Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3351

Appeal MA15-111

Halton Regional Police Services Board

August 25, 2016

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to police investigation records relating to the appellant's alleged assault of her son. The police provided partial access to the records, but withheld witness statements and other information pursuant to the personal privacy exemption at section 38(b) of the *Act.* The appellant appealed. In this order, the adjudicator finds that the appellant cannot exercise a right of access on behalf of an individual less than sixteen years of age pursuant to section 54(c) of the *Act*. She finds that the disclosure of the information at issue would be an unjustified invasion of personal privacy, and upholds the police's application of section 38(b) to the information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14, 14(1)(d), 38(b) and 54(c).

Orders and Investigation Reports Considered: Orders M-787, MO-1480, MO-3026 and PO-3599.

BACKGROUND:

[1] The records at issue in this appeal relate to an investigation by the Halton Regional Police (the police) into allegations that the appellant committed a criminal offence involving one of her two sons. No charges resulted from the investigation.

[2] The appellant is separated from her sons' father, who is referred to in this order

as the affected party or the father. Numerous arbitration and court proceedings have taken place with respect to issues of custody and access, and from the material before me, it appears that those proceedings are ongoing.

[3] After the couple separated, one of their children made a statement to the police in which he made allegations that the appellant had assaulted him. The appellant was not charged with any offence.

[4] The appellant then sought a copy of the police's records relating to their investigation of the alleged incident. Specifically, she made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for access to the following information:

> Police Occurrence Report with officer notes and any other supporting material of [a specified date] or otherwise if this is not the exact date, then my request for the same of the report in [a specified month] 2014 or since [a particular constable] has prepared this report and can provide notes, etc.

[5] In a subsequent decision letter, the police confirmed that the appellant had verbally clarified her request and described that clarified request as being for:

> …access to a copy of the police occurrence report, officer's notebook entries, and witness statements with [the appellant's] personal information only.

[6] The police identified records responsive to the request and issued a decision letter which provided partial access to a copy of the police occurrence reports and officers' notebook entries, and denied access to witness statements of other individuals. In denying access to the withheld information, the police relied on the discretionary personal privacy exemption at section 38(b) of the *Act*, as well as the discretionary law enforcement exemption at section 38(a) in conjunction with sections 8(2)(a), 8(1)(e) and 8(1)(l) of the *Act*. The police also found that some portions of the records were not responsive to the request.

[7] The appellant appealed the police's decision to this office.

[8] During mediation, the police advised the mediator that they were no longer relying on section 8(2)(a) of the *Act* to deny access to any information. Further, the appellant confirmed with the mediator that she is not pursuing access to police code information or to information that the police found to be non-responsive to her request. As a result, that information and the application of section 38(a), in conjunction with sections 8(1)(e) and 8(1)(l) are no longer at issue in this appeal.

[9] The appellant confirmed that she seeks access to the remaining information, to

which access was denied pursuant to the personal privacy exemption at section 38(b) of the *Act*.

[10] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking and receiving representations from the police and the children's father (the affected party). In accordance with this office's *Practice Direction 7: Sharing of representations*, I provided the appellant with a severed copy of the police's representations. The affected party also agreed to share his representations and a copy was provided to the appellant. I then invited and received representations from the appellant.

[11] In the Notice of Inquiry that I sent to the parties, in addition to seeking representations on the section 38(b) personal privacy exemption claimed by the police, I asked for representations on whether the appellant can exercise a right of access to information on behalf of her child or children, pursuant to section 54(c) of the *Act*, which provides that "[a]ny right or power conferred on an individual under this Act may be exercised … if the individual is less than sixteen years of age, by a person who has lawful custody of the individual."

[12] In this order, I find that section 54(c) is inapplicable in the circumstances, with the result that the appellant cannot exercise her children's right of access to the records, nor can she consent on their behalf to the disclosure of the withheld information to herself. I find, further, that disclosure of the withheld information to the appellant would be an unjustified invasion of the personal privacy of other individuals, and I uphold the police's decision to withhold that information under section 38(b).

RECORDS:

[13] The information at issue consists of portions of the occurrence reports and officer notebook entries that were withheld under section 38(b). Also at issue are two videotaped statements which were withheld in their entirety.

[14] The police severed and disclosed some information to the appellant, including portions of the occurrence reports that contain the fact of the allegations, the investigatory steps taken, and the outcome of the investigation. The withheld information consists primarily of the substance of the statements to the police. Also withheld were some names and contact information of individuals mentioned in the records.

[15] All of the information that was withheld is referred in this order collectively as the information at issue, or the withheld information.

ISSUES:

A. Can the appellant exercise a right of access on behalf of an individual less than sixteen years of age pursuant to section 54(c) of the *Act*?

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

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

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

DISCUSSION:

Issue A: Can the appellant exercise a right of access on behalf of an individual less than sixteen years of age pursuant to section 54(c) of the *Act*?

[16] I find below under Issue B that the records contain the personal information of the appellant's children. The children are under the age of sixteen, raising the potential application of section 54(c) of the *Act*, which provides:

> Any right or power conferred on an individual by this Act may be exercised,
>
> > if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

[17] Under this section, a requester can exercise another individual's right of access under the *Act* if he or she can demonstrate that the individual is less than sixteen years of age, and that the requester has lawful custody of the individual.

[18] If a requester meets the requirements of this section, then he or she is entitled to have the same access to the personal information of the child as the child would have. The request for access to the personal information of the child will be treated as though the request came from the child him or herself.[1]

[19] The consequences of the application of section 54(c) are significant. In the usual case, that is, where section 54(c) does not apply, if an individual requests access to a record containing his or her own personal information as well as the personal

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[1] Order MO-1535.

information of another individual, the institution may refuse to disclose the information if disclosure would be an unjustified invasion of the personal privacy of the other individual.

[20] By contrast, where section 54(c) is invoked, since the person with custody essentially "steps into the shoes" of the child, any personal privacy rights of the child on whose behalf the request is made are not considered in determining whether to grant access to the person with custody.

[21] In the appeal before me, it is not in dispute that both of the appellant's children are under the age of 16 years. The issue is whether the appellant has lawful custody of the children and if so, whether section 54(c) applies.

Evidence relating to custody and access

[22] The appellant and the affected party entered into a separation agreement whereby they had joint custody of their children. However, since then, there has been considerable litigation between the appellant and the affected party relating to issues of custody and access. Following allegations that the appellant abused the children, the father brought a motion before an arbitrator, seeking to have the appellant's time with the children supervised. The arbitrator dismissed the father's motion and, among other things, ordered that the mother (the appellant) and the children immediately commence relationship building/reunification therapy.

[23] The arbitrator also ordered that an assessment be conducted by a social worker pursuant to section 30 of the *Children's Law Reform Act*.[2] Following the issuance of the assessor's report, and pursuant to Temporary Care Agreements (one in respect of each child), the children were placed in the care and custody of the Children's Aid Society.

[24] It is important to note that, according to the police, the family court file is sealed. It is clear that I do not have before me all information pertaining to the custody and access litigation. The most recent information I have, however, is that the children have been placed in the care and custody of the Children's Aid Society.

Representations

[25] The police submit that although the court file regarding the appellant and the affected party's custody and access disputes has been sealed via court order since December 2014, it is difficult to imagine that no temporary or emergency orders have been put in place since issues initially arose in February 2014, given the turmoil in the family.

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[2] R.S.O. 1990, c. C.12.

[26] The police also refer to Order P-673, where Assistant Commissioner Irwin Glasberg found that the provincial equivalent to section 54(c), section 66(c) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) did not apply. In Order P-673, Assistant Commissioner Glasberg stated:

> The records at issue in the present appeal relate to a custody and child protection dispute involving the father and his former spouse. The documents also explain the roles of the Ministry's Office of Child and Family Service Advocacy (OCFSA), the Children's Aid Society of Metropolitan Toronto (CASMT) and other government agencies in dealing with these matters. The records collectively contain extremely sensitive information including the views of a very young child on this difficult situation.
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> I have carefully reviewed the representations provided to me in conjunction with the records at issue. While the father has argued that he requires his son's personal information to determine whether the various government agencies acted within their statutory mandates, he has failed to convince me that he is exercising such a right of access on behalf of his son. Rather, my conclusion is that the father, while acting in good faith, is seeking this information to meet his personal objectives and not those of his son.
>
> I also find, based on the sensitive nature of the materials contained in the records, that the release of the son's personal information would not serve the best interests of the child.

[27] The police submit that although the appellant may claim that she seeks access to the records on behalf of her children, the police feel that she is seeking access for her own personal gain or to pursue her own personal agenda.

[28] The affected party provided copies of the Temporary Care Agreements referred to above and submits that the CAS, as the entity with custody of the children, should be the entity to make decisions about the release of the records to the appellant.

[29] I asked the appellant to comment on the Temporary Care Agreements. The appellant submits that the agreements are voluntary and could be abandoned at any time. She also submits that she had custody of the children at the time she made her access request in January 2015.

Analysis and findings

[30] For the following reasons, I find that the appellant cannot exercise a right of access to the information at issue on behalf of her children pursuant to section 54(c) of

the *Act*, nor can she consent on their behalf to the disclosure of the information to herself.

[31] Based on the evidence I have before me, I am not satisfied that the appellant is currently a custodial parent. Although I do not have the full history of the custody and access proceedings before me, the most recent custody arrangement of which I am aware is that the Children's Aid Society has custody of the children pursuant to the Temporary Care Agreements.

[32] The appellant points out, however, that she had custody of the children at the time that she made her request for access to information. Based the information before me, that does appear to be the case.

[33] However, I do not need to make a determination about whether, as a general proposition, section 54(c) applies where the parent had custody at the time of the request for information but ceased to have custody before an access decision is made either by the institution or, on appeal, by this office. For the following reasons, I find that, even if the appellant is treated as a custodial parent, section 54(c) does not apply in the circumstances of this appeal. For reasons similar to those of Adjudicator John Higgins in Order PO-3599, I find that, applying the modern principle of statutory interpretation, which includes consideration of the purpose of the legislation as a whole and the provision in question, section 54(c) does not apply here.

[34] In Order PO-3599, Adjudicator Higgins had to decide whether section 66(c) of *FIPPA*, the equivalent of section 54(c) of the *Act*, applied where the appellant, a custodial parent, sought access to OPP investigation records concerning allegations that he had committed a criminal offence involving his daughter.

[35] In finding that section 66(c) did not apply, Adjudicator Higgins stated as follows:

> [T]he modern principle of statutory interpretation indicates that in some circumstances, despite the apparent plain or literal meaning of a provision, a more probing reading may cause a different interpretation to be adopted. The Supreme Court of Canada has stated this principle as follows:
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> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[3]

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[3] *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR. 27 at para. 21, quoting from Elmer Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87.

[36] Adjudicator Higgins noted that in applying this principle, the Court rejected an interpretation which, despite being in accordance with plain meaning, was incompatible with both the object of the legislation at issue and with the object of the provisions themselves. The Court observed that it is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences, and that an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment.[4]

[37] Adjudicator Higgins went on to observe that significant context for rights that arise from being a custodial parent is provided by statutes that deal expressly with custody issues, such as the *Divorce Act* and the *Children's Law Reform Act*, both of which contain as an important guiding principle the best interests of the child or children. He quoted the following passage from the Supreme Court of Canada's decision in *Young v. Young*:[5]

> The power of the custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. …
>
> It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being.

[38] Adjudicator Higgins noted that this approach is also expressed in section 19(a) of the *Children's Law Reform Act*, which states:

> The purposes of this Part[6] are,
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> > (a) to ensure that applications to the courts in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children;

[39] Adjudicator Higgins concluded that section 66(c) of *FIPPA* did not apply in the

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[4] The Court is quoting from Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991) at pp. 378-80.
[5] [1993] 4 SCR 3.
[6] A reference to Part III of the *Children's Law Reform Act*, entitled "Custody, Access and Guardianship."

circumstances before him. In reaching his conclusion, Adjudicator Higgins stressed that the appellant, although a custodial parent, was not acting in a custodial capacity; rather, he sought access in order to further his own interests in the matrimonial proceedings. Adjudicator Higgins also noted that the evidence was that the children were fearful of the appellant, and that, since the issues of custody and access were the subject of ongoing Family Court proceedings, that Court could decide whether production was required in the best interests of the children.

[40] In her representations, the appellant articulates two main reasons for her request for the records. First, the appellant is of the view that the records will assist her son with his therapy. Second, she believes that having the records will offer her some protection should further allegations of a similar nature arise in the future.

[41] At first blush, the appellant's request would appear to be at least in part an "incident of custody"; that is, one in which she is acting in a custodial capacity by seeking the records to assist her son. On a plain reading of section 54(c), the appellant would appear to be entitled to exercise her son's right of access to his own personal information.

[42] However, I agree with Adjudicator Higgins that section 54(c) must be interpreted in light of the purposes of the *Act* and the object of section 54(c) itself. One of the fundamental purposes of the *Act*, as set out in section 1(b), is to protect the personal privacy of individuals. On the other hand, section 54(c) clearly contemplates a curtailment of a child's privacy rights in relation to the person with custody of that child.

[43] The information at issue in this appeal consists mainly of the children's statements about the alleged sexual abuse, and occurrence reports referring to those statements in detail. In my view, these are not the types of records to which section 54(c) would apply so as to permit the parent against whom the allegations were made to either (a) request access, on behalf of the children, to the children's own personal information, or (b) consent, on the children's behalf, to the release of the records to the parent. Under these circumstances, I find that the privacy protection purpose of the *Act* set out in section 1(b), as well as the guiding principles of the best interests of the child found in the *Divorce Act* and the *Children's Law Reform Act*, require that section 54(c) not apply. In my view, it would be perverse to interpret section 54(c) so as to permit a custodial parent, as a matter of right, and without separately considering the child's privacy interests, to exercise the child's right of access to allegations of the child against that very parent. Whether the allegations are founded or not is not the issue. While section 54(c) contemplates some measure of loss of a minor's privacy rights, it would, in my view, constitute a severe violation of fundamental privacy principles to interpret section 54(c) to apply in the present circumstances.

[44] That is not say that the appellant's argument that she requires the records for her son's therapy, or that she needs them to protect herself in the matrimonial

litigation, are necessarily without merit. Those arguments will be explored in my discussion under Issue C, below, where factors weighing for and against disclosure are weighed and a determination made as to whether disclosure would constitute an unjustified invasion of personal privacy. However, in my view, the information at issue in this appeal is not information with respect to which the appellant ought to be able to "step into the shoes" of her children for access purposes, without consideration of those factors.

[45] I conclude that section 54(c) does not apply in the circumstances of this appeal.

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

[46] In order to determine which sections of the *Act* may apply, it is necessary to 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,
>
> (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;

[47] 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.[7]

[48] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[8] However, 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.[9]

[49] The police submit that the records contain statements and allegations of the appellant, her children, and both official and medical personnel in a professional capacity, which qualifies as the personal information of the children and of the appellant. They also submit that the records contain the address and telephone numbers of individuals other than the appellant.

[50] The affected party and the appellant did not make representations on whether the records contain personal information.

[51] I have reviewed the records and I find that they contain the personal information of several identifiable individuals, including the appellant and her sons. Portions of the Occurrence Report and General Occurrence Report contain home addresses and telephone numbers. The allegations contained in the videotaped statements to the police constitute the personal information of the appellant and of her sons, under the introductory wording of the definition. The remainder of the records repeat the allegations and therefore also contain the personal information of the appellant and her sons.

[52] The police severed and released portions of the records. The fact of the allegations against the appellant, the steps taken by the police in response to them, and the outcome of the investigation were released to the appellant. Most of the withheld material consists of the substance of the allegations, which contain the personal information of both the appellant and her sons. From my review of this information, I find that it is not reasonably possible to sever and disclose further information to the appellant, without also disclosing the personal information of others.

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[7] Order 11.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

[53] The other withheld information consists of the home addresses and telephone numbers of various individuals other than the appellant.

[54] I will now consider whether the withheld personal information is exempt from disclosure pursuant to section 38(b) of the *Act*.

Issue C: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[55] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. One of them is section 38(b), which states:

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

[56] 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.[10]

[57] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. None of the parties argued that any of the circumstances in section 14(4) apply, and I find that they do not. I will now consider the application of sections 14(1) through (3).

Section 14(1)

[58] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). The only two paragraphs with potential application in this appeal are paragraphs 14(1)(a) and (d), which state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

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[10] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

Is there consent within the meaning of section 14(1)(a)?

[59] For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.[11] No individual whose personal information appears in the records has consented to the disclosure of the information at issue to the appellant. To the extent that the appellant appears to be consenting on her children's behalf, I find, for the reasons stated under Issue A, that section 54(c) does not apply so as to allow her to consent on behalf of her children. Therefore, section 14(1)(a) does not apply.

Does another Act authorize disclosure pursuant to section 14(1)(d)?

[60] In the Notice of Inquiry that I sent to the parties, I invited representations on whether section 14(1)(d) applies on the basis of section 20(5) of the *Children's Law Reform Act*, which states as follows:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

[61] Section 16(5) of the *Divorce Act* contains similar wording about access to a child's information:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

[62] None of the parties made representations on section 14(1)(d) of the *Act*. Previous orders of this office have invoked section 14(1)(d) in finding that disclosure is authorized by the above provisions. In Order M-787, Adjudicator Holly Big Canoe found that section 16(5) of the *Divorce Act* authorized disclosure of health information about a child to a parent who had a right of access. In Order MO-3026, Adjudicator Justine Wai found that section 20(5) of the *Children's Law Reform Act* authorized disclosure to the requester of information about an alleged assault on the children of the requester. In that case, the requester was a custodial parent but was not the alleged assaulter.

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[11] See Order PO-1723.

Adjudicator Wai found that the records contained information that can reasonably be viewed to pertain to the welfare of the requester's children. I agree with Adjudicator Wai and find that the information at issue in this appeal relates to the welfare of the appellant's children.

[63] As noted above, the most recent custody and access arrangements of which I have been made aware are the Temporary Care Agreements, whereby the Children's Aid Society took the appellant's children into its custody and care. Whether the agreements provide for the appellant to have access rights with respect to her children is not entirely clear. However, even if they do, I find for the following reasons that section 14(1)(d) does not apply in the circumstances of this appeal.

[64] In Order PO-3599, referred to in some detail above, Adjudicator Higgins addressed the applicability of section 21(1)(d) (the *FIPPA* equivalent to section 14(1)(d)) to the circumstances before him. As noted above, the requester in that appeal was a father who had allegedly assaulted his child and subsequently sought access to police investigation records pertaining to those allegations. Adjudicator Higgins stated:

> Arguably, a plain language reading of section 21(1)(d) in conjunction with section 20(5) of the *Children's Law Reform Act* and/or section 16(5) of the *Divorce Act* would mean that disclosure is not an unjustified invasion of personal privacy and that section 49(b) [the *FIPPA* equivalent to section 38(b) of the *Act*] exemption would therefore not apply. However, as with section 66(c), a more probing reading of these sections may produce a different outcome, in keeping with the modern principle of statutory interpretation.
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> …
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> In Order MO-1480, Assistant Commissioner Sherry Liang addressed the *MFIPPA* equivalent of section 21(1)(d) and a police occurrence report relating to an alleged assault of the requester's daughter by another individual. She reviewed a number of previous orders and stated:
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> > The result of these orders is that individuals who are entitled to have access to a child, and therefore to the information described by the CLRA,[12] cannot be prevented from having access to that information because of the provisions of section 14(1) of the Act. *Together, the provisions of the CLRA and this Act express a policy that in these limited circumstances, the welfare of children overrides personal privacy rights.* [Emphasis added.]

[12] The *Children's Law Reform Act*.

> However, that order, as well as Orders MO-3026 and M-787, are distinguishable. The records at issue in those orders did not relate to allegations that the individual requesting the information had committed a criminal offence involving their child, as is the case here. Moreover, as already noted, in this case, a local Child and Family Service agency found in its report that "the [appellant]'s actions have been sexually inappropriate with [his daughter]." …
>
> The result of applying section 21(1)(d) in this appeal would be disclosure to the appellant of sensitive personal information about the children that appears in a police record. The legislature would not have intended that section 21(1)(d) apply in these circumstances. To find otherwise would be inconsistent with the privacy protection purpose of the Act set out in section 1(b) as well as the principles expressed in section 16(8) of the *Divorce Act* and section 19(a) of the *Children's Law Reform Act*, quoted above in my discussion of section 66(c) of the Act.
>
> I have therefore concluded that the circumstances of this appeal differ significantly from the circumstances described in Order MO-1480 where Assistant Commissioner Liang found that "the welfare of children overrides privacy rights." It is far from clear that disclosure of the records would be in the children's best interests and I therefore find it would be an unreasonable and illogical interpretation to read section 21(1)(d), in conjunction with section 20(5) of the *Children's Law Reform Act* and/or section 16(5) of the *Divorce Act*, as authority to disclose the withheld information.
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> Moreover, the appellant has brought a motion for production of this same information in the Family Court proceedings. In my opinion, it would be preferable for the Family Court to determine that issue, rather than for this office to order the information disclosed under the *Act*. The best interests of the children are a paramount consideration, and one which the Family Court, with its expertise on such questions, and with more up-to-date information about the circumstances of the children than I have in my possession, is much better positioned to determine.

[65] There are important differences between the facts in Order PO-3599 and the facts in the present appeal. In Order PO-3599, there was evidence that the appellant had engaged in sexually inappropriate actions with his daughter. In the appeal before me, there is some evidence that the Children's Aid Society was concerned that the children may have been influenced or coached with respect to the allegations contained in the records at issue. I also have no information before me that there is currently a motion for production of the same information in the context of the ongoing matrimonial proceedings. Finally, the appellant before me seeks access at least in part

for the benefit of her son.

[66] However, notwithstanding those differences, I reach the same conclusion as Adjudicator Higgins did in Order PO-3599. For reasons similar to my reasons for finding that section 54(c) does not apply, I find that section 14(1)(d) does not apply, because the legislature could not have intended that the scope of section 14(1)(d) would include the appellant's right to access a child's statements about her alleged sexual abuse of that child, without separate consideration of the child's privacy interests.

[67] I conclude, therefore, that section 14(1)(d) does not apply.

[68] I will now consider the provisions of sections 14(2) and (3), which are also relevant in determining whether disclosure would or would not be an unjustified invasion of privacy. In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy 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.[13]

Section 14(3)(b) presumption: investigation into possible violation of law

[69] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police submit that the presumption listed at section 14(3)(b) applies. It 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;

[70] This presumption requires only that there be an investigation into a possible violation of law.[14] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) can still apply. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[15]

[71] The records at issue were compiled and are identifiable as part of a police

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[13] Order MO-2954.
[14] Orders P-242 and MO-2235.
[15] Orders MO-2213, PO-1849 and PO-2608.

investigation into a possible violation of the *Criminal Code of Canada*.[16] I find, therefore, that the presumption at section 14(3)(b) applies to the information at issue.

Section 14(2) factors

[72] Section 14(2) also lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[17] Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[18]

[73] In this appeal, the parties' representations raise the possible application of paragraphs 14(2)(d) and (f). Those paragraphs 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;

[74] The factor at section 14(2)(d), if it applies, would weigh in favour of disclosure, while the factor at section 14(2)(f) would weigh in favour of non-disclosure.

[75] I will first consider the section 14(2)(f) factor weighing in favour of non-disclosure and will then turn to the factors that would favour disclosure: section 14(2)(d), and the appellant's argument that she requires the records to assist with her son's therapy, which could be considered an unlisted factor weighing in favour of disclosure.

Is the information highly sensitive within the meaning of section 14(2)(f)?

[76] The police argue that the information is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[19] The police submit:

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[16] R.S.C., 1985, c. C-46.
[17] Order P-239.
[18] Order P-99.
[19] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

> The children's allegations of sexual assault by the Appellant are extremely sensitive in nature…. even releasing a summary of the statement or allegations to someone who may or may not have custody would be a breach of their personal privacy, and possibly affect the trust that the children have in this institution to protect their privacy.

[77] The appellant argues that she has already seen her son's statement at the Children's Aid Society's offices, and simply seeks a copy of it.

[78] Regardless of the fact that the appellant may have seen the records or some portion of them, I find that disclosure of a copy of the records to her could reasonably be expected to cause her children significant personal distress. I find this to be the case regardless of whether the children were coached into making the statements, as has been alleged. The children are young and are caught up in what is evidently a very difficult and contentious marital breakdown. In my view, the release of the information at issue would reasonably be expected to cause them significant distress. I find, therefore, that the factor at section 21(1)(f) applies and weighs in favour of non-disclosure.

Is the personal information relevant to a fair determination of the appellant's rights within the meaning of section 14(2)(d)?

[79] As noted above, the appellant argues that she requires access to the records for her self-protection. She submits that, should there be further allegations, she would like to be able to point out inconsistencies between each of the reportings.

[80] Previous orders of this office have found that, for the factor at section 14(2)(d) to apply, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (3) the personal information to which the appellant is seeking access has some bearing on or is significant to the determination of the right in question;

> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[20]

[81] As noted previously in this order, I do not have direct information about what, if any, proceedings are currently underway relating to custody and access issues. However, from the most recent information I have been provided with, the Temporary Custody Agreements, I find that it is fair to assume that the custody and access issues between the appellant and the affected party are ongoing. I find, therefore, that requirements (1) and (2) have been established.

[82] As for the third criterion, I note that the appellant has stated that the records are required in the event that further allegations are made against her. It is not clear, therefore, that the records are necessarily relevant to the custody and access issues, unless further allegations are made. However, I am prepared to accept for the purpose of this appeal that the records may have some bearing on the custody and access issues. I find, therefore, that the third criterion has been met.

[83] As for the fourth criterion, some previous orders of this office have interpreted the phrase "necessary to prepare for the proceeding" as applying to information that goes beyond merely information that is relevant to the issues to be decided in the proceeding.[21] For example, previous orders have ordered disclosure of an affected party's name to a requester who requires it to commence an action against the affected party.[22] The ability of a party to obtain the evidence in the context of the other proceeding may also be relevant.[23]

[84] I am prepared to accept for the purposes of this appeal, however, that the fourth criterion is satisfied. As a result, I find that the information at issue is relevant to a fair determination of the appellant's custody and access rights.

[85] However, I place only limited weight on this factor. I have little information about the status of the custody and access proceedings, and so am not in a position to evaluate the extent to which the records at issue are necessary for the resolution of the issues before the court or the arbitrator. The Family Court or the arbitrator would have the power to order production and would be much better placed than I am to determine whether production is necessary in the interests of justice.

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[20] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[21] See Orders P-312 and M-119.
[22] See Orders M-746 and M-1146.
[23] See Orders PO-1715, MO-2677 and PO-3482.

Section 14(2) unlisted factor: Is disclosure desirable to assist the appellant's son with his therapy?

[86] The appellant submits that the records could help her son with his therapy. Although I have no reason to doubt that the appellant believes this to be the case, her belief is insufficient for me to find that this is a relevant factor in favour of disclosure. I do not have any other evidence before me, such as a letter from the therapist, to suggest that the records would be beneficial for the appellant's son's therapy. Since there is insufficient evidence before me to conclude that disclosure would assist with the therapy, I find that this is not a relevant factor favouring disclosure of the information at issue.

Conclusion on section 38(b): disclosure would be an unjustified invasion of personal privacy

[87] I have found above that the presumption at section 14(3)(b) applies because the records were compiled as part of an investigation into a possible violation of law. In addition, the information at issue is highly sensitive within the meaning of section 14(2)(f), a factor that also weighs against disclosure.

[88] The only factor in favour of disclosure is the factor at section 14(2)(d) (fair determination of rights), to which I have accorded limited weight. This limited weight is not sufficient to outweigh the presumption and factor weighing against disclosure. As a result, I find, subject to my discussion of the "absurd result" principle, below, that the disclosure of the information at issue would be an unjustified invasion of personal privacy.

Does the "absurd result" principle apply?

[89] As noted above, the appellant submits that she has already seen the records and simply seeks a copy for herself. The appellant has, by this submission, implicitly raised the "absurd result" principle. According to this principle, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[24]

[90] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement;[25] the requester was present when the information was provided to the institution,[26] or the information is clearly within the

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[24] Orders M-444 and MO-1323.
[25] Orders M-444 and M-451.
[26] Orders M-444 and P-1414.

requester's knowledge.[27]

[91] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[28]

[92] In Order PO-2285, Assistant Commissioner David Goodis addressed the absurd result principle in the context of an appellant's request for records relating to his arrest for uttering threats against his wife. The appellant argued that he was already aware of the information through the Crown disclosure process in the criminal proceedings.

[93] In rejecting the application of the absurd result principle, Assistant Commissioner Goodis stated:

> Although the appellant may well be aware of much, if not all, of the information remaining at issue, this is a case where disclosure is not consistent with the purpose of the exemption, which is to protect the privacy of individuals other than the requester. In my view, this situation is similar to that in my Order MO-1378, in which the requester sought access to photographs showing the injuries of a person he was alleged to have assaulted:
>
> > The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.
> >
> > In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) presumption may still apply…
>
> In my view, this approach recognizes one of the two fundamental purposes of the Act, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.
>
> [I] find that there is particular sensitivity inherent in these records, and that disclosure would not be consistent with the purpose of the exemption, and the absurd result principle therefore does not apply.

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[27] Orders MO-1196, PO-1679 and MO-1755.
[28] Orders M-757, MO-1323 and MO-1378.

[94] I agree with Assistant Commissioner Goodis' reasoning (which was also adopted by Adjudicator Higgins in Order PO-3599), and find it equally applicable to the circumstances before me. The records at issue are highly sensitive, dealing as they do with a child's allegations of sexual abuse by his parent. In my view, applying the absurd result principle here would not be consistent with the privacy protection purpose of the section 38(b) exemption, nor would it be in keeping with one of the two fundamental purposes of the *Act*, the protection of privacy of individuals. I decline, therefore, to apply the absurd result principle in the circumstances of this appeal.

[95] I conclude that the withheld information is exempt from disclosure pursuant to section 38(b).

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

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

[97] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations.

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

[99] The police submit that although the video statements and the portion of the withheld police occurrence report and officers' notebook entries were about the appellant, releasing the information would release the children's personal information. The police also submit that it considered the best interests of the children in determining whether or not to disclose the information. From a review of the police's representations in their entirety, it is evident that the police were most concerned about protecting the children's privacy.

[100] The appellant did not provide representations specifically on this issue.

[101] I am satisfied that the police considered relevant circumstances and did not take into account irrelevant considerations in exercising their discretion to withhold the

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[29] Order MO-1573.
[30] Section 43(2).

information at issue under section 38(b). Further, there is no evidence that the police acted in bad faith. As noted above, the police severed and released considerable information to the appellant including the results of their investigation into the allegations.

[102] I conclude that the police's exercise of discretion was appropriate, and I uphold it.

ORDER:

I uphold the police's decision to withhold the information at issue under section 38(b) and dismiss the appeal.

Original Signed by: August 25, 2016
Gillian Shaw
Adjudicator