8] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[9]

[28] I am satisfied that information about an individual who is identified in the context of the "john" sting, if it exists, would be compiled and identifiable as part of an investigation into a possible violation of law. Accordingly, I find that, if a record exists, its disclosure would presume to constitute an unjustified invasion of personal privacy under section 14(3)(b).

Section 14(2): factors for and against disclosure

[29] 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.[10]

[30] The police submit that the factor in section 14(2)(f) is relevant in the circumstances of this appeal. This section states:

> 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,

[8] Orders P-242 and MO-2235.
[9] Orders MO-2213, PO-1849 and PO-2608.
[10] Order P-239.

the personal information is highly sensitive.

[31] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[11]

[32] The police submit that:

> In this case, if a record existed, the type of information being applied for is that of a named individual being involved with the police in relation to a "john sting." The appellant in this matter is the media. If such information existed and was released to the media, an affected party would have to deal with media exposure relating to matters which any individual may find embarrassing and damaging to both their personal and professional lives. Such disclosure could leave an affected party with grave concerns about the demise of any personal relationships they may be involved in and most certainly could cause concerns for their position with their employer. Undoubtedly, this should be considered grounds for excessive personal distress if a record were to exist.

[33] The appellant does not address this issue.

[34] I agree with the police that the public dissemination of information pertaining to criminal activities in general, and more specifically, information about an individual's involvement in a "john sting" would likely cause significant personal distress. Accordingly, I am satisfied that the factor in section 14(2)(f) is highly relevant with respect to the type of information requested, if it exists.

Part two: disclosure of the fact that the record exists (or does not exist)

[35] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) 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 personal privacy.

[36] The appellant does not address this issue.

[37] The police submit that since the appellant has requested information about a specifically named individual, disclosing whether a record exists or not would provide information to the appellant that would identify whether or not the named individual had been involved with the police in the context of a law enforcement matter.

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[11] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[38] Based on the submissions made by the police, I am satisfied that disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant that would reveal whether or not this person has been involved in a police sting operation. I find that disclosure of the fact that a record exists, or does not exist, in itself, would constitute an unjustified invasion of personal privacy. Accordingly, I find that section 14(5) applies in the circumstances of this appeal.

B: Is there a compelling public interest in disclosure of whether or not records exist that clearly outweighs the purpose of the section 14(5) exemption?

[39] The appellant focuses his representations on the application of section 16 of the *Act*.

[40] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[41] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records, if they exist. Second, this interest must clearly outweigh the purpose of the exemption. In the case of a claim that section 14(5) applies, a third requirement must be met, that is, whether there is a compelling public interest in disclosure of the fact that records exist or do not exist.

[42] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records, if they exist, before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the issues identified in a section 14(5) situation, with a view to determining whether there could be a compelling public interest in disclosure or identification that a record exists, which clearly outweighs the purpose of the exemption.[12]

Compelling public interest

[43] In considering whether there is a "public interest" in disclosure of a record, and/or the fact that a record exists, the first question to ask is whether there is a relationship between the record, if it exists, and the *Act*'s central purpose of shedding light on the operations of government.[13] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve

[12] Order P-244.
[13] Orders P-984, PO-2607.

the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[14]

[44] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[15]

[45] A public interest is not automatically established where the requester is a member of the media.[16]

[46] Any public interest in *non*-disclosure, or refusal to confirm or deny, that may exist also must be considered.[17] If there is a significant public interest in the non-disclosure of the record or its existence then disclosure cannot be considered "compelling" and the override will not apply.[18]

[47] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation.[19]
- the integrity of the criminal justice system has been called into question.[20]
- public safety issues relating to the operation of nuclear facilities have been raised.[21]
- disclosure would shed light on the safe operation of petrochemical facilities [22] or the province's ability to prepare for a nuclear emergency.[23]
- the records contain information about contributions to municipal election campaigns.[24]

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[14] Orders P-984 and PO-2556.
[15] Order P-984.
[16] Orders M-773 and M-1074.
[17] Ontario Hydro v. Mitchinson, [1996] O.J. No. 4636 (Div. Ct.).
[18] Orders PO-2072-F and PO-2098-R.
[19] Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 484 (C.A.).
[20] Order P-1779.
[21] Order P-1190, upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[22] Order P-1175.
[23] Order P-901.
[24] Gombu v. Ontario (Assistant Information and Privacy Commissioner) (2002), 59 O.R. (3d) 773.

[48] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations.[25]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[26]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[27]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[28]
- the records do not respond to the applicable public interest raised by appellant.[29]

[49] The appellant provides some background to his request with respect to the issue of prostitution and the efforts that the police have taken in addressing it. The appellant also refers to a number of media articles that focus on this issue as well as a 2012 RCMP disciplinary report, which refers to "an example of a constable being reprimanded for allowing a prostitute actively soliciting sexual activity to enter personal vehicle for sexual activity." Although the appellant does not provide any copies of these documents, he submits that "[t]hese facts demonstrate the importance of releasing information to the public…"

[50] The appellant states further that the articles he refers to "makes it clear that illegal acts involving prostitution and RCMP members is a matter of significant public importance – and a matter that the public should be aware of.

[51] The appellant points out that evidence of RCMP officers being charged or involved in a prostitution sting has serious implications on public safety. He submits further that the public should be able to know "whether or not Canada's policing agencies are handling criminal matters involving their own officers in an appropriate way, or if they are being swept under the rug."

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[25] Orders P-123/124, P-391 and M-539.
[26] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[27] Orders M-249, M-317.
[28] Order P-613.
[29] Orders MO-1994 and PO-2607.

[52] The appellant goes on to discuss recent issues regarding the RCMP, noting that "[t]he RCMP has been under great scrutiny lately for how they deal with internal issues of abuse and discipline." The appellant quotes from recent comments made by RCMP Commissioner Paulson regarding unprofessional conduct within the force and the approach he intends to take in addressing accountability and discipline.

[53] The appellant submits that if the information he is seeking exists, "it could shed light on the operations of [the police] and RCMP." Although the appellant notes that the named RCMP member referred to in his request has left the force, and acknowledges that he does not "assume to know all the facts relating to [the] particular request," he indicates that he is still interested in understanding how the matter referred to in the request was dealt with by the RCMP:

> Any relevant records would help us best understand the particular allegations being referenced in the request that have come to Commissioner Paulson's attention and one that, if true, raises serious issues of accountability within the senior ranks of the RCMP and members of the [police]. We are hoping that records would allow for the matter to be assessed as to how it was initially investigated, how it was resolved by the RCMP and [police] at the time, and what is happening now on the file.

[54] The appellant concludes that the timing of this issue is "critical" given a recent court decision regarding prostitution laws and submits that this is a "highly debated topic and an issue that deserves the fullest public discussion possible."

[55] In response to the appellant's submission, the police note that the 2012 disciplinary report referred to by the appellant is statistical in nature and does not identify any particular individual. However, the police take the position that the report "provides a level of transparency while at the same time does not breach the privacy of individuals," and that it meets one of the fundamental purposes of the *Act*, which is to shed light on the operations of government.[30]

[56] With respect to the second part of the section 16 test, the police reiterate that the nature of the information requested, if it exists, would be very sensitive in nature. Moreover, the police state that the type of information requested would have been gathered as a part of their law enforcement mandate, and pursuant to section 14(3)(b), its disclosure would presumed to be an unjustified invasion of privacy.

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[30] See: Order PO-2626 referred to by the police where it was found that there was no compelling interest in the disclosure of personal information where the disclosure of information in the Annual Reports of the institution at issue was sufficient to subject the mediation process involving harassment complaints to public scrutiny.

Analysis and findings

[57] I agree with the appellant that issues relating to prostitution and the efforts made by the police in tackling the problem are matters of public interest. Recent events involving the RCMP, which have been widely discussed in the media, have evoked a response from the highest levels of the RCMP to make the force more accountable within its own internal structure and to the Canadian public. I also agree that the manner in which the RCMP moves forward in addressing these issues is of public interest. Similarly, ensuring equal application of the law by the police raises public interest concerns.

[58] In his representations, the appellant refers to current issues regarding prostitution and the manner in which the RCMP and police address discipline and the enforcement of Canadian laws. He also refers to a 2012 RCMP discipline report, which identifies a number of discipline matters that went to formal hearings, including one that pertained to a constable's poor judgement in his dealings with a prostitute.

[59] However, the appellant does not indicate that there is reason to believe that the named RCMP Superintendent was somehow complicit in this type of activity. Indeed, the appellant acknowledges that he does not assume to know all the facts relating to his request, and has provided no basis for believing that the person named in his request has engaged in the type of activity he refers to. Moreover, the appellant is seeking records that are between seven to eight years old.

[60] The appellant does not tie in events that occurred in the past to the current public interest arguments he makes. It is not clear to me how records from 2005 or 2006, if they exist, relating to a period of time prior to the recent events involving the RCMP, would facilitate public debate today regarding current issues of police discipline and enforcement of the law. This is particularly so where there is no evidence presented that directs the appellant's attention to one particular individual.

[61] Despite providing no evidence in support of his belief that records regarding the named RCMP Superintendent might exist, the appellant "hopes" that any responsive records, if they exist, "would allow for the matter to be assessed as to how it was initially investigated, how it was resolved by the RCMP and [police] at the time, and what is happening now on the file." In my view, the appellant's submissions do not sufficiently connect the information he is seeking about the named RCMP officer and the public interest arguments he has made in this instance. Although the appellant might have some information about the named Superintendent that he has chosen not to share during this inquiry, it would appear from the evidence he has provided that he has randomly selected the named individual.

[62] I am not persuaded that there is a compelling public interest in disclosure of the personal information of a named individual, or even of whether or not responsive records exist, without establishing a basis for doing so in the hopes that its disclosure "might" expose them and the police forces involved to public scrutiny or to facilitate public debate on the issues of interest to the media.

[63] The records that the appellant seeks, if they exist, would fall within the presumption at section 14(3)(b). Previous orders of this office have consistently recognized that the types of personal information set out in section 14(3) are generally regarded as particularly sensitive.[31] Although there may well be occasions where the privacy interests of a particular individual must give way to the public interest, I am not persuaded that "fishing" for information is sufficient to outweigh the significant privacy interest at stake.

[64] Accordingly, I find that there is no compelling public interest in the identification of the fact that records exist or not, that outweighs the purpose of the section 14(1) exemption in the circumstances of this appeal.

ORDER:

I uphold the decision of the police.

Original signed by: November 14, 2013
Laurel Cropley
Adjudicator

[31] See, for example: Orders PO-1878 and MO-2954. See also: Volume 2 of the Report of the Commission on Freedom of Information and Individual Privacy/1980 (the Williams Commission Report) at page 326.