Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3117

Appeal MA13-177

Toronto Police Services Board

October 29, 2014

Summary: The appellant seeks access to the police's records relating to an incident in which she was involved. After locating responsive records, the police issued a decision granting the appellant partial access to them. The police advised the appellant that portions of the records were withheld under sections 38(a), read with section 8(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime), and section 38(b) (personal privacy) of the *Act*. During mediation, the appellant claimed that additional responsive records should exist and that the public interest override applied to the information withheld from disclosure. After conducting a second search, the police located a 911 transcript responsive to the appellant's request and granted her access to it, in part, with portions withheld under section 38(b). Additionally, the police advised the appellant that they could not confirm or deny the existence of records responsive to one portion of her request under section 14(5).

In this order, the police's decision is upheld, in part. The adjudicator finds that the exemption in section 38(a), read with section 8(1)(l), does not apply to the undisclosed portion of record 2. The adjudicator also finds that the personal privacy exemption in section 38(b) applies to the information at issue, but that the absurd result principle applies to some portions which are ordered disclosed to the appellant. In addition, the adjudicator orders the police to disclose the portions of the DVD that contain only the appellant's personal information to her. The adjudicator finds that the police properly exercised their discretion in applying section 38(b) to withhold certain portions of the records. Further, the adjudicator finds that the police properly relied on section 14(5) in response to the appellant's request for information relating to a possible police attendance at an identified address. Finally, the adjudicator upholds the police's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) ("personal information"), 8(1)(l), 14(1), 14(2)(a), 14(2)(g), 14(3)(b), 14(5), 38(a) and 38(b)

Orders and Investigation Reports Considered: MO-2378, PO-2525

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 information on all incidents or visits made by the police to an identified address from October 1, 2011 to the date of the request. The requester included the following list of records sought:

- Calls made to the police (911 or to general non-emergency number)
- All police reports, summary reports and officers' notes
- The arrest report and any documents prepared with respect to incident on October 10, 2011 at [identified address]
- Copy of DVD record from surveillance cameras at [identified address] on October 10, 2011 of incident and arrest of [requester]
- Any officers' notes, summaries, reports prepared for Jan. 4, 2013 trial of the [requester]

[2] After locating responsive records, the police issued a decision, granting the requester partial access to the following records: Field Information Report, Record of Arrest, Supplementary Record of Arrest, Civilian Witness List and the notes of four named officers. The police advised the requester that portions of the records were withheld under sections 38(a), read with section 8(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime), and section 38(b) (personal privacy). The police also claimed the application of the presumption in section 14(3)(b) to the information withheld under section 38(b). In addition, the police indicated that certain portions of the records were withheld as they were found to be non-responsive to the original request. Finally, the police advised the requester that only records that are property of the police can be released by their Access and Privacy Unit.

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

[4] During mediation, the appellant confirmed that she is seeking access to the withheld portions of the records. In addition, she confirmed that she seeks access to the complete transcript of a specified 911 call and to a copy of the DVD from the surveillance camera at the identified address.

[5] In response, the police issued a revised access decision to the appellant, granting partial access to a 911 transcript, with portions withheld under section 38(b) of

the *Act*. With regard to the DVD, the police advised the appellant that they did not create it and it is therefore not their property. On this basis, the police argue that the DVD falls outside the ambit of the *Act*. The police advised the appellant that they can only release the DVD to the rightful owner and cannot release it without the owner's written consent.

[6] The appellant advised the mediator that she disagreed with the police's decision, asserting that the copy of the DVD is the property of the police and was made public by the Crown Attorney during her trial and, therefore, should be released to her. The appellant also confirmed that she continues to seek access to the withheld portions of the 911 transcript and the other records.

[7] The appellant also advised the mediator that she believes that additional records should exist. In particular, the appellant claimed that there should be records regarding police attendance at an identified address in December 2011 to discuss her January 2013 trial (the trial), as well as records provided by the police to the Crown Attorney for her trial.

[8] Upon review of the appellant's concerns, the police issued another supplementary decision, advising that, pursuant to section 14(5) of the *Act*, they could not confirm nor deny the existence of records regarding police attendance at the identified address in December 2011. The police further advised the appellant that they consulted the officer in charge of the investigation relating to her trial and determined that no records were created specifically for the Crown Attorney for the trial.

[9] The appellant confirmed that she continues to seek access to the withheld portions of the records, with the exception of the information that was severed as not responsive to the request. As such, information marked as not-responsive are not at issue in this appeal. Upon review of the 911 transcript, I find that some portions that were withheld from disclosure contain information that is also not responsive to the appellant's request and I have removed them from the scope of this appeal.

[10] The appellant also raised the possible application of the public interest override in section 16 to the withheld portions of the records. The appellant continues to pursue access to the DVD and believes that records created for the trial should exist.

[11] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the police and an affected party, seeking their representations. Both parties submitted representations.

[12] Prior to submitting representations, the police issued a revised decision regarding the DVD. In their revised decision, the police advised the appellant that they now considered the DVD to be within their custody and control. However, they denied the

appellant access to the DVD, in full, claiming the exemption in section 38(b) to withhold it. The police also claimed the application of the presumption in section 14(3)(b) to the DVD.

[13] I then invited the appellant to make representations in response to a Notice of Inquiry and the police's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appellant also submitted representations. I then sought representations from the police in response to those submitted by the appellant. The police submitted representations.

[14] In the discussion that follows, I find that the withheld portions of the records contain the personal information of the appellant and the affected party. I find that the exemption in section 38(a), read with section 8(1)(l), does not apply to the portion of record 2. I find that the personal privacy exemption in section 38(b) does apply to the information at issue, but find that the absurd result principle applies to some of those portions and should be disclosed to the appellant. I also find that certain portions of the DVD that contain only the appellant's personal information should be disclosed to her. I find that the police properly exercised their discretion in applying section 38(b) to the remaining portions of the record. In addition, I find that the police properly relied on section 14(5) in response to the appellant's request for information relating to a possible police attendance at an identified address. Finally, I find that the police conducted a reasonable search for responsive records.

RECORDS:

[15] The records remaining at issue are as follows:

- Severed portions of Record 1: Field Information Report
- Severed portions of Records 2 and 3: Record of Arrest
- Severed portions of Records 4 and 5: Supplementary Record of Arrest
- Severed portions of Record 8: Civilian Witness List
- Severed portions of Records 9 through 25: Police Officers' Notes
- DVD
- Severed portions of a 911 Transcript (or ICAD Event Details Report)

ISSUES:

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

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

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

D. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

E. Can the police rely on section 14(5) of the *Act* in refusing to confirm or deny the existence of responsive records?

F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the section 38(b), read with section 14(1), exemption and section 14(5)?

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) and, if so, to whom does it relate?

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

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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;

[17] 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.[1]

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

> (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.

[19] 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.[2]

[20] 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.[3]

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[1] Order 11
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[22] In their representations, the police submit that the records contain the names, addresses, telephone numbers, dates of birth and other identifying information about the affected party and other individuals identified in the records. The police also submit that the records contain the information the affected party provided to the police. The police submit further that the undisclosed information is not about an individual in a professional, official or business capacity. Therefore, in the circumstances of this appeal, the police submit that sections 2(2.1) and 2(2.2) of the *Act* do not apply to the information in the records.

[23] In her representations, the appellant submits that the records requested contain personal information relating to her as provided to the police by the affected party and recorded by the police. The appellant submits that the information at issue contains "personal information" as that word is defined in section 2(1)(g) of the *Act* as it includes the views or opinions of another individual about her. The appellant also acknowledges that the records contain the identifying information of the affected party such as name, address and telephone numbers.

[24] Based on my review of the records at issue, I find that they contain "personal information", as that term is defined in section 2(1) of the *Act*.

[25] Specifically, I find that the reports, records of arrest, civilian witness list and officers' notes contain the appellant's personal information, including her date of birth (paragraph (a)), information relating to her educational, medical, psychiatric, psychological, criminal or employment history (paragraph (b)), her address and telephone number (paragraph (d)), the opinions or views of individuals as they relate to her (paragraph (g)) and her name, along with other personal information about her (paragraph (h)). As the field information report, record of arrest, supplementary record of arrest, witness list, police officers' notes and 911 transcript relate to an incident that the appellant was involved in, I find that they can be considered to contain her personal information, within the meaning of that term in section 2(1) of the *Act*.

[26] In addition, I find that the reports, records of arrest, civilian witness list and officers' notes contain the personal information of other identifiable individuals, including the affected party. I find that the personal information includes these individuals' addresses and telephone numbers (paragraph (d)) and their names, along with other personal information about them (paragraph (h)). I also find that the affected party's personal information includes his date of birth (paragraph (a)) and his personal views or opinions (paragraph (e)).

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

[27] With regard to the 911 Transcript (the transcript), I find it contains the appellant's "personal information", including her address (paragraph (a)), the opinions or views of other individuals as they relate to her (paragraph (g)) as well as her name, along with other personal information about her (paragraph (h)). Further, I find that the transcript contains the personal information of the affected party, including his phone number (paragraph (a)), his views or opinions (paragraph (e)) as well as his name, along with other personal information about him (paragraph (h)).

[28] I note that the police severed the event numbers from the records. The police's representations do not address how the event numbers constitutes "personal information" within the meaning of section 2(1). In Order MO-2378, Adjudicator Daphne Loukidelis considered whether Intergraph Computer Aided Dispatch (ICAD) event numbers constitute "personal information":

> With respect to the ICAD event numbers, I find that these do not fit within the definition of "personal information in section 2(1) of the *Act*. Previous orders of this office have established that information is identifiable if there is a *reasonable expectation* that an individual may be identified by the disclosure of the information [see *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891 (ON CA), [2002] O.J. No. 4300 (C.A.) and Order P-230]. This suggests that there must be a means of connecting the information with an identifiable individual. I find that I have not been provided with evidence to substantiate that some means of connecting the event number to a specific individual without reference to the Police database, which is not accessible to the public, exists. In my view, therefore, the event number cannot identify any individual and accordingly, it cannot accurately be described as an "identifying number." More generally, the number is not information about an "identifiable individual".

[29] I adopt this analysis for the purposes of this appeal. The transcript at issue is an ICAD Event Details report and the ICAD event number is one of the event numbers that has been severed from the records. The other event number appears to concern a separate, but related, incident. Based on my review of the records, I agree with Adjudicator Loukidelis and find that the event numbers are about events and not an "identifiable individual" because it is not connected to the appellant, but rather the incidents. Therefore, I find that the event numbers in the records and transcripts are not "personal information" within the meaning of section 2(1) of the *Act* and I will order them disclosed, as no other exemptions have been claimed and no mandatory exemptions apply.

[30] With regard to the DVD copy of the surveillance tape, I am satisfied that it contains images of identifiable individuals, specifically the appellant and affected party.

Consistent with past orders of this office[5], I find that the images contained in the tape fall within the ambit of paragraph (h) of the definition of personal information in section 2(1) of the *Act*. Accordingly, the DVD includes the personal information of the appellant and the affected party.

[31] I note that, in her representations, the appellant states that she is seeking access to only the information provide to and recorded by the police that relates to her, including facts, views and opinions. The appellant states that she does not seek the name, address, telephone number, date of birth or other identifying information about the affected party. Accordingly, these portions of the records are no longer at issue in this appeal. In addition, the name, address and telephone number of another identifiable individual which also appears in the records are no longer at issue in this appeal.

[32] I have reviewed the information that remains at issue and find that they contain the personal information of the appellant and the affected party. The personal information consists of information relating to the appellant's educational, medical, psychiatric, psychological, criminal or employment history (paragraph (b)), affected party's personal opinions or views (paragraph (e)), the views or opinions of the affected party about the appellant (paragraph (h)) and their names, along with other personal information about them.

[33] As I have found that the information at issue contains the personal information of the appellant and/or the affected party, I will consider whether they qualify for exemption under Part II of the *Act*.

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

[34] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. 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.

[35] 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]

[5] Orders HO-005 and PO-2477.
[6] Order M-352.

[36] 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.

[37] In this case, the police relies on section 38(a), in conjunction with section 8(1)(l), to withhold a portion of page 2 of the records. Section 8(1)(l) states:

> 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.

[38] 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]

[39] Where section 8(1)(l) 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]

[40] In their representations, the police submit that the discretionary exemption at section 38(a), in conjunction with section 8(1)(l) exemption, applies to the portion of page 2 of the records regarding a CPIC check. The police do not provide any further representations on this portion of the record and the application of the exemption.

[41] The appellant submits that the disclosure of her personal records could not reasonable be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[42] Based on my review of the portion of the record withheld under section 38(a) in conjunction with section 8(1)(l), I am not satisfied that the police have provided me with sufficiently "detailed and convincing" evidence to establish a reasonable expectation that the harm described in section 8(1)(l) will occur if that portion is disclosed to the appellant. The portion of page 2 that is at issue consists of information relating to a CPIC check. It does not contain information relating to the transmission access codes or other similar types of CPIC database information that the IPC has found to be exempt under section 8(1)(l) of the *Act*.[9] Without further evidence establishing a

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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] See Orders M-933, MO-1004, MO-1293 and P-1214.

reasonable expectation that the harm described in section 8(1)(l) will occur if this portion of the record is disclosed to the appellant, I find that section 8(1)(l) does not apply to the information at issue.

[43] As the information withheld under section 38(a), read with section 8(1)(l), does not contain the personal information of the affected party, I will not consider whether it is exempt under section 38(b). Further, as no other exemptions were claimed to withhold this information from disclosure, I order the police to disclose the portion of page 2 withheld under section 38(a), read with section 8(1)(l), to the appellant.

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

[44] Section 38(b) of the *Act* is the discretionary personal privacy exemption under Part II of the *Act*. Section 38(b) provides:

> A head may refuse to disclose to the individual to whom the information relates personal information
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[45] Because of the wording of section 38(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in the records which also contain the requester's personal information.[10]

[46] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[47] In the circumstances of this appeal, it must be determine whether disclosing the personal information of the appellant and the affected party would constitute an unjustified invasion of the affected party's personal privacy under section 38(b).

[48] If the information at issue 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 personal information against the other individual's right to protection of their privacy.

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[10] Order M-352.

[49] Under section 14, where a record contains the personal information of an individual other than the requester, the institution must refuse to disclose that information unless disclosure of the personal information in the records would result in an unjustified invasion of another individual's personal privacy. Section 14(2) provides some criteria for the police to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is no an unjustified invasion of personal privacy under section 38(b).

[50] Based on my review of the records, I find that they contain some personal information that relates only to the appellant. Specifically, I find that a portion of the DVD depicts images of the appellant alone. Reviewing the DVD, I find that the first minute and forty one seconds contains only the appellant's personal information, as she is the only individual on camera. As this portion of the DVD contains the personal information of only the appellant, I find that it is not exempt under section 38(b) of the *Act* and will order the police to disclose that information to the appellant.

[51] With regard to the records that remain at issue, I find that they contains both the appellant's and the affected party's personal information. Further, I find that although these portions of the records contain the appellant's personal information, her personal information is inextricably intertwined with that of the affected party. Accordingly, I will now consider whether the disclosure of the information that remains at issue would result in an unjustified invasion of the affected party's personal privacy.

Section 14(1)

[52] In their representations, the police submit that none of paragraphs (a) to (e) of section 14(1) apply to the information at issue. The affected party states that he does not consent to the disclosure of any of the personal information that relates to him. However, the appellant submits that section 14(1)(a) applies to the information because the information requested contains her own personal information, including the views and opinions of other individuals about her. Section 14(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[53] On my review of this issue, I note that the affected party stated in his representations that he does not consent to the disclosure of his personal information.

As a result, I find that section 14(1)(a) does not apply to the information remaining at issue, as the affected party whose information is at issue did not consent to the disclosure of the information relating to him.

Section 14(3)

[54] In their representations, the police submit that the presumption listed in section 14(3)(b) of the *Act* applies to the information at issue in this appeal. Section 14(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal information 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.

[55] The police submit that section 14(3)(b) of the *Act* applies in this case because they conducted an investigation based on an individual's claim that the appellant damaged his property. The police state that they compiled personal information about identifiable individuals involved in the incident as part of an investigation into a possible violation of law. As such, the release of such information would constitute an unjustified invasion of personal privacy under section 38(b).

[56] In his representations, the affected party made a number of submissions expressing concern regarding the potential implications of the disclosure of the information at issue. The affected party takes the position that the disclosure of any of the information at issue would result in an unjustified invasion of his personal privacy and that the personal information is, therefore, exempt under section 38(b).

[57] In her representations, the appellant acknowledges that the presumption in section 14(3)(b) applies to the information remaining at issue because criminal proceedings were commenced. However, since the case was dismissed, the appellant submits that the information should be made available to her under section 14(2)(a) of the *Act*.

[58] Based on my review of the information remaining at issue and the representations of the parties, I find that the presumption in section 14(3)(b) applies to the information at issue. This office has previously 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.[11] In the circumstances of this appeal, criminal proceedings were commenced against the appellant and while the case was subsequently dismissed, section 14(3)(b) still applies to the personal information that remains at issue. I have reviewed the transcripts, the reports, officer's notes, DVD and other related records at issue and it is clear from the circumstances that the personal information in them was compiled and is identifiable as part of the police's investigation into a possible violation of law, namely the *Criminal Code of Canada*.

[59] Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, and falls within the presumption in section 14(3)(b). Its disclosure is, therefore, presumed to be an unjustified invasion of another's personal privacy under section 38(b).

Section 14(2)

[60] In situations where the records are claimed to be exempt under section 38(b), section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of privacy under section 38(b).[12]

[61] The police submit that none of the factors listed in section 14(2) apply to the information at issue. The affected party did not make submissions on whether the factors apply. However, the appellant relies on the considerations in section 14(2)(a) and (g) to support her position that the records should be disclosed in full. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny
>
> (g) the personal information is unlikely to be accurate or reliable

[62] The appellant submits that the disclosure of her personal information is desirable for subjecting the activities of the police to public scrutiny. In the confidential portions of her representations, the appellant describes what she believes are the circumstances surrounding the 911 call and the manner in which the police responded to the call. The appellant submits that, in view of the circumstances surrounding the incident that is the subject of her request, it is the public interest that the transcripts of the 911 calls be released to her. Furthermore, the appellant submits that there are a number of

[11] Orders P-242 and MO-2235.
[12] Order P-239.

factually incorrect statements in the officers' notes and that the information should be released to her so that she may confirm that the information is correct.

[63] Previous orders have established that section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[13]

[64] In the circumstances of this appeal, I am not satisfied that the factor in section 14(2)(a) applies to the information at issue and that its disclosure would subject the police to public scrutiny. The portions of the records remaining at issue contain the personal information of the appellant and the affected party, including his personal opinions or views regarding the appellant and the incident. The information at issue does not contain details regarding the manner in which the police responded to the 911 call or the incident that is the subject of the investigation. Therefore, I find that the factor in section 14(2)(a) does not apply to the information at issue.

[65] I also find that none of the other factors favouring disclosure apply to the information at issue.

[66] In the case of section 14(2)(g), this office has found that this factor is intended to weigh against disclosure where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the subject.[14] In her representations, the appellant submits that the information withheld from disclosure should be disclosed to her because it may be inaccurate or unreliable and she should have the opportunity to correct it. Further, the appellant suggests that the police may have collected incorrect information and failed to verify it before reporting it as fact.

[67] In the circumstances of this appeal, it is difficult for me to assess whether the comments that the affected parties made about the appellant are unlikely to be accurate or reliable. The appellant has not provided me with sufficient evidence to determine that the information recorded by the police for the purposes of this investigation is likely to be inaccurate or unreliable. Therefore, I find that the factor in section 14(2)(g) is not relevant in determining whether the disclosure of the affected party's personal information would constitute an unjustified invasion of personal privacy.

Absurd result

[68] In her representations, the appellant submits that it is absurd that the police have decided to withhold the information she requested in view of the minor nature of the incident. The appellant submits that the incident is a civil matter and should not have been taken to the criminal court.

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[13] Order P-1134.
[14] Order PO-2271.

[69] The police submit that, in the circumstances, it would not be absurd to withhold the information that remains at issue in this appeal.

[70] This office has found that where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 14(1) or 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[15] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[16]
- the requester was present when the information was provided to the institution[17]
- the information is clearly within the requester's knowledge[18]

[71] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[19]

[72] Reviewing the records, I find that the absurd result principle applies to some of the information at issue, namely the address of the incident and the fact that the driveway that is the location of the incident that is the subject of the records is a "shared" driveway. Although the address of the incident is the affected party's address, the appellant is clearly aware of the address and location of the incident due to her involvement in the incident. While I appreciate that the records include the personal information of the affected party and other individuals, I find that the information is clearly within the knowledge of the appellant and as such, its disclosure would not result in an unjustified invasion of the affected party and other individuals.[20] Accordingly, I am satisfied that the appellant is entitled to access to some additional information in the records, specifically the description of the location of the incident that is the subject of the records and the address of the incident.

[73] However, I find that the absurd result principle does not apply to the remaining personal information at issue as the requester was not present when the information was provided to the police and it is not clearly within her knowledge. Therefore, I find that the personal information that remains at issue qualifies for exemption under

[15] Orders M-444 and MO-1323.
[16] Orders M-444 and M-451.
[17] Orders M-444 and P-1414.
[18] Orders MO-1196, PO-1679 and MO-1755.
[19] Orders M-757, MO-1323 and MO-1378.
[20] Order MO-1573.

section 38(b) of the *Act*. I will now consider whether the police's exercise of discretion to withhold these portions of the record should be upheld.

D. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[74] The section 38(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

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

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

[76] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[21] This office may not, however, substitute its own discretion for that of the institution.[22]

[77] The police submit that they exercised their discretion in deciding whether to apply the section 38(b) exemption to the withheld information in the records and did so in a proper manner. The police advise that they considered the following factors in their exercise of discretion:

- Section 29 of the *Act* authorizes the indirect collection of personal information for the purpose of law enforcement and section 28 introduces safeguards to the collection of personal information. In the case at issue, the balance between rights of access and the protection of privacy must be given in favour of protecting the privacy of the other involved parties.

- In assessing the value of protecting privacy interests of an individual other than the requester, one needs to consider the nature of the institution. The nature of a law enforcement institution is in a great part to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. Given the unique status of law enforcement institutions within the *Act*, the police state that they generally view the spirit and content of the *Act* as placing a

[21] Order MO-1573.
[22] Section 43(2) of the *Act*.

> greater responsibility to safeguarding the privacy interests of individuals where personal information is being collected.

[78] In her representations, the appellant submits that the IPC should not uphold the police's exercise of discretion. The appellant submits that she should have the right of access to her own personal information to ascertain its accuracy.

[79] In my view, the police exercised their discretion properly in withholding some information in the records under section 38(b). They conducted a review of the records and decided to disclose most of the appellant's own personal information to her, while exercising their discretion to withhold other information that falls within the purview of the personal privacy exemption. I am not persuaded that the police failed to consider relevant factors or that they considered irrelevant factors. Consequently, I uphold the police's exercise of discretion under section 38(b) with respect to the information that I have found to qualify for exemption under that provision.

E. Can the police rely on section 14(5) of the *Act* in refusing to confirm or deny the existence of responsive records?

[80] During mediation, the appellant claimed that there should be records regarding police attendance at an identified residential address in December 2011. In response to this claim, the police issued a revised access decision to the appellant, advising her that it refused to confirm or deny the existence of records responsive to that request under section 14(5) of the *Act*. 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.

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

[82] 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.[23]

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

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[23] Order P-339.

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.

[84] The Ontario Court of Appeal[24] has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), 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 Ministry must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.

[85] The effect of this interpretation is that the institution may not invoke section 14(5) where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.

[86] In their representations, the police state that they conducted a complete and thorough search for records relating to a possible police attendance at an identified address on an unspecified day in December 2011. However, in the confidential portions of their representations, the police submit that the disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy. Further, the police submit that 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

[87] The appellant does not make submissions on whether section 14(5) applies in this case. However, she submits that there should be records regarding police attendance at the identified address in December 2011.

Part 1: Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy

[88] 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.

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[24] 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.

[89] An unjustified invasion of personal privacy can only result from the disclosure of personal information. That term is defined in section 2(1) and is discussed above, under Issue A.

[90] Under section 2(1) of the *Act*, "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 the disclosure of the name would reveal other personal information about the individual. Records of the nature requested, if they exist, would reveal that the police attended the identified residential address, as well as the purpose of the attendance. I find that such records, if they exist would contain the personal information of identified individuals, including the affected party.

[91] With regard to whether the disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy under section 14(1), I am satisfied that the police have provided me with sufficient evidence to demonstrate that it would. The appellant did not make any submissions regarding this issue and has not provided any evidence to demonstrate that the disclosure of the records (if they exist) would not constitute an unjustified invasion of personal privacy or that any of the factors favouring disclosure in section 14(2) apply to their disclosure. Further, upon review of the police's arguments, I find that none of the exceptions to section 14(1) in paragraphs (a) through (e) or section 14(4) apply to the records (if they exist).

[92] Accordingly, I find that the police have satisfied part one of the section 14(5) test.

Part 2: Disclosure of the fact that the record exists (or does not exist)

[93] Under part two of the section 14(5) test, the police must demonstrate that disclosure of the fact that a 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. Applying part one of the section 14(5) test, I found that disclosure of the records, if they exist, would constitute an unjustified invasion of the affected party's personal privacy.

[94] The police submit that the disclosure of the fact that the record exists (or does not exist) would constitute an unjustified invasion of the personal privacy for all individuals involved. The appellant does not make submissions on part two of the test.

[95] In my view, disclosure of the fact that records exist (or do not exist) in response to this portion of the appellant's request would in itself reveal personal information to the appellant about whether or not, when and potentially why the police attended the identified address in December 2011. Reviewing the circumstances of this request and the submissions of the police, I find that none of the exceptions to section 14(1) in

paragraphs (a) through (e) or section 14(4) apply to the disclosure of the fact that the records do or do not exist. Further, I find that none of the factors favouring disclosure in section 14(2) apply in this case. Consequently, I find that disclosure of the fact that responsive records exist (or do 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 and this information would be exempt under section 14(1) of the *Act*.

[96] Accordingly, I find that the police have established both requirements for section 14(5).

F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the section 38(b), read with section 14(1), exemption and section 14(5)?

[97] I will now consider whether there exists a compelling public interest in disclosure of the information that qualifies for exemption under section 38(b). Section 16 of the *Act* 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. [emphasis added]

[98] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[99] 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 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 records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[25]

[100] In their representations, the police submit that the responsive records relate to a personal dispute involving the appellant. The police submit that the information at issue is of no interest to the public and its disclosure would not outweigh the purpose of the personal privacy exemption in section 38(b).

[25] Order P-244.

[101] The appellant submits that it is in the public interest of all taxpayers to know how police and court resources are being spent. In this case, the appellant states that there is a clear public interest as the trial relating to the incident that is the subject of her request was mentioned in a Toronto Star article. The appellant states that the Toronto Star reported that the trial is an example of a minor case that is clogging up the court system and wasting court resources. The appellant submits that the fact that the case was headlined in a national newspaper shows that there is a public interest in the manner in which the police carry out their business. The appellant also submits that there is a public interest in the records relating to the incident that is the subject of her request and the public has the right to know why criminal charges were filed.

Compelling public interest

[102] In considering whether there is a "public interest" in disclosure of the records, the first question is to ask whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[26] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of the 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.[27]

[103] A public interest does not exist where the interests being advanced are essentially private in nature.[28] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[29] A public interest is not automatically established where the requester is a member of the media.[30] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[31]

[104] Any public interest in non-disclosure that may exist also must be considered.[32] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling"[33].

[105] In Order PO-2525, Adjudicator Diane Smith addressed the application of the provincial equivalent to section 16 in regard to the notes of Ontario Provincial Police officers that were involved in an investigation. Adjudicator Smith concluded

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[26] Orders P-984 and PO-2607.
[27] Orders P-984 and PO-2556.
[28] Orders P-12, P-347 and P-1439.
[29] Order MO-1564.
[30] Orders M-773 and M-1074.
[31] Order P-984.
[32] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)
[33] Orders PO-2072-F, PO-2098-R and PO-3197.

that section 23 of *FIPPA* did not apply in the circumstances of that case. In making this finding she stated:

> I find that there is no compelling public interest in the disclosure of the personal information in this case as the appellant is requesting the information for a predominantly personal reason [Order M-319]. The appellant requires the information to pursue his legal remedies against the builder of his home and the government officials who were instrumental in the issuance of a building permit and associated documents connected to the building of his home. The appellant seeks to pursue these remedies as a result of the denial of coverage of his home under the government-sponsored insurance program, the former Ontario New Home Warranty Program (now known as the Tarion Program). In my view, even the appellants' comments about the possible "premature" ending of the investigation relate to a personal interest, rather than a public one, in the particular circumstances of this appeal.

[106] In this appeal, while I acknowledge the appellant's stated desire to secure the non-disclosed information at issue in order to shed light on the operations of government and inform the public about the police's conduct, I concur with the analysis and conclusions of Adjudicator Smith in Order PO-2525. The only information that remains at issue consists of personal information that relates to the affected party and the appellant. However, I have found that the personal information of the appellant is inextricably intertwined with that of the affected party and, as such, cannot be disclosed without resulting in an unjustified invasion of the affected party's personal privacy.

[107] Reviewing the records, I find that the withheld portions do not relate to the manner in which the police collected information in the course of their investigation or to the manner in which they conducted the investigation. While I appreciate that the incident and subsequent trial were reported in the Toronto Star, I do not find that this demonstrates that there exists a compelling public interest in the disclosure of the personal information that remains at issue. Overall, I find that the appellant's interest in the information at issue in this case as being essentially private, as between herself and the affected party.

[108] Accordingly, I find that the public interest override in section 16 of the *Act* has not been established.

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

[109] During mediation, the appellant took the position that additional responsive records should exist. In particular, the appellant claimed that records provided by the police to the Crown Attorney for her trial should exist. In their representations, the

police submit that they conducted a reasonable search for records. The police submit that they confirmed that the Officer-in-Charge of the investigation informed the police that no additional records were prepared for the Crown. Once the investigation was complete and charges were laid, the police state that the investigative records were forwarded to the Crown Attorney and no other records were created.

[110] In her representations, the appellant advised that she seeks access to the Crown or Prosecutor's Brief that the police provided to the Ministry of the Attorney General during preparation for her trial. The appellant states that she contacted the Ministry of the Attorney General and its FOI staff confirmed that the police provided the ministry with a Prosecutor's Brief or Police Investigation File.

[111] In reply, the police submit that there are no additional responsive records. They state that they conducted an investigation which resulted in a laying of a charge and the arrest of the appellant. At the conclusion of the investigation, the police state that the records at issue in this appeal were forwarded to the Crown. The police state that the appellant received the exact document that was sent to the Ministry of the Attorney General, with the exception of the personal information of the affected party.

[112] 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 under section 17 of the *Act*.[34] 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]

[113] 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.[36]

[114] Based on my review of the parties' representations, I am not satisfied that the appellant provided me with sufficient evidence to find that there is reasonable basis for her conclusion that additional responsive records exist. The police have explained that the records at issue were forwarded to the Ministry of the Attorney General for the purposes of the appellant's trial. The police have also provided me with sufficient evidence to show that additional records were not prepared by them for the purposes of the trial. Further, the appellant has not provided me with evidence to show that additional records, beyond those at issue in this appeal, were created for the purposes of the trial. Accordingly, I find that the police have conducted a reasonable search for records.

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[34] Orders P-85, P-221 and PO-1954-I.
[35] Orders P-624 and PO-2559.
[36] Order MO-2243.

ORDER:

1. I order the police to disclose the portions of the DVD that contain the personal information that relates exclusively to the appellant. Specifically, I order the police to disclose the first minute and forty one seconds of the DVD.

2. I order the police to disclose the information that I have found to not be exempt under section 38(b) of the *Act*. I have provided the police with a copy of the records at issue and have highlighted the exempt information in green. To be clear, the police must disclose all of the records to the appellant, but not the information highlighted in green.

3. The police must disclose these portions of the records to the appellant by **December 4, 2014** but not before **November 28, 2014.**

4. I uphold the police's decision to withhold the remaining portions of the records from disclosure.

5. I find that the police properly relied on section 14(5) of the *Act*.

6. I find that the police conducted a reasonable search for responsive records.

Original Signed By: October 29, 2014
Justine Wai
Adjudicator