Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3662

Appeal PA14-89

Ministry of Community Safety and Correctional Services

October 27, 2016

Summary: The Ministry of Community Safety and Correctional Services received a request for access to information pertaining to charges laid against the requester as well as information relating to his apprehension under a Form 2 issued under the *Mental Health Act*. Relying on multiple exemptions, the ministry granted access to portions of the records but denied access to the remaining information. In this order the adjudicator finds that certain information qualifies for exemption under section 49(a) (discretion to refuse requesters own information) in conjunction with sections 14(1)(e) (danger to health and safety) and 19 (solicitor client privilege) and that other information is exempt under section 49(b) (personal privacy). He also finds that the public interest override at section 23 of the *Act* does not apply to the information. However, the adjudicator does find that certain information in the records can be reasonably severed and disclosed to the appellant without revealing information that is subject to exemption and orders that this information be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 10(2), 14(1)(c), 14(1)(d), 14(1)(e), 14(1)(l), 19(a), 21(2)(a), 21(2)(d), 21(2)(f), 21(3)(b), 23, 49(a), 49(b) and 64(1).

Orders Considered: M-1109, MO-1786, MO-2043, MO-2114, P-984, P-1014, P-1618, PO-1940, PO-2532-R and PO-2751.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to "any and all records containing personal information regarding [the requester] and/or information relating to all charges laid against him on [a specified date] ([two specified occurrence numbers]) in the possession of the Ontario Provincial Police."

[2] The ministry identified records responsive to the request and granted partial access to them. The ministry relied on section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(c) (reveal investigative techniques and procedures), 14(1)(d) (disclose the identity of a confidential source of information), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report) and 19 (solicitor-client privilege), as well as section 49(b) (personal privacy) to deny access to the portion it withheld. The ministry further advised that the records also contained non-responsive information.

[3] The requester (now the appellant) appealed the ministry's access decision.

[4] At mediation, the appellant confirmed that he is not seeking access to the information the ministry marked as not responsive or to the police code information contained in the records. As a result, pages 12, 13, 33, 34, 45, 76, 83, 129 and 131 of the records, the police code information and the information the ministry indicated to be non-responsive, are no longer at issue in this appeal.

[5] No further mediation was possible and the matter was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry into the appeal, I sought and received representation from the ministry, the appellant and two affected parties. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In his representations, the appellant advised that he is not seeking access to identifying information such as names, addresses and phone numbers, which, he asserts, is already within his knowledge. Accordingly, that information is also no longer at issue in the appeal.

[8] In its representations, the ministry advised that it was no longer relying on section 14(2)(a) as a ground to deny access to the responsive information. In addition, the ministry advised that it would be disclosing the names of dispatched police officers that are found in portions of pages one and two of the responsive records. It subsequently issued a decision letter releasing that information to the appellant. Accordingly, access to that information, as well as the application of section 14(2)(a), is

no longer at issue in the appeal. As a result of the additional disclosure provided by the ministry, page 1 of the records is no longer at issue in the appeal.

[9] In this order, I uphold the ministry's decision in part and order it to disclose portions of some withheld information to the appellant.

RECORDS REMAINING AT ISSUE:

[10] The responsive records consist of General Occurrence Reports, Supplementary Occurrence Reports, Occurrence Summaries, Witness Statements, Police Officers' notebook entries and email correspondence. Portions of pages 2-11, 14-32, 35-44, 46-73, 75, 77-82, 84-128, 130 and 132-179 remain at issue.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the discretionary exemption at section 49(b) apply to the information for which it is claimed?

C. Does the discretionary exemption at section 49(a) in conjunction with sections 14(1)(c), (d), (e) and/or (l) and/or 19 apply to the balance of the information for which it is claimed?

D. Does section 19 apply to the information for which it is claimed?

E. Do sections 14(1)(c), (d), (e) and/or (l) apply to the balance of the information for which it is claimed?

F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(b) exemption?

G. Did the institution exercise its discretion under sections 49(a) (in conjunction with sections 14(1)(e) and 19(a)) and 49(b)? If so, should this office uphold the exercise of discretion?

H. Can the records reasonably be severed without disclosing exempt information?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1)?

[11] In order to determine which sections of the *Act* may apply, it is necessary to

decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except where they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

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

[13] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

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[1] Order 11.

> (3) 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.
>
> (4) 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.

[14] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2]

[15] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3]

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

[17] The ministry submits that the request is for records relating to two occurrences investigated by the Ontario Provincial Police (OPP). The ministry states that one of the investigations led to charges against the appellant, as well as the deployment of the OPP's Emergency Response Team.

[18] The ministry adds that:

> The records relate to two related domestic incidents involving suspected violence or the threat of violence. The ministry has protected records belonging to affected third parties, at least one of whom is identified in the records as being a victim of crime. It is our position that other affected third parties may also be victims of crime in accordance with the definition of that term as set out in the *Victims' Bill of Rights, 1995*[5] [footnote omitted]. It is a principle of the *Victims' Bill of Rights, 1995*, that the ministry, as part of the justice system, must respect victims' personal privacy. These potential victims of crime have not consented to the disclosure of their personal information.

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[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[5] SO 1995, c 6.

[19] The ministry submits that the records at issue contain the personal information of the appellant and other identifiable individuals. The ministry submits that it has withheld "[i]nformation, including opinions or factual statements, provided by, or about third parties, which would likely identify affected third parties, even if their names are not disclosed". The ministry further submits that because of the content of the records, "severing identifying information such as names and dates of birth would not serve to remove personal information from the records."

[20] The two affected parties object to the disclosure of any of their personal information. They submit that disclosure of any of the records to the appellant would reveal, or potentially reveal, personal information about them, including their address, contact information, or other information that would enable the appellant to contact them, either directly or indirectly.

[21] The appellant does not dispute that personal information of the affected parties is contained in the records being sought such as names, addresses and phone numbers but he reiterates that he does not seek access to that type of information.

[22] The appellant asserts, however, that the opinions of certain named individuals about him, particularly opinions relating to his mental health, does not constitute the personal information of those named individuals. The appellant submits:

> … To the extent that this information was provided to a Justice of the Peace and the OPP with the understanding that it should be relied upon in a mental health assessment of the appellant, it becomes part of the personal information of the appellant. The information of the [named individuals] was as a matter of fact provided to a psychiatrist for consideration as to whether the appellant should be committed under a Form 2.

[23] The appellant further submits that the "source/complainant is known to the appellant and acknowledges their identity in the context of [this] appeal".

Analysis and finding

[24] In the circumstances of this appeal, because of the manner in which the request is framed, and that the information at issue in the appeal pertains to matters involving the appellant, I find that all the records remaining at issue contain the personal information of the appellant, as that term is defined in section 2(1) of the *Act*.

[25] I further find that all of the records which contain the personal information of the appellant also contain the personal information of identifiable individuals other than the appellant. Additionally, in light of the circumstances that led to the creation of the records, I find that these individuals would be identifiable in the records even if their

names and contact information were severed from the records.

[26] I also acknowledge that paragraphs (e) and (g) of the definition of personal information provide that the personal opinions or views of an individual are that individual's personal information, except where they relate to another individual and that the views and opinions of another individual about an individual are the second individual's personal information. However, in all the circumstances of this appeal the personal information of the appellant that falls into this category is so intertwined with the personal information of other identifiable individuals that, with some exceptions, it cannot be severed.

[27] In this regard, after the severance of certain information, there are portions of the records that contain the personal information of the appellant only. Accordingly, it is possible to disclose a severed version of those pages which contain his information only. This is discussed in more detail in the section dealing with the application of section 10(2) of the *Act*, below.

Issue B: Does the discretionary exemption at section 49(b) apply to the information for which it is claimed?

General principles

[28] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[29] Under section 49(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 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[30] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[31] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[6]

[32] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the

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[6] Order MO-2954.

information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[33] The ministry's representations in this appeal raise the possible application of the presumption in section 21(3)(b), the factor favouring non-disclosure at section 21(2)(f) and an unlisted factor favouring non-disclosure, that one of the individuals in the records is identified as being a victim of crime. Although not specifically cited by the appellant, the tone and content of the appellant's representations appear to raise the possible application of the factors favouring disclosure at sections 21(2)(a) and 21(2)(d) of the *Act*.

[34] Sections 21(2)(a), 21(2)(d), 21(2)(f) and 21(3)(b) of the *Act* read:

> 21 (2) 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,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (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;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) 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.

The ministry's representations

[35] The ministry submits that it relied on the presumption at section 21(3)(b) to withhold most of the records.

[36] Relying on Order PO-2955, the ministry submits that:

> All of the records we have withheld under this exemption relate to OPP investigations. One of the investigations resulted in charges. The other did not, but nevertheless falls within the scope of this presumption, because if

> the OPP officers had found that an offence had occurred, they could have, as police officers, laid charges.

[37] The ministry also claims that the personal information in the records is highly sensitive and is subject to the factor favouring non-disclosure at section 21(2)(f), submitting:

> The ministry relies on Order P-1618, where the IPC found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f). The ministry submits that this reasoning should be applied to the records, especially given that none of the affected third parties have consented to the disclosure of their records, and much of the personal information was provided by them with the expectation that it be treated in confidence.

[38] The ministry also suggests an unlisted factor favouring non-disclosure, that one of the individuals in the records is identified as being a victim of crime, and other affected third parties in the records may fall within the definition of that term set as out in the *Victims Bill of Rights, 1995* (*VBR*). The ministry submits that:

> … disclosure of personal information would violate the rights accorded to victims pursuant to the *Victims Bill of Rights, 1995*. The preamble to the *VBR* emphasizes the importance of the justice system not increasing the suffering of victims of crime:
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> > "The people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness. The people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime ...."
>
> The *Victims Bill of Rights, 1995*, prescribes in paragraph 1 of section 2 the following principle: "Victims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials." As "justice system officials", we submit OPP officers are bound by this provision. We submit that any consideration of section 21 must consider disclosure being an unjustified invasion of their personal privacy by virtue of the fact that it would contravene the *Victims Bill of Rights, 1995*, and in particular the likelihood that it would increase the suffering of victims.

The two affected parties' representations

[39] The representations of the two affected parties included a copy of a statement of claim issued by the appellant against them that asserts multiple causes of action. They state that they have not delivered a statement of defence but when they do, they will plead a number of allegations concerning the appellant including their concerns for their personal safety in connection with the appellant and the specific reasons and particulars for those concerns, which they listed in their representations.

[40] The affected parties further submit that they each are a person whose well-being and safety could be affected by the disclosure of the records, or information contained therein, because, among other things: (a) of the civil proceeding and the nature thereof; (b) they are, or may be, a potential victim; and/or (c) generally, by reason of their relationship with the appellant.

[41] The two affected parties request that their personal privacy be respected and vigorously protected, particularly having regard to the nature of this case, the civil proceeding and, in particular, the parties involved and the nature and circumstances of their relationship with one another.

The appellant's representations

[42] With respect to the application of the section 21(3)(b) presumption, the appellant submits:

> The appellant does not dispute that the OPP was engaged in an investigation into possible violations of the law; however, it is submitted that there is a strong public interest in disclosing records that relate to an investigation that *prima facie* failed to abide by any standard of rigour or procedure. As stated earlier, the disclosure in this case will illustrate a lack of process on the part of the OPP rather than the use of sophisticated or systematic investigation. The appellant submits that the OPP must, at least, disclose to the IPC what, if any investigative techniques were used to assess the threat of the appellant, why the appellant was not interviewed, why it took several days before exercising arrests for a situation of alleged domestic violence that occurred months previously and what role [named individual] had in fast tracking the complaint, it is submitted that repeated interviews of [named individual] were done in quick succession on the basis of favouritism towards her [because of certain identified reasons].

[43] With respect to the factor at section 21(2)(f), the appellant submits that:

> … the records being withheld are not "highly sensitive" in nature as the complainant knew or ought to have known that they would be disclosed to the appellant in criminal proceedings or Mental Health proceedings. Such is precisely the case. To the extent that any particulars were not disclosed, further disclosure is unlikely to be highly sensitive in nature.

[44] With respect to the unlisted factor relating to the *VBR*, the appellant submits:

> … the ministry's assertion that an exemption of records is required to protect victims of crime is incorrect as the appellant was not convicted of a crime. The *Victims Bill of Rights, 1995*, … defines a victim as "a person who, as a result of the commission of a crime by another, suffers emotional or physical harm, loss or damage to property of or economic harm..." Under the Bill, "crime" means an offence under the *Criminal Code* (Canada); l'acte criminel"). There is no victim of crime in this case, such that this public policy rationale should not be available to the ministry.

Analysis and finding

Factor favouring disclosure: section 21(2)(a) (public scrutiny)

[45] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[7]

[46] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a).[8]

[47] In Order P-1014, Senior Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Senior Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, the senior adjudicator concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Senior Adjudicator Higgins found that the factor at section 21(2)(a) did not apply.

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[7] Order P-1134.
[8] Order P-256.

[48] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Senior Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature to satisfy him that the conduct of the OPP in relation to him and its investigation of the matters involving him were appropriate. There does not appear to me to be a systemic problem. As in Order P-1014, this is a private interest, and I therefore find that section 21(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 21(2)(a) does not apply to the information in the records that remains at issue.

Factor favouring disclosure: 21(2)(d) (fair determination of rights)

[49] For section 21(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

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

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[9]

[50] There appear to be three separate, but as it turns out, chronologically overlapping proceedings that are addressed in the records at issue. One is the investigation into an allegation of criminal harassment which did not result in charges. The second relates to the obtaining and executing a Form 2 pursuant to the *Mental Health Act*[10] apprehending the appellant. The third is an investigation relating to an allegation of domestic assault which resulted in charges, but apparently no conviction. It is clear that the appellant has commenced a proceeding into his concerns about his being charged and for his apprehension under a Form 2 pursuant to the *Mental Health Act*. The appellant asserts that he is in need of the information in the records generally, but has not provided a great deal of evidence about exactly how the information in the records that he seeks will have some bearing on or is significant to the determination of

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[9] 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.).

[10] R.S.O. 1990, c 7.

the court proceeding. Nor has he fully explained how the personal information is *required* in order to prepare for the proceeding or to ensure an impartial hearing. Furthermore, there is a disclosure process that is available in the civil proceedings.

[51] In my view, considering all the circumstances, I find that the factor in section 21(2)(d) does not apply to the personal information in the records that remains at issue.

Factor favouring non-disclosure: Section 21(2)(f) (highly sensitive)

[52] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[11]

[53] Based on my review of the records at issue and the representations, I find that due to its subject matter and the context in which it was gathered, the personal information in these records is inherently highly sensitive and, therefore, that the consideration at section 21(2)(f) is relevant to the determination of whether or not it should be disclosed. In my view this factor applies in this case and is a factor weighing in favour of a finding that disclosure would constitute an unjustified invasion of personal privacy when balancing the appellant's access rights against the privacy interests of other identifiable individuals.

Unlisted Factor Favouring non-disclosure: Victims Bill of Rights

[54] The ministry relied on section 2(1) of the *Victims Bill of Rights, 1995* which prescribes that victims of crime "should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials." The ministry argues that as a "justice system official", the ministry is bound by this provision and any determination under section 21(1) of the *Act* must consider whether disclosure would violate the *Victims Bill of Rights, 1995* and "the likelihood that it would increase the suffering of a victim."

[55] In light of my finding above that the factor at section 21(2)(f) applies and/or my finding below that the presumption at section 21(3)(b) applies, and no factors favouring disclosure have been established, it is not necessary for me to also consider whether this unlisted factor favouring non-disclosure also applies.

Presumed unjustified invasion of personal privacy: section 21(3)(b) (investigation into violation of law)

[56] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation

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[11] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

into a possible violation of law.[12] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[13]

[57] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[14]

[58] As discussed above, there appear to be three separate, but as it turns out, chronologically overlapping proceedings that are addressed in the records at issue. One is the investigation into an allegation of criminal harassment which did not result in charges. The second relates to the obtaining and executing a Form 2 apprehending the appellant. The third is an investigation relating to an allegation of domestic assault which resulted in charges, but apparently no conviction. Although it is arguable that the section 21(3)(b) presumption does not apply to the proceedings relating to the Form 2,[15] because of the way in which the events unfolded there is no practical way to parse out that information. In any event, I find that the personal information of other identifiable individuals relating to the Form 2 proceeding that is not subject to the section 21(3)(b) presumption would be subject to the factor at section 21(2)(f).

Weighing the factor and presumption and balancing the interests of the parties

[59] As set out above, in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.

[60] I have found that the presumption at section 21(3)(b) and the factor at section 21(2)(f) favour non-disclosure and that there are no factors that favour disclosure. Considering and weighing the factor and presumption and balancing the interests of the parties, I therefore find that disclosure of the personal information would be an unjustified invasion of personal privacy under section 49(b).

Absurd result

[61] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the

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[12] Orders P-242 and MO-2235.
[13] Orders MO-2213 and PO-1849.
[14] Orders M-734, M-841, M-1086 and PO-1819.
[15] See in this regard the discussion in Orders MO-1384 and MO-1428.

exemption.[16]

[62] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[17]
- the requester was present when the information was provided to the institution[18]
- the information is clearly within the requester's knowledge[19]

[63] 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.[20]

[64] The appellant's position is that by the affected parties including a copy of the statement of claim with their representations they have relinquished any claim to the protection of their identity. In any event, the appellant submits that he knows who they are and is aware of the information they provided. In addition, in his initial submissions, referring to section 64(1) of the *Act*, the appellant submitted that the statutory scheme under *FIPPA* is not limited by other processes, nor does it purport to limit other access procedures.

[65] He submits:

> … Moreover, given the [named individuals'] admission of their involvement in the matter, the OPP's principled objections to disclosure of information are almost wholly insufficient to resist the disclosure of information on the basis of protection of the [named individuals'] identity. In these circumstances, as stated below, each of the OPP's asserted bases of exemption should be rejected as the rationale for protection sought is undermined by virtue of the fact that the appellant is aware of the [named individuals'] identity and the [named individuals] are aware of the appellant's knowledge in this regard.

[66] The appellant identifies one of the affected parties as being the person who put the matters in motion, which included making statements to a Justice of the Peace that led to his being apprehended under a Form 2. He submits that this is recounted in the Statement of Claim, and that:

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[16] Orders M-444 and MO-1323.
[17] Order M-444.
[18] Orders M-444, MO-2266 and P-1414.
[19] Orders MO-1196, PO-1679 and MO-1755.
[20] Orders MO-1323, PO-2622 and PO-2642.

> In the circumstances, it would be absurd to attempt to exempt any record which may serve to identify [named individual], who has through [the IPC process] identified herself as a source in the OPP investigation. There is no rationale provided as to why she would or does fear the appellant. The appellant is aware of her particulars and has known her all his life. He has not caused her harm nor is there any indication that he may do so in the future. …

[67] The appellant also refers to a videotape statement of one of the named individuals that, I presume, he must have seen and/or received in the context of disclosure in a criminal proceeding.

[68] The ministry submitted that it is not clear how much knowledge the appellant has but that disclosure would be inconsistent with the purpose of the exemption, which is "to protect the privacy of the affected third parties whose personal information has been collected as part of a law enforcement investigation". In reply, the ministry submitted that the affected parties have privacy rights in accordance with *FIPPA*, whether or not they identify themselves, and that any reasonable interpretation of the *Act* plainly supports this position.

[69] The affected parties submitted in reply that the appellant's knowledge of their identities, either before or after the disclosure request was made by him, is entirely irrelevant to this appeal and forms no tenable basis for appealing the ministry's initial decision to properly protect personal information.

Analysis and finding

[70] In Order MO-2114, Adjudicator Laurel Cropley was faced with a similar situation. She wrote:

> With respect to the information that the appellant may already be aware of, that information is also about identifiable individuals other than the appellant. In Order MO-1524-I, I made the following comments regarding a similar situation, which I find to be equally applicable to the case before me:
>
> > The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient

> basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.

I also adopt the findings of Adjudicator Frank DeVries in Order PO-2440, where he stated:

> I have carefully reviewed the circumstances of this appeal, including the specific records at issue, the background to the creation of the records, the unusual circumstances of this appeal, and the nature of the allegations brought against the police officer and others…I find that, in these circumstances, there is particular sensitivity inherent in the personal information contained in the records, and that disclosure would not be consistent with the fundamental purpose of the *Act* identified by Senior Adjudicator Goodis in Order MO-1378 (namely, the protection of privacy of individuals, and the particular sensitivity inherent in records compiled in a law enforcement context). Accordingly, the absurd result principle does not apply in this appeal.

[71] The records contain the personal information of identifiable individuals other than the appellant relating to matters involving them. Due to the nature of the information and the relationship between the appellant and the affected parties, I find in these circumstances that the sensitivity of the personal information of other identifiable individuals, the bulk of which was collected in the course of an investigation into a possible violation of law, constitutes a compelling reason for not applying the "absurd result" principle. Disclosure of this personal information would be inconsistent with the purpose of the section 49(b) exemption, which must include the protection of the personal privacy of individuals in the law enforcement context.

[72] In arriving at this decision, I have taken into consideration section 64(1) of the *Act*, which provides:

> This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

[73] In Order MO-2114, Adjudicator Cropley discussed the municipal equivalent of section 64(1) in the following way:

> In Order MO-1109, former Assistant Commissioner Tom Mitchinson, [in commented on this section as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).

Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:

> This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

…

I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through discovery or disclosure is not determinative of whether access should be granted under the *Act*. Although the appellant may have knowledge of the content of the videotape because of its limited disclosure to him through the criminal disclosure process, I am mindful that the limitation placed on its subsequent use *via* the undertaking given by the appellant's criminal lawyer reflects the sensitivity of the information.

[74] In this appeal, based on the fact that a request for information was made, although the appellant may be aware in general of what occurred, other than perhaps a videotape of a witness statement which the appellant saw and/or received as disclosure in a criminal proceeding, it is clear that the appellant is not aware of the exact information that is found in the records remaining at issue. In addition, as set out above, disclosure of this personal information would be inconsistent with the purpose of the section 49(b) exemption.

[75] In all the circumstances, I find that the absurd result principle does not apply.

Issue C: Does the discretionary exemption at section 49(a) in conjunction with sections 14(1)(c), (d), (e) and/or (l) and/or 19 apply to the balance of the information for which it is claimed?

Introduction

[76] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from

this right.

[77] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[78] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[21]

[79] In this case, the institution relies on section 49(a) in conjunction with sections 14(1)(c), (d), (e) and (l) and 19.

[80] I will first address the possible application of section 19.

Issue D: Does section 19 apply to the information for which it is claimed?

General principles

[81] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
> >
> > (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[82] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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[21] Order M-352.

Branch 1: common law privilege

[83] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[84] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[22] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[23] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[24]

[85] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[25]

[86] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[26] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[27]

Branch 2: statutory privileges

[87] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The representations

[88] Relying on Order PO-2532-R, the ministry submits that the section 19 exemption applies to the portions of the records that document discussions that took place between members of the OPP and Crown Attorneys, as well as actual email communications. It submits that the purpose of both types of records was to obtain legal advice and to record that advice and that there is no evidence to suggest that the

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[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders MO-1925, MO-2166 and PO-2441.
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[25] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[26] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[27] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

privilege was waived.

[89] The appellant submitted that he is entitled to know the date of the correspondence and the identity of the initiating and receiving parties of the correspondence that is claimed to constitute solicitor-client privilege. He submits that "[t]he timing of alleged solicitor-client privileged communications may illustrate whether any diligence was done to determine whether the actions of the OPP were lawful".

Analysis and finding

[90] I find that the pages for which section 19(a) is claimed are emails and/or the recordings of communications between Crown Counsel and members of the OPP, either copied or not copied, to other members of the OPP. I find that the information at issue contains legal advice or forms part of the continuum of communications aimed at keeping both the Crown Counsel and members of the OPP informed so that legal advice may be sought and given as required. In my view, disclosing this information would reveal the confidential privileged communications. Furthermore, I find that the pages cannot reasonable be severed without revealing information that qualifies for exemption. Accordingly, I find that the records, or portions of the records, where the withheld information is found qualifies for exemption under Branch 1 of section 19(a). This information is found on pages 14 to 25 and a portion of pages 6, 39 and 41.

[91] As I have found that section 19(a) applies, it is not necessary for me to consider whether these records, or portions thereof, also qualify for exemption under section 19(b).

[92] Accordingly, as I have found that section 19(a) applies to the information for which it is claimed, subject to my discussion on the exercise of discretion below, I uphold the ministry's decision to withhold these records, or portions of these records, pursuant to section 49(a) in conjunction with section 19(a) of the *Act*.

[93] I will now consider whether sections 14(1)(c), (d), (e) and/or (l) apply to the balance of the information at issue.

Issue E: Do sections 14(1)(c), (d), (e) and/or (l) apply to the balance of the information for which it is claimed?

General principles

[94] Sections 14(1)(c), (d), (e) and (l) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,

> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[95] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[96] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[28]

[97] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[29] It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. As set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* how much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[30]

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[28] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[29] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[30] 2014 SCC 31 (CanLII) at paras. 52-4.

The ministry's representations

[98] The ministry submits that the OPP is a police service, and the records at issue are operational records that were created during OPP law enforcement investigations, one of which resulted in charges. The ministry submits that it has applied the exemptions primarily to protect the integrity of law enforcement investigations, specifically related to domestic violence, and out of concern for the safety of affected third party individuals. The ministry submits that there is a particular sensitivity that is inherent in law enforcement records created in the context of suspected or actual violence.

[99] The ministry submits that section 14(1)(c) applies to certain information because the records describe the kinds of OPP techniques and procedures utilized in the following scenarios:

> (a) When the OPP are attending at a residence to investigate an allegation of domestic assault, where it has been determined that a strong law enforcement response is required: The techniques and procedures in the records relate to the kinds of prior checks that are conducted by the OPP on suspects, the staging and monitoring activities that are performed, as well as the specific types of OPP resources that are deployed; and,
>
> (b) When responding to threats of domestic violence: The techniques and procedures in the records relate to evaluative tools that the OPP use to consider the threat that someone poses.

[100] The ministry submits that these techniques and procedures have been put into place to protect members of the public, particularly victims or potential victims of domestic assault. The ministry claims that disclosing these records would allow alleged offenders to circumvent the techniques and procedures that are described and possibly cause harm to suspected victims and responding police officers. The ministry submits that it does not believe that these investigative techniques and procedures are widely known, especially to the extent they are described in the records.

[101] The ministry referred to Order MO-1786 which it submits upheld the application of section 14(1)(c) to investigative techniques and procedures contained in a policy that guided a law enforcement agency when attending at a victim's residence to investigate an allegation of domestic assault. The ministry submits that the reasoning used in Order MO-1786 ought to be applied to the records remaining at issue.

[102] The ministry submits that section 14(1)(d) can apply in two instances: if it could identify a confidential source of information in respect of a law enforcement matter or if it could disclose information furnished only by the confidential source. The ministry submits that both of these eventualities are applicable to the records at issue.

[103] Relying on Order MO-2043, the ministry submits that it has applied this exemption to most of the records on the basis that to disclose any of them would reveal the identity of a confidential source of information regarding a potential breach of law as well as other personal information belonging to that confidential source. The ministry submits that from the detail contained in the extensive number of records at issue it is clear that this information could only have been provided by the confidential source.

[104] Regarding the application of section 14(1)(e), the ministry submits that in light of the subject matter of the records, it withheld them out of specific concern that their disclosure could reasonably be expected to harm affected third party individuals mentioned in the law enforcement records, who are identified variously as being either witnesses, a victim or a complainant. The ministry submits that:

> As we have noted, these records relate to individuals involved in law enforcement investigations, and they contain what can only be characterized as highly detailed, sensitive and candid information. We submit that the personal information was provided with the expectation that it would not be disclosed in the manner contemplated by this appeal.

[105] The ministry submits that in the circumstances, withholding the records on the basis of section 14(1)(e) is prudent and reasonable.

[106] The ministry submits that it has applied section 14(1)(l) for the following reasons:

> (a) The responsive information in the records relates to individuals identified as being a complainant, witnesses and a victim. The ministry submits that members of the public seek the assistance of the police, on the understanding that the information they provide is often highly sensitive, and for that reason alone, would never be disclosed in the manner contemplated by this appeal. The ministry is concerned that the disclosure of the records could discourage members of the public from seeking police assistance out of concern that the confidentiality of their information will not be safeguarded. The ministry submits that such an outcome could be expected to either facilitate the commission of crime or hamper its control; and,
>
> (b) The records include confidential law enforcement information that members of the OPP used for the purpose of documenting their investigations, and for internal communications. The ministry is concerned that members of the OPP will be less likely to record information and to communicate candidly with one another, if the records that they create are more likely to be disclosed. The ministry submits that this outcome could also have the result of facilitating crime or hampering its control.

The representations of the two affected parties

[107] The two affected parties adopt the ministry's submissions and submit that as a result of the appellant's previous conduct they are concerned for their personal safety in connection with the appellant, and for the personal safety of others. They set out the specific reasons and particulars for those concerns in their representations.

Representations of the appellant

[108] The appellant submits that the OPP, contrary to the ministry's blanket assertion of exemption over investigative techniques, followed no standard protocol and did no preliminary on-site or other investigation prior to arresting the appellant. With respect to the ministry's representations in particular, the appellant submits:

> a) The suggestion that the OPP was investigating a domestic assault incident is specious and misplaced. On the date of the arrest of the appellant there was no allegation of domestic violence from the alleged victim. The complaint was made by [a named individual] which related to events that had allegedly transpired several months previously in relation to violence or threat of violence against [a named individual]. The OPP based its investigation and decision to arrest the appellant entirely on the statement of [a named individual] with no investigation or interview with the appellant.
>
> (b) The response of the OPP in this regard is entirely pre-textual and made in bad faith. The appellant submits that the OPP is not permitted to mislead or raise principled objections that it knows are contrary to the facts in a specific case. In this context, it is submitted that the OPP must disclose to the appellant all the information relating to the investigative techniques it used in this case. What it will reveal is that information from [a named individual] was relied upon for the purpose of arresting the appellant to commit him on a Form 2. When such committal was rejected by an authorized physician, the appellant was arrested for domestic assault on allegations that were advanced solely by [a named individual]. It is submitted that the "investigative techniques" that the OPP purports to protect are in fact non-existent or not applied. If anything, the public interest requires disclosure of how the OPP has responded to an allegation of domestic violence in an ad-hoc and dangerous manner.
>
> (c) The threat level analysis employed by the OPP would not be revealed by disclosing statements of [two named individuals].

[109] The appellant also submits that there is no evidence of any ongoing criminal investigation, restraining order, or criminal activity by him as asserted by the ministry or

as stated by the affected parties and that:

> The concerns of these parties that there would be danger or risk in releasing information to the appellant has no air of reality particularly in the context of what amounts to a legal proceeding for the appellant to seek redress against the [named individuals]. The appellant has not, nor has he ever endangered the safety of the [named individuals] and now is taking legal steps to pursue his rights. The concerns of the [named individuals] in this regard about danger to their safety are entirely without merit and were unsuccessful even in forming the basis of his *Mental Health Act* detention.

[110] With respect to the application of section 14(1)(d), the appellant submits:

> … [the named individuals] have identified themselves as the "confidential sources" of the OPP by furnishing a copy of the appellant's statement of claim filed against them. It is submitted that as a matter of both public policy and logic that protecting the identity and identifying features and information of people who acknowledge that their identity is known to the appellant and identify themselves in submissions to the IPC (which are disclosed to the appellant), does not constitute an appropriate basis for exemption under *FIPPA*.

[111] With respect to the application of section 14(1)(e), the appellant submits:

> … The IPC can simply review those statements contained in the public statement of claim filed by [named individuals] to ascertain the level of information that has already been made available to the appellant. What needs to be assessed is whether the disputed records would materially alter or change what the appellant has already been apprised of. Thereafter, some credible threat assessment must be adduced by the OPP.
>
> The notion that disclosure of specific information by [named individuals] will put them at risk when the fact that they have disclosed information is already known as well as significant detail of the content of their disclosure, strains credulity. The OPP has never sought a restraining order against the appellant, who is not a threat to any person and - to the contrary - is seeking to obtain information by exercising his statutory right of access to information. [Named individuals] are not victims within the meaning of the *Victims Bill of Rights*; however, they were instrumental in filing a document that unsuccessfully sought to have the appellant involuntarily committed to psychological detention.

[112] With respect to the application of section 14(1)(l), the appellant writes:

> (a) The appellant submits that the ministry is improperly applying the instant exemption on the principle that disclosure may erode confidence within the system of reporting crimes. Firstly, the exemption requires the institution to point to a crime that can be averted by preventing disclosure. The principled objection in this case is predicated on protection of systemic integrity and not the commission of an unlawful act. Secondly, the exemption does not hamper the control of a crime as the appellant is already aware of the identity of the complainant and the general information provided by them. It would not dissuade the reporting of potentially criminal activity for complainants to know that *FIPPA* records disclosure is made to an appellant where the complainant's identity and information has already been disclosed to the appellant.
>
> (b) The records available to the appellant suggest that the OPP refused to contact him or investigate the matter pre-emptively before arresting him. They demonstrate that the OPP relied exclusively upon information provided from [an identified individual] who also had direct and/or indirect information in providing the complaint. There is a strong public interest in disclosing any public record that will identify the precise role of [named individual] in disclosing information or fast tracking the complaint of [named individual]. Indeed, the protection in this case is not about protecting candid internal conversations about a serious criminal matter, but rather, it is submitted that it risks revealing improper communications between law enforcement to prioritize a complaint based on the status of the complainant.

[113] With respect to the itemized concerns of the two affected parties, the appellant states:

> … the itemized concerns of [named individual] … are exaggerated and false in the sense that they are not even subjectively credible. The appellant has never made any utterances in respect of [named individual] and until the date of his arrest head a friendly relationship with him. It is submitted that the statements of [named individual] are made with malice in an effort to protect his spouse and the credibility of her comments. …
>
> …
>
> [Named individual] has identified himself and stated generic reasons for fearing for his safety. None of the reasons, as admitted by [named individual], provides particulars of his position. …

> …
>
> It is submitted that [named individual's] statements were insufficient to either secure a mental health detention of the appellant or to substantiate any criminal charge against him. The only charge, which was denied, was not substantiated by evidence from [an individual] and was not prosecuted.

Analysis and findings

[114] I will first address the potential application of section 14(1)(e).

Section 14(1)(e)

[115] A person's subjective fear, while relevant, may not be enough to justify the exemption.[31]

[116] The term "person" is not necessarily limited to a particular identified individual, and may include the members of an identifiable group or organization.[32] The issue is not increased risk *per se* but rather whether the ministry has demonstrated a risk of harm that is well beyond the merely possible or speculative.

[117] Adjudicator Cropley's comments in Order PO-1940, while addressing the application of section 20 of the *Act*[33], are helpful. In that order, she stated:

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

[118] In the current appeal, based on the materials before me as well as the context

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[31] Order PO-2003.
[32] Order PO-1817-R.
[33] A similar test is often applied when considering the section 14(1)(e) and 20 exemptions.

and the nature of the relationships set out in the records, I conclude that with respect to certain specific information in the records there is a reasonable basis for a finding that disclosing this information could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person and that the reasons for resisting disclosure are not frivolous or exaggerated. This is information that is specific and detailed regarding certain observation and containment processes that, if disclosed, would provide information that could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. I find that the evidentiary standard set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* for establishing the application of section 14(1)(e) has been met with respect to this information. This information appears on pages 2, 36, 37, 38, 44, 46, 47, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 72, 73, 77, 78, 79, 80, 82, 122 and 123 of the records.

[119] Accordingly, I find that this information qualifies for exemption under section 49(a) of the *Act*, in conjunction with section 14(1)(e).

[120] I will now consider whether sections 14(1)(c), 14(1)(d) and/or 14(1)(l) apply to the remainder of the information for which those sections are claimed.

Section 14(1)(c)

[121] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the investigative technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the investigative technique or procedure is generally known to the public.[34]

[122] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[35]

[123] To meet the "investigative technique or procedure" test, the ministry is also required to show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. As Senior Adjudicator John Higgins stated in Order PO-2751:

> … The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly,

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[34] Orders MO-2347-I, P-170, P-1487 and PO-2751.
[35] Orders P-1340 and PO-2034.

> that the technique or procedure in question is not within the scope of section 14(1)(c).

[124] The ministry argues that the information withheld under this exemption is information that details techniques and procedures. It submits in particular that they relate to the kinds of prior checks that are conducted by the OPP on suspects, the staging and monitoring activities that are performed, as well as the specific types of OPP resources that are deployed when responding to threats of domestic assault. In addition, the ministry submits that they relate to evaluative tools that the OPP use to consider the threat that someone poses.

[125] Order MO-1786 dealt with portions of a policy book which appears to have spelled out interview techniques and detail the specific investigative techniques and/or procedures relating to domestic assault cases. In Order PO-2751, the records contained very detailed information about investigative methods used to investigate child pornography. In Order PO-2751, the Senior Adjudicator found that section 14(1)(c) applied to many of them, explaining that "any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*36 falls under this exemption." In my view, the same level of detail that appears to have been present in the records under consideration in those orders is not present in the information that I have not already found to qualify for exemption, and I am left wondering what specific information, if disclosed, would reveal an investigative technique or procedure.

[126] In that regard, while revealing some of the remaining information may disclose a risk assessment, in my view, it would not reveal an investigative technique or procedure with respect to the generation of a risk assessment or with respect to the evaluation of a threat that someone poses so as to qualify as an "investigative" technique or procedure under section 14(1)(c).

[127] Not having been provided with the requisite evidence to persuade me that the disclosure of this remaining information could reasonably be expected to result in the alleged harm under section 14(1)(c), I find that section 14(1)(c) does not apply.

Section 14(1)(d)

[128] For section 14(1)(d) to apply, the institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.[37] Further, the institution must provide evidence of the circumstances in which the informant provided the information to the

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[36] [2001] 3 S.C.R. 442, 2001 SCC 76.
[37] Order MO-1416.

institution in order to establish confidentiality.

[129] The purpose of the section 14(1)(d) exemption is to protect confidential informants. I accept that in many law enforcement situations, such as when an individual directly makes an anonymous complaint regarding a by-law infringement, section 14(1)(d) can apply.

[130] Although there appears to be ample evidence to show that the appellant may be aware of the source or sources of the information that resulted in the charges being laid or his apprehension under the Form 2 it is not necessary to address this in detail. This is because, in my view, disclosing the balance of the information that I have not already found to qualify for exemption would not disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source within the meaning of section 14(1)(d). Accordingly, I find that section 14(1)(d) does not apply.

Section 14(1)(l)

[131] With respect to the application of section 14(1)(l) I find that the proposition suggested by the ministry is far too broad. Taken to its logical conclusion this would mean that this exemption would apply to all information provided in a criminal investigation, a result that could not have been contemplated or intended by the legislature in enacting this statutory provision.

[132] I also find that the evidence tendered by the ministry in this appeal with respect to the application of section 14(1)(l) is highly speculative. The keeping of written records is an integral part of policing, and I am not satisfied that disclosing the records at issue in this appeal would interfere with that practice. I also do not accept that disclosure of the remaining information at issue would somehow facilitate the commission of an unlawful act or hamper the control of crime.

[133] Accordingly, I find that section 14(1)(l) does not apply.

PUBLIC INTEREST OVERRIDE

Issue F: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(b) exemption?

General principles

[134] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[135] Even though section 49(b) is not listed, because section 23 may override the application of section 21, it may also override the application of section 49(b) with reference to section 21.[38] If section 23 were to apply in this case, it would have the effect of overriding the application of section 49(b), and the appellant would have a right of access to the information at issue.

[136] Sections 14 and 19 are not one of the sections to which section 23 applies. Furthermore, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[39] the Supreme Court of Canada held that the legislature's decision not to make documents found to be exempt under section 14 and 19 of the *Act* subject to the section 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[40] Accordingly, the analysis that follows applies only to the information that I found to be exempt under section 49(b) of the *Act*.

[137] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[138] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[41]

Compelling public interest

[139] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[42] 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

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[38] See, for example Order PO-2246.
[39] [2010] 1 SCR 815, 2010 SCC 23.
[40] Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[41] Order P-244.
[42] Orders P-984 and PO-2607.

opinion or to make political choices.[43]

[140] A public interest does not exist where the interests being advanced are essentially private in nature.[44] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[45]

[141] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[46]

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

- the records relate to the economic impact of Quebec separation[47]
- the integrity of the criminal justice system has been called into question[48]
- public safety issues relating to the operation of nuclear facilities have been raised[49]
- disclosure would shed light on the safe operation of petrochemical facilities[50] or the province's ability to prepare for a nuclear emergency[51]
- the records contain information about contributions to municipal election campaigns[52]

[143] 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[53]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[54]

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[43] Orders P-984 and PO-2556.
[44] Orders P-12, P-347 and P-1439.
[45] Order MO-1564.
[46] Order P-984.
[47] 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.).
[48] Order PO-1779.
[49] 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.) and Order PO-1805.
[50] Order P-1175.
[51] Order P-901.
[52] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[53] Orders P-123/124 and P-391.

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[55]
- the records do not respond to the applicable public interest raised by appellant[56]

The representations

[144] In his representations with respect to the application of the section 21(3)(b) presumption, the appellant submitted that "there is a strong public interest in disclosing records that relate to an investigation that *prima facie* failed to abide by any standard of rigour or procedure."

[145] Later on in his representations the appellant added that:

> … there is a strong public interest in disclosing the involvement of [named individual] in the investigation and complaint, which drove the appellant's arrest. The appellant submits that the reason for [named individual's] interest in resisting disclosure of records relating to his statements [is because it] would reveal his undue influence in a police investigation that was inappropriately expedited and fast tracked without proper evidence or diligence. This is not a proper basis for exemption; moreover, it is indicative of a bad faith animus which militates in favour of disclosure of [named individual's] statements.

[146] And that:

> … There is a strong public interest in disclosing information to an accused person who is exonerated of the same matter of which he was accused.

[147] The ministry submits in reply that as the possible application of section 23 was not identified as an issue in the Notices of Inquiry, the appellant's representations on section 23 should not be considered. The two affected parties also submit in reply that the appellant's arguments are not properly responding representations and are not properly brought before me on this appeal.

[148] With respect to the substance of the appellant's section 23 arguments, the two affected parties submit in reply that:

> … while the appellant seems to argue there is some generalized "public interest" that is relevant to this appeal, the appellant fails to provide either

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[54] Orders P-532, P-568, PO-2472, PO-2614 and PO-2626.
[55] Orders M-249 and M-317.
[56] Orders MO-1994 and PO-2607.

> any evidence or any reasonable basis to establish this. To the contrary, the disclosure of the records is clearly within the personal interest of the appellant, including for the purposes of the proceeding he has commenced, but he certainly establishes no basis for any public interest being served by such disclosure.

[149] The two affected parties further submit that:

> Moreover, the appellant fails to address in his very general argument of "public interest" the broad disclosure obligation(s) of the parties in the proceeding he has commenced, in which he expressly alleges wrongdoing on the part of the OPP and the ministry, including the appellant's allegation that his *Charter* rights were allegedly infringed.
>
> The appellant will have the opportunity to seek and obtain disclosure from the ministry, the OPP and [named individuals] of the records in the course of the proceeding, to the extent the appellant establishes that the records meet the test for disclosure in the proceeding, subject to any applicable privilege or statutory or common law exception for such disclosure requested by him.

[150] The two affected parties conclude their reply representations by alleging that the appellant is improperly attempting to utilize this appeal process to argue his own legal position with respect to the claims and damages sought by him in his own action. They further submit that the appellant is attempting to argue alleged facts and claims as between himself and the affected parties for the improper purpose of attempting to gain an advantage in the action, which is neither the purpose nor objective of *FIPPA*.

Analysis and finding

[151] There was a great deal of concern about the manner in which the appellant raised the application of section 23 of the *Act*. It is not necessary to make a determination with respect to whether the appellant properly raised the application of section 23 of the *Act*, because even if he did, I find below that it does not apply.

[152] In my view, disclosure of the withheld portions information in the records would not "serve the purpose of informing the citizenry about the activities of their government, 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", as required in Order P-984. In my view, the appellant seeks access to the severed portions of the records in order to pursue his own interests. There does not appear to me to be a systemic problem, but he takes issue with matters relating solely to him. While these are of importance to him, in my view, they are in the nature of a private, rather than a public interest.

[153] Furthermore, there is no "compelling" public interest in the disclosure of the personal information in this case, because in my view, the appellant is requesting the information for a predominantly personal reason.[57]

[154] Accordingly, I find that there does not exist any public interest, compelling or otherwise, in the disclosure of the withheld information that I have found to qualify for exemption under section 49(b) of the *Act*. As a result, I find that section 23 has no application in the present appeal.

EXERCISE OF DISCRETION

Issue G: Did the institution exercise its discretion under sections 49(a) (in conjunction with sections 14(1)(e) and 19(a)) and 49(b)? If so, should this office uphold the exercise of discretion?

General principles

[155] The section 49(a) (in conjunction with sections 14(1)(e) and 19(a)) and section 49(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[156] 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
- it fails to take into account relevant considerations.

[157] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[58] This office may not, however, substitute its own discretion for that of the institution.[59]

The representations

[158] The ministry submits that it properly exercised its discretion in withholding the information at issue. The ministry submits that it exercised its discretion based on the following considerations:

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[57] See in this regard Order M-319.
[58] Order MO-1573.
[59] Section 54(2).

- The public policy interest in protecting the privacy of personal information belonging to affected third parties, which is contained in law enforcement investigation records.
- The public policy interest in safeguarding the privacy of victims of crime, who seek out the protection of law enforcement; and,
- The concern that disclosure of the records would jeopardize public confidence in the OPP, especially in light of the public cooperation that the OPP depend upon when they conduct law enforcement investigations.

[159] The appellant submits that:

> To the extent that there is discretion for release of records pursuant to section 49 of *FIPPA*, the appellant submits that the exercise of discretion to release information by the institution was not done in a lawful or fair manner. There is no public interest to be served in a case where the very integrity of the OPP investigation and collection process is at issue in a case where the source/complainant is known to the appellant and acknowledges their identity in the context of an appeal.

[160] The appellant further submits that:

> … the true animating concern of the ministry in this case is not out of an interest in preventing crime, protecting the safety of any person or the integrity of investigation techniques, but rather, the exemptions are being exercised in bad faith to mask an investigation that followed no consistent process and was unduly influenced and expedited by virtue of the status of [named individual] … .
>
> To this end, it is submitted that the OPP has been deliberate and selective in failing to make any mention of [named individual] as an officer involved in the investigation. It is submitted that he was present at the time when [named individual] provided witness statements and that he communicated directly with investigating officers to advance the investigation. As a matter of appearance of justice, [named individual] should not have been involved in the complaint and investigation process; however, it is imperative that his name and role be disclosed by the institution.
>
> …
>
> … it is submitted that the ministry improperly exercised its discretion in refusing to disclose responsive records and that its discretion was

> exercised in bad faith to protect itself from liability in view of a perfunctory and externally influenced investigation.

Analysis and finding

[161] In all the circumstances, I find that in denying access to the records, the ministry exercised their discretion under section 49(a) (in conjunction with sections 14(1)(e) and 19(a)) and section 49(b) in a proper manner, taking into account all relevant factors and not taking into account any irrelevant factors. Furthermore, I am not satisfied that the ministry exercised its discretion in bad faith or for an improper purpose.

[162] Consequently, subject to the discussion on severance below, I conclude that the information at issue in the records qualifies for exemption under section 49(a) (in conjunction with sections 14(1)(e) and 19(a)) and section 49(b) of the *Act*.

SEVERANCE

Issue H: Can the records reasonably be severed without disclosing exempt information?

[163] Where a record contains exempt information, section 10(2) of the *Act* requires the ministry to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[60]

[164] In my view it is possible to sever some of the information in the following pages and disclose it to the appellant, without disclosing the information that I have found be exempt: 4 to 7, 11, 37 to 39, 40, 43, 46, 54, 61, 62, 69, 70, 75, 77, 79, 81, 85, 97, 98, 99, 101, 119, 126, 130, 135 to 137, 141, 142, 144 to 146, 158, 159 and 167 to 179.

[165] I have highlighted the information to be disclosed to the appellant in green on a copy of those pages that I have provided to the ministry along with this order.

[166] Based upon my review of the information in the records that I have not ordered to be disclosed, in the circumstances of this case, any remaining possible severance would either reveal exempt information or result in disconnected snippets of information being revealed.

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[60] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

ORDER:

1. I do not uphold the ministry's decision to withhold information on pages 4 to 7, 11, 37 to 39, 40, 43, 46, 54, 61, 62, 69, 70, 75, 77, 79, 81, 85, 97, 98, 99, 101, 119, 126, 130, 135 to 137, 141, 142, 144 to 146, 158, 159 and 167 to 179 that I have highlighted in green on a copy of those pages that I have provided to the ministry along with this order. I order the ministry to disclose this information to the appellant by sending it to him by **December 2, 2016**, but not before **November 28, 2016**.

2. In all other respects I uphold the decision of the ministry to withhold the balance of the information at issue.

3. In order to ensure compliance with paragraph 1 of this order, I reserve the right to require the ministry to send me a copy of the pages that I have ordered to be disclosed to the appellant.

Original Signed by: October 27, 2016

Steven Faughnan
Adjudicator