Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3847-I

Appeals MA18-19-2, MA18-20-2, MA18-21-2, MA18-22-2 and MA18-408

Strathroy-Caradoc Police Service

October 11, 2019

Summary: The appellants are seeking access to records relating to the death of their minor child, and made five access requests to the Strathroy-Caradoc Police Service (the police). The police denied access in whole, claiming the application of the discretionary law enforcement exemption in sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this interim order, the adjudicator finds that all of the records are exempt from disclosure under either section 8(1)(b) (law enforcement investigation), or section 38(a), in conjunction with section 8(1)(b). However, the police's exercise of discretion is not upheld, and they are ordered to re-exercise their discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1)(definition of personal information), 8(1)(b) and 38(a).

Orders and Investigation Reports Considered: Orders M-1027, MO-2909-I, MO-3224, PO-2085 and PO-3117.

Cases Considered: *Ontario (Attorney General) v. Information and Privacy Commissioner* 2009 CanLII 9740.

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of five appeals filed with this office in response to five access requests made by the requesters under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Strathroy-Caradoc Police Service (the police) for records relating to the tragic death of

their minor child.[1] In response to the requests, the police denied access to all of the information, in whole. The police advised the requesters that the records relate to a matter that is part of an open and ongoing investigation file, claiming the application of the discretionary exemptions in sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation).

[2] The requests to the police are as follows:

MA18-19-2

[3] Copies of any reports relating to the requesters' child, including reports filed by the Children's Aid Society, the police, Child Protection Specialists, Hospital services and the Office of the Chief Coroner (the Coroner).

MA18-20-2

[4] A copy of an audio recording of an interview of a named requester that was conducted by a named police officer on a specified date.

MA18-21-2

[5] Copies of a named police officer's notes during a specified time period.

MA18-22-2

[6] A copy of an audio recording of an interview of a named requester that was conducted by a named police officer on a specified date.

MA18-408

[7] The synopsis of information provided to the coroner to be used in the coroner's investigation of the appellants' child's death.

[8] The requesters (now the appellants) appealed all five decisions to this office. During the mediation of the appeals, the mediator advised the police that the records would be more properly considered under the discretionary exemption in section 38(a) (discretion to refuse requester's own information), in conjunction with section 8(1). The police agreed. Consequently, section 38(a) was added as an issue in the appeals.

[9] The police also advised the mediator that the records in appeal MA18-408 are

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[1] The Ministry of the Solicitor General (the ministry) also received five access requests from the requesters for records relating to the death of their child. The ministry denied access to all of the records. The requesters appealed the ministry's access decisions to this office. The inquiry into the ten appeals was conducted concurrently.

the same as the records at issue in appeal MA18-19-2.

[10] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought representations from the police. At the same time, I sought representations from the ministry on the appeals of its decisions. The ministry subsequently advised this office that it would be providing representations on the police's behalf, which it did. I then sought and received representations from the appellants and further representations, including further affidavit evidence from both the ministry and the police. Representations were shared between the parties in accordance with this office's *Practice Direction 7*.

[11] For the reasons that follow, I find that the discretionary exemptions found at section 8(1)(b) and 38(a), in conjunction with section 8(1)(b) of the *Act* apply to exempt all of the records at issue from disclosure. However, I do not uphold the police's exercise of discretion and I order them to re-exercise their discretion.

RECORDS:

[12] The voluminous records consist of audio recordings, search warrants, a sudden death report, third party statements, photographs, supplementary reports, meeting minutes, emails, officers' notes and other correspondence.

ISSUES:

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

B. Does the discretionary exemption at section 8(1)(b) or section 38(a), in conjunction with section 8(1)(b), apply to the information at issue?

C. Did the police exercise their discretion under sections 8(1)(b) and 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[13] The police, through the ministry, provided background information concerning the records that are the subject matter of the requests. In particular, the police submit that the records relate to the tragic death of a young child. The death was initially investigated by the Strathroy police. However, it is now being investigated solely by the OPP. The Strathroy police further submit that, as a provincial law enforcement agency, the OPP frequently becomes involved in major investigations, which may have been initially investigated by a municipal police service.

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

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

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

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

personal information.[2]

[16] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

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

Representations

[18] The police submit that the records contain the personal information of several identifiable individuals, including statements made by these individuals to the police. The police rely on the findings made in Order PO-3544, in which Adjudicator John Higgins found that records relating to an OPP investigation of a death were found to contain personal information because they linked third party individuals to a police investigation. In addition, Adjudicator Higgins also found that it is a principle that personal information remains personal information, even if it is known to others, including the general public, and that severing certain personal identifiers would not render individuals non-identifiable.

[19] The police further submit that the exceptions to the definition of personal information in sections 2(2) and 2(3) do not apply, as none of the individuals who are subject to the investigation have been deceased for thirty years or more, and the investigation does not relate to individuals in a business, professional or official capacity.

[20] The appellants submit that the records contain their personal information, as well as the personal information of their children, and that it is likely there is the personal information of other individuals in the records. The appellants submit that they give permission for their personal information to be disclosed, and that they are not interested in seeking other personal information, such as telephone numbers or banking information.

Analysis and findings

[21] I find that, based on the police's representations, the appellants' representations and my review of the representative sample of records, the records in their entirety

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

qualify as personal information as defined in section 2(1) of the *Act*. The records are clearly identified as relating to first, the Strathroy police's, and then second, the OPP's investigation into the death of the appellants' child. Therefore the records constitute recorded personal information about the deceased child. In addition, as the police note, the records also contain recorded personal information about other identifiable individuals contained in their statements made to the police. Lastly, as the appellants note, the records also contain their own personal information, as well as the personal information of their family members.

[22] Before assessing whether the records have been properly withheld under the exemptions claimed by the police, I note that the *Act* contains different provisions for addressing the application of exemptions to records. Requests for general records (including those containing the personal information of individuals other than the requester) must be addressed under Part I of the *Act*, which includes the discretionary exemption in section 8(1). Requests for one's own personal information must be addressed under Part II of the *Act* which includes the exemptions in sections 38(a) and (b).[5]

[23] For records not containing the appellants' personal information or that of their children, it must be determined whether they qualify for exemption under section 8(1). For the records containing the appellants' personal information and that of their children, it must be determined whether they qualify for exemption under section 38(a), read in conjunction with section 8(1).

Issue B: Does the discretionary exemption at section 8(1)(b) or section 38(a), in conjunction with section 8(1)(b), apply to the information at issue?

[24] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[25] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

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[5] I also note the applicability of section 54(c) of the *Act*, which provides that any right or power conferred on an individual by the *Act* may be exercised by a person who has lawful custody of an individual under the age of sixteen. In other words, the appellants' right of access to the personal information of their children is considered under Part II of the *Act*.

[26] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[6]

[27] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[28] In this case, the police rely on section 38(a) in conjunction with section 8(1)(b), or section 8(1)(b) on its own.

[29] Section 8(1)(b) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
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> > interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

[30] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

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

[31] The term "law enforcement" has covered a police investigation into a possible violation of the *Criminal Code*.[7]

[32] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[33] It is not enough for an institution to take the position that the harms under

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[6] Order M-352.
[7] Orders M-202 and PO-2085.
[8] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[9] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

[34] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement.

Representations

The Strathroy police's representations

[35] The police submit that the records they withheld from disclosure are "law enforcement records" because they were created by the police for the purpose of conducting an investigation. The police also submit that previous orders of this office have confirmed that the police and the OPP are agencies which have the function of enforcing and regulating compliance with the law, and that the term "law enforcement" applies to a police investigation into a possible violation of the *Criminal Code of Canada*.[11]

[36] The police further submit that there is a statutory mandate prescribed in the *Police Services Act*, which requires the police to investigate the death of a child, and to resolve whether or not a crime has occurred. The police go on to state that the death was initially investigated by the police, but is now being investigated solely by the OPP. The police argue that the investigation is currently taking place, is active and is ongoing.

[37] The police state:

> Law enforcement investigations take time, but the interests of justice [require] that they be allowed to take place and be completed. The Ministry has opposed the disclosure of all of the records that form part of the law enforcement investigation because of the strong likelihood that disclosure will cause irreparable harm.

[38] The police go on to argue that the exemption in section 8(1)(b) applies to

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[9] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] Order PO-3117.

exempt the records from disclosure because there is a specific, active and ongoing investigation in existence, and that it is especially difficult to predict future events in the circumstances of this appeal, given that the investigation is still taking place. In particular, the police submit that OPP investigators have been assigned to the investigation, led by a Detective from the OPP Criminal Investigations Branch. The investigation, which commenced in 2015, has involved 33 police officers from both the police and the OPP. The police go on to argue that the OPP is continuing to pursue leads and is conducting law enforcement activities consistent with an active and ongoing investigation.

[39] The police further state:

> . . . We can advise that our law enforcement investigation will continue until the OPP concludes who or what may have caused the fatal injury to the appellants' [child].
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> The law enforcement investigation has taken place over nearly 3 years, which we acknowledge is a significant period of time. But law enforcement investigations can be *far* lengthier, depending on the nature and circumstances of the investigation. In Order PO-3117, the OPP investigation related to a death that had occurred 13 years before, in 1999. In Order MO-2909-I, the police investigation related to a missing person who had disappeared 50 years earlier, and whose whereabouts remained unknown to the police. Yet, in both orders, the Adjudicators had no hesitation in finding that section 14(1)(b) applied to the records. We submit the same finding should be made in this appeal.

[40] The police also submit that in order for section 8(1)(b) to apply, they must provide evidence that the disclosure of the records could "reasonably be expected to interfere with the law enforcement investigation." The police argue that disclosing the records would interfere with the OPP investigation for the following reasons:

- it could reveal suspects and persons of interest who are still being investigated which could lead these individuals to take steps to cover their tracks, intimidate potential witnesses or otherwise hinder the investigation;[12]

- police investigators will have no way of knowing when an individual comes forward with information whether that individual learned of the information through the release of the records, or because of what they learned first-hand, thereby tainting the reliability of future evidence;

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[12] See Order PO-3117.

- because the investigation is ongoing, the OPP cannot necessarily determine the relevance of a record to the investigation. What appears to be insignificant during one part of an investigation may be much more significant at a later point, when the police obtain new evidence;

- the disclosure of the records and their potential publication in the media or on the Internet would make it much more difficult to find an unprejudiced jury, should the investigation eventually proceed to trial; and

- if records containing third party personal information are disclosed, individuals in the future would be hesitant to come forward, out of concern that their personal information would also be disclosed, which would interfere with future law enforcement investigations.

The appellants' representations

[41] The appellants submit that there is a compelling public interest in the disclosure of the information at issue because the operation of the publicly-funded justice system is at the centre of this case, and is subject to public scrutiny.

[42] The appellants further submit that there is no ongoing investigation, and that even if there is some slight monitoring activity of the investigation by police, there is no need to withhold the information at issue. They argue that the institution has not met its burden of proof under the *Act* to prove that there is an active, ongoing investigation. The appellants' position is that the investigation concluded almost two years ago. In particular, the appellants submit that the investigation is not ongoing for the following reasons:

- the Detective leading the investigation has had no contact with them, and did not respond to emails sent to him by the appellants;

- if the investigation was truly ongoing, the ministry could have stated at the very least, for example, that the Detective has interviewed a certain number of witnesses, or requested additional forensic testing, or has gone before a Judge to request a number of new search warrants;

- a search of court records showed no activity on the file for the past almost two years;

- a reporter from the Toronto Star brought an application for, and obtained, in the Ontario Court of Justice, the Informations to Obtain (ITO's) related to a series of search warrants and production orders obtain by the police in relation to the investigation of their child's death;

- during the above-referenced proceeding, the Crown Attorney stated to Justice J. Skowronski that "there's no investigation that the Crown has now carriage of the prosecution of;"[13]

- the above-named Justice stated that the "police did an investigation and determined that there were no charges to be laid:"

- the police and the ministry did not oppose the release of the ITO's;

- Canadian jurisprudence holds that search warrants and ITO's are not disclosed to the public and the media if a case is ongoing;[14] and

- all of the ITO's and search warrants in this case were completed and filed almost four years ago.

[43] The appellants further argue that should I find that there is an ongoing investigation, the disclosure of the information at issue would not interfere with an ongoing investigation. In particular, the appellants submit that due to the disclosure of the ITO's, a significant amount of information has already been disclosed to the public, including synopses of interviews with "dozens" of people, and no harm has ensued. The appellants attached to their representations a sample ITO and transcripts of two court appearances relating to the seeking of the ITO's. The appellants also submit that the police's representations are "boiler plate" and not specific enough to meet the burden of proof.

[44] The appellants also submit that there is a public interest in the disclosure of the information at issue, in order to subject the activities of the police, pathologists, doctors, coroners, children's aid officials and others, to public scrutiny, with a view to correcting mistakes, avoiding future deaths and improving future investigations. Lastly, the appellants argue that there is a public, rather than a private, interest in the records because it is their intention to share any information they obtain with the Toronto Star "in the hope that sunlight will be focused on these important public issues."

The police's reply representations

[45] In reply, the police reiterate that there is an ongoing investigation into the death of the appellants' child, regardless of the appellants' position to the contrary. The police submit that the OPP does not close investigations, especially serious ones such as where a death has occurred, simply because of the passage of time. In particular, the police state:

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[13] The appellants provided this office with a copy of the transcript of that proceeding.
[14] The appellants refer to a high-profile double homicide in which the Toronto Star unsuccessfully applied to access to ITO's and search warrants.

> As part of their law enforcement investigation, OPP investigators are *presently* seeking an additional medical opinion to assist in determining the means by which the death of the appellants' [child] occurred. The OPP have sought out the expertise of a clinician at The Hospital for Sick Children in Toronto, and we are waiting for that process to conclude. We believe that this medical opinion is a critical part of the investigation because it may yield clues as to the manner of death. The outcome of this medical opinion could result in charges being laid. We point it out as evidence that there is in fact an ongoing and active law enforcement investigation.

[46] With respect to the appellants' statements that there have not been any new court documents, the police submit that the alleged lack of new court records is not determinative as to whether there is an active and ongoing investigation, and an investigation does not need to result in the creation of court records in order for the records to be subject to section 8(1)(b).[15] In this instance, the police argue, seeking a medical opinion from a clinician at The Hospital for Sick Children is a specific example of there being an ongoing and active law enforcement investigation.

[47] Concerning the court proceedings and transcripts that the appellants included in their representations, the police submit that the appellants have interpreted the transcripts to mean the investigation has concluded, but this is not the case. The police further state that they will not comment on the court transcripts any further because they do not know if the Court considered all scenarios at issue in this appeal, such as the possibility of the OPP seeking an additional medical opinion.

[48] The police go on to argue the following:

> . . . There are different legal processes and pre-requisites to meet for obtaining records, depending on whether the process is an access request under [the *Act*] or by some other means, such as a judicial application. Records obtainable by one means may not be obtainable by another. In Order PO-3117 (at paragraph 79), records obtained by the appellant in that appeal during a Coroner's inquest were nevertheless upheld as being exempted under section 14(1)(b) for the purpose of [the *Act*]. In other words, the merits of an access request under [the *Act*] must be assessed based on the requirements of [the *Act*], and not what has been disclosed pursuant to another legal mechanism or process.
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> The transcripts were created over a year ago. Regardless of how the court transcripts are interpreted by the appellants, it is the position of the OPP

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[15] See, for example, Order MO-2909-I.

> that as of the date of the [appellants'] request for records under [the *Act*] up to the present time, and the for foreseeable future, there is an ongoing and active law enforcement investigation. In Order PO-3117 (at paragraph 63), the IPC accepted that the lack of a limitation period for serious crimes, the application of new technologies and the discovery of new evidence supported the application of section 14(1)(b) . . .

The appellants' sur-reply representations

[49] In sur-reply, the appellants submit that the exact language used in the reply representations was that the institution "was of the view" that there is an active and ongoing investigation. The appellants infer from the use of this language that the police are not able to state declaratively or categorically that there is an active, ongoing investigation into their child's death, and that the police's statements are speculative.

[50] With respect to the OPP seeking an additional medical opinion, the appellants note that this was not referred to in the original representations. If the OPP requested this opinion after making their first representations, the appellants are concerned that it was done so to help the police maintain a seal on the records at issue. Even if the opinion was requested before the police submitted their original representations, the appellants submit that a request for a further additional medical opinion is not evidence of an ongoing investigation.

[51] The appellants state:

> On this issue, we also want to raise the importance of public scrutiny being brought to bear on this case. If the police have recently requested an additional opinion concerning our [child's] death, which the ministry notes in its representations is a "critical part of the investigation," we believe the records should be released so that we can understand why this was not done three years earlier.

[52] With respect to the police's position that they properly applied the exemptions under the *Act*, the appellants submit that they did not properly exempt the audio/video recordings of the police's interviews with the appellants and their other children. The appellants submit that in Order MO-2909-I, I ordered the police to disclose the appellant's statement to the police, finding that "it would be absurd to withhold this statement from the appellant, as she provided the information to the police and would be aware of its contents." The appellants submit that this is the same issue in this case.

[53] Lastly, the appellants refer to the case of Ontario (Attorney General) v.

Information and Privacy Commissioner,[16] in which the Divisional Court upheld this office's decision to order the disclosure of a video statement, the video of a search warrant execution and other information. The appellants' position is that this appeal is similar to the one referred to above, and that they would be successful at Divisional Court, as this precedent would apply.

The affidavits of the police and the OPP

[54] After receiving all of the representations, I wrote to the ministry providing it with the opportunity to provide further representations regarding its position that there is an ongoing investigation relating to the death of the appellants' child. In particular, I requested sworn affidavits from individuals who are in charge of the investigations within the OPP and the Strathroy police, explaining how and why there is an ongoing investigation. The Strathroy police and the OPP subsequently provided sworn affidavits.

[55] The Strathroy police's affidavit was sworn by the Chief of Police, who stated that the Strathroy police are not presently conducting an ongoing law enforcement investigation that is the subject matter of appeals MA18-19-2, MA18-20-2, MA18-21-2, MA18-22-2 and MA18-408.

[56] The OPP's affidavit was sworn by a Detective Inspector with the Criminal Investigations Branch of the OPP, who is the Case Manager in charge of the investigation into the death of the appellants' child. The affiant states that the OPP is still investigating the death, because the manner of death still remains undetermined, and the OPP is attempting to ascertain who and what caused the fatal injury to the child, and whether or not a criminal offence has occurred in relation to the death.

[57] The affiant goes on to state that he is being assisted by five members of the OPP in this investigation, and they are currently conducting investigative strategies and techniques which are consistent with conducting a death investigation. In addition, the affiant swears that the OPP are currently seeking further medical interpretation from a paediatrician at The Hospital for Sick Children in Toronto. The paediatrician will use police information and reports, as well as medical records, to produce a clinical report that the OPP hopes will assist with the law enforcement investigation. Lastly, the affiant submits that as of July 4, 2019, the paediatrician informed the police that the clinical report has not yet been completed.

The affidavit of the appellants

[58] I then provided the appellants with the opportunity to provide representations in response to the above-referenced affidavits. The appellants provided representations,

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[16] See 2009 CanLII 9740.

including an affidavit sworn by one of the appellants.

[59] With respect to the police's affidavit, the appellants submit that the police have confirmed that they are not conducting an investigation and, therefore, all records maintained by the police relating to their child should be disclosed, as the "ongoing investigation" exemption no longer applies. The appellants further argue that even if there is an OPP investigation, that should not be grounds for "sealing" the Strathroy police records. The appellants submit that if that were the case, access to the public could be continually stymied by one police force handing off its investigation to another force, contravening the nature and spirit of the *Act*.

[60] Concerning the OPP's affidavit, the appellants submit that it stretches the imagination that no progress has been made since the current Detective Inspector/Case Manager of the investigation took over the case. In addition, the appellants' position is that the language in the affidavit is vague, because the five OPP members assisting the Detective have not been identified, nor has the paediatrician been identified, nor the exact date when the paediatrician was asked to provide an opinion.

[61] One of the appellants provided a sworn affidavit. The affiant swears that they contacted a staff member of the Office of Patient and Family Experience at The Hospital for Sick Children, and was subsequently advised that the staff member had "checked with the appropriate people at the Hospital" and was informed that no records regarding the affiant's child had come in to the "appropriate" sections of the hospital. The affiant then swears that it is their belief that these alleged requests for medical opinions are an attempt to stymie the appellants' attempts to gain access to the information that is the subject matter of the appeals.

[62] Lastly, with respect to whether there is an investigation that is ongoing, the appellants reiterate that the onus is on the Strathroy police and the OPP to demonstrate that. The appellants refer to Order MO-3224, which involved records relating to the death of the requester's son. This office found that despite the police's claim that the investigation was ongoing and unsolved, the police had failed to show that there was an ongoing investigation. The appellants further submit that even if a medical report has been requested, that is not sufficient to satisfy the ongoing investigation criteria. In support of their position, the appellants refer to Order M-1027 in which this office found that the police were incorrect in stating that by disclosing two witness statements, there would be interference in the administration of justice, and the investigation itself.

Analysis and findings

[63] As previously stated, to the extent that the records contain the personal information of individuals other than the appellants and their children, I consider the

possible application of section 8(1)(b). The records that contain the personal information of the appellants and/or any of their minor children are considered under section 38(a), in conjunction with section 8(1)(b).[17] For the reasons that follow, and subject to my findings regarding the police's exercise of discretion, I find that the records at issue in all of these appeals are exempt from disclosure under either section 8(1)(b) alone, or section 38(a), in conjunction with section 8(1)(b) of the *Act*.

[64] First, I find that the Strathroy police's and the OPP's investigations were undertaken with a view to bringing charges under the *Criminal Code of Canada* and proceedings in court where a penalty or sanction, such as imprisonment, could be imposed against an individual or individuals relating to the death of the appellants' child. As a result, I find that the records relate to "an investigation undertaken with a view to a law enforcement proceeding . . ." as set out in section 8(1)(b).

[65] In order for section 8(1)(b) to apply, two requirements must be met. The first requirement is that the law enforcement investigation must be a specific, ongoing investigation. The second requirement is that the police must prove that disclosing the records could reasonably be expected to interfere with the investigation.

[66] With respect to the first requirement, based on my review of the parties' representations, their affidavit evidence, and my review of the most recent records generated by the OPP, I am satisfied that there is an active, ongoing OPP investigation into the death of the appellants' child. I reviewed communications between the OPP and the paediatrician it has engaged at The Hospital for Sick Children. The most recent communications took place fewer than two months ago. The paediatrician has been engaged to conduct a review of records relating to the child, and to then provide a medical opinion to the OPP regarding the manner of death. I note that, based on my review of the most recent records, the paediatrician was engaged prior to the commencement of these appeals. I also saw the voluminous records that were provided to the paediatrician by the OPP. I accept the police's argument that the outcome of the medical opinion could result in charges being laid. While the appellants' position is that there is not an ongoing investigation taking place, I find that is simply not the case. Therefore, I conclude that there is a specific, active and ongoing investigation being conducted by the OPP into the death of the child, which has not concluded.

[67] With respect to the second requirement, in Order PO-2085, Assistant Commissioner Sherry Liang found that in determining whether the disclosure of records could reasonably be expected to interfere with a law enforcement investigation, the law enforcement provisions of sections 14(1)(a) and 14(1)(b) of the provincial *Act* do not require that the institution be the agency conducting the investigation. In other words,

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[17] See section 54(c) of the *Act*, which allows the appellants to make an access request on behalf of their children.

applying the approach taken in Order PO-2085, the exemption in section 8(1)(b) can apply to the police's records, even if the agency conducting the investigation is the OPP, rather than the police. What matters is whether the disclosure of the Strathroy police records could reasonably be expected to interfere with the OPP's investigation.

[68] I find that the disclosure of the records at issue could reasonably be expected to interfere with the investigation into the death of the appellants' child, and I make this finding taking into account the particular facts of this case, both parties' representations, and the nature of the records at issue, which contain sensitive information about the death of the child. This office has found in previous orders that disclosing records to a requester under the access scheme in the *Act* is deemed to be disclosure to the world,[18] because the *Act* does not impose any restrictions or limits on what a requester can do with records they receive. As a result, disclosing the records to the appellants would move them into the public domain where they can be freely disseminated.

[69] In Order PO-3117, Adjudicator Colin Bhattacharjee found that disclosure of records held by the OPP relating to an ongoing murder investigation could reasonably be expected to interfere with that investigation. He stated the following:

> I find that such disclosure could reasonably be expected to interfere with the murder investigation because it could make the suspects aware of the evidence that the OPP has collected against them. This awareness could lead these individuals to take steps to further cover their tracks, intimidate potential witnesses who have not yet come forward, or otherwise hinder the investigation.
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> Similarly, I find that disclosing the records could taint the quality of new evidence that can be gathered. As the ministry points out, if an individual approaches the OPP and presents information about the murder, the investigators have no way of knowing whether that individual learned of the information from murder investigation records that came into the public domain or if that individual had firsthand knowledge of the information. . .

[70] I agree with and adopt the findings of Adjudicator Bhattacharjee, and find that they are equally applicable to the circumstances of these appeals. I have been persuaded by the arguments made by the police that the disclosure of the records could reasonably be expected to interfere with the OPP investigation. The fact that some information stemming from this investigation has been obtained by a member of the media by way of application to the Ontario Court of Justice, does not mean that the

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[18] Orders MO-1719 and MO-1721-F.

exemption in section 14(1)(b) does not apply to the records at issue.

[71] The appellants have relied on three orders of this office, as well as a decision of the Divisional Court, to support their position that there is not an ongoing investigation or that, if there is an ongoing investigation, the police have not provided sufficient evidence to support its position that the disclosure of the records could reasonably be expected to interfere with the investigation. I will address each in turn.

[72] In Order M-1027, the records at issue were two witness statements provided to the Toronto Police. Former Adjudicator Holly Big Canoe found that, while she was satisfied that there was an ongoing investigation (into an armed robbery), the Metropolitan Toronto Police Services Board (the Toronto police) had not provided sufficient evidence to establish how the disclosure of the witness statements could reasonably be expected to interfere with either a law enforcement matter or investigation, and she ordered two witness statements to be disclosed to the appellant.[19] In these appeals, I find that the police have provided sufficient evidence that the disclosure of any of the records, including witness statements could reasonably be expected to interfere with the ongoing and active investigation.

[73] In Order MO-2909-I, the appellant sought access to records held by the Durham Regional Police Services Board (the Durham police) relating to the disappearance of the appellant's sister almost fifty years ago. I found that most of the records were exempt under the law enforcement investigation exemption, as there was an ongoing investigation and the disclosure of the records, which contained sensitive information such as evidence gathered by the Durham police, as well as the identity of potential suspects, could reasonably be expected to interfere with the investigation. I also found that two types of records were not exempt under section 8(1)(b). The first types were press releases and publicly-available articles. The second was a summary of the appellant's *brief* statement to the Durham police. In the present appeals, the witness statements made by the appellants are anything but brief, and I find that their disclosure could reasonably be expected to interfere with this investigation. In addition, the press releases in Order MO-2909-I had been released and the articles had been published. In the present case, while the Toronto Star has obtained ITO information from the Courts, there is no evidence before me that the information in the ITO's has been published.

[74] In Order MO-3224, the appellant sought access to records held by Hamilton Police Services Board (the Hamilton police) relating to the death of the appellant's son. In that appeal, the Hamilton police claimed the application of the law enforcement matter exemption in section 8(1)(a). Adjudicator Justine Wai found that there was

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[19] The witnesses had provided consent to disclose their witness statements. As a result, the personal privacy exemption was not at issue.

insufficient evidence to support the Hamilton police's claim that the law enforcement matter was ongoing or active. Adjudicator Wai made her finding, in part, due to her review of the most recent records. She found that the records did not demonstrate that the investigation was ongoing, and that, in fact, there had been no activity on the investigation for nearly eight years. In the present case, as previously stated, I have found that there is evidence, on the face of the records, themselves, that this investigation is ongoing and active.

[75] In Ontario (Attorney General) v. Information and Privacy Commissioner,[20] the Ministry of the Attorney General (MAG), brought applications for judicial review of two decisions of this office, ordering the ministry to disclose certain records arising out of criminal investigations. At issue in this case was the application of section 19 (solicitor-client privilege) of the provincial *Act*, and whether it exempted from disclosure records in the hands of the police, when copies of the same records are found in the Crown brief. The Court held that section 19 is not a means to cover police records still in police protection, and that there are other exemptions in the *Act* to directly address the interests in protecting police records from disclosure, such as sections 14(1), 20 and 21(1) (of the provincial *Act*). In that case, at the time of the access request, the ministry had claimed a number of law enforcement exemptions in section 14, but then later withdrew them. I find that this order has no relevance to these appeals, because the provincial equivalent of section 8(1) was not at issue before the adjudicator; only the solicitor-client exemption (which was not claimed in these appeals) was at issue.

[76] The appellants' representations go on to argue that there is a public interest in disclosure of this information, which relates to the public interest override found in section 16 of the *Act*. However, section 16 does not include section 8 as an exemption that can be overridden by a compelling public interest in disclosure.[21] The appellants have also raised the absurd result principle with regard to their witness statements, as well as the witness statements of their other children. The absurd result principle[22] has been applied by this office in the context of the possible application of the personal privacy exemptions in sections 38(b) and 14(1) of the *Act*, and not in the context of section 8(1)(b). In any event, I find that releasing these statements to the appellants would be inconsistent with the purpose of the section 8 exemption, noting that disclosure of these statements to the appellants amounts to disclosure to the world.

[77] As I have found that the records are exempt from disclosure under section

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[20] See note 16.

[21] A public interest in disclosure is, however, a relevant factor in a head's exercise of discretion. See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

[22] Under the personal privacy exemption in section 38(b), the absurd result principle may apply to not exempt information where the requester originally supplied the information or is otherwise aware of it, if withholding the information would be absurd and inconsistent with the purpose of the exemption. See, for example, Orders M-444, MO-1323 and P-1414.

8(1)(b) on its own or under section 38(a), in conjunction with section 8(1)(b) of the *Act*, I am not required to consider the application of the other exemption claimed by the police, namely section 8(1)(a), or the application of the public interest override found at section 16 of the *Act*.

Issue C: Did the police exercise their discretion under sections 8(1)(b) and 38(a)? If so, should this office uphold the exercise of discretion?

[78] The sections 8(1)(b) and 38(a) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

[80] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

[81] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information and exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;

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[23] Order MO-1573.
[24] See section 43(2).
[25] Orders P-344 and MO-1573.

- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations

[82] The police submit, through the ministry, that they have exercised their discretion correctly in not disclosing the records that are the subject matter of these appeals. The police further submit that they took into consideration the strong public policy interest in protecting the integrity of investigative records, to ensure that the evidence in the records can be used in the future, as required, to apprehend and prosecute offenders who are brought to justice. The police also submit that they took the privacy interests of third party individuals into consideration, as the information at issue is highly sensitive.

[83] Lastly, the police argue that they balanced the appellants' need to understand the cause of their child's death, with the need to conduct a fair and complete law enforcement investigation.

[84] The appellants submit that the police "erred" by not exercising their discretion. They further submit that past orders of this office have found that "institutions should consider the broader interests of public accountability" when deciding whether to disclose information,[26] and that public scrutiny of an institution is very important in holding it to account.[27]

[85] The appellants go on to state:

> It is our submission that the Respondents are trying to avoid scrutiny of their actions, including their focus on the wrong people as suspects in the death; shoddy police work; conflict of interest in police work (connections to a person of interest); and general concern that it would lower the estimation of two police forces in the eyes of the public if information regarding their (at times) ineptitude was released. We submit that the

[26] Order P-256.
[27] Order PO-2789.

> decision to deny access to the information that is subject to this appeal was done for an improper purpose – to save the force's [sic] from scrutiny and embarrassment.

[86] In reply, the police submit that while they understand that the appellants have a compelling need to make sense of their child's tragic death, the fact remains that there is a public interest in protecting records subject to an ongoing and active law enforcement investigation; a fundamental principle, which has consistently been upheld on past orders of this office.

[87] In sur-reply, the appellants state that in interim Order MO-2909-I, I ordered the Durham Regional Police Services Board to re-exercise their discretion with respect to certain records, finding that the police did not take into consideration "the fact that exemptions from the right of access should be limited and specific." The appellants then argue that if this office does not order full access to the records, it should order the police to re-exercise their discretion, as there are most likely vast amounts of information that could be disclosed, if discretion was properly applied.

Analysis and findings

[88] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[28] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[29] Having found that the records at issue are exempt from disclosure under the law enforcement exemption in section 8(1)(b) on its own, or section 38(a) (in conjunction with section 8(1)(b)), my finding regarding the police's exercise of discretion is in relation to these two exemptions.

[89] In this instance, based on the representations provided, I am not satisfied that the police properly exercised their discretion in not disclosing the records that I have found to be exempt from disclosure under the law enforcement exemption. As previously stated, the ministry provided the representations on the police's behalf and, based on those representations, I am not persuaded that the police independently exercised their discretion in not disclosing the records. The exercise of discretion is conducted by the head of an institution. In this instance, I am not satisfied that the head of the Strathroy police exercised their discretion. In sum, I do not uphold the police's exercise of discretion to not disclose the records to the appellants under section 8(1)(b) on its own, or section 38(a), in conjunction with section 8(1)(b), and I will order them to re-exercise their discretion.

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[28] Order MO-1287-I.
[29] Order 58.

ORDER:

1. I uphold the police's application of the sections 8(1)(b) and 38(a) exemptions, but do not uphold their exercise of discretion.

2. I order the police to re-exercise their discretion and to provide representations to this office and to the appellants, describing their re-exercise of discretion within 30 days of the date of this order.

3. I remain seized of this matter.

Original Signed by: October 11, 2019

Cathy Hamilton
Adjudicator