Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3172

Appeal MA12-538

London Police Services Board

March 26, 2015

Summary: The appellant, a member of the media, sought records from the police regarding the involvement of any member of the RCMP in a prostitution sting operation conducted by the police in 2006. The police refused to confirm or deny the existence of a record pursuant to section 14(5) (personal privacy). The appellant appealed this decision claiming that the public interest override in section 16 applied in the circumstances. He also appealed the police's decision not to grant him a fee waiver. In this order, the adjudicator upholds the decision of the police to refuse to confirm or deny the existence of a record, and finds that the public interest override does not apply. The adjudicator orders the police to waive the fee in the circumstances.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 14(2)(f), 14(3)(b), 14(5), 16, 45(4); Regulation 823 section 8.

Orders Considered: MO-2978

Cases Considered: *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.

OVERVIEW:

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

> All records (electronic or in notebooks) with respect to all London Police "John" stings that took place in London between 2005 and/or 2006 that relate to any RCMP member as being charged, questioned, pulled over, warned, arrested or otherwise involved in the non-enforcement side of the project.

[2] The appellant subsequently narrowed the time period of his request to January 1, 2006 to October 31, 2006.

[3] The police issued a fee estimate in the amount of $993, and advised the appellant that he could request a fee waiver. Although he objected to the fee, the appellant paid the $496.50 deposit requested by the police and submitted a request for a fee waiver, setting out a number of reasons why he believed the fee ought to be waived.

[4] The police refused to grant the fee waiver claiming that "the request did not meet the requirements stated in section 45(4) of the *Act.*" The police subsequently issued their decision regarding access and final fee.

[5] With respect to access, the police stated that they cannot confirm or deny the existence of the record, in accordance with sections 14(5) (personal privacy) and 8(3) (law enforcement) of the *Act.*

[6] With respect to the fee, the police stated that the final fee is $998, based on 1986 minutes of search time at $.50 per minute, and that a balance of $496.50 was owed.

[7] The appellant appealed the fee, the denial of fee waiver, and the refusal to confirm or deny the existence of records.

[8] During mediation, the police confirmed their position regarding the fee, the fee waiver and access. The police clarified that they are relying only on section 14(5) with respect to their decision to refuse to confirm or deny the existence of records, and are no longer relying on section 8(3).

[9] Mediation did not resolve this appeal, and it was forwarded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The police provided initial representations which were shared, in part, with the

appellant, who also responded with representations. The police then provided reply representations, and the appellant provided further representations by way of surreply. This appeal was subsequently transferred to me to complete the adjudication process.

[10] In this order, I uphold the decision of the police to refuse to confirm or deny the existence of a record on the basis of section 14(5), and find that the public interest override does not apply. However, I order the police to waive the fee in the circumstances of this appeal, and to return to the appellant the deposit paid by him.

ISSUES:

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

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

C: Should the fee be waived?

DISCUSSION:

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

[11] 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.

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

[13] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[1]

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

[1] 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.

[15] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[2]

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

Definition of personal information

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

[17] The term "personal information" is defined in section 2(1) as follows:

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

[2] Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[18] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[3]

[19] Sections 2(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 (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.

[20] 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

[3] Order 11.

professional, official or business capacity will not be considered to be "about" the individual.[4]

[21] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

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

[23] The police submit that if a record or records exist, it would contain the personal information of identifiable individuals. They state:

> … should records exist, they would contain information such as addresses, telephone numbers, dates of birth, gender, places of employment, and statements of involved individuals. The appellant made his access request about a specific type of record, namely "all records (electronic or in notebooks) with respect to all London Police 'John' stings that took place in London [during 2006] that relate to any RCMP member as being charged, questioned, pulled over, warned, arrested or otherwise involved in the non-enforcement side of the project." It is clear that the records requested, should they exist, would contain the personal information of identifiable individuals.

[24] The appellant takes the position that his request is not for records containing "personal information" as defined in section 2(1). He refers to section 2(2.1) of the *Act* which confirms that 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." He then states:

> The records I have requested relate specifically to information that deals with RCMP members, as relevant by their profession. Furthermore, my request did not ask for individual names or pertain to any particular individuals. It was a general request.

Finding

[25] The appellant's request is clear. It is for information that relates to "any RCMP member as being charged, questioned, pulled over, warned, arrested or otherwise

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

involved in the non-enforcement side of the project." The project is connected to "John stings" that were conducted by the police from January 1, 2006 to October 31, 2006. In my view, the request cannot be interpreted as referring to the actions of RCMP members in their "professional capacity." It is clear that the appellant is seeking information about any RCMP members being caught or in some way being involved in the sting operation in their personal, rather than in any professional, capacity.

[26] As a result, I find that if a record or records exist, they would contain the personal information of identifiable individuals.

[27] The appellant also suggests that certain information can be redacted from the records, and the remaining information disclosed. He states that he is "willing to accept the redaction of addresses, telephone numbers and dates of birth." He also states that he may be willing to have individual names redacted.

[28] In my discussion below, I uphold the decision of the police to refuse to confirm or deny the existence of a record or records responsive to the request. In these circumstances, there is no purpose served in discussing the possible severance of records, the existence of which cannot be confirmed or denied.

Unjustified invasion of personal privacy

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

[30] Section 14(4) refers to specific types of information the disclosure of which would not constitute an unjustified invasion of privacy. In my view, the type of information that the appellant is seeking, if it were contained in a record or records, would not fall within the section 14(4) exceptions.

[31] *Section 14(3): disclosure presumed to be an unjustified invasion of privacy*

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

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

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

> 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.

[34] The police state:

> In this case, the type of records sought, if they exist, would deal with information regarding a police project into prostitution activities in the City of London. Such projects are conducted for the purpose of investigating possible violations of the law. Even if no charges resulted, the presumption in section 14(3)(b) can still apply, as set out in Order MO-2785:
>
> > As set out above, the presumption in section 14(3)(b) can apply to records even if no criminal proceedings were commenced against any individuals. The presumption only requires that there be an investigation into a possible violation of law.

[35] The appellant refers to the specific language of section 14(3)(b), particularly the portion which states that the presumption applies "except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." The appellant argues that issues have been raised in the past regarding the internal discipline of RCMP members, and refers to public statements which confirm that unacceptable behavior by RCMP members must be dealt with appropriately and in a "serious manner." The appellant then states that "Being able to review any existing records in relation to our request would shed light on how the RCMP is dealing [with] improper behaviour." He also states that disclosure of any records "could possibly reveal violations of RCMP members that require further investigation or prosecution yet to be carried out and that would otherwise not be pursued." Lastly, he states that any existing responsive records would allow an examination into whether the RCMP is taking the proper steps to "protect Canadians".

Findings

[36] Previous orders of this office have found that even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of

law.[8] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[9]

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

Section 14(2): factors for and against disclosure

[38] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[10]

[39] The police submit that the factors in section 14(2)(e) and (f) are relevant in the circumstances of this appeal. 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,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm; and
>
> (f) the personal information is highly sensitive.

[40] In order for section 14(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[41] To be considered highly sensitive under 14(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.

[42] In support of their position that these factors apply, the police state:

> In this case, the appellant is seeking disclosure of personal information regarding any RCMP member who was charged, questioned, pulled over, warned, arrested or otherwise involved in the non-enforcement side of a "John" sting project. It is obvious on its face that this would be highly

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

> sensitive and, if made public, would likely expose a member of the RCMP to ridicule, as well as personal and professional damage.

[43] The appellant argues that the factor in section 14(2)(e) does not apply on the basis that, if an RCMP member is contravening the law, that individual should be "subject to reprimand." As I understand the appellant's position, he seems to suggest that disclosure in these instances would not be "unfair."

[44] I agree with the police that the disclosure of personal information pertaining to criminal activities in general and, more specifically, involvement in a "John sting" would likely cause significant personal distress. As a result, I am satisfied that the factor in section 14(2)(f) is highly relevant with respect to the type of information requested, if it exists.

[45] Whether the factor in section 14(2)(e) would apply to responsive records, if they exist, is not as clear. However, because I have found that the section 14(3)(b) presumption applies, and because of my finding below that the existence of records cannot be confirmed or denied, it is not necessary for me to make a finding on the possible application of section 14(2)(e) in this appeal.

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

[46] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[47] The police state:

> The issue under this part is whether disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy. …

[48] The police also provide confidential representations in support of their position.

[49] The appellant states in his representations that he has already been told that records do exist. In addition, the appellant states that section 14(5) is to be applied only "in rare cases." He then provides arguments in support of his position that section 14(5) should not apply. However, I note that many of these arguments focus on the appellant's view that there is a public interest in information of the nature requested. I address this argument under the "public interest" discussion, below.

[50] In their reply representations, the police directly address and dispute the appellant's position that they have advised the appellant that records exist. They state:

> [The police do] not dispute they confirmed records exist, however, there appears to have been a communication breakdown as to what records the police confirmed existed.
>
> The request was for "....all London Police 'John' stings that took place in London in 2005 and/or 2006 that relate to any RCMP member ....."
>
> The [police] only confirmed "John" sting records existed for the time frame in question and that from these records [upon being] located, a secondary search would have to be conducted to see if these records involved any RCMP members.
>
> The police have communicated to the appellant that "John sting" records clearly exist, and the appellant has been so advised. The issue is that the [police have] refused to confirm or deny any involvement by a member of the RCMP.

[51] The appellant was provided with the police's reply representations, but did not address their position on this issue in his sur-reply representations.

Findings

[52] Based on the representations of the parties, I am satisfied that the police have not confirmed or denied that any records responsive to the appellant's specific request exist. The police simply confirmed that "John" sting records existed for the time frame in question, which would need to be searched. I find they have not confirmed or denied the existence of any records that may involve members of the RCMP.

[53] With respect to whether the police properly refused to confirm or deny the existence of responsive records, I note that the circumstances of this appeal are very similar to another appeal processed by this office, which resulted in Order MO-2978. I find that Order MO-2978 has a direct bearing on the application of section 14(5) in this appeal.

[54] MO-2978 arose from a request made to the London police by a member of the media for:

> [A]ll notes (electronic or in notebooks) for the female undercover officers working in a London Police "John" sting that took place in 2005 and/or 2006 which mention or refer to in any way [a named RCMP member]. …

[55] In response to that request, the police also issued a decision in which they refused to confirm or deny the existence of a record pursuant to section 14(5) of the *Act*.

[56] In that order, Adjudicator Laurel Cropley upheld the decision of the police, and found that disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant that would reveal whether or not the named individual has been involved in a police sting operation. As a result, she found that the disclosure of the fact that a record exists, or does not exist, in itself, would constitute an unjustified invasion of personal privacy, and that section 14(5) applied in the circumstances of that appeal.

[57] The similarities between the request resulting in Order MO-2978 and the request in this appeal require me to have reference to that order. The current request is to the same police service for information about "John stings" relating to the RCMP, and covers a narrower timeframe within the same period of time covered in Order MO-2978. Except for the narrower time frame, the only other difference between these two requests is that the earlier request asked for information about a named member of the RCMP, and the current request is for the information about any RCMP officer. I accept that this difference is important. However, I find that the similarities between these two requests are also very significant.

[58] The request resulting in Order MO-2978 was very narrow and specific, it sought access to records pertaining to a named individual who works for the RCMP and was involved in a specific type of offence during a narrowly defined timeframe. In this appeal, I find that the two differences in the requests (the narrowing of the timeframe, and the broadening of the identity of category of individual involved), combined, make this request slightly broader than the one resulting in Order MO-2978. I must determine whether this slight broadening of the request results in a different decision. I find, in the circumstances, that it does not.

[59] The request in this appeal, for the same category of individual (RCMP member), a narrower time period, and the same specific type of offence, is sufficiently similar to the one resulting in Order MO-2978 to support the decision of the police to refuse to confirm or deny the existence of a responsive record. Based on the similarities between this appeal and Order MO-2978, and the confidential representations of the police, I find that the disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant that would constitute an unjustified invasion of personal privacy, and that section 14(5) applies.

[60] I find support for this decision in considering the nature of section 21(5) and the personal privacy interests it protects. It is not difficult to imagine circumstances where

modifying a request by slight increments to obtain a different response could result in the disclosure of personal information, even if an individual's name is not requested.[11]

[61] As noted, in the circumstances of this appeal, I am satisfied that the significant similarities in the request resulting in Order MO-2978 and the request in this appeal support my finding upholding the decision of the police to refuse to confirm or deny the existence of records responsive to the request.

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

[62] The appellant takes the position that the public interest override in section 16 of the *Act*. applies to the circumstances of this appeal. Section 16 states:

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

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

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

Compelling public interest

[65] In considering whether there is a "public interest" in disclosure of a record, and/or the fact that a record exists, the first question to ask is whether there is a

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[11] For example, if the police refused to confirm or deny the existence of records of an ongoing illegal gaming investigation of a requester, they may well be able to similarly refuse to confirm or deny a subsequent request for any "current investigations for illegal gaming of any individuals who live on my street." However, confirming that records exist in response to a significantly broader request (ie: all current gaming investigations in Toronto) might very well not reveal personal information.

[12] Order P-244.

relationship between the record, if it exists, and the *Act*'s central purpose of shedding light on the operations of government.[13] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[14]

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

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

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

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

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

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[13] Orders P-984, PO-2607.
[14] Orders P-984 and PO-2556.
[15] Order P-984.
[16] Orders M-773 and M-1074.
[17] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[18] Orders PO-2072-F and PO-2098-R.
[19] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[20] Order P-1779.
[21] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[22] Order P-1175.
[23] Order P-901.

- the records contain information about contributions to municipal election campaigns.[24]

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

- another public process or forum has been established to address public interest considerations.[25]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[26]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[27]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[28]

- the records do not respond to the applicable public interest raised by appellant.[29]

Representations

[71] The appellant takes the position that the public interest override in section 16 of the *Act* applies. He states that the topic of prostitution in the city of London has been a matter of public discussion and interest dating back many years, and that "the issue of RCMP officer's disciplinary and behavioural issues has been a matter of great importance and reporting in Canada the past couple of years."

[72] The appellant then refers to a newspaper article and a 2012 RCMP disciplinary report which support his position, and argues that they "demonstrate the importance of releasing information to the public."

[73] The appellant also argues that, if an RCMP officer is breaking the law, they should be disciplined. He then states that "the RCMP has been under great scrutiny lately for how they deal with internal issues of abuse and discipline." He also refers to public statements and legislation which he states confirm "the importance of maintaining the public trust and reinforces the high standard of conduct expected of

[24] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[25] Orders P-123/124, P-391 and M-539.
[26] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[27] Orders M-249, M-317.
[28] Order P-613.
[29] Orders MO-1994 and PO-2607.

[RCMP] members." In addition, the appellant argues that the public should know if a member of the RCMP "has been caught in the act of committing a crime," and that this should outweigh the right a member has to keep this information secret. He also argues that being able to review any responsive records would also "shed light on how the RCMP is dealing with improper behaviour."

[74] The police provide representations in response to the appellant's position. They confirm the type of the information that is made publicly available regarding RCMP officers' discipline. They then refer specifically to the appellant's statement that the public should be advised if a member of the RCMP is "breaking the law" and state:

> … if an RCMP officer had been charged criminally as a result of a "John Sting," the Chief of Police would be permitted pursuant to the provisions of the *Police Services Act*, R.S.O. 1990, Chap. P.15, and Ontario Regulation 265/98, to release the identity of the individual. Further, the London Police Service has procedures in place with respect to notifying other police agencies in such cases. …

[75] In his surreply representations, the appellant confirms his view that there is a compelling public interest in the requested information, and refers to arguments similar to those set out above.

Analysis and findings

[76] I accept the appellant's position that issues relating to prostitution and the efforts made by the police in tackling the problem are matters of public interest. I also accept that there has been public discussion about the accountability of the members of the RCMP for their actions, and agree that the manner in which the RCMP addresses these issues is of public interest. In addition, ensuring equal application of the law by the police raises similar public interest concerns.

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

[78] However, in the circumstances, I am not persuaded that there is a compelling public interest in the disclosure of the requested information at issue, or in disclosing whether or not responsive records exist. I make this finding for two main reasons.

[79] In the first place, as noted by the police, this request is not specifically for records of an RCMP officer "breaking the law," but for records covering a narrow, defined portion of time in 2006 that relate to any RCMP member being involved in any

way in the non-enforcement side in a "John sting" project. In these circumstances, I am not satisfied that there is a compelling public interest in confirming whether or not records of this nature exist. I make this finding acknowledging the police's representations which confirm that information about criminal charges of RCMP officers can be and is made publicly available through other mechanisms.

[80] Secondly, I accept the findings made by Adjudicator Cropley in MO-2978 where she found a lack of connection between events occurring in 2006 and the current public interest arguments made. She stated:

> It is not clear to me how records from 2005 or 2006, if they exist, relating to a period of time prior to the recent events involving the RCMP, would facilitate public debate today regarding current issues of police discipline and enforcement of the law. …

[81] I agree with this statement by Adjudicator Cropley. I am not satisfied that the records requested, relating to the time period covering the first 10 months of 2006, if they exist, would facilitate public debate regarding current issues of police discipline and enforcement of the law.

[82] As found above, the records requested in this appeal, if they exist, would fall within the presumption at section 14(3)(b). Previous orders of this office have consistently recognized that the types of personal information set out in section 14(3) are generally regarded as particularly sensitive. Clearly, there will be occasions where the privacy interests of a particular individual must give way to the public interest, however, in the circumstances of this appeal, and for the reasons set out above, I am not satisfied that these circumstances exist in this appeal.

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

Issue C. Should the fee be waived?

General principles

[84] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section states:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

[85] Section 8 of Regulation 823 sets out the following additional matters for a head to consider in deciding whether to waive a fee:

> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[86] A requester must first ask the institution for a fee waiver before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[30] In reviewing a decision by an institution denying a fee waiver, this office may decide that only a portion of the fee should be waived.[31]

[87] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees. The appellant bears the onus of establishing the basis for the fee waiver under section 45(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances.[32]

[88] There are two parts to my review of the decision by the police not to waive the fee under section 45(4) of the *Act*. I must first determine whether the basis for a fee

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[30] Orders M-914, P-474, P-1393 and PO-1953-F.
[31] Order MO-1243.
[32] Order PO-2726.

waiver under the criteria listed in subsection (4) has been established. If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived.[33]

Whether the basis for a fee waiver under the criteria listed in subsection (4) has been established

[89] In this appeal, both parties address the issue of whether the criteria listed in section 45(4)(c) has been established. However, I note that, on its face, the response by the police and the findings in this order establish that the criteria in section 45(4)(d) has been established. Section 8 of Regulation 823 sets out the following additional matters for a head to consider in deciding whether to waive a fee:

> 1. Whether the person requesting access to the record is given access to it.

[90] In this appeal, not only has the appellant not been given access to a record, but the appellant has not even been advised of whether or not a record exists. In these circumstances, I find that the criteria in section 45(4)(d) have been established.

[91] Having found that the basis for a fee waiver under section 45(4)(d) has been established, I must consider whether it would be fair and equitable to waive the fee.

Whether it would be fair and equitable to waive the fee

[92] For a fee waiver to be granted under section 45(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;

[33] Order MO-1243.

- whether the requester has advanced a compromise solution which would reduce costs; and

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

Representations

[93] The appellant asserts in his representations that it would be fair and equitable to waive the fees associated with his request. He refers to the fact that he worked constructively with the institution and narrowed the scope of the request. He also states:

> The wording of my request never changed so a decision to neither confirm nor deny based on section 14(5) could have been identified on the onset of my request and could have avoided any searching or processing related to this request.

[94] The police argue that a fee waiver would not be fair and equitable in the circumstances. They submit that they worked constructively with the requester and assisted in narrowing the request, and that the request involved a large number of records. They also note that the appellant was advised during the process that payment of the fee did not "guarantee access," and argue that the waiver of this fee "would place an unreasonable burden from the appellant to the police." In addition, they refer to other confidential factors that I should consider in deciding not to waive the fee.

[95] On my review of the circumstances surrounding the appellant's request, as well as the decision of the police and my findings in this order, I am satisfied that it would be fair and equitable to waive the fee.

[96] I am satisfied that both the appellant and the police worked constructively to narrow the scope of the request. I also accept that, in response to the narrowed request, the police conducted a significant search for records. In addition, I accept that the appellant was aware that he would not necessarily be provided with access to the records even if the search was conducted. However, a very significant factor in this appeal is the fact that, following the police's search for records, they issued a decision to the appellant in which they refused to confirm or deny the existence of any responsive records. On my review of all of the circumstances of this appeal, and particularly the representations of the police, I do not accept the position of the police that it was fair and equitable for them not to waive the fee.

[97] In these circumstances, and particularly in light of the fact that the appellant is not aware of whether or not records responsive to his request exist, I find that it is fair and equitable for the police to waive the fee under section 45(4). I will also order the police to refund the deposit paid by the appellant.

ORDER:

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

2. I order the police to waive the fee and reimburse to the appellant the deposit amount paid by him.

Original Signed by: March 26, 2014
Frank DeVries
Senior Adjudicator