Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3841-I

Appeal MA17-8-2

Toronto Police Services Board

September 25, 2019

Summary: The appellant requested under the *Municipal Freedom of Information and Protection of Privacy Act* specified types of records arising from a 2001 meeting between the police and their Shanghai counterparts that included a presentation about the appellant. The appellant appealed the police's initial decision that there exist no responsive records. During the appeal process, the police located and partially disclosed some records, withholding portions of the records under section 38(b) (personal privacy) or on the basis they are not responsive to the appellant's request. In this order, the adjudicator upholds the police's severances to the records on the claimed grounds. She also largely upholds the police's search for records reasonably related to the appellant's request, with three exceptions. She orders the police to conduct another search for responsive records in their email and network accounts and in the Office of the Chief to remedy certain deficiencies in their searches of those areas.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2(1) (definitions), 14(2), 14(3)(b), 16, 17, and 38(b).

Orders and Investigation Reports Considered: Orders MO-2841-I and MO-3651-R.

OVERVIEW:

[1] The appellant was the subject of a criminal investigation and prosecution in relation to allegations of sexual assault. The appellant was convicted of several offences and was sentenced. He notes that this matter has received some media attention.

[2] The appellant later obtained a copy of an agenda of a meeting between members of the Toronto Police Service – Detective Service and a delegation of the

Shanghai Municipal Public Security Bureau. The meeting agenda bears the date "April 6/2001-03-20," and lists a number of items for discussion. They include the creation of a Combined Forces Asian Investigation Unit and presentations on two criminal investigations. The agenda indicates that one of the presentations was about the appellant.

[3] Based on this information, the appellant made the following request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Under the powers of [the *Act*], I am requesting copies of all records (including transcripts) of all meetings held between the Toronto Police Service – Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal Public Security Bureau [PSB].
>
> This will include records of the preparatory arrangements made by the [police] for arranging the trip of the Shanghai PSB to Canada. It will include records of airport pickup, accommodation, meeting venues, costs of hosting the event (including hotel bills and meal receipts) directly related to hosting the Shanghai PSB officials.
>
> The request for responsive records will include copies of all presentations made to the Shanghai PSB by [three of the four police officers named in the agenda] (as they then were) and all others who made presentations at the meetings. It will also include records of these meetings as recorded in the [police] officers' official memorandum books and internal communication on the meetings between the [police] and the Shanghai PSB.
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> The dates of these arrangements and meetings will be from March 20, 2001 (and/or earlier) or dates prior to April 6, 2001, and records created subsequent to the meeting by way of review or follow-up responses to the meeting. This request will also include the personal information about me, in transcript, published and distributed at the official meeting.

[4] The appellant filed an appeal to this office based on the police's failure to respond to his request in accordance with the procedures set out in the *Act*. That appeal file was closed after the police issued a decision to the appellant.

[5] The police's decision stated that no responsive records exist. The decision letter contained details of the police's search efforts, including inquiries made with the former units of the three officers (now retired) named in the appellant's request. The police also reported that many record types are not retained permanently, and provided a link to their records retention policies.

[6] The appellant was dissatisfied with the police's decision and appealed it to this

office, giving rise to this appeal.

[7] During the mediation stage of the appeal process, the appellant provided the mediator with additional information in support of his belief that the police had not conducted a reasonable search for records. The mediator provided this information to the police, who agreed to conduct another search for records.

[8] The appeal was then transferred to the adjudication stage at the appellant's request. An adjudicator with this office decided to conduct an inquiry into this matter by first seeking representations from the police on the issue of the reasonableness of the police's search for records.

[9] In response, the police provided representations, along with a copy of a revised decision letter to the appellant setting out the results of some further searches conducted after receiving the additional information at the mediation stage. In the revised decision, the police grant full access to a meeting agenda and eight identical copies of a "Wanted" poster bearing the image and personal details of the appellant. The police also grant partial access to a one-page note authored by an identified police officer, and partial access to one page of the memorandum notebook of the same officer. The police made one discrete severance to the note under section 38(b) (personal privacy) of the *Act*, and made two severances to the notebook on the ground these portions are not responsive to the appellant's request.

[10] The appellant advised the adjudicator that he wished to continue the appeal on the issues of reasonable search and the police's severances to the officer's note and notebook.

[11] The adjudicator sought supplementary representations from the police on the issues arising from the police's severances to the records. He next sought responding representations from the appellant, then a reply from the police. The parties' representations were shared with one another in accordance with this office's *Code of Procedure.*

[12] The appeal file was then transferred to me to continue the inquiry. At his request, I provided the appellant with a copy of the police's reply representations, to which the appellant responded with unsolicited representations in sur-reply. The appellant made a number of other unsolicited submissions throughout the inquiry process. I have considered all of these in arriving at my findings below.

[13] In this order, I uphold the police's decision to sever two pages of responsive records on the claimed grounds. I also find that, with three exceptions, the police have made reasonable efforts to locate records responsive to the appellant's request. I order the police to conduct another search for responsive records that may be contained in police email and network accounts, and in the Office of the Chief, and to provide me and the appellant with representations (and a supplementary access decision, if applicable) regarding their further search efforts.

RECORDS:

[14] At issue are the police's severances to one page of a note authored by a named police officer, and to a memorandum notebook of the same officer.

[15] The appellant also believes that there exist additional responsive records not located by the police.

ISSUES:

A. Do the records contain "personal information" within the meaning of section 2(1) of the *Act*? To whom does the personal information relate?

B. Does the discretionary personal privacy exemption at section 38(b) of the *Act* apply to the withheld portion of the one-page note? If so, should this office uphold the police's exercise of discretion?

C. Is there a compelling public interest in the disclosure of the information withheld under section 38(b) that clearly outweighs the purpose of the exemption?

D. What is the scope of the appellant's request? Are the withheld portions of the notebook page responsive to the request? Did the police conduct a reasonable search for responsive records?

DISCUSSION:

A. Do the records contain "personal information" within the meaning of section 2(1) of the *Act*? To whom does the personal information relate?

[16] 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.

[17] That term is defined at section 2(1) of the *Act* to mean recorded information about an identifiable individual. This includes, among other things, the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h) of the definition at section 2(1)]. Information about an unnamed individual may also qualify as personal information if it is reasonable to expect that the

individual could be identified from the information.[1]

[18] Section 2 also contains certain exceptions to the definition of personal information that I will not address here, as they are not relevant in the circumstances.

[19] In this case, there is no dispute that the records contain the appellant's personal information. At a minimum, the appearance of his name in both records reveals that the appellant is a person known to the police. This is the appellant's personal information within the meaning of the definition at paragraph (h) of section 2(1) of the *Act*.

[20] I find, in addition, that the withheld portion of the one-page note contains the personal information of another individual. This is in spite of the fact that this individual is not named in the record. This record is an officer's account of his investigation of allegations of sexual abuse committed by the appellant. It includes details of the unnamed individual's report to police about his being a victim of sexual abuse when he was a child. (The police observe that the appellant was ultimately convicted of offences relating to these incidents.)

[21] Even though he is not named, I find it reasonable to expect that this individual could be identified based on this context, and the other information about him appearing in the record, which includes his age and specific details about the incidents of abuse. On this basis, I find that the unnamed individual is an "identifiable individual" within the meaning of section 2(1), and that all the information about him appearing in the record is his "personal information" within the meaning of the *Act*. This includes the information about him in the discrete portion of the officer's note that the police withheld from the appellant, which is at issue in this appeal.

[22] In making this finding, I specifically reject the appellant's argument that I ought to consider the withheld portion of the record in isolation from the rest of the record (which has been disclosed to the appellant) in deciding whether there is a reasonable expectation of identification of the unnamed individual. Specifically, the appellant posits that the withheld portion, which is only one small part of the record, contains very little or only very general information about the individual, so that it is not reasonable to expect that the individual could be identified from disclosure of that discrete portion. However, identifiability is determined by reference to the particular information at issue as well as other information known to the appellant—which includes, in this case, the remainder of the record. All this information makes it reasonable to expect that the unnamed individual could be identified.

[23] I have also considered but found irrelevant to this issue other arguments made

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[1] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891 (ON CA).

by the appellant. These include allegations of defects in the police's investigation of the appellant, and in the compliance of police and the Crown with the rules for disclosure in criminal proceedings.[2] I also find irrelevant the appellant's argument that the officer lacked the clinical expertise to make certain observations about the unnamed individual in his account of the interaction with the individual. It is not necessary that the information at issue arise from a "legitimate clinical diagnosis" in order to qualify as personal information.

B. Does the discretionary personal privacy exemption at section 38(b) of the *Act* apply to the withheld portion of the one-page note? If so, should this office uphold the police's exercise of discretion?

[24] The police withheld the discrete portion of the officer's note concerning the unnamed individual under section 38(b) of the *Act*. For the reasons that follow, I uphold the police's decision.

[25] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[26] Sections 14(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

[27] Sections 14(1)(a) to (e) and section 14(4) set out circumstances in which disclosure of information is not an unjustified invasion of personal privacy, and the information is not exempt under section 38(b). Although the appellant alludes to the application of section 14(4), he does not elaborate on this claim. Based on my own review, I conclude that none of the circumstances listed in sections 14(1)(a) to (e) or section 14(4) applies.

[28] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the

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[2] The adjudicator in Reconsideration Order MO-3651-R addressed the appellant's arguments about the relevance of the Crown's disclosure obligations established in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC). As the adjudicator noted there, the disclosure rules under *Stinchcombe* are distinct from the access regime established under the *Act*.

interests of the parties.[3]

[29] The police rely on the presumption at section 14(3)(b). This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information [...] was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation[.]

[30] The police assert that the personal information at issue in the record was collected by the police during the course of the criminal investigation of the appellant. While I agree that the record contains information about the police's investigation of the appellant (a law enforcement matter), it is not clear to me that this information was "compiled and is identifiable" as part of that investigation.

[31] The police describe the record as an officer's note, but on my reading, the record appears to be the text of the presentation given by that officer to the Chinese delegation about the police's investigation of the appellant. In that case, I would not describe the record as one compiled as part of the police investigation. It may be that the withheld portion of the presentation contains information about the unnamed individual that was compiled (and is identifiable) in that context, but the police have not provided evidence to satisfy me of this connection. In these circumstances, I decline to find that the presumption applies. As a result, it is unnecessary for me to address the appellant's arguments on this topic, except to note that any deficiencies in the investigation that led to the appellant's conviction have no bearing on the question of whether the presumption applies.

[32] The police and the appellant cite the factors at sections 14(2)(d), (f) and (h). These sections state:

> (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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> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

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[3] Order MO-2954.

[33] Section 14(2)(d) is a factor weighing in favour of disclosure where a requester can establish that the personal information at issue has some bearing on the determination of a legal right in an existing or contemplated proceeding, among other requirements. The appellant maintains that the legal right in question is his right to disclosure under *Stinchcombe*. The appellant also claims a right to seek a determination about whether the police complied with section 11(a) of the *Canadian Charter of Rights and Freedoms* (which provides that any person charged with an offence has the right to be informed without unreasonable delay of the specific offence), and a right to pursue judicial or ministerial review of his conviction.

[34] I have already addressed the distinction between disclosure under the *Act* and disclosure requirements under *Stinchcombe* in the context of criminal proceedings. More generally, I am not persuaded that the appellant has established a connection between the personal information at issue—which is one discrete portion of a presentation—and the determination of a legal right in an existing or contemplated proceeding. Irrelevant to this test is the appellant's assertion that there must exist additional responsive records that will show whether the police complied with the *Charter*, and that will provide fresh evidence to support an application for ministerial review of his conviction. (I do not understand the appellant to be raising a constitutional question applicable to the appeal before me by referring to the *Charter*, but if he is, he has failed to notify the appropriate parties of a constitutional question in accordance with this office's procedures.) I conclude that the factor at section 14(2)(d) does not apply.

[35] The police rely on the factors at sections 14(2)(f) and 14(2)(h), which if applicable weigh against disclosure. Section 14(2)(f) applies to personal information that is "highly sensitive," which has been interpreted by this office to mean there is a reasonable expectation of significant personal distress if the information were disclosed.[4] Section 14(2)(h) applies where both the individual supplying the information and the recipient had an objectively reasonable expectation that the information would be treated confidentially. I agree that the withheld information, which relates to an individual's report to the police about his experiences of sexual abuse, meets both these conditions.

[36] I have considered the appellant's argument that this individual "vacated" any privacy interests in his own information as a result of the individual's having voluntarily provided details of these incidents in the media. I do not agree that by voluntarily disclosing certain information about himself, the individual forfeited or voided any privacy interests in the particular information at issue in this appeal. I also do not accept the appellant's argument that section 14(2)(f) cannot apply to the information at issue because the individual has voluntarily shared other "highly sensitive" information

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

about himself with the public.

[37] I have, however, considered whether any such voluntary disclosure by the individual raises the application of any listed or unlisted factors in favour of disclosure, or the application of the absurd result principle.

[38] To begin, I do not agree that any disclosure of information by the individual to the media amounts to a consent to disclose within the meaning of section 14(1)(a) of the *Act*. Among other things, any such consent must relate to the particular information at issue, and must be a written consent to disclosure in the context of the access request.[5] There is no evidence here of a consent meeting these requirements.

[39] I have considered the appellant's claim that the information already publicly shared by the individual consists of this individual's baseless and fabricated allegations against the appellant. In some circumstances, this type of claim could raise fairness issues that militate in favour of disclosure of personal information. In this case, however, I find no inherent unfairness issues arising from the police's decision to deny access. Among other reasons, the information at issue does not address the claim made by the appellant, and the appellant had the opportunity to address the substance of the individual's allegations against him during the criminal proceedings related to those allegations and others.

[40] The appellant suggests that disclosure of the individual's personal information will assist in addressing public concerns about police misconduct. These arguments are related to his claim that the public interest override applies to any information exempt under section 38(b), and I will address them in more detail under the next heading. Here, I am not persuaded that the effect of disclosure on the public's confidence in the police is an applicable factor in deciding whether the personal privacy exemption applies.

[41] I have considered whether the absurd result principle applies. Where a requester is aware of the information sought to be withheld under section 38(b), the information may not be exempt, because to withhold the information could be absurd and inconsistent with the purpose of the exemption.[6] The absurd result principle has been applied, for example, where a requester sought access to his own witness statement,[7] and where information at issue was clearly within the requester's own knowledge.[8]

[42] In this case, the appellant intimates that he has obtained a copy of the information at issue through another source, and purports to quote from it in order to

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[5] Order PO-1723.
[6] Orders M-444 and MO-1323.
[7] Orders M-444 and M-451.
[8] Orders MO-1196, PO-1679 and MO-1755.

demonstrate that the police improperly withheld this information under section 38(b). Even if the appellant were aware of the information, I would nonetheless uphold the police's denial of access to it under section 38(b). This is a case where disclosure of the individual's information would be inconsistent with the important privacy protection purposes of the section 38(b) exemption, with the result that the absurd result principle would not apply even if the information were already within the appellant's knowledge.[9]

[43] Finally, I uphold the police's exercise of discretion in the application of section 38(b). I am satisfied that the police took into account only relevant considerations and did not take into account irrelevant considerations in deciding to disclose the majority of the record to the appellant, while withholding one discrete portion on personal privacy grounds. The appellant's arguments about the police's exercise of discretion and the appropriateness of their response to his request have to do with disputing the reasonableness of the police's search for records. I will address those arguments under Issue D, below.

C. Is there a compelling public interest in the disclosure of the information withheld under section 38(b) that clearly outweighs the purpose of the exemption?

[44] The appellant claims that there is a public interest in the disclosure of information withheld under section 38(b).

[45] Section 16 of the *Act* states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 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.[10]

[46] Although section 16 does not explicitly list section 38(b), this office has read in section 38(b) as an extension of a requester's ability to raise the public interest override in cases where information is withheld under the mandatory personal privacy exemption at section 14.[11]

[47] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.

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[9] Orders M-757, MO-1323 and MO-1378.

[10] This is the current version of section 16, incorporating an amendment introduced after the date of the appellant's request. The amendment has no bearing on the issues in this appeal.

[11] See Order P-541 (addressing the provincial equivalent to section 16), followed in Orders PO-2246, MO-2701, and many others.

[48] 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.[12] A public interest does not exist where the interests being advanced are essentially private in nature.[13]

[49] The appellant contends that the withheld information consists of an officer's account of an individual's state of mental health at the time of this individual's report to police. Besides questioning the appropriateness of the officer's making observations of this nature, and his clinical expertise to do so, the appellant proposes that disclosure of the withheld information would provide the public with useful information about the police's general approach to people in mental crisis. He cites two recent high-profile cases of death by police shooting, drawing a connection to the present case based on a claim that all these cases raise questions about police treatment of individuals in mental distress.

[50] I do not accept the proposed connection between the particular information at issue in this appeal and a broader public interest in issues of police accountability, police training and mental health awareness. More specifically, I do not accept the claim that there is a public interest in scrutinizing the actions of the police officers involved in the appellant's case in order to determine, among other things, whether officers' interactions with mentally distressed individuals generated unfounded allegations against the appellant. While this may be a matter of personal interest to the appellant, there is no evidence of a broader public interest in pursuing these claims.

[51] Furthermore, even if I were convinced of a compelling public interest in this matter, I would also have to be satisfied that any such interest clearly outweighs the purposes of the section 38(b) exemption. I find no evidence of a compelling public interest that would clearly outweigh the privacy protection purposes of withholding the personal information of this individual in relation to his report of sexual abuse.

[52] The public interest override does not apply.

D. What is the scope of the appellant's request? Are the withheld portions of the notebook page responsive to the request? Did the police conduct a reasonable search for responsive records?

[53] The police withheld two discrete portions of an officer's memorandum notebook on the ground they are not responsive to the appellant's request.

[54] The appellant also challenges reasonableness of the police's search for records.

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[12] Orders P-984 and PO-2607.
[13] Orders P-12, P-347 and P-1439.

[55] Both issues raise questions about the scope of the appellant's request, which I will address first.

What is the scope of the appellant's request?

[56] 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,
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> > (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;
> >
> > (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]

[57] 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.[15]

[58] To be considered responsive to the request, records must "reasonably relate" to the request.[16]

[59] The appellant's request is set out above. (I also quote from relevant portions of the request, below.) Broadly speaking, the appellant seeks records of any meeting held between the police and Shanghai public security authorities, or the Combined Forces Asian Investigation Unit, as reflected in the agenda identified by the appellant. Examples include meeting transcripts and copies of presentations made at the meeting. The request also encompasses records created after the meeting for review or follow-up purposes, and records of internal communications on the meetings between the police and Shanghai authorities. Finally, the request covers records of "preparatory arrangements" made by the police to bring Shanghai authorities to Canada for the

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[14] This is the current version of section 17, incorporating an amendment to section 17(1)(a) introduced after the filing of the appellant's request. This amendment has no bearing on the issues in this appeal.
[15] Orders P-134 and P-880.
[16] Orders P-880 and PO-2661.

meeting.

[60] The agenda indicates that the meeting or meetings took place around March or April 2001, and included discussion of the appellant and other items.

[61] The police state that while the appellant's request appeared to be clearly defined, they received additional information from the appellant (during the mediation stage of the appeal process) that assisted them in conducting further searches and locating additional records as a result. The police submit that it was unnecessary to seek further clarification from the appellant.

[62] I agree with the police that the appellant's request is clear on its face. It is a broad request for records about discussions at or arising out of any meeting held between the identified bodies around the specified time frame, as well as for certain types of records relating to arrangements for and costs of the meeting. It is also clear that the request encompasses both records of personal information of the appellant and other information that is unrelated to the appellant.

[63] I recognize that at various points during the appeal process, the appellant raised concerns about the police's having created and having distributed at the meeting a "Wanted" poster bearing his image and other details about him. (Duplicate copies of this poster are among the responsive records located and disclosed by the police during this appeal.) The appellant asserts that the poster was created using the photograph appearing on his Ontario driver's licence. He asserts that this kind of use by the police of an individual's driver's licence information would shock the public conscience, and is a matter that should be examined by this office. The appellant was advised during the appeal process that he may file a privacy complaint regarding this issue if he wishes. I will not make a determination on this matter in this order.

[64] What is relevant to the issue at hand is the appellant's further claim that records relating to the production and printing of the poster are responsive to his request. He indicates that such records would include details of how the police obtained his information from the Ministry of Transportation, and how they obtained other information appearing on the poster, such as his address, phone number and employer in China.

[65] I find that records concerning the production of the "Wanted" poster fall outside the scope of the appellant's request. These types of records are not reasonably related to his request for personal information about himself "in transcript, published and distributed at the official meeting," or for records of presentations made at the meeting. They are also not covered by the component of his request seeking "records of preparatory arrangements made by the Toronto Police Service for arranging the trip" of Shanghai authorities to Canada. It is clear from the wording of this part of his request, and from the examples he cited (records of airport pick-up, hotel bills and meal receipts, among others) that the appellant was referring to records having to do with logistical arrangements and costs of bringing Shanghai officials to the meeting. If the

appellant now wishes to pursue access to records about the production of the posters distributed at the meeting, he must make a fresh request under the *Act*.

[66] For similar reasons, I reject the appellant's assertion that his request covers memorandum book entries and other records of any officers that were created in advance of, or in preparation for, for the meeting, such as presentation drafts. While the appellant's request covers records created or distributed during the meeting, and certain records created after the meeting, the only "preparatory" records covered by the request are those of the administrative type described above. More generally, I reject the appellant's claim that records of any of the various named officers' involvement in the appellant's case are responsive simply because the meeting included, as one component, a presentation about the appellant's case. The proposed interpretation goes well beyond a reasonable reading of his request. If the appellant now wishes to pursue access to any of these types of records, he must make a new request under the *Act*.

[67] Taking into account the scope of the request as I have defined it above, I will next consider whether the police properly withheld portions of one record on the basis of non-responsiveness, and whether the police conducted a reasonable search for all records reasonably related to the request.

Are the withheld portions of the notebook page responsive to the request?

[68] The police withheld two discrete portions of one page of an officer's memorandum notebook on the ground these portions are not responsive to the appellant's request. I agree with the police's assessment. These withheld portions contain notations about matters that are unrelated to the meeting of interest to the appellant. The only portion of the page that relates to the identified meeting has been disclosed to the appellant.

[69] I recognize that in their representations on this topic, the police characterized the withheld information as being unrelated to the appellant, and, on that basis, as being non-responsive to his request. I acknowledge that this statement could be interpreted to mean the police did not treat as responsive any general information (meaning non-personal information) relating the meeting, despite the clear language of the appellant's request. I confirm for the appellant's benefit that the information at issue does not contain any information (whether general information or personal information of the appellant) encompassed by his request. I uphold the police's decision to withhold the two severances on the basis of non-responsiveness.

Did the police conduct a reasonable search for responsive records?

[70] The appellant provided extensive representations on the reasonableness of the police's search for records.

[71] The appellant observes that the police initially took the position that there exist

no records responsive to his request, referring him to their records retention schedules, and noting that three of the police officers identified in his request had retired. He observes that although the police characterize the additional information he provided during the mediation stage as a "clarification" of his original request, the scope of his request ought to have been clear to the police from the start. He notes that the police initially failed to respond to his request at all, requiring him to file the deemed refusal appeal that preceded the present appeal, and that he has filed a number of previous appeals against the police, which have resulted in orders with which (he says) the police have failed to comply. He recounts other examples of police conduct in support of his contention that they have generally behaved in a way that is unprofessional, uncivil, and contemptuous of the *Act*.

[72] I agree with the appellant that the police's initial search efforts were deficient, in at least one respect. While the appellant requested (among other things) "copies of all presentations made to the Shanghai [Public Security Bureau]" by any of three named officers, as well as by "others who made presentations," it is evident from the police's later responses that they initially focused only on records relating to the three named officers, and not to any other individuals who made presentations at the meeting. I agree that it was inappropriate of the police to require the appellant to provide the name of the fourth officer who presented at that meeting (who is clearly named in the agenda) as a "clarification" of a request that was already clear and unambiguous in its original form. It was also inappropriate of the police to ask the appellant to provide specific details of the second presentation given at that meeting (which concerned a separate criminal case that is not related to the appellant's case) before agreeing to search for records of that presentation. The appellant's request clearly covers records of any presentations given at the meeting, including any unrelated to him. These errors in the police's initial interpretation of the appellant's request contributed to their failure to initially locate any responsive records.

[73] However, following discussions at the mediation stage, the police conducted further searches, which resulted in the identification of some responsive records, and a revised decision on the appellant's request. The issue before me is whether, through these additional search efforts, the police have meet the standard of reasonableness set out in the *Act*. In making my decision, I will not address arguments about deficiencies in the initial search efforts and access decision made by the police, except to the extent these may be relevant in assessing the adequacy of the police's later search efforts. Similarly, while I have read all the submissions made by the appellant (which address, among other things, the police's conduct in processing this request and others that he has made over the years, and the outcome of other orders issued by this office), I will only consider them below where they are relevant to the issue before me—namely, whether the police conducted a reasonable search for records responsive to the particular request giving rise to this appeal.

Parties' representations, and findings

[74] The police provided the sworn affidavit of an analyst in the Access and Privacy Section with responsibility for responding to requests made under the *Act*. The analyst provides a detailed account of the steps taken in response to the appellant's request, including those taken after the receipt of additional information from the appellant during the appeal process.

[75] The analyst explains that the police's initial search efforts included searches conducted by individuals in the Intelligence Service, the Organized Crime Enforcement Unit, and the former units or divisions of each of the three officers named in the appellant's request (all of whom had retired by the time of the searches). An information security officer also searched all police email files for emails with the keywords "Shanghai Municipal Public Security Bureau," "Shanghai PSB," and "Shanghai" within the timeframe January 1 to April 6, 2001. This included searches of any existing network and email accounts for the three retired officers named in the appellant's request (the analyst advises that there were network and email accounts for two of the retired officers, but not for the third). The analyst reports that the information security officer did not locate any responsive email records through these searches.

[76] The analyst also provided a link to the police's records retention by-law, enacted in 2000.[17] She notes that the by-law sets a retention period of two years for records relating to conferences (such as meeting agendas), and that the appellant's request, made in 2016, concerns records of a meeting held around March or April 2001.

[77] Based on these results, the police issued the initial decision to the appellant advising that no responsive records were located.

[78] The police conducted further searches after the receipt of some correspondence from the appellant during the mediation stage. This included a search of the records of a fourth officer (also retired) whose name appears on the meeting agenda as a presenter on the topic of the appellant's case. The analyst reports that after searching two original memorandum books belonging to this officer, she located an entry dated April 6, 2001 about this officer's attendance at a specified location for a presentation to a Chinese delegation about the appellant's case. The responsive portion of this record was identified and disclosed to the appellant in the police's revised decision.

[79] The analyst requested that a particular police division conduct a search for Crown brief materials pertaining to the appellant's case. This division reported that it

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[17] The police cite City of Toronto By-Law No. 689-2000 (To establish a schedule of retention periods for records of the Toronto Police Services Board) (enacted October 5, 2000). The relevant sections of this by-law are largely identical in later versions, including in current Chapter 219, Records, Corporate (Local Boards) of the *City of Toronto Municipal Code* (June 19, 2019).

had no responsive records. The analyst notes that the retention by-law provides that records of divisional investigations of "sexual type offences" are generally retained by the relevant division for seven years after the conclusion and expiry of the appeal period. (The by-law indicates selective storage in some circumstances, which the police do not state would be applicable here.)

[80] The analyst also asked that a second search be conducted of the Intelligence Unit for records concerning presentations made to a Chinese delegation, on or around April 6, 2001, about the appellant's case. This second search turned up no responsive records.

[81] In some of his further correspondence sent to the police at the mediation stage, the appellant names several other police officers who he speculates may have been at the meeting, because these individuals were part of the team that investigated the appellant (and were led by the officer who made a presentation about the appellant at the meeting). Based on this, the analyst requested searches of the records of each of these officers. In the case of three of the officers (who were retired at the time of the searches), the Sex Crimes Unit, Professional Standards and a particular division reported no responsive records belonging to those officers in those locations. (In addition, one of the retired individuals was contacted directly, and he advised that he has no memorandum notes, meeting notes or correspondence responsive to the appellant's request.) The other two officers (who were not retired) conducted their own searches, and did not locate any responsive records.

[82] The analyst also contacted the manager of accounting services to request a search for cost information relating to the meeting hosted by the police for members of the Shanghai Public Security Bureau within the timeframe March 1 to April 30, 2001. She cited as examples invoices for hotel accommodations, meeting venues, meal receipts and other records about costs directly related to hosting the Chinese delegation. The accounting services manager reported that the retention period for cost information is seven years, and that no such records exist. The analyst notes that this is consistent with the time period set out in the retention by-law.

[83] The analyst asked that the Office of the Chief conduct a search for records relating to meetings held between the police and the Shanghai Municipal Public Security Bureau between March and April 2001 relating to the appellant's case. No responsive records were located. The analyst notes that the retention by-law provides a retention period of one year plus current year for Unit Commander files.

[84] The appellant's correspondence also included a claim that some records responsive to the current request had already been provided to him by the police as a result of previous IPC orders issued against the police. The appellant cited a number of IPC orders.

[85] The analyst reports that a search was conducted of the storage area of the police's Access and Privacy Section for records relating to past access requests

submitted by the appellant. She reports that this search turned up boxes labelled with the appellant's name, and that one of these boxes contained a file folder labelled "Chinese Presentation." This file contained the following records that were subsequently identified and partially disclosed to the appellant in the police's revised decision: the one-page "note" of a retired police officer (which I described above as the text of the presentation given at the meeting by that officer); the meeting agenda; and eight identical copies of the "Wanted" poster bearing the appellant's image and other personal information.

[86] Based on these efforts, the police take the position that they have now conducted a reasonable search in compliance with the requirements of the *Act*.

[87] The appellant raises a number of objections.

[88] First, the appellant objects to the police's assertion that there are no responsive records for any of the officers whose records were searched, with the exception of the officer who made a presentation about the appellant at the meeting (for whom two responsive records were located). The appellant asserts that because the police located a responsive entry in this officer's memorandum notebook, it follows that memorandum books of all the other officers present at the meeting must also exist, and can be located with reasonable search efforts.

[89] I do not agree with the appellant's conclusion. The records retention by-law provides that officers' memorandum books are retained for eight years from the date of last entry. The fact that one officer's memorandum notebook may have been retained beyond the usual period does not mean that others must exist. The officer whose records were located had particular involvement in the appellant's case—among other things, he led the criminal investigation of the appellant, and he presented to the Chinese delegation on the appellant's case at the meeting in question. Because of his involvement with the appellant's case, certain records of this particular officer have been identified as being responsive to a number of previous access requests made by the appellant. In these circumstances, I do not find it unusual that the police maintained certain records of this officer in a separate file devoted to past access requests made by the appellant. At the same time, I do not find it unusual or unreasonable that there would no longer exist memorandum notebooks from 2001 for other officers who may have had little or no involvement in the meeting of interest to the appellant.

[90] The appellant proposes that because the meeting included presentations by the police on two major criminal investigations (an unrelated homicide investigation, and the appellant's sexual offences case), the appropriate retention periods are much longer than those claimed by the police. Specifically, the appellant observes that records about a homicide are to be retained permanently. In addition, he says, because the investigation into his case involved many different police units (such Sex Crimes, Major Crimes, and Child Exploitation Units), and not just one police division, the applicable

retention period is 25 years (the retention period for unit-level records), rather than the seven years claimed by the police for division-level records. On this basis, he says, responsive records must still exist, and the police's failure to locate additional records is evidence of an unreasonable search.

[91] I reject this argument. I see no reason to question the police's classification of records that would be responsive to the appellant's request (and, by extension, the retention periods that the police have claimed for such records). On the other hand, I find highly questionable the appellant's proposed reclassification of records based on the premise that records of a presentation about a certain type of crime are to be treated in the same manner as occurrence reports, photographs or confidential Crown instructions in relation to that crime. This is not a reasonable basis for believing that additional, differently classified records must exist.

[92] The appellant identifies several other ways in which he believes the police's searches were inadequate, and he suggests how they can be done more thoroughly. These include suggestions that retired officers conduct their own searches (rather than having proxies conduct searches of these officers' former units), and that retired officers swear affidavits about their search efforts. The appellant asserts that Order MO-2841-I (a previous order arsing from one of his appeals) established this as the correct methodology for searching the records of retired police officers. I do not read Order MO-2841-I as prescribing that searches of retired officers' records be conducted in any particular way. Even if it had, such a direction would only bind the institution that is the subject of that particular order. I am satisfied in this case that the police's efforts to locate responsive records of retired police officers were reasonable in the circumstances, and I see no basis to order further searches based on the appellant's directions.

[93] The appellant asserts that the police conducted an incomplete search for Crown brief materials responsive to the request. This appears to be based on a claim that the analyst, in her affidavit, cites an incorrect number (or that she cites only one of two relevant numbers) for the Crown brief file associated with the appellant's case. The analyst conducted this search by asking that an administrative assistant with a particular division search the division for a particular Crown brief file. No responsive records were located.

[94] The appellant appears to suggest that a search for a different Crown brief file number at the same division might have turned up responsive records. At the same time, he indicates that records that ought to have been located from this search were already included in materials given to the defence as part of the Crown's disclosure in the appellant's criminal proceedings. The appellant sets out a number of complaints about the conduct and record-keeping practices of the lead investigating officer in his case, and the conduct of the Crown and unit commander. Of relevance to this appeal is his assertion that a complete search of the division would turn up records containing direct references to the preparation and generation of records of certain officers in

anticipation of the 2001 meeting with the Chinese delegation.

[95] I found, above, that records generated by officers in preparation for the meeting (and records about the police's investigation of the appellant more generally) are not reasonably related to the appellant's request. Here, I also find that there is no useful purpose in ordering another search of the relevant police division for Crown brief materials using a different file number. The records that appear to be of most interest to the appellant are not responsive to the request, and would not be identified through a further search. In addition, as the analyst notes in her affidavit, division-level records of sexual offences have a retention period of seven years after the conclusion and expiry of the appeal period. The appellant has not raised a reasonable basis to believe that information responsive to his request would exist within division records that later formed part of the Crown brief, or any that such records that once existed would still exist given the applicable retention period. In these circumstances, I find unwarranted any further search for Crown brief materials held at the police division.

[96] Next, the appellant states that he has received (through other access requests or through other means) some records that are responsive to the present request, but that were not located or identified by the police as responsive records in this appeal. He states, for example, that he has copies of records that show that one of the retired officers (for whom the police located no responsive records) played a central role in preparing for the meeting with the Chinese delegation, and in preparing the "Wanted" posters featuring the appellant that were distributed at the meeting. Again, I note that officers' records pre-dating the meeting with the Chinese delegation (and made in preparation of that meeting) do not fall within the scope of the request. Given this, whether such records may exist has no bearing on my assessment of the reasonableness of the police's search for responsive records.

[97] Similarly, the appellant cites a number of past orders in which, he says, the police were ordered by this office to disclose records to him, but in relation to which the police have failed to make any disclosures. I understand that the police have since mailed to the appellant some records for which they had previously required the appellant's attendance in person. The appellant provides copies of some newly obtained records, which he describes as evidence of the engagement of other named officers in the meeting in question, and he reiterates his request that the memorandum notebooks of these officers be searched. He also describes the newly obtained records as providing clear indication that police officers communicated with the Crown Attorney in advance of the meeting with their Shanghai counterparts.

[98] I have looked at the records provided by the appellant, and do not reach the same conclusions. It is unclear to me how newly obtained records such as arrest warrants and international notices pertaining to the appellant reasonably relate to the request at issue in this appeal. There is no suggestion, for example, that these documents were distributed at the meeting.

[99] I am also not persuaded that email correspondence between various police

officers about securing these documents is evidence that all these officers were involved in the meeting with Shanghai officials. Even if there were reason to believe that these officers attended that meeting, I am satisfied that any responsive notebook entries documenting the 2001 meeting would be subject to the same retention periods described above, and, as such, could not reasonably be expected to be located on a further search. In these circumstances, I do not find it necessary or appropriate to order searches for these officers' memorandum notebooks. In addition, as I have found above, records of communications between police officers or other individuals (such as the Crown Attorney) about preparations for the 2001 meeting are not reasonably related to the request at hand. If the appellant wishes to pursue access to these types of records, he must make a new access request.

Order for further searches

[100] Finally, I identify three areas in which I find the police's searches were deficient. To remedy some of these deficiencies, I will order the police to conduct further searches.

[101] The appellant takes issue with the police's search of email records because they did not use the following key words: "Combined Forces Asian Investigation Unit," the name of the Unit Commander of the Asian Investigation Unit, or the name of the Commander of the Detective Services Unit (where the meeting was held). The police have explained that they used the following key words extracted directly from the appellant's request in conducting the email searches: "Shanghai," "Shanghai Municipal Public Security Bureau" and "Shanghai PSB." While I agree that it would have been prudent for the police to include the term "Combined Forces Asian Investigation Unit" in their searches, I find it unlikely that the use of this term (or any of the other search terms proposed by the appellant) would have yielded responsive records different from those that were located.

[102] However, I find that the police's search of email and network accounts was deficient in one respect. That is because of the inappropriately narrow timeframe applied to the searches. Because the searches were restricted to email records created between January 1 and April 6, 2001, they would not have captured any records post-dating the meeting created for the purpose of review or follow-up to the meeting, which clearly fall within the scope of the appellant's request. To correct this defect, I will order the police to conduct another search of police email and network accounts for records containing the key words "Shanghai" or (for the sake of completeness) "Combined Forces Asian Investigation Unit," over the expanded timeframe of March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant).

[103] There is another significant defect warranting a further search. In her affidavit, the analyst indicates that she asked the Office of the Chief to conduct a search for records pertaining to the meeting of interest to the appellant, where those records relate to the appellant's case. Given that the appellant's request is not limited to meeting records that are about his own case, this was an inappropriately narrow search

request. This type of search would exclude, for example, records about costs incurred in hosting the Shanghai delegation, and records of review or follow-up post-dating the meeting. I will therefore order the police to conduct another search of the Office of the Chief for responsive records that is not limited in this way.

[104] There is one final area in respect of which I find the police's search was deficient. I conclude, however, that it is not necessary for me to order further searches to address this defect.

[105] The appellant's request clearly covers copies of all presentations made at the meeting. This includes the presentation given at that meeting about the criminal case that is unrelated to the appellant's case. The police state that because the appellant admitted to having no direct involvement in that case, they "chose not to breach the personal information of individuals subject to that murder investigation, by conducting unauthorized searches through any of those case files, if they still exist."

[106] This is not a permissible basis upon which to refuse to conduct a search for records. Under the *Act*, the police are required to take reasonable steps to identify and locate responsive records. After locating responsive records, the police may decide to refuse access; if they do, they must provide a notice that conforms to the requirements of section 22 of the *Act*. However, this does not relieve the police from the initial obligation to search for and to identify responsive records.

[107] In this case, however, the appellant has conceded that he has no interest in the personal information of individuals involved in the other investigation, or in the transcript of the presentation about that case. He indicates, instead, that he believes the memorandum notebook of this presenting officer will contain other notes about the meeting that he may find useful.

[108] The police have already provided details of their searches for this particular officer's records, including his email and network accounts (with the time restriction described above, which will be remedied through my order). The police report that no responsive records were found. Although the police analyst does not specify in her affidavit that the search for "records" of this particular officer included his memorandum notebooks, I find this to be a reasonable assumption, particularly in view of the fact that her search for the "records" of another officer turned up a responsive memorandum notebook. In addition, even if there were some doubt about whether this officer's memorandum notebooks were included in the original search, given the applicable retention period of eight years (after the date of last entry), I find it unlikely that these notebooks would exist. Given all this, it would serve no useful purpose to order another search for these notebooks.

[109] As a result, while I find that the police's search in respect of this component of the appellant's request was unreasonable, it is unnecessary to address this deficiency through an order for further searches.

[110] In the result, I largely uphold the reasonableness of the police's search for records reasonably related to the appellant's request, with three exceptions. As a remedy, I will order the police to conduct additional searches of their email and network accounts, and of the Office of the Chief, in accordance with the parameters set out below. If the police locate additional responsive records as a result of these searches, they must issue an access decision to the appellant.

ORDER:

1. I uphold the police's decision to withhold one discrete portion of a one-page note under section 38(b) of the *Act*. The public interest override at section 16 does not apply to this information.

2. I uphold the police's decision to withhold portions of a memorandum notebook page on the basis they are not responsive to the appellant's request.

3. I uphold the police's search for records reasonably related to the appellant's request, with the exception of their search of police email and network accounts, and of the Office of the Chief.

   I order the police to conduct another search of police email and network accounts for responsive records containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant).

   I order the police to conduct another search of the Office of the Chief for records responsive to the appellant's request. Responsive records may include records that do not contain personal information of the appellant.

   The police are to provide me with representations on these searches by **October 24, 2019**. These representations are to be provided in the form of an affidavit signed and sworn or affirmed by the person or persons with knowledge of the search, and should include:

   - the names and positions of the person(s) who conduct the searches (or who are contacted in the course of the searches);

   - details of the searches carried out, including the date(s) of the searches and nature and locations of the files searched;

   - the results of the searches; and

   - whether it is possible that responsive records existed but no longer exist. If so, the police must provide details of when such records were destroyed

and any relevant record maintenance policies and practices, such as evidence of retention schedules.

4. I may provide the appellant with a copy of the police's representations described in order provision 3, unless there is an overriding confidentiality concern. If the police believe that portions of their representations should remain confidential, the police must identify these portions, and must explain why the confidentiality criteria in Practice Direction 7 of the IPC's *Code of Procedure* apply to these portions.

5. If the police locate additional records as a result of these further searches, they must issue a decision to the appellant in accordance with the *Act* regarding access to such records. The police are to treat the date of this order as the date of the request. I direct the police to provide me with a copy of this decision.À

6. I remain seized of this appeal to address matters arising from order provisions 3 and 4.

Original signed by September 25, 2019

Jenny Ryu
Adjudicator