Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-2988

Appeal MA12-543

Toronto Police Services Board

December 20, 2013

**Summary:** The Toronto Police Services Board (the police) received a request for information relating to two particular incident reports detailing incidents involving the requester. The police denied access to the responsive information, in part, pursuant to section 38(a) (discretion to refuse a requester's own information), read in conjunction with sections 8(1)(l) (facilitate commission of an unlawful act) and 9(1)(d) (relations with other governments); and section 38(b) (personal privacy), taking into consideration the presumption at section 14(3)(b) (compiled as part of an investigation into a violation of law). The police also severed information on the basis that it was not responsive to the request. Also at issue in this appeal is whether the police conducted a reasonable search for responsive records. In this order, the adjudicator finds that the records contain the personal information of the appellant and other identifiable individuals; that the discretionary exemption at section 38(a), read in conjunction with sections 8(1)(l) applies to some portions of the information for which it was claimed but not to other portions; that the discretionary exemption of section 38(a), read in conjunction with section 9(1)(d) does not apply to the information for which it was claimed; that the discretionary exemption at section 38(b) applies to the information for which it was claimed; and, that the information severed as non-responsive, is not responsive to the request. The adjudicator also finds that the police's search for responsive records was reasonable. As a result, the adjudicator partially upholds the police's decision and orders the police to disclose portions of the records at issue.

**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"), 8(1)(l), 9(1)(d), 14(2)(d), (f), (h), 14(3)(b), 17, 38(a) and (b).

**Orders and Investigation Reports Considered:** Orders MO-1288, MO-1972-R and PO-2456.

## OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two specified police reports.

[2] The police located two responsive records and issued a decision granting partial access to them. They denied access to portions of the records pursuant to the discretionary exemption at section 38(a) (discretion to refuse a requester's own information), read in conjunction with section 8(1)(l) (facilitate commission of an unlawful act), and the discretionary exemption at section 38(b) (personal privacy), read in conjunction with section 14(3)(b) (investigation into a possible violation of law), of the *Act*.

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

[4] During mediation, the appellant advised that she was seeking access to additional records relating to the two incidents identified in her request, including officers' notes, dispatch records, 911 transcripts and a record of radio communications. The police agreed to conduct a search for all records relating to the two incidents.

[5] As a result of their additional search, the police located additional records, including 911 call reports, and officers' memorandum notebooks. The police issued a supplementary decision granting partial access to these records. Portions of the records were denied pursuant to the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l), and the discretionary exemption at section 38(b), read in conjunction with section 14(3)(b). The police also advised that some of the information in the records was denied as it was not responsive to the request.

[6] Following receipt of the supplementary decision and partially severed records, the appellant advised that she wished to pursue access to all of the information denied by the police, including the non-responsive information. The appellant also maintained her belief that additional records should exist. Accordingly, the reasonableness of the police's search was added as an issue in this appeal.

[7] Also during mediation, the police took the position that the discretionary exemption at section 38(a), read in conjunction with section 9(1)(d) (relations with other governments) of the *Act* applied to a severance made to the bottom of one of the records.

[8] As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a notice of inquiry, setting out the facts and issues on appeal, to the police, who provided me with representations.
[9] I then sought representations from the appellant and provided her with a copy of the police's representations. The appellant chose not to submit substantive representations.

[10] In this order, I partially uphold the police's decision to deny access to portions of the responsive information. In the discussion that follows, I reach the following conclusions:

- The records at issue contain the "personal information" of both the appellant and other identifiable individuals, within the meaning of that term as it is defined at section 2(1) of the *Act*;
- the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l) of the *Act* applies to some of the information for which it has been claimed but it does not apply to other information for which it has been claimed;
- the discretionary exemption at section 38(a), read in conjunction with section 9(1)(d) of the *Act* does not apply to the information for which it has been claimed;
- the discretionary exemption at section 38(b) of the *Act* applies to the information at issue;
- the police's exercise of discretion to deny access to portions of the records was reasonable;
- some of the information contained in the records is not responsive to the appellant's request; and
- the police's search for responsive records was reasonable.

## RECORDS:

[11] There are 37 pages of records remaining at issue that consists of two five-page occurrence reports, one five-page I/CAD Event Details Report detailing a 911 call, one three-page I/CAD Event Details Report also detailing a 911 call, and 19 pages of police notes from four officers' notebooks.

## ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

B. Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l) of the *Act,* apply to the information at issue?

C. Does the discretionary exemption at section 38(a), read in conjunction with section 9(1)(d) of the *Act,* apply to the information at issue?

D. Does the discretionary exemption at section 38(b) apply to the information at issue?

E. Did the police exercise their discretion under sections 38(a) and/or (b)? If so, should this office uphold the police's exercise of discretion?

F. Is some of the information contained the records not responsive to the appellant's request?

G. Did the police conduct a reasonable search for responsive records?

## DISCUSSION:

### A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[12] Under the *Act,* different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[1] Where the records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the appellant but do not contain the personal information of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[13] Accordingly, in order to determine which sections of the *Act* apply, it is necessary to decide whether the record contains "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,

[1] Order M-352.

> (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.[2]

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

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[2] Order 11.

> (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 (2.1) 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.[3]

[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.[4]

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[19] The police submit that the appellant originally sought access to all police reports under her name and was initially provided with the only two police reports that were responsive to that request. They state that during mediation they were advised that the appellant was seeking more detailed information regarding the two incidents and that as a result, additional 911 call records and police officers' memorandum book notes were also located and partially disclosed.

[20] The police submit that from the responsive information, they severed the personal information of affected parties whose names, home addresses, and home phone numbers appeared in the text of the reports. The police submit that this information falls within paragraphs (c) and (d) of the definition of "personal information," namely, an identifying number, symbol or other particular assigned to the individual and the address, telephone number, fingerprints or blood type of the individual.

[21] The police confirm that none of the affected parties consented to the release of their personal information. As a result, they submit that their personal information was not disclosed.

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

[22] Having reviewed the information at issue, which consists of portions of 911 call details, occurrence reports and police officer notes, I accept that they contain the personal information of the appellant and other identifiable individuals who were interviewed as part of the police investigation or whose personal information was otherwise collected as part of the investigation. Specifically, the information includes information relating to race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status (paragraph (a)), medical, psychiatric, psychological, criminal or employment history (paragraph (b)), addresses and telephone numbers (paragraph (d)), personal opinions or views of individuals (paragraph (e)), the views or opinions of other individuals about the individual (paragraph (g)), and the names of individuals together with other personal information about them (paragraph (h)).

[23] Accordingly, I find that the records at issue contain the "personal information" of both the appellant and other identifiable individuals, within the meaning of the definition of that term at section 2(1) of the *Act*.

[24] As described above, in circumstances where the appellant's personal information is mixed with that of other identifiable individuals, Part II of the *Act* applies and I must consider whether the information is properly exempt pursuant to the discretionary exemptions at section 38.

## B. Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(l) of the *Act,* apply to the information at issue?

[25] 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.

[26] 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.

[27] 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.[6]

[6] Order M-352.

[28] 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.

[29] In this case, the institution relies on section 38(a) in conjunction with section 8(1)(l). Section 8(1)(l) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

[30] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[7]

[31] Where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[8]

[32] 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.[9]

### ***Representations***

[33] The police make the following submissions regarding the application of section 38(a), read with section 8(1)(l), to the information for which it was claimed:

> Section 8(1)(l) was used to exempt the Toronto Police Service "10-*" codes and the term CPIC (Canadian Police Information Centre) [sic] from the Occurrence Reports, 911 Call Transcripts and police officers' memorandum books. The "ten code" is a method by which certain information is passed efficiently from one police source to another in an encoded form. The term "code" itself indicates that the information is being conveyed in such a manner that anyone intercepting the message will be unable to determine the content or import of the message.

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[7] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[8] 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.).

[9] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.

> Typically, some of the codes refer to the office and/or patrol vehicle availability status. CPIC is a common tool used by all law enforcement agencies it is composed of five distinct service areas which are responsible for the delivery and sharing of national police, law enforcement, criminal justice, and public safety information. Some criminal elements go to great lengths to try to monitor police communications. This causes police forces, including this institution, to invest several million dollars in the technologies to scramble or otherwise thwart the interception of police communications messages for the primary purpose of preventing those who engage in illegal activities from being able to monitor the status of police personnel and equipment.
>
> Obviously, if our codes, including the "10-*" codes or a system used by all police agencies for the purpose of law enforcement control, including the CPIC system were to become common knowledge, such knowledge "could reasonably be expected to facilitate the commission of an unlawful act or hamper crime control."

[34] The police point to Order M-757 issued by this office that found police "10-codes" to be exempt from disclosure pursuant to section 8(1)(l).

### *Analysis and findings*

[35] Having reviewed the information at issue for which the police have claimed the application of the exemption at section 38(a), read in conjunction with section 8(1)(l), I accept that the majority of it consists of police codes.

[36] The law surrounding the disclosure of police codes is well-established. In Order MO-2112, Adjudicator Colin Bhattacharjee considered the application of section 8(1)(l) to "police codes" despite a lack of evidence to support the police's decision to deny access to this type of information. In that order, Adjudicator Bhattacharjee stated:

> I would note, however, that the police have withheld "police codes" from the records at issue. This office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to "10 codes," [10] as well as other coded information such as "900 codes."[11] These orders adopted the reasoning of Adjudicator Laurel Cropley in Order PO-1665:
>
> > In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for

[10] Orders M-93, M-757, MO-1715 and PO-1665.
[11] Order MO-2014.

> individuals to engage in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.
>
> Although the police have not provided any representations as to why they severed police codes in the records at issue, I accept that this information may be withheld pursuant to section 8(1)(l) of the *Act*. Consequently, I find that the police codes in the records at issue qualify for exemption under section 38(a) in conjunction with section 8(1)(l) of the *Act*.

[37] I agree with Adjudicator Bhattacharjee's reasoning in Order MO-2112, and find it to be relevant to the current appeal. I accept that this office has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to them. In accordance with those orders, I find that disclosure of the police codes for which the police have claimed section 8(1)(l) could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Therefore, subject to my review of the police's exercise of discretion below, I find that section 38(a), read in conjunction with section 8(1)(l), applies to this information.

[38] However, the police have also claimed that section 8(1)(l) applies to information obtained from a CPIC check (pages 1, 4, 6, 9 and 23) as well as information obtained from a check of another national law enforcement database (pages 6 and 9). From my review, this information does not qualify as coded information. Moreover, the police have not provided with me with sufficiently detailed and convincing evidence to establish that the disclosure of this specific information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As a result, I find that section 38(b), read in conjunction with section 8(1)(l), does not apply to this information and I will order it disclosed.

## C. Does the discretionary exemption at section 38(a), read in conjunction with section 9(1)(d) of the *Act,* apply to the information at issue?

[39] The police have denied access to a portion of the records under section 38(a), read in conjunction with section 9(1)(d). The relevant portions of section 9(1) read:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;

> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c); or

[40] The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure."[12]

[41] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, 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.[13]

[42] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[14]

[43] For a record to qualify for this exemption, the institution must establish that:

> 1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and
>
> 2. the information was received by the institution in confidence.[15]

[44] The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. Some orders refer to a mutual intention of confidentiality.[16] Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence.[17]

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[12] Order M-912.
[13] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[14] Order P-1552.
[15] Orders MO-1581, MO-1896 and MO-2314.
[16] Order MO-1896.
[17] Orders M-844 and MO-2032-F.

### *Representations*

[45] The police submit that the information for which it has claimed section 38(a), read in conjunction with section 9(1)(d), is information that was received from the Niagara Regional Police Service [NRPS] in confidence. It submits:

> Confidential stamps were on all of the pages received by this Police Service which normally indicates they did not wish the release of their records to non-law enforcement agencies or to those seeking like purpose. We did not consult with the NRPS, therefore we could not release their records.

### *Analysis and findings*

[46] From my review of the only information for which section 9(1)(d) has been claimed (on page 2), it is not evident to me that this information originates from the NRPS. However, even if it is information that was provided to the police by the NRPS, previous orders of this office have established that municipal entities do not constitute "another government or its agencies" for the purpose of section 9(1)(d) of the *Act*.[18] Additionally, previous orders have also found that information provided to a police service from another police service does not qualify for exemption under section 9(1)(d) as police services do not represent agencies of any of the governments referred to in clause (a), (b) or (c) of that section.[19]

[47] In the circumstances of this appeal, even if the information for which the police have claimed section 9(1)(d) did originate from the NRPS, I do not accept that the NRPS represents "an agency of a government referred to in clause (a), (b), or (c)" for the purposes of section 9(1)(d) and the exemption cannot apply to it.

[48] However, from my review of the information for which section 9(1)(d) has been claimed, it appears to be information that comes from a national law enforcement database. Although it does not appear that this office has specifically addressed the application of section 9(1)(d) to information from this particular database, in my view, it is akin to CPIC information, which also originates from a database that is national in scope.

[49] In Order MO-1288, former Adjudicator Holly Big Canoe addressed similar records, which were obtained by the police from CPIC, though in that case the information held by CPIC originated with another Canadian police agency. She found that applying the principles set out above respecting the expectation of confidentiality on the part of the senior government agency:

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[18] Order PO-2456.
[19] Order MO-1972-R.

> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
>
> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware.

[50] Similarly, I find that in the present case there is no reasonable expectation of confidentiality in the specific information for which the police have claimed section 9(1)(d). As was the case in Order MO-1288, the information originates from a national database, the appellant is the requester and, the information relates to her. Accordingly, I do not accept that section 9(1)(d) applies to this information.

[51] Having found that section 9(1)(d) does not apply to the information for which it has been claimed, I find that it is not exempt under section 38(a). As no other exemptions have been claimed for this specific information and no mandatory exemptions apply to it, I will order that this information be disclosed to the appellant.

## D. Does the discretionary exemption at section 38(b) apply to the information at issue?

[52] 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.

[53] 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.

[54] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1).

[55] The factors and presumptions in section 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). That section reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom it relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[56] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). In this case, paragraphs (a) to (c) of section 14(4) do not apply.

### *Section 14(3) - presumptions*

[57] In *Grant v. Cropley*[20] 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.

[20] [2001] O.J. 749.

[58] 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).

[59] In its decision letter, the police submit that the presumption at paragraph (b) of section 14(3) could apply. That section reads:

> 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;

[60] 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.[21] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[22]

[61] The police submit:

> Clearly, disclosure of the affected individuals' personal information would constitute an unjustified invasion of personal privacy. Since these records initially were created and compiled for the purpose of an investigation into the incident involving the appellant, section 14(3)(b) of the *Act* applies to these pages of the records.
>
> The occurrence report and memorandum book record were created by officers that attended the 911 calls made by the appellant seeking assistance from the police. The appellant made several claims involving third parties which the police notes and began their investigation. Once the circumstances were thoroughly investigated, certain concerns were brought to light. Consequently, a determination was made that the appellant should be apprehended. Regardless of whether charges are laid does not negate the applicability of this section as it only requires that there be an investigation into a possible violation of the law.

[62] From my review of the records at issue, they are clearly records that were compiled by the police in the course of their investigation into an incident involving the appellant and others. The information at issue consists of reports, 911 calls and police memorandum book notes detailing the incident and the police's investigation into that incident. In my view, these records are clearly compiled and are identifiable as part of

[21] Orders P-242 and MO-2235.
[22] Orders MO-2213, PO-1849 and PO-2608.

an investigation into a possible violation of law. Accordingly, I find that the information falls under section 14(3)(b) of the *Act* and its disclosure amounts to a presumed unjustified invasion of the personal privacy of individuals other than the appellant, under section 38(b).

[63] Section 14(2) provides some factors for the police to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors under section 14(2) is not exhaustive. The police must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[23] Some of these criteria weigh in favour of disclosure, while others weigh in favour of privacy protection.

### *Section 14(2) – factors*

[64] In the circumstances of this appeal, the police submit that, from the appellant's perspective, the possible application of the factor favouring disclosure at section 14(2)(d) might apply. However, on my review of the information at issue, the criteria listed at sections 14(2)(f), and (h) may also be relevant. Those sections read:

> 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,
>
> (c) the information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom it relates in confidence;

*Section 14(2)(d)*

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

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

[23] Order P-99.

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[24]

[66] Previous orders have established that an appellant must provide sufficient evidence to establish that there is a proceeding that exists or is contemplated in some definite fashion and that is relevant to a fair determination of a right.[25]

[67] Additionally, it has previously been held that for the purpose of civil litigation, it may be that the discovery mechanisms available to the requester in that litigation will be sufficient to ensure a fair hearing with the result that section 14(3)(d) does not apply.[26]

[68] As the appellant has not made submissions on this issue, I have not been provided with sufficient evidence to establish that a proceeding exists or is contemplated. Additionally, I have not been provided with sufficient evidence to establish that any of the other three elements of the test outlined above have been met. Accordingly, I do not find that the criteria at section 14(2)(d) is a relevant consideration in the circumstances of this appeal.

*Section 14(2)(f)*

[69] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[27] Given the nature of the information that is at issue, I accept that the personal information that has been withheld can be considered to be highly sensitive and that its disclosure could reasonably be expected to result in significant personal distress for the other identified individuals. Accordingly, I find that this factor weighing against disclosure is relevant.

*Section 14(2)(h)*

[70] The factor at section 14(2)(h) weighs in favour of privacy protection. For it to apply, both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is

[24] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[25] Order P-443.
[26] Order PO-1833.
[27] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[28]

[71] In my view, the context and surrounding circumstances of this matter are such that a reasonable person would expect that the information supplied by them to the police would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 14(2)(h) is a relevant consideration that weighs in favour of protecting the privacy of the affected parties and withholding their personal information.

***Summary***

[72] In conclusion, I have found that the presumption at section 14(3)(b) applies to the personal information at issue because it amounts to information that was compiled as part of an investigation into a possible violation of law. Accordingly, I find that disclosure of the information at issue is presumed to result in an unjustified invasion of the personal privacy of individuals other than the appellant.

[73] Even if some of the information is not covered by a presumption, there is no evidence to support a conclusion that any of the criteria in section 14(2) which favour disclosure apply in the circumstances. However, I have found that there is some evidence that the factors weighing in favour of privacy protection and against disclosure at sections 14(2)(f) and (h) are relevant considerations as the information is highly sensitive and was supplied to the police by the individuals to whom it relates in confidence.

[74] As a result, I find that the disclosure of the information, which amounts to the affected parties' personal information, would constitute an unjustified invasion of personal privacy and the discretionary exemption at section 38(b) applies to the information for which it was claimed. Accordingly, subject to my discussion below on the exercise of discretion, I will uphold the police's decision not to disclose it.

## E. Did the police exercise their discretion under sections 38(a) and/or (b)? If so, should this office uphold the police's exercise of discretion?

[75] The exemptions at sections 38(a) and (b) 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.

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

[28] Order PO-1670.

- 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.

[77] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] This office may not, however, substitute its own discretion for that of the institution.[30]

***Relevant considerations***

[78] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[31]

- 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
  - 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

[29] Order MO-1573.
[30] Section 43(2).
[31] Orders P-344 and MO-1573.

- 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

- the historic practice of the institution with respect to similar information.

[79] The police submit that in exercising their discretion to deny access to portions of the information it took into account all relevant facts and did not take into account irrelevant ones. They submit that their exercise of discretion was made in good faith. The police submit:

> The mandate, and indeed, spirit of the *Act* is the balance of privacy protection with the public's right to know. The institution scrupulously weighs these facts in each and every access request file. As the majority of our records contain sensitive material, we must balance the access interests of the requester with the privacy rights of other individuals.

[80] Based on my review of the information at issue and the representations submitted by the police, I accept that the police exercised their discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

[81] Accordingly, I uphold the police's exercise of discretion as reasonable and find that the information which is subject to sections 38(a) and (b) is properly exempt under those discretionary exemptions.

## F. Is some of the information contained the records not responsive to the appellant's request?

[82] Section 17 of the Act imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. That section states that the requester must "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." If the request "does not sufficiently described the record sought", that section provides that the institution "shall inform the applicant of the defect and shall offer assistance in reformulating the request."

[83] Institutions should adopt a liberal interpretation of a request and generally ambiguity in the request should be resolved in the requester's favour.[32] To be considered responsive to the request, records must "reasonably relate" to the request.[33]

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[32] Order P-134.
[33] Order PO-2661.

[84] The police have identified some of the information that it has severed from the responsive records as not responsive to the request.

[85] In the circumstances of this appeal, I have reviewed this information closely and I agree with the police that it is not responsive to the request. The information identified as non-responsive is information that relates to other incidents that the officers who were involved in investigating the incidents at issue were investigating or dealing with concurrently and, in my view, cannot be said to be information that reasonably relates to the appellant's request for information in this appeal.

[86] Accordingly, in my careful examination of the content of information that was severed as non-responsive, I find that it is not specifically responsive to the appellant's request in this appeal. Therefore, I uphold the police's decision to sever this information as non-responsive.

## G. Did the police conduct a reasonable search for responsive records?

[87] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[34] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[88] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[35] To be responsive, a record must be "reasonably related" to the request.[36]

[89] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[37]

[90] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[38]

[91] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[39]

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[34] Orders P-85, P-221 and PO-1954-I.
[35] Orders P-624 and PO-2559.
[36] Order PO-2554.
[37] Orders M-909, PO-2469 and PO-2592.
[38] Order MO-2185.

[92] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[40]

### *Representations*

[93] During mediation, the appellant advised that despite the fact that the police located and partially disclosed additional records responsive to her request, she continued to believe that even more additional records should exist.

[94] The police submit:

> A thorough and complete search was conducted on our Toronto Police Service database and two police reports were located and subsequently released to the appellant with the exception of personal information from identifiable affected parties and law enforcement tools. Later through mediation, we were advised by the IPC's mediator that the appellant wished to obtain more detailed information regarding the two incidents and it was suggested that we release the police officers' memorandum book notes as well. Our institution subsequently complied with this request and released additional information including the 911 Call Transcript and the attending officers' memorandum book notes. At this point, all police records related to the appellant held by this Police Service were released.

[95] The police also provided an affidavit sworn by the access and privacy analyst who conducted the search for responsive records. The affidavit details the steps taken during the initial searches for responsive records as well as the additional searches that were conducted during the course of mediation.

[96] The police concluded their representations with the following general submission:

> The institution made every effort to locate the responsive records, within and external to the institution, and released all responsive records in our custody as mandated by the *Act*.

### *Analysis and finding*

[97] Based on the evidence before me, I accept that an experienced employee, knowledgeable in the subject matter of the request expended a reasonable effort to identify and locate records reasonably related to the request in the police's custody or control.

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[39] Order MO-2246.
[40] Order MO-2213.

[98] An access and privacy analyst employed by the police searched relevant databases using information provided the appellant and located occurrence reports responsive to the request. Subsequently, she also located the police notes of all the officers in attendance, as well as the relevant 911 call transcripts.

[99] As noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In the circumstances of this appeal, I find that the police have provided such evidence.

[100] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must provide a reasonable basis for concluding that such records exist.[41] In my view, the appellant has not done so in this appeal. Apart from her statement during mediation that such records must exist, the appellant has not provided me with a reasonable basis to conclude that additional records related to the incident exist in the custody or control of the police.

[101] In summary, I find that the police have provided sufficient evidence to establish that they have conducted a reasonable search for responsive records. I am therefore satisfied that the police's search for records responsive to the appellant's request is in compliance with its obligations under the *Act*. Accordingly, I uphold the police's search.

## ORDER:

1. I order the police to disclose the information obtained from the CPIC database and the other national law enforcement database that appears on pages 1, 2, 4, 6, 9 and 23 by providing her with a copy by **January 20, 2014**. For the sake of clarity, with this order I have enclosed a copy of the relevant pages which have been highlighted to indicate the information that **should <u>not</u> be disclosed.**

2. I uphold the police's decision to deny access to the remainder of the information at issue.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the police to provide me with a copy of the records that are disclosed to the appellant.

Original Signed By: December 20, 2013
Catherine Corban
Adjudicator

[41] Order MO-2246.