Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3548

Appeal MA16-277-2

Ottawa Police Services Board

January 4, 2018

Summary: This appeal relates to an individual's request for access to records related to a motor vehicle accident in which a named individual was allegedly involved. The police responded to the request by relying on section 14(5) of the *Municipal Freedom of Information and Protection of Privacy Act* to refuse to confirm or deny the existence of responsive records. The requester appealed and he also claimed that disclosure of the requested information was in the public interest. The adjudicator upholds the decision of the police.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 14(3)(b), 14(5) and 16.

OVERVIEW:

[1] This order addresses the issues raised by an individual's request to the Ottawa Police Services Board (the police) for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to information relating to a motor vehicle accident in which a named individual was allegedly involved.

[2] The police issued a decision to the requester stating that the existence of records responsive to the request could not be confirmed or denied, in accordance with section 14(5) of the *Act*. The police stated that if such records did exist, they would be exempt under the mandatory exemption in section 14(1) (personal privacy), together with the presumption against disclosure in section 14(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law).

[3] The requester, now the appellant, appealed the police's decision to this office and a mediator was appointed to explore the possibility of resolution of the issues. During the mediation stage, the appellant took the position that disclosure of the requested information is in the public interest. Consequently, the possible application of the public interest override in section 16 of *MFIPPA* was added as an issue in the appeal.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator provided the police with the opportunity to submit representations, initially. The adjudicator provided the non-confidential portions of the police's representations to the appellant to invite representations from him.[1] The appellant submitted representations, which were sent to the police, who then provided reply representations. Finally, the appellant provided further representations by way of sur-reply. The appeal was subsequently transferred to me.

[5] In this order, I uphold the decision of the police to refuse to confirm or deny the existence of responsive records, pursuant to section 14(5) of *MFIPPA.* I also find that there is no compelling interest under section 16 that outweighs the purpose of the exemption.

ISSUES:

A. Can the police rely on section 14(5) of the *Act* in the circumstances of this appeal?

B. Is there a compelling public interest that outweighs the application of section 14(5) of the *Act*?

DISCUSSION:

A. Can the police rely on section 14(5) of the *Act* in the circumstances of this appeal?

[6] Under section 14(5) of *MFIPPA*, an institution may refuse to confirm or deny the existence of records on the basis that confirming or denying their existence would itself constitute an unjustified invasion of an individual's privacy.

[7] Section 14(5) reads:

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[1] Portions of the representations were not shared with the appellant because they fit within the confidentiality criteria in IPC *Practice Direction 7*.

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[8] A requester in a section 14(5) situation is in a different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[2]

[9] In order to exercise its discretion to invoke section 14(5), the police must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; *and*

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[10] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*.[3]

[11] The effect of this interpretation is that the institution may *not* invoke section 14(5) where disclosure of the mere existence or non-existence of the record would not itself engage a privacy interest.[4]

Part one: disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy

Definition of personal information

[12] As stated, under part one of the section 14(5) test, the police must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy.

[13] An unjustified invasion of personal privacy can only result from the disclosure of *personal* information and so it is necessary to look at the definition of that term. Section

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[2] Order P-339.
[3] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.
[4] Order MO-2928.

2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), educational or employment history (paragraph (b)), address (paragraph (d)), their views and opinions (paragraph (e)), the views and opinions of others *about* other individuals (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[14] Sections 2(2.1) and (2.2) provide exceptions to the definition of personal information for certain information about individuals in their business, professional or official capacity.[5]

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6] Further, the information must be about the individual in a personal capacity. 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.[7]

[16] In this appeal, the police submit that if the record exists, it would contain the personal information of another individual because the appellant is requesting records related to an alleged accident involving this other named individual in which he (the appellant) was not involved.

[17] The appellant argues that "vehicle accident records belong to the Ministry of Transport of Ontario (MTO), to which … [the police are] obliged, by law, to transfer such records." Further, since MTO will, the appellant argues, release "anyone's accident records to any citizen who provides the name and date of birth of the person whose records they are seeking …. vehicle accident records are therefore, by law, not considered or treated as personal information."

[18] In reply, the police submit that if any such motor vehicle accident report exists, it would contain the names, addresses, date of birth, sex, driver's license number, vehicle plate numbers and information about witnesses, if any. The appellant's sur-reply representations repeat his previous argument about the records belonging to MTO, thereby making them publicly available.

[19] In my view, the appellant's position that the record would not contain personal

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[5] Section 2(2.1) provides that the definition of 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."

[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

information because the police are allegedly required to share accident information with the Ministry of Transportation is neither persuasive nor relevant to my determination of this issue under *MFIPPA.*

[20] Under paragraph (h) of the definition in section 2(1) of the *Act*, "personal information" means recorded information about an identifiable individual, including 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. Records of the nature requested, if they exist, would reveal that the named individual was involved in a motor vehicle accident, which fits within paragraph (h) of the definition of "personal information." Additionally, it is likely that the records, if they exist, would contain other information about that individual that would fit into paragraphs (a), (c) and (d) of the definition. Therefore, I find that such records, if they exist, would contain the personal information of the named individual.

Unjustified invasion of personal privacy

[21] Based on the wording of the appellant's request and my finding above, it is clear that if responsive records do exist, they would contain the personal information of another individual, and not the personal information of the appellant.

[22] Where a record only contains the personal information of an individual other than the requester, the mandatory exemption in section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) applies.

[23] Section 14(1) sets out certain exceptions to the general rule against the disclosure of personal information that relates to an individual other than the requester.[8] The only exception that could apply in the circumstances of this appeal is section 14(1)(f), which provides that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, … if the disclosure does not constitute an unjustified invasion of personal privacy." The factors and presumptions in sections 14(2), (3) and (4), provide guidance in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 14(5).

[24] 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 14(1). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain

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[8] For example, section 14(1)(a) refers to the written request or consent of an individual entitled to have access to the record, while section 14(1)(d) covers information for which there is a statute expressly authorizing disclosure.

types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

[25] Once established, a presumed unjustified invasion of personal privacy under section 14(3) cannot be rebutted by either one or more relevant section 14(2) factors. It can only be overcome if an exception in section 14(4) or the "public interest override" at section 16 applies.[9]

[26] The police rely on section 14(3)(b) in their decision letter and elaborate in their submissions that the personal information in the record, if it exists, would be gathered when the police attended at the scene and created records relating to the accident. The police maintain that the appellant has no right of access to this information, if it exists, because any incident that may have occurred involved another individual, not the appellant.

[27] The appellant refutes the claim that section 14(5) applies and refers again to his position that the Ministry of Transportation, and not the police, own the vehicle accident records of the named individual. The appellant adds that the police "do not have the authority to make this decision or apply any exemptions." The appellant maintains that since the police regularly release the names of people charged under the *Highway Traffic Act* to the media, it is "disingenuous" for the police to claim concern for the personal privacy of a citizen.

[28] Based on the evidence before me, I am satisfied that the presumption in section 14(3)(b) of the *Act* would apply to the personal information in these records, if they exist, because this information would have been compiled by the police and be identifiable as part of an investigation into a possible violation of the *Highway Traffic Act.* It is not necessary for charges to have been laid or criminal proceedings commenced against any individuals for the presumption in section 14(3)(b) to apply. Further, as I indicated previously, any regime under which the police may provide accident records to the Ministry of Transportation, as described by the appellant, is not within my purview or relevant to my analysis under *MFIPPA.* Therefore, I find that the section 14(3)(b) presumption applies to the personal information of the named individual that may be contained in responsive records, if they exist.

[29] The Divisional Court's decision in the *John Doe* case precludes me from considering whether the section 14(3)(b) presumption can be rebutted by either one or a combination of the factors set out in section 14(2).

[30] As I stated above, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I did consider the exceptions in section 14(4) of *MFIPPA*, and I find that the personal information in the records, if they exist, would not fall under any of

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

these exceptions. I will address section 16, below.

[31] Accordingly, I find that the police have established that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. This finding means that the first part of the test under section 14(5) of the *Act* has been satisfied.

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

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

[33] The parties' representations do not greatly assist with my analysis. However, aspects of the police's representations on this issue are relevant, including portions that were withheld as confidential, although I cannot set them out here. With consideration of the information that was provided to me, I am persuaded that disclosing the existence or non-existence of responsive records would in itself convey information to the appellant. Further, based on the application of section 14(3)(b) for the reasons stated above, I conclude that the nature of the information conveyed is such that disclosure would presumptively constitute an unjustified invasion of personal privacy. This finding satisfies the second part of the test under section 14(5) of the *Act*. Accordingly, I find that the police have established both requirements for invoking section 14(5).

[34] I have also considered the circumstances of this appeal and the submissions offered by the police, and I am satisfied that the police have not erred in the exercise of their discretion to claim the application of section 14(5) of the *Act*.

[35] I will now consider the appellant's argument that section 16 of the *Act* applies.

B. Is there a compelling public interest that outweighs the application of section 14(5) of the *Act*?

[36] The appellant submits that there is a compelling public interest that outweighs the application of section 14(5) of the *Act* in the circumstances of this appeal.

[37] Section 16 states:

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

[38] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records, if they exist. Second, this interest must clearly outweigh the purpose of the exemption. In the case of a claim that section

14(5) applies, a third requirement must be satisfied, that is, whether there is a compelling public interest in disclosure of the fact that records exist or do not exist.

[39] The *Act* is silent as to who bears the burden of proof in respect of section 16. Generally, past decisions have held that the onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records, if they exist, before making submissions in support of a contention that section 16 applies. Finding otherwise would impose an onus that could seldom be met by an appellant. Accordingly, the entire situation of a section 14(5) claim must be considered with a view to determining whether there could be a compelling public interest in disclosure, or identification that a record exists, which clearly outweighs the purpose of the exemption.[10]

[40] In considering whether there is a "public interest" in disclosure of a record, or the fact that a record exists, the first question to ask is whether there is a relationship between the record and the *MFIPPA*'s central purpose of shedding light on the operations of government.[11] In order to find a compelling public interest in disclosure, the information in the record must 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.[12]

[41] A public interest does not exist where the interests being advanced are essentially private in nature.[13] However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist.[14]

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

[43] Any public interest in *non*-disclosure, or refusal to confirm or deny, must also be considered.[16] If there is a significant public interest in the non-disclosure of the record, or its existence, then disclosure cannot be considered "compelling" and the override will not apply.[17]

Representations

[44] In their representations, the police submit that there is no compelling public

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[10] Order P-244.
[11] Order P-984 and PO-2607.
[12] Order P-984 and PO-2556.
[13] Orders P-12, P-347, and P-1439.
[14] Order MO-1564.
[15] Order P-984.
[16] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[17] Orders PO-2072-F, PO-2098-R and PO-3197.

interest in disclosure of this particular record, if it exists. The police note that there is already a mechanism for public disclosure of information when an accident occurs and serious injuries result, provided that the consent of persons involved in the collision is obtained. The police suggest that there is a public interest in non-disclosure of the records, if any exist, because the public would be less forthright in cooperating with the police if the personal privacy exemption were to be overridden in cases like this one.

[45] The appellant describes circumstances related to a previous, but distinct, police investigation into incidents involving the named individual and the appellant's family member. He refers to other information he claims was disclosed to him by the police during that investigation and expresses concern that this individual "… has a special relationship with police services in Ottawa-Gatineau." The appellant submits that "it is in the public interest to know whether or not the OPS are protecting a child predator" and he asserts that in this context, the police are in a conflict of interest in deciding whether to release records. The appellant states that it is in the public interest that citizens do not lose faith in public institutions, such as the police, and he submits that permitting the police to withhold the record here would lead to that result.

[46] In reply, the police acknowledge the appellant's connection with the named individual. However, the police submit that those other incidents were reported, investigated and concluded and, further, that the appellant's history of involvement in that regard does not mean he is entitled to access all records about the named individual, if any exist. In particular, the appellant's dissatisfaction with the outcome of a prior investigation involving his family member does not confer any right of access to records related to the named individual regarding incidents in which the appellant was not involved.

[47] The appellant, in sur-reply, submits that as a citizen, he "has the right to conduct an investigation and file criminal charges in Federal Court when the police fail to do so." He claims that the records "pertain not only to a serious accident in which [the named individual] was involved and not charged by the [police], but also the nature of the relationship between [the named individual] and the [police]." The appellant suggests that there is a public interest in disclosure if the records reveal evidence of criminal conspiracy and police protection of a child abuser. In the appellant's view, the importance of the matters he has identified outweigh any concern for the privacy of the named individual.

Analysis and findings

[48] Where the issue of public interest is raised, the costs and benefits of disclosure to the public must be weighed. As part of this balancing, I am required to determine whether a compelling public interest exists which outweighs the purpose of the

exemption.[18] An important consideration in this balancing is the extent to which denying access to the information, if it exists, is consistent with the purpose of the exemption.[19]

[49] Section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained, except where infringements on this interest are justified. To advance the legislative aim of protecting personal privacy, section 14(5) may be invoked to refuse to confirm or deny the existence of a record if its requirements are met,[20] as I concluded above that they are in this situation.

[50] Under section 16, I have considered the information requested by the appellant, and I conclude that disclosure of records responsive to this request, if they exist, would not serve the purpose of "informing or enlightening the citizenry about the activities of their government or agencies." While I accept that ensuring the equal application of the law by the police is in the public interest, there is simply not sufficient evidence to establish a connection between that interest and the disclosure of the requested records or in disclosing whether responsive records of that type exist. The appellant has not provided any persuasive evidence that such a record, if it exists, is connected to the issue of whether the police are carrying out their law enforcement mandate in an even-handed manner. On the facts, the appellant's interest in responsive records here, if they exist, does not rise above a private interest; nor do I find that this private interest raises issues of a more general application.

[51] As I concluded above, the records requested in this appeal, if they exist, would fall within the presumption against disclosure in section 14(3)(b). Past orders have consistently recognized that the types of personal information covered by section 14(3) are regarded as particularly sensitive. Although there will be occasions where the privacy interests of a particular individual must give way to the public interest, this appeal does not provide the setting for one of those rare occasions.

[52] In my view, there is no compelling public interest in the identification of whether responsive records exist that outweighs the purpose of the section 14(5) exemption in the circumstances of this appeal. Accordingly, I find that section 16 does not apply.

ORDER:

I uphold the decision of the police to refuse to confirm or deny the existence of responsive records pursuant to section 14(5) of *MFIPPA.*

Original Signed by: January 4, 2018
Daphne Loukidelis

[18] Order PO-1705.
[19] Order P-1398.
[20] See Order M-615.

Adjudicator