Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3082

Appeal MA12-483

Ottawa Police Services Board

August 14, 2014

**Summary:** This order relates to an access request submitted by the appellant under the *Act*, seeking police records related to incidents occurring at a local restaurant in 2011. The records identified by the police as responsive were withheld, in part, under sections 38(a) (discretion to refuse requester's personal information), along with sections 8(1)(i) and 8(1)(l) (law enforcement), as well as section 38(b) (unjustified invasion of personal privacy), together with the presumption in section 14(3)(b) (investigation into possible violation of law). The appellant appealed the access decision, raising many issues and concerns, including with the adequacy of the searches conducted. In this order, the adjudicator dismisses the preliminary matters raised by the appellant and partly upholds the access decision of the police. The adjudicator also finds that the public interest override does not apply and that the police conducted a reasonable search.

**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, 4(2), 5(1), 14(1), 14(3)(b), 16, 17, 23(1), 23(2), 29(1)(f), 30(2), 30(3), 37(3), 38(b), 43(1), and 43(3).

**Orders and Investigation Reports Considered:** Orders MO-2910 and MO-2954.

## OVERVIEW:

[1] This order addresses the request submitted by the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ottawa Police Services Board (the police) for records related to two incidents that took place at an identified restaurant in downtown Ottawa in September 2011. After specifying the occurrence numbers for the two incidents, the request stated:

> … It is required to obtain the consents of the police personnel and all 3rd parties to obtain the disclosures of all investigations results of both incidents. I have filled a police Form of Statements during the night of Sept 2nd … I request the disclosure of the cameras' records (pictures & video formats) of both incidents that occurred in [the named restaurant]. Please, state if the accused persons were charged criminally. Please provide information about their criminal proceedings. Please, waive the fees. Please, keep on hold of records.

[2] The police sought clarification from the appellant about the second occurrence number because the file associated with it had a different date and did not contain information about him. The appellant provided information to the police to try to clarify his interest and, after obtaining this information, the police conducted a search for responsive records. No records related to the appellant were identified under the second occurrence number, although records for a second, related, occurrence were located. The police issued a decision granting partial access to the records, withholding information pursuant to section 38(a), together with sections 8(1)(i) and (l) (law enforcement), and section 38(b) (discretion to refuse requester's personal information), in conjunction with the presumption against disclosure in section 14(3)(b) (investigation into a possible violation of law). The police also provided information to the appellant as to where and how he could pick up copies of the records disclosed to him.

[3] The appellant appealed the decision to this office. He advised this office that he had not picked up the disclosed records and expressed dissatisfaction with the police's decision, generally. In particular, he was concerned that in spite of the additional information he provided, the police had:

> concealed many details about the existence of the [restaurant] camera's footages in its response. It has refused to allow the examination of the records before the pick-up … [and] … the coordinator refused to confirm the availability of the discs or tapes in the records.

[4] After opening Appeal MA12-483, this office appointed a mediator to explore the possibility of resolving the issues. During mediation, the appellant confirmed that he was appealing the withholding of information under the exemptions and the adequacy of the police's search for records because he believes that the police should have the

audio and video recordings of the incidents at the restaurant in their possession. The appellant also expressed the view that there is a compelling public interest in the disclosure of the records for the purpose of section 16 of the *Act.*

[5] Achieving a mediated resolution of the appeal proved not to be possible. The appeal was transferred to adjudication, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry outlining the facts and the issues to the police, initially, seeking representations. I received representations from the police, which I provided to the appellant, along with a Notice of Inquiry. In return, I received voluminous representations from the appellant that included multiple exhibits, attachments and a CD containing audio and video files.[1] These representations confirmed that the appellant had finally picked up the records disclosed to him to that point. After reviewing the appellant's submissions, I concluded that the police should be provided an opportunity to submit reply representations, particularly regarding the appellant's position about being permitted to examine original records onsite to address concerns he had about the records disclosed to him. For this purpose, I provided the police with the complete written representations of the appellant.[2] The police submitted brief reply representations.

[6] In the first part of this order, I address certain issues raised by the appellant, explaining why they are not reviewed further. I conclude that the police met their responsibilities under section 23 of the *Act.* I uphold the police's decision to deny access to most of the withheld information under section 14(1) or section 38(b), with the exception of the appellant's personal information and a telephone number on several pages. Given that finding, the possible application of section 38(a), together with section 8, is not reviewed. Finally, I find that the public interest override in section 16 does not apply to override the personal privacy exemption, and I uphold the police's search for responsive records.

## RECORDS:

[7] Remaining at issue, in part or in full, are two General Occurrence (GO) reports, with related police officers' notes and other records, including CPIC inquiries and bail documents (43 pages). The first GO records are numbered pages 1 to 41, while the second GO records are numbered pages 42 to 61.

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[1] I reviewed the CD files, which consisted of recordings the appellant made of various conversations with restaurant staff and police officers, as well as video footage of the restaurant and of the appellant reviewing the records disclosed to him in June 2013 at police headquarters.

[2] I sent a list of the appellant's exhibits to the police, but not the exhibits themselves as I concluded that they were either already in the police's possession or I did not consider that they required a response.

# ISSUES:

Preliminary Issue: limits of jurisdiction

A. Have the police complied with section 23(2) of the *Act*?

B. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

C. Does the personal privacy exemption in section 14(1) or section 38(b) apply to the withheld information?

D. Did the police properly exercise their discretion?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption?

F. Did the police conduct a "reasonable" search for records?

# DISCUSSION:

## Preliminary Issue: limits of jurisdiction

[8] In his representations, the appellant raises many issues that he believes arise from this appeal under the *Act*. He poses questions and expresses opinions about what the police are required to do to address his concerns. He mentions "disclosure of the video recordings to the appellant under the Federal Privacy Act 'PIPEDA'," a federal statute over which I have no jurisdiction.[3] He also alleges certain "offences" on the part of the police that he believes amount to a "breach" of the *Act* and require redress by this office. He alleges that the police committed "perjury" and violated section 48(1)(e) of the *Act* by "assigning fake information in the second police report."[4] I will address these issues in the context of my jurisdiction, below, before proceeding with my review of the other issues before me.

[9] The appellant sought to add section 5(1) (obligation to disclose record revealing a grave hazard) as an issue.[5] Section 5(1) is a mandatory provision which requires the

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[3] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. See also my review of the search issue, below.

[4] Section 48(1)(e) provides that "No person shall wilfully make a false statement to mislead or attempt to mislead the Commissioner in the performance of his or her functions under this *Act*."

[5] Section 5(1) of the *Act* states: "Despite any other provision of this *Act*, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public."

*head* of the institution (i.e., the police) to disclose records in certain circumstances. As I advised the appellant during the inquiry, I do not have the authority to make an order pursuant to section 5(1) of the *Act*, even if I concluded that the circumstances of this appeal warranted. On the facts of this appeal, this provision is not applicable and it will not be reviewed further.[6]

[10] The appellant expresses a great deal of concern about the accuracy of the records and identifies section 30(2) of the *Act* as relevant, particularly relating to concerns about his own information.[7] The appellant also mentions section 29(1)(f) of the *Act*,[8] apparently because he believes it justifies disclosure of the withheld information in this appeal due to concurrent proceedings in which he may be involved. However, as I advised the appellant in the Notice of Inquiry, my authority in conducting inquiries under Part III of the *Act* relates to appeals of the decisions of the head of an institution. Sections 29(1)(f) and 30(2) are found in Part II of the *Act* and do not relate to a decision made by a head of an institution. Part II establishes rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. This part of the *Act* does not create the right of access that the appellant is exercising in this appeal; nor does it provide the basis for him to challenge the accuracy of the information in the records.[9] Respecting the appellant's concerns about accuracy, I also note that there is an exception in section 30(3) that provides that section 30(2) "does not apply to personal information collected for law enforcement purposes."[10] As the personal information gathered in this appeal is derived from a law enforcement context, the exception to section 30(2) provided by section 30(3) would presumably apply.

[11] As suggested, many of the remedies sought by the appellant exceed the limits of my jurisdiction. Certainly, those remedies that would have me addressing alleged breaches of the *Police Services Act,* the "Criminal Investigation Policy," the "Ontario Public Service Act" and the "City of Ottawa Municipal Bylaw Policy" are not ones I can provide. Even the requested remedies that make reference to provisions of the *Act* are not orders I can make. Notably, however, my findings in this appeal do not preclude the appellant from exercising any rights he may have in other forums and under other legislation.[11]

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[6] See Orders 65, M-401, P-956, MO-2205 and MO-2554.

[7] Section 30(2) states: "The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date."

[8] Section 29(1)(f) provides that "An institution shall collect personal information only directly from the individual to whom the information relates unless,… (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or judicial or quasi-judicial tribunal."

[9] See, for example, Orders M-96, PO-2219, PO-2723, PO-2860 and PO-3290.

[10] According to section 2(1) of the *Act*, "law enforcement" means, (a) policing, (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or (c) the conduct of proceedings referred to in clause (b).

[11] See, for example, section 51(1) of the *Act.*

[12] In the rest of this order, therefore, I set out only those submissions of the appellant that are germane to my determination of the issues within the scope of my authority as a delegate of the Commissioner under Part II of the *Act*.

## A. Have the police complied with section 23(2) of the *Act*?

[13] One of the "Sought Orders" contained in the appellant's representations is that he be permitted to examine the "original" records. Sections 23(1) and (2) of the *Act* address copies of the record and access to original records and state:

> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this *Act* shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
>
> (2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

[14] Section 23(2) is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give the requester the opportunity to examine an original record, the head *must* do so, upon request.[12] Some examples of why it might not be reasonably practicable to comply with a request to examine original records onsite are: the record is very large; reproduction of a record may be unduly burdensome on the institution; or if only part of the record is subject to disclosure and it is not feasible to allow inspection without disclosing the protected parts of the record as well.

### *Representations*

[15] When the police initially provided representations in this appeal, the appellant had not yet picked up the records that were disclosed to him. Regarding the appellant's standing request that he be permitted to review the records prior to picking them up, the police stated:

> The original records are kept electronically within a secure, confidential records management system that is restricted to authorized personnel only. 'An office' cannot be provided to the appellant to review the records prior to release. The police station is a secure building where public access is limited to the main lobby.

[12] Orders PO-1679 and MO-1329.

[16] Regarding concerns expressed earlier by the appellant about the authenticity of the records, the police provided details intended to reassure the appellant that the records disclosed to him were, in fact, prepared by the police and are "reliable."

[17] As indicated, the appellant then picked up the records that were disclosed to him, initially. In his representations, he expresses concern that there may be discrepancies in the disclosed materials, and he suggests that I ought to review the records disclosed to him to confirm that they match the originals. He submits that he ought to:

> [have] the option to pick-up the copies of the records under sec. 23(1) and/or [(2)], take them to a private room accessible by exceptional visitors from the public, and then allow the appellant ***to examine the original records and compare the copies of the records with the originals*** [emphasis in original].
>
> The Ottawa Police Service has stated that the institution is a secured facility, so no person is allowed from the public to enter the secured zone. This comment is unreasonable and meant to create a situation of no cooperation … The Ottawa Police facility has many private rooms…

[18] In their reply representations, the police maintain that it would not be reasonably practicable to permit the appellant to review the original records because they are stored electronically with "numerous other records that contain highly sensitive and personal information of other individuals which would be exempt under the *Act.*" The police submit that allowing the appellant access to the original records in the manner dictated by him would result in contravention of one of their policies,[13] which mandates that proper precautions be taken to prohibit the display of information on computer screens to unauthorized persons. The police state that none of the private rooms accessible to the public are equipped with computers that are connected to these highly secure databases. The police maintain that they have met their obligation under section 37(3) of the *Act* to ensure that the personal information disclosed to the appellant is "in a comprehensible form ..." Specifically, the police submit that they have met the requirement in section 23(1) to provide the appellant with "redacted copies of the records in the format in which they exist within the police's Records Management System."

### *Analysis and findings*

[19] Relevant to my findings in this section is that section 23 of the *Act* does not oblige an institution to provide an opportunity to review records produced by an

[13] Identified in the police's representations as Policy No.2.13.

institution in response to a request in whatever manner or form requested.[14] As long as the records disclosed are in a "comprehensible form,"[15] and copies of them have been produced, the institution's obligations have been met. Section 2 of Ontario Regulation 823 (under the *Act*) also sets specific requirements with respect to the security of an institution's records.[16] I note, in particular, that section 2(1) of Ontario Regulation 823 provides that: "A head who provides access to an original record must ensure the security of the record."

[20] As outlined above, under section 23(2) of the *Act*, the police are entitled to decline to accept a request to examine the original record if it would not be reasonably practicable to comply with it. In this appeal, I accept the evidence of the police regarding the security of its records management system, including the reasons provided for not facilitating access to the originals of the records as requested by the appellant. Accordingly, since I accept that it is not reasonably practicable for the police to permit the appellant to review the originals of the records in this context, I find that the police have met their obligations under the *Act* with respect to the appellant's access to the records disclosed to him.

## B. Do the records contain "personal information" according to the definition in section 2(1) of the *Act*?

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

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

[14] Order MO-2910.
[15] Section 37(3) of the *Act.*
[16] See also Orders PO-1679 and MO-1329.

> (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;

[22] 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.

[23] Sections 2(2.1) and (2.2) of the *Act* provide exceptions to the definition of personal information for information related to one's business or profession. These parts of section 2 of the *Act* 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 (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[24] 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.[17] Even if information relates to an individual in a professional, official or business capacity, it may

[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

still qualify as personal information if the information reveals something of a personal nature about the individual.[18]

### *Representations*

[25] The police submit that the records contain the personal information of three individuals, two of whom "were involved in their personal capacity and one other individual [who] was involved in a business capacity but [whose] … personal information" is contained in the records. The police do not elaborate further on the specific nature of the personal (or other) information in the records.

[26] The appellant observes that the police did not specify who the other individuals in the records were, but states that he "is expecting they are the recruited criminals and the management personnel in the restaurant." He notes that his own personal information appears in these records and submits that there would also be the personal information of police officers and other third parties "that could appear in the surveillance cameras' records."

### *Findings*

[27] Based on my review of the records, I find that pages 1-2, 4-5, 7, 8, 9, 10-12, 30, 37-39, 41, 42-43, 44-48 and 60-61 contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (a) (age, sex), (b) (education or other history), (d) (address or phone number), (e) (his opinions or views), (g) (views or opinions about him) and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*.

[28] I also find that there is personal information about other identifiable individuals in the records that falls under the following paragraphs of the definition: (a) (age, sex, marital or family status), (b) (employment or other history), (c) (identifying number or other assigned particular), (d) (address or phone number), (e) (their opinions or views), (g) (views or opinions about them), and (h) (names, with other personal information relating to these individuals).

[29] However, some of the records contain *only* the personal information of other identifiable individuals, not the appellant. These records are found on pages 14, 15-16, 17, 18-20, 21, 22-23, 24, 25-26, 27-28, 31-32, and 34(a)-36.

[30] Additionally, on my review of the records, I note that the police withheld contact information about the restaurant, specifically the restaurant's telephone number on pages 43, 47, and 60. I find that this contact information fits within section 2(2.1) which is an exception to the personal information definition. Given my finding that this

[18] Orders P-1409, R-980015, PO-2225 and MO-2344.

particular information is not personal information, it cannot be withheld under section 14(1) or 38(b). Since the police apparently did not claim that the law enforcement exemption applies to it, it must be disclosed.

[31] Therefore, I find that some of the records contain the mixed personal information of the appellant and other identifiable individuals, while others contain only the personal information of other individuals. Next, I will review the possible application of the personal privacy exemption to the records under section 14(1) or section 38(b), as relevant.

## C. Does the personal privacy exemption in section 14(1) or section 38(b) apply to the withheld information?

[32] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester. This decision 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.

[33] In contrast, under section 14(1), where a record contains personal information of another individual but not the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[34] Whether the relevant exemption is section 14(1) or section 38(b), sections 14(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold is met. The exceptions in sections 14(1)(a) to (e) are relatively straightforward. None of them apply in this appeal. The exception in section 14(1)(f) (where "disclosure does not constitute an unjustified invasion of personal privacy"), is more complex and requires a consideration of additional parts of section 14.

[35] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[36] For records claimed to be exempt under section 14(1), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.[19] The information at issue in this appeal does not fit into any of the exceptions in section 14(4).

[37] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.[20]

[38] For records claimed to be exempt under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[21] This represents a shift away from the previous approach under both sections 38(b) and 14, whereby a finding that a section 14(3) presumption applied could not be rebutted by any combination of factors under section 14(2).[22]

### *Representations*

[39] According to the police, the records contain the mixed personal information of individuals who made the statements and the appellant. The police submit that in deciding to deny access to the information, they considered the fact that no consent was obtained from the other individuals and their privacy rights should be protected accordingly. The police rely on section 14(3)(b) but provide no further details in support of that claim.

[40] The appellant's submissions include reference to each of the paragraphs of section 14(1), except section 14(1)(e). He reviews each part of section 14(1), seeking to relate the sought-after disclosure in this appeal with each of the exceptions listed. Respecting section 14(1)(d), which permits disclosure of personal information by a head if the disclosure is expressly authorized by a statute of Canada or Ontario, the appellant submits that disclosure is justified by section 41(1.2) of the *Police Services Act*[23] and by

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[19] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[20] Order P-239.
[21] Order MO-2954.
[22] As explained by Adjudicator Laurel Cropley in Order MO-2954 (at page 24): "… [I]t is apparent that the mandatory and prohibitive nature of section 14(1) is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the requester's own information. On the other hand, section 38(b) is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information."
[23] R.S.O. 1990, CHAPTER P.15. Section 41(1.2) of the *Police Services Act* deals with a police chief's power to disclose personal information for eight identified purposes.

section 7 of the *Canadian Charter of Rights and Freedoms*.[24] The appellant submits that if I permit him "to blur the personal information of the third parties using a marker to hide them on the images or objects to hide them in the video recordings and other records," there would not be an unjustified invasion of personal privacy.

[41] The appellant submits that the presumptions against disclosure in sections 14(3)(a) and (c) to (h) are "irrelevant and not causing unjustified invasion of privacy." Regarding section 14(3)(b), the appellant acknowledges that the police compiled the records "for a possible violation of law." However, he expresses concern that the police "committed omissions, fraud and misfeasance by not taking the charged person through criminal proceedings to the court" or collecting the video recordings of the theft. He characterizes these actions or omissions as intentional negligence and states he has instituted "corrective" civil proceedings.[25]

[42] Regarding the factor favouring disclosure in section 14(2)(a), the appellant maintains that disclosure is important to assist him in "prosecuting the crime" because has "not [been] served honestly by the police" because they failed to consider that "the crimes were the accumulation of illegal persecution led by extremists in Canada National Security" against him. The appellant suggests that this same lack of consideration of the impact of the "extremists' illegal activities" on his health and security also makes the factor favouring disclosure in section 14(2)(b) relevant.

[43] The appellant submits that section 14(2)(d) is relevant because the information at issue is "critically important… in claiming damages against the criminals and the extremists behind the criminals" related to the theft of his "documents, identifications and assets."

[44] The appellant also offers his views regarding the relevance and applicability of the factors weighing in favour of non-disclosure of the information in sections 14(2)(e) to (i).

[45] Finally, regarding the absurd result principle, the appellant conveys his opinions about the "unreasonable" or "absurd" handling (by the police) of the matters that are the subject of his request.

### *Analysis and findings*

[46] In reviewing the possible application of exemptions, the analysis is conducted on a record-by-record basis.[26] Previously in this order, I concluded that certain records

[24] Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[25] The appellant provides case numbers for an Ontario Superior Court of Justice proceeding, as well as one for the Court of Appeal.
[26] See Orders MO-1891, MO-2477 and PO-3259.

contain *only* the personal information of other identifiable individuals, not the appellant. Therefore, the relevant personal privacy exemption for the records at pages 14, 15-16, 17, 18-20, 21, 22-23, 24, 25-26, 27-28, 31-32, and 34(a)-36 is the mandatory one in section 14(1). Since the records at pages 1-2, 4-5, 7, 8, 9, 10-12, 30, 37-39, 41, 42-43, 44-48 and 60-61 contain the personal information of the appellant and other identifiable individuals, the relevant personal privacy exemption for them is the discretionary one in section 38(b).

[47] 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. As stated above, this approach involves a weighing of the requester's right of access to his or her own personal information against the other individuals' right to protection of their privacy.

[48] Importantly, I note that there are several pages in the group of "section 38(b) records" listed above that contain undisclosed personal information about the appellant. I find that disclosure of the appellant's own personal information to him could not possibly result in an unjustified invasion of *another* individual's personal privacy, and I will order that it be disclosed. The specifics of my finding are detailed in the disclosure provision of this order, below.

[49] In the remainder of this analysis, therefore, I must consider whether disclosure of the personal information of other identifiable individuals would result in an unjustified invasion of their personal privacy.

[50] The brief representations provided by the police did not address the issue in a meaningful way. The police submit that witnesses would be "… hesitant to assist police in the future as there would be no guarantee that information would not be released," but do not refer to the other individuals whose personal information was withheld that were not witnesses in these incidents. However, the records do speak for themselves, and I have considered their content in my analysis of the exemption claim.

[51] The appellant's representations were considerably more detailed, including review and commentary on nearly all of the parts of section 14 of the *Act*. Before I set out my findings, I note that the exceptions in section 14(1), if they apply, permit the *head* of an institution to release information. The appellant argues that section 14(1)(d) operates along with his "security rights" in section 7 of the *Charter* in such a way that he, as "a Canadian Citizen should not be deprived from such rights of access" to this information. I find that section 14(1)(d) does not apply on the facts of this appeal. In any event, to pursue such an argument, a Notice of Constitutional Question pursuant to

section 12 of this office's *Code of Procedure* and section 109 of the *Courts of Justice Act*[27] would be required, and no such notice was served.

[52] In this appeal, the only relevant exception is section 14(1)(f), which permits disclosure of another individual's personal information if, as stated above, "the disclosure does not constitute an unjustified invasion of personal privacy." The police state, and the appellant apparently accepts, that the presumption in section 14(3)(b) applies. I agree. Section 14(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[53] The presumption at section 14(3)(b) can apply to a variety of investigations.[28] 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.[29]

[54] I find that the personal information at issue in these records was compiled by the police and is identifiable as part of investigations intended to determine if various offences under the *Criminal Code* had been committed. On this basis, I find that the presumption at section 14(3)(b) applies to the records.

[55] My finding that section 14(3)(b) applies is sufficient for me to conclude that disclosure of pages 14, 15-16, 17, 18-20, 21, 22-23, 24, 25-26, 27-28, 31-32, and 34(a)-36 would result in a presumed unjustified invasion of the personal privacy of the individuals whose personal information appears in the records. Accordingly, I find that those pages are exempt under section 14(1), together with section 14(3)(b).

[56] Regarding the records for which the discretionary exemption in 38(b) is relevant (pages 1-2, 4-5, 7, 8, 9, 10-12, 30, 37-39, 41, 42-43, 44-48 and 60-61), the finding that section 14(3)(b) applies does not end the analysis. I must determine what weight to afford this presumption, recognizing that the types of information set out in section 14(3) are generally regarded as particularly sensitive.[30] The appellant's stated reasons for obtaining access include seeking to continue the investigation into the theft of his

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[27] R.S.O. 1990, c. C.43.
[28] Order MO-2147.
[29] Orders P-242 and MO-2235.
[30] Order MO-2954.

wallet personally, exposing the "extremists in Canada National Security," and pursuing other remedies against the police in the various civil actions in which he claims to be engaged, or intends to initiate. With regard for all of the evidence before me, including the particular content of the records themselves, I conclude that the personal information about other identifiable individuals in these records is not reasonably connected to those interests. Accordingly, I find that the presumption in section 14(3)(b) weighs heavily in favour of privacy protection for this information.

[57] As suggested above, apart from noting section 14(3)(b) in passing, the submissions of the police did not address section 14, including the factors favouring privacy protection in sections 14(2)(e)-(i). Additionally, I find that the appellant's representations do not support the possible application of any of the factors in sections 14(2)(a)-(d) that might weigh in favour of his access to the personal information of other individuals appearing in these records. With specific reference to section 14(2)(d), which received more attention in the appellant's submissions, I conclude that the appellant's arguments do not satisfy the four-part test to establish the relevance of the factor,[31] and I find that the factor does not apply. In sum, I find that there are no factors weighing in favour of the disclosure of the personal information of other individuals that is contained in these records.

[58] In this context, I have considered the appellant's access rights against the privacy rights of other individuals. I find that the disclosure of the withheld portions of pages 1-2, 4-5, 7, 8, 9, 10-12, 30, 37-39, 41, 42-43, 44-48 and 60-61, which are subject to the presumption in section 14(3)(b), would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information qualifies for exemption under section 38(b).

[59] Under the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[32] In the circumstances of this appeal, there is insufficient evidence to demonstrate that any of the withheld personal information of other individuals in the records is within the appellant's knowledge. Accordingly, I find that refusing to disclose the personal information of other individuals to the appellant would not lead to an absurd result.

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[31] To establish section 14(2)(d), the appellant was required to provide sufficient evidence to satisfy me that: 1. an imperiled legal right exists; 2. the right in question is related to an existing proceeding; 3. the personal information being sought is significant to a determination of the appellant's rights in other proceedings; *and* 4. access to the other individuals' personal information is necessary to prepare for any such proceeding or to ensure an impartial hearing. See Orders P-312, PO-1931, MO-1664 and MO-2415.
[32] Orders M-444 and MO-1323.

[60] Subject to my review of the police's exercise of discretion, I find that the discretionary exemption in section 38(b) applies to the remaining personal information of other individuals in the records. It is not necessary to review that issue with respect to the personal information I found exempt under section 14(1), because it is a mandatory exemption.

[61] The police also claimed that certain information in the records on pages 15-16, 17, 18-20, 21, 22-23, 24 and 25-26, as well as page 35, were exempt under section 8(1)(i) or section 8(1)(l). However, given my finding above that those pages are exempt under section 14(1), together with section 14(3)(b), it is unnecessary to review the possible application of the law enforcement exemptions to those records.

## D. Did the police properly exercise their discretion?

[62] As I have upheld the decision of the police to deny access to most of the information at issue under section 38(b), I must now consider their exercise of discretion in doing so. As section 38(b) is a discretionary exemption, the police had the discretion to disclose the withheld information, even if it qualified for exemption. On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the police erred in exercising their discretion where, for example, I find that they did so in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to take into account relevant considerations. In such a case, I may send the matter back to the police for an exercise of discretion based on proper considerations. However, section 43(2) of the *Act* states that I may not substitute my own discretion for that of the police.[33]

### *Representations*

[63] Under their representations for section 38(b), the police explain their exercise of discretion as follows:

> Information collected by the police from individuals must be safe guarded in order to protect processes. If the information collected by the police is released without consent, of the individuals who supplied it, then these same individuals may be hesitant to assist police in the future as there would be no guarantee that information would not be released.
>
> After fully reviewing the information we determined that the privacy rights of the individuals who supplied the information overrides the appellant's right to the information.

[33] Order MO-1573.

[64] The police acknowledge that they exercised their discretion to withhold some of the appellant's personal information, but reason that it was necessary to protect the law enforcement investigation process.

[65] In the list of "orders sought" by the appellant, he submits that the police ought to be required to re-exercise their discretion and disclose more information to him. He asserts that the police exercised their discretion "in bad faith for an improper purpose and illegal objective," explaining his view that the police "falsified" the second occurrence report. The appellant submits that the police did not consider relevant factors in their exercise of discretion and suggests that their concerns about security are exaggerated.

***Findings***

[66] My review of the exercise of discretion by the police relates only to the information in the records for which I have upheld the application of section 38(b), together with section 14(3)(b).

[67] I have considered the parties' submissions. I have also considered the competing interests in this appeal. In this respect, I am satisfied that the police understood their obligation to balance the appellant's interests in seeking access to the withheld information against protecting the privacy interests of other individuals whose information appears in those records. I note that additional information that I have found not to be exempt under section 38(b) will be disclosed pursuant to this order. Overall, I am satisfied that the police exercised their discretion properly, and I will uphold it.

## E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption?

[68] The appellant argued that there is a public interest in the disclosure of the withheld information. In light of the suggestion that the public interest override in section 16 of the *Act* applies, I included the issue in my inquiry. However, I advised the parties at that time that my preliminary view was that section 16 does not apply in the circumstances of this appeal because the appellant's interest in the records appears to be a purely private, personal one.

[69] 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.

[70] Therefore, section 16 could be applied to override the personal privacy exemption in section 14(1) or section 38(b) if the following two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[71] 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 a 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, this office 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.[34]

[72] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[35] A public interest does not exist where the interests being advanced are essentially private in nature.[36] However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[37]

***Representations***

[73] The appellant submits that the personal privacy exemption can, and should, be overridden by section 16 because the police are concealing critical information, including information that would confirm that he is being subjected to "severe" threats and "illegal persecution." The appellant suggests that there is a public interest in disclosure of the records to bring to light the falsification of information in the second occurrence report (by the police), as well as the recruitment of people to commit criminal acts against him. He argues that disclosure will expose the wrongdoing and thereby enhance the operation of the police. The appellant also refers to using the disclosed information in court to establish the violation of law by the police, "recruited criminals," and the "suspected extremists in Canada National Security."

[74] I did not ask the police to provide representations on this issue, and they did not provide any.

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[34] Order P-244.
[35] Orders P-984 and PO-2607.
[36] Orders P-12, P-347 and P-1439.
[37] Order MO-1564.

***Analysis and findings***

[75] In order for me to find that section 16 of the *Act* applies, I must be satisfied that there is a compelling public interest in the disclosure of the information that clearly outweighs the purpose of the personal privacy exemption.

[76] There is a legitimate public interest in ensuring the accountability of police as they carry out their law enforcement mandate. In the present appeal, however, the evidence provided by the appellant does not establish that a compelling public interest exists. Specifically, the appellant has not provided sufficient evidence to support the argument that his interest transcends the personal realm. Although a private interest in disclosure sometimes raises issues of more general application, thereby establishing a public interest, this is not such a case. Moreover, the appellant's assertions about police and "Canada National Security" wrongdoing cannot be substantiated. In any event, I cannot see any connection between the exempt information and the alleged public interest purpose in the accountability of the police or the Canadian security establishment. The fundamental purpose of the exemption in sections 14(1) and 38(b) is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.[38] In this appeal, no justified infringement has been shown.

[77] In the circumstances, I find that there is no compelling public interest in the disclosure of the exempt information that outweighs the purpose of the personal privacy exemption. Accordingly, I find that the "public interest override" in section 16 does not apply in the circumstances of this appeal.

## F. Did the police conduct a "reasonable" search for records?

[78] The appellant expresses the view that the police have not conducted a "reasonable search" because audio and/or video-tapes related to the incident at the specified restaurant have not been identified and disclosed to him.

[79] As outlined in many past orders of this office, 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 of the *Act.*[39] 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.[40] To be responsive, a record must be "reasonably related" to the request.[41]

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[38] Order MO-2923.
[39] Orders P-85, P-221 and PO-1954-I.
[40] Orders M-909, PO-2469 and PO-2592.
[41] Order PO-2554.

[80] The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that they made a reasonable effort to identify and locate responsive records within their custody or control.[42] Additionally, 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.[43] I may order further searches if I am not satisfied that a reasonable search was conducted.

***Representations***

[81] The police addressed this issue in a brief manner, mainly relying on the assertion that the videos the appellant seeks are in the "care and control of the establishment in which the incident occurred … [not] the Ottawa Police Service." The police submit that the investigating officer tried to obtain a copy of the video from the restaurant, but after "numerous telephone calls and emails to the establishment went unanswered the file was closed…" The police submit that the narrative information on pages 47 and 48 of the responsive records confirms the (unsuccessful) efforts of the officer to obtain the videos.

[82] The appellant's submissions on the search issue are not gathered under one heading, but rather appear throughout his representations. The appellant explains that he seeks access to the videos because the police reports do "not describe the events prior to the initiation of the incident" or are inaccurate, both of which have allowed "the assaults and the criminal harassments [against him] to pass without punishment."

[83] Regarding the specific videos sought, the appellant states:

> In the Appeal MA12-483 filed on October 17, 2012, the FOI office has mentioned that the file [for the second occurrence number] was empty as of August 15th 2012, it did not notice the file [third identified occurrence number], and the appellant provided a description of the incident for a second time[44] in response to the request of the FOI office.

[84] According to the appellant, proper investigation of these incidents requires the police to pick up the videos from the restaurant. The appellant does not accept the police's indication that restaurant management did not respond to messages left with them in an effort to obtain the videos. He refers to management being available "24/7 in the restaurant during day and night shifts." The appellant believes that the police

[42] Orders P-624, PO-2559 and MO-2185.
[43] Order MO-2246.
[44] The appellant describes a "2nd file of harassment" or incident at the same restaurant in which another individual is alleged to have "insulted" the appellant, as well as throwing objects and foodstuffs at him.

closed the file prematurely "before the video recordings were collected, because the police can visit the restaurant personally" to pick them up.

[85] The appellant refers to seeking the disclosure of the video recordings to him "under the Federal Privacy Act 'PIPEDA'" and notes that his "complaint with the Federal Privacy Commissioner has been rejected … on the grounds that … [the] restaurant wanted monies of about $400 to severe [sic] the video recordings…." The appellant mentions that the federal Privacy Commissioner's Office agreed to ask the management of the restaurant "to keep on hold or retain the records for additional two years and for courts' purpose."

### *Analysis and findings*

[86] The appellant argues that the police did not conduct a reasonable search because he believes that their search should have culminated in the police obtaining the restaurant's surveillance footage.[45]

[87] To begin, I am satisfied that the police embarked on their searches with specific knowledge of the records the appellant was seeking, based on the information provided in his request, including the occurrence numbers. When the police discovered that the second occurrence number apparently linked with a file that was unrelated to the appellant, the police sought confirmation from him. In this respect, I am satisfied that the police met their responsibility to clarify the request under section 17(2) of the *Act.*[46]

[88] As suggested above, part of my determination of the issue of "reasonable search" depends on the appellant being able to provide a reasonable basis for concluding that additional responsive records exist that have not yet been identified by the police.[47] In this appeal, however, the existence of the restaurant's surveillance footage does not appear to be in dispute. The determination therefore rests on whether there is enough evidence to satisfy me that the police made a reasonable effort to locate all of the responsive records within their custody or control.[48] On the totality of the information available to me, I conclude that the police have met their obligations in this regard.

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[45] The surveillance footage, regardless of its format, fits within the definition of "record" in section 2(1) of the *Act.*

[46] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17(2) states: (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[47] Order MO-2246.

[48] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody *or* under the control of an institution; it need not be both. See Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[89] Clearly, the restaurant's surveillance footage was not in the custody of the police, but rather in the restaurant's possession. What could reasonably be expected of the police in response to the appellant's request for it under the *Act*? Were the police in a position to assert control over the video, such that they ought to have obtained it for the appellant, subject to any necessary severance of exempt information?

[90] The video footage was created by the restaurant, as part of its regular surveillance program. It was not created by the police or as a result of any legal duty on the part of the police. The restaurant is not an institution under the *Act* and is, instead, a private commercial enterprise operating throughout Canada. As the appellant has apparently recognized, the restaurant is subject to PIPEDA. He did, in fact, try to obtain the video footage under PIPEDA, albeit unsuccessfully.

[91] In my view, given the circumstances of the creation of the video footage, the police made reasonable efforts to "search" for the record by requesting that restaurant management provide it, and by following up on that request when a response was not forthcoming. However, I conclude that the obligations of the police to conduct a "reasonable" search for the purpose of section 17 of the *Act* ended there.

[92] In particular, I accept the evidence of the police that the footage was not necessary to further their investigation into the theft of the appellant's wallet. This being the case, I am satisfied that the police were not in a position to compel the restaurant to provide the video footage when the restaurant did not voluntarily provide it upon request. In this particular context, I am satisfied that the police had no express or implied right to possess or control the video record.[49]

[93] Accordingly, based on the information provided to me, I find that the police's search for records responsive to the appellant's request was reasonable for the purposes of section 17 of the *Act*, and I dismiss this aspect of the appeal.

## ORDER:

1. I order the police to disclose the additional non-exempt information from pages 5, 7, 9, 11, 41, 43 44, 47 and 60, as indicated on the copies of those pages provided to the police with this order by **September 19, 2014** but not before **September 15, 2014**. For clarity, the exempt information is highlighted.

2. I uphold the decision of the police to deny access to the remaining withheld responsive portions of the records.

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[49] See *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; and *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

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.

4. I uphold the police's search for records.

Original Signed by: August 14, 2014
Daphne Loukidelis
Adjudicator