Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3503

Appeal MA16-286

Toronto Police Services Board

September 29, 2017

Summary: The Toronto Police Services Board (the police) received a request for access to information relating to a criminal charge against the appellant. At mediation, the appellant expanded his request to include the contents of a complaint file arising from a complaint he made against a named police officer. The appellant also asserted that the police withheld responsive information and did not conduct a reasonable search for responsive records that fell within the scope of the request. The police took the position that certain withheld information was not responsive to the request and relied on section 38(b) (personal privacy) to deny access to portions of a General Occurrence Report and Police Officers' Notes and took the position that the content of the complaint file was excluded from the *Act* by operation of section 52(3)1. This order finds that certain withheld information is professional, not personal information, and should be disclosed to the appellant but that other withheld information qualifies for exemption under section 38(b); that certain withheld information is responsive to the request and should also be disclosed to the appellant and that the police conducted a reasonable search for responsive records. Finally, this order finds that the content of the complaint file generated as a result of the complaint is excluded from the *Act* by operation of section 52(3)1.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 2(2.1), 2(2.2), 17, 14(2)(a), 14(3)(b), 38(b) and 52(3)1.

Orders Considered: M-835, MO-1447, MO-1589-R, MO-2131 and P-1014.

Case Considered: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 5067.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information relating to a criminal charge against the requester.

[2] The original request was worded as follows:

- only need documents dated after November 2014
- any documents, reports where I was named
- all documents related to the charge issued by [named police officer] (52 Div.) in December 2014
- Statement made to [named police officer] by [named individual]
- [of named store]

[3] The police identified records responsive to the request and granted partial access to them. The police relied on sections 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1)(l) (facilitate commission of an unlawful act) and 38(b) (personal privacy) of the *Act* to deny access to the portion they withheld. The police also took the position that some information in the records is non-responsive to the request.

[4] The requester (now the appellant) appealed the police's decision.

[5] At mediation, the appellant took the position that additional responsive records ought to exist relating to a particular complaint file. He indicated that he is seeking access to all records that exist in relation to the complaint file and sent a letter to the mediator setting out the types of records that he asserted ought to exist.

[6] After the mediator relayed the information to the police, they conducted another search for responsive records and issued a supplementary decision letter advising the appellant that:

> … records contained within a Public Complaint file are collected, prepared, maintained and used to investigate an allegation of misconduct under the *Police Services Act* … As such, the records no longer fall under the jurisdiction of [*MFIPPA*] and any public complaints or disciplinary act records that may or may not exist would qualify for exclusion under section 52(3) of the *Act*.

> Therefore, access is denied to the records investigating your complaint pursuant to [section] 52(3) of the *Act*. …

[7] The appellant maintained his position that the police did not conduct a reasonable search for responsive records. Accordingly, the reasonableness of the police's search for responsive records was added as an issue in the appeal. In addition, it appears that the appellant is also challenging the police's position that some information in the records is non-responsive to the request.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[9] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police and an individual whose interests may be affected by the disclosure of the requested information (the affected party). Only the police provided responding representations. In their representations, the police advised that they were no longer relying on section 38(a) in conjunction with 8(1)(l) of the *Act* to withhold certain information from disclosure. Accordingly, that information and the application of section 38(a) in conjunction with section 8(1)(l) are no longer at issue in this appeal and I will order that it be disclosed to the appellant. I have highlighted this information in green in a copy of the records that I have provided to the police along with a copy of this order.

[10] I then sent a Notice of Inquiry to the appellant along with a copy of the police's representations. The appellant provided responding representations. In his representations, the appellant made extensive submissions about the content of the Investigative Report that had been listed as a responsive record in the Mediator's Report. As confirmed in a letter attached as a schedule to his representations, the Investigative Report was provided to him after the date of his request. Accordingly, access to the Investigative Report is no longer at issue and I will not be addressing access to that record in this order.

[11] In this order, I find that certain withheld information is professional, not personal information, and should be disclosed to the appellant but that other withheld information qualifies for exemption under section 38(b); that certain withheld information is responsive to the request and should also be disclosed to the appellant and that the police conducted a reasonable search for responsive records that fall within the scope of the expanded request. This order also finds that the content of the complaint file generated as a result of the complaint is excluded from the *Act* by operation of section 52(3)1. In addition, I order the information that the police initially identified as being subject to exemption under section 38(a) in conjunction with section 8(1)(l), a claim that the police subsequently withdrew, be disclosed to the appellant.

RECORDS:

[12] The records remaining at issue consist of a General Occurrence Report, Police Officers' Notes and the content of the responsive complaint file.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

B. Did the institution conduct a reasonable search for records?

C. Does section 52(3) exclude the records in the responsive complaint file from the *Act*?

D. Do the General Occurrence Report and Police Officers' Notes contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

DISCUSSION:

Issue A: What is the scope of the request? What records are responsive to the request?

[13] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[15] In support of his position that other records exist that fall within the scope of his request the appellant refers to a letter to the mediator who conducted the mediation of his appeal that also accompanied his representations. As set out above, in the letter he points to specific portions of the Investigative Report that refer to various materials collected and prepared for the purpose of conducting an investigation into the appellant's complaint about the conduct of a particular police officer. He also refers to information he says he received from the Detective who wrote the Investigative Report indicating, he asserts, that the police received information from the Durham Police Services Board.

Analysis and finding

[16] In my opinion, the police correctly point out that the appellant's original request was for records relating to his arrest. Only at mediation did the appellant expand his request to include records relating to his complaint about the conduct of a particular police officer. The appellant's expanded request was addressed by the police when it issued a supplementary decision letter indicating that those records were excluded from the *Act* by operation of section 52(3).

[17] In my view, the police have properly defined the scope of the expanded request to be for records relating to his arrest and for records relating to his complaint about the particular police officer. I am also satisfied that the police properly identified the General Occurrence Report, police officers' notes and the contents of the responsive complaint file generated as a result of the complaint as responsive records.

[18] In addition, I have reviewed the portions of the General Occurrence Report and police officers' notes that the police assert not to be responsive to the request, and only agree with their position with respect to information in the police officers' notes. Those portions of the police officers' notes relate to matters that do not involve the appellant or contain general administrative information that is not responsive to the appellant's request. The information contained in the General Occurrence Report that the police identified as non-responsive pertains to the appellant and is, in my view, responsive to the appellant's initial request for information relating to a criminal charge against him. As no exemptions have been claimed to apply to this information, I will order that this information be disclosed to the appellant. I have highlighted this responsive information

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

in green on a copy of the General Occurrence Report provided to the police along with a copy of this order.

Issue B: Did the institution conduct a reasonable search for records?

[19] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[3] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[20] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[21] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[6] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[7]

[22] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[8]

[23] In support of his position that the police did not conduct a reasonable search for responsive records the appellant again refers to his letter to the Mediator and further asserts that, "(i)n addition to that I have provided all this information to Toronto police services over the phone as well." The appellant asserts that the content of the Investigative Report reveals "the existence of lots of documents and information that I am looking for". The appellant questions the police's motivation and asserts that they conducted themselves "in bad faith with malicious intention".

[24] The police state that they conducted a secondary search for responsive records once the appellant specified the records he was seeking access to and they issued a decision letter to the appellant taking the position that those records were excluded

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.

from the *Act* by operation of section 52(3).

Analysis and finding

[25] While the appellant challenges the adequacy of the police's search for responsive records he does not, in my view, provide a reasonable basis for concluding that additional records exist.

[26] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. In my view, the police conducted, in good faith, a reasonable search for records that were responsive to the expanded request in satisfaction of their obligations under section 17 of the *Act*.

[27] Accordingly, I find that the police have conducted a reasonable search for records responsive to the appellant's expanded request at issue in this appeal.

Issue C: Does section 52(3) exclude the records in the responsive complaint file from the *Act*?

[28] The police take the position that the materials generated as a result of the complaint in the responsive complaint file are excluded from the *Act* under section 52(3)1 of *MFIPPA*.

Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[29] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[30] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[9]

[31] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[10]

[32] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[11]

[33] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[12]

[34] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[13]

[35] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[14]

Section 52(3)1: court or tribunal proceedings

[36] For section 52(3)1 to apply, the institution must establish that:

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[9] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[10] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[11] Order PO-2157.
[12] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[13] Orders P-1560 and PO-2106.
[14] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The police's representations

[37] The police submit that the Investigative Report provided to the appellant was prepared by a police Detective as a result of a complaint made by the appellant against a police officer. They explain that the appellant was not satisfied with the Detective's findings and subsequently asked the Office of the Independent Police Review Director (OIPRD) to review his complaint, and the findings of the Detective.

[38] The police submit:

> Once a review is concluded it may result in a disciplinary hearing pursuant to Part V of the *Police Services Act*[15] (*PSA*). These records relate to an anticipated tribunal regarding the conduct of the subject officer depending on the OIPRD's findings. The anticipated proceedings relate directly to the employment of an officer, to which this institution has an interest. The Tribunal is a quasi-judicial forum, presided over by a Hearing Officer where allegations of serious breaches of the Code of Conduct [...] against police officers are adjudicated.

[39] In support of their position the police rely on Order MO-2131, an Order of Senior Adjudicator Frank DeVries, where he concluded that section 52(3)1 applied to records in a Public Complaint Investigation file generated as a result of an investigation of a complaint against a police officer.

The appellant's representations

[40] The appellant submits that the police have not established that the complaint or criminal charges involving the appellant are ongoing and accordingly, the records generated as a result of the complaint in the responsive complaint file are not excluded from the *Act* and should be disclosed. In support of his position, the appellant refers to the following excerpt from Order MO-1447 authored by Adjudicator Donald Hale:

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[15] *Police Services Act*, R.S.O. 1990, c. P.15.

> As noted above in my discussion of section 52(3)1, the investigations by the Police and OCCPS under the *PSA* into the appellant's allegations of misconduct by an officer were completed some six months ago. I find that I have not been provided with sufficient evidence by the Police to lead me to the conclusion that the Police and OCCPS consider their investigations of the allegations of wrongdoing by the officer to be ongoing. Similarly, the appellant makes it clear in his submissions that he too considers the investigation of his complaint to be completed. Based on my review of the records and the submissions of the parties, I find that due to the passage of time, there is no reasonable prospect of the legal interests of the Police being engaged in this employment-related matter in such a way as would affect their legal rights or obligations. Specifically, as six months have elapsed since the conclusion of the OCCPS investigation, I find that the Police no longer have the requisite legal interest as these events are no longer in the reasonably proximate past. In my view, there no longer exists a reasonable prospect that the legal interests of the Police will be engaged.
>
> Accordingly, I find that section 52(3)3 also does not apply and that the records are subject to the access provisions of the *Act*.

[41] The appellant further submits that the police are "unlawfully withholding the information, that I have requested in order to deal with the unlawful activities of two or possibly a third individual in question". He submits that the police cannot use privacy as an excuse to not disclose information to "avoid any prosecution against the unlawful act committed".

Analysis and finding

[42] In Reconsideration Order MO-1589-R Adjudicator Donald Hale reconsidered and reversed his findings in Order MO-1447 as a result of the decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*[16] (*Ontario (Solicitor General*) which overturned several of the decisions of this office with respect to the provincial equivalent to sections 52(3)1 and 52(3). In reconsidering and reversing his decision, he wrote:

> In *Ontario (Solicitor General)*, above, the Court of Appeal stated the following with respect to the "time sensitive" element under the provincial equivalent of section 52(3)1:

[16] (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 5067.

> In my view, the time sensitive element of subsection 6 is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
>
> . . . . .
>
> In my view, therefore, [Former Assistant Tom Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

The finding in Order MO-1447 that section 52(3)1 does not apply is based solely on the application of this "time sensitive" approach. In other words, it appears that I would have found that section 52(3)1 applies, but for the passage of time. Because this approach was explicitly rejected by the Court of Appeal, I have reached the conclusion that this finding constitutes a jurisdictional defect in the order, and that the order should be reconsidered for this reason.

[43] Adjudicator Hale reached the same conclusion regarding his findings with respect to section 52(3)3 in Order MO-1447.

[44] Accordingly, as the law now stands, "once effectively excluded from the operation of the Act, the records remain excluded". Therefore, the section 52(3)1 exclusionary provision still applies even if the investigation that is the subject of the records has been concluded.

[45] I now turn to the analysis of the three parts of the test.

Part 1: collected, prepared, maintained or used

[46] The police take the position that the responsive records generated as a result of the complaint in the complaint file fall outside of the scope of the *Act* as a result of the operation of section 52(3)1. In my view, those records would all have been collected and prepared for the purpose of conducting an investigation into the appellant's complaint about the conduct of a particular police officer. I am satisfied that those records were collected and/or prepared by the police. Therefore, I find that the first part of the test under section 52(3)1 has been met.

Part 2: proceedings before a court or tribunal

[47] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue. For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used. A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations. "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.

[48] This office has consistently held that proceedings arising from complaints filed under the *PSA* constitute proceedings before a "tribunal or other entity" for the purposes of section 52(3)1. I find, therefore that the responsive records generated as a result of the complaint in the complaint file were collected, prepared, maintained or used in relation to anticipated proceedings under the *PSA*. As a result, I find that the second part of the test under section 52(3)1 has been met with respect to the responsive records in the complaint file.

Part 3: labour relations or employment

[49] To satisfy Part 3 of the section 52(3)1 test, the police must establish that the proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[50] In my view disciplinary hearings under the *PSA* relate to the employment of a person by the institution for the purposes of section 52(3)1. In this regard, I adopt the findings of former Assistant Commissioner Tom Mitchinson in Order M-835 where he found that the penalties which follow the discipline of police officers pursuant to the *PSA* "can only reasonably be characterized as employment related actions."

[51] Therefore, I find that part 3 of the test under section 52(3)1 has been satisfied, as the collection, preparation or maintenance of the records by the police was in relation to proceedings or anticipated proceedings concerning the employment of the officer.

[52] In summary, I find that all three parts of the test under section 52(3)1 of the *Act* have been met for the responsive records generated as a result of the complaint in the complaint file at issue. I also find that the responsive records generated as a result of the complaint in the complaint file do not fall within any of the exceptions in section

52(4). Accordingly, I uphold the decision of the police that the responsive records generated as a result of the complaint in the complaint file are excluded from the operation of the *Act* under section 52(3)1.

[53] I now turn to the issues arising from the appellant's original request.

Issue D: Do the General Occurrence Report and Police Officers' Notes contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

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

> (h) the individual's name 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;

[55] 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.[17]

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

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[57] 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.[18] 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.[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[20]

[58] The police submit that records contain the personal information of a security guard which relates to his home address, date of birth, home telephone number, and ethnicity. The police further submit that information also relates to a name and date of birth of another party, as supplied by the security guard.

[59] The appellant submits that a named security guard was working for a named company that was contacted to do loss prevention at the store where the "alleged" incident took place. He submits that at all material times the security guard was acting as a representative for the named company and the store and:

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[17] Order 11.
[18] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[19] Orders P-1409, R-980015, PO-2225 and MO-2344.
[20] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> Therefore, the testimony provided by him and any personal information listed therein is not considered personal information according to [the *Act*].

Analysis and findings

[60] I have reviewed the records at issue and find that they contain the personal information of the appellant as well as other identifiable individuals that falls within the scope of the definition of "personal information" at section 2(1) of the *Act*. That said, I find that the name of the security guard and his business contact information qualifies as information about him in a business rather than personal capacity. However, other information that relates to the security guard including certain descriptors and his home address and personal contact information reveals something of a personal nature about him and thereby qualifies as his personal information. Accordingly, as no other exemptions have been claimed to apply to this information, I will order that the withheld portions of the General Occurrence Report and Police Officers' Notes containing the name and business contact information of the security guard be disclosed to the appellant. I have highlighted those portions of the records in green on a copy of the records that I have provided to the police along with a copy of this order.

[61] Having found that the records contain the mixed personal information of the appellant and other identifiable individuals, I will consider the appellant's right to access the remaining withheld information under section 38(b) of the *Act.*

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

[62] 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. 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.

Section 38(b) reads:

> 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

[63] Section 14 of the *Act* provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. If the information fits within any of the paragraphs of sections 14(1) or 14(4), disclosure is not an unjustified invasion of

personal privacy and the information is not exempt under section 38(b).

[64] 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 14(3) and balance the interests of the parties.[21] 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). In this appeal, the police assert that that the presumption in section 14(3)(b) applies. The appellant does not specifically refer to any specific factor favouring disclosure but the tenor of his representations appear to raise the possible application of the factor at section 14(2)(a). Those sections read:

> (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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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 police's representations

[65] The police submit that:

> The nature of law enforcement institutions, in great part, is to record information relating to unlawful activities, crime prevention activities, or activities involving members of the public who require assistance and intervention by the police. An important principle contained in the Freedom of Information legislation is that personal information held by institutions should be protected from unauthorized disclosure. The information collected was supplied to the investigating police, in the course of an investigation into a law enforcement matter, namely the arrest of the appellant.

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[21] Order MO-2954.

> Individuals supply their personal information, believing there to be a certain degree of confidentiality. Police investigations imply an element of trust that the law enforcement agency will act responsibly in the manner in which it deals with recorded personal information. This is in addition to the possibility that based on any potential release of their personal information the affected parties could be exposed to further negative attention from the appellant.

The appellant's representations

[66] The appellant submits that the information is no longer private because the records remaining at issue were presented in court. He submits that the police claim that they take very seriously the protection of privacy of witnesses but have not protected his information. He further submits that the security guard was contacted by this office and has chosen to not give a response and accordingly, "those documents have to be released to me without any further delay". He submits that "(i)n this situation the adjudicator has the authority to order the release of [the] information without any further approval from these parties concerned".

Analysis and finding

[67] With respect to the appellant's submission regarding the lack of representations, the failure of a party to provide representations is not equivalent to a consent to the disclosure of their personal information and I must still conduct the appropriate analysis. Similarly, regarding the discussion of matters in open court, 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.[22] 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.[23] This is addressed in more detail below.

[68] I agree with the position of the police that the presumption against disclosure in section 14(3)(b) applies in this appeal because the personal information in the General Occurrence Report and Police Officers' Notes was compiled and is identifiable as part of an investigation into a possible violation of the *Criminal Code*[24]. The presumption only requires that there be an investigation into a possible violation of law[25], which I find occurred in this case.

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[22] Orders M-444 and MO-1323.
[23] Orders MO-1323 and MO-1378.
[24] R.S.C., 1985, c. C-46.
[25] Orders P-242 and MO-2235.

[69] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[26] 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 14(2)(a).[27]

[70] In Order P-1014, an order dealing with the provincial equivalent of section 14(2)(a), 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. 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 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," Adjudicator Higgins found that the provincial equivalent of section 14(2)(a) did not apply.

[71] 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 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 police in relation to him and its investigation of the matters involving him were appropriate. In my view, the disclosure of the withheld information at issue would not result in greater scrutiny of the police. As in Order P-1014, this is a private interest, and I therefore find that section 14(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 14(2)(a) does not apply to the information in the records that remains at issue.

[72] Given the application of the presumption in section 14(3)(b), and the fact that no factors favouring disclosure were established, and balancing all the interests, I am satisfied that the disclosure of the remaining withheld personal information would constitute an unjustified invasion of another individual's personal privacy. Accordingly, I find that this personal information is exempt from disclosure under section 38(b) of the *Act*. I am also satisfied that the undisclosed portions of the records cannot be reasonably severed, without revealing information that is exempt under section 38(b) or

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[26] Order P-1134.
[27] Order P-256.

resulting in disconnected snippets of information being revealed.[28] I am also satisfied that it is clear that the appellant is not aware of the exact information that I have found to qualify for exemption and, in any event, disclosure of this personal information would be inconsistent with the purpose of the section 38(b) exemption. Accordingly, in all the circumstances, I find that the absurd result principle does not apply to the information that I have not ordered to be disclosed.

[73] Finally, I have considered the circumstances surrounding this appeal and I am satisfied that the police have not erred in the exercise of their discretion with respect to section 38(b) of the *Act* regarding the withheld information that will remain undisclosed as a result of this order. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose. The police considered the purposes of the *Act* and have given due regard to the nature of the information in the specific circumstances of this appeal. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

1. I uphold the reasonableness of the police's search for responsive records that fall within the scope of the request.

2. I uphold the police's decision that section 52(3)1 excludes the records generated as a result of the appellant's complaint in the responsive complaint file from the scope of the *Act*.

3. I order the police to disclose to the appellant the additional information that I have highlighted in green on a copy of the records that I have provided to the police along with this order by sending it to him by **November 3, 2017** but not before **October 30, 2017**.

4. In order to ensure compliance with paragraph 3, I reserve the right to require the police to send me a copy of the records as disclosed to the appellant.

Original Signed by: September 29, 2017
Steven Faughnan
Adjudicator

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