Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3915

Appeal MA18-100

Halton Regional Police Services Board

March 12, 2020

Summary: The Halton Regional Police Services Board (the police) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to an investigation into allegations made by the appellant about abuse or sexual abuse of her minor daughter. The police granted partial access to the responsive records, denying access to portions of them under the discretionary exemptions at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the law enforcement exemption at section 8(1)(e), and section 38(b) (personal privacy) of the *Act*. The appellant appealed. In this order, the adjudicator finds that the appellant cannot exercise a right of access on behalf of her daughter pursuant to section 54(c) of the *Act*. She finds that disclosure of the personal information remaining at issue would be an unjustified invasion of personal privacy of the individuals to whom that information relates and upholds the police's denial of access to the information under section 38(b). She also upholds the police's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(e), 14(1), 14(1)(a) and (d), 14(2)(a), (d), and (f), 14(3)(b), 38(a) and (b) and 54(c).

Orders and Investigation Reports Considered: Orders P-673, PO-3599, MO-1480 and MO-3351.

OVERVIEW:

[1] The Halton Regional Police Services Board (the police) received two requests

under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the investigation into allegations made by the requester about the abuse or sexual abuse of her minor daughter. The requester sought access to all police reports, handwritten notes and audio and video recordings for a specified time period. One request is for records containing the requester's own information, while the other request is for records containing information relating to her daughter. The requester stated that she has sole custody of her daughter and enclosed a copy of a court order dated January 28, 2016 with her request.

[2] As the responsive records for both requests are the same, the police responded with a single decision. They advised that they had located records relating to four occurrences and that they were granting partial access to the occurrence reports and the police officer notes for those occurrences. They further advised that they were denying access in full to the related video recordings. The police claimed the exemptions at section 38(a) (discretion to refuse a requester's own information), read in conjunction with the law enforcement exemptions at section 8(1)(e) (endanger life or safety) and section 8(1)(l) (facilitate commission of an unlawful act), as well as section 38(b) (personal privacy) of the *Act* apply to the information that it withheld.

[3] The requester, now the appellant, appealed the police's decision.

[4] During mediation, the appellant advised that the police interviewed her in March 2017 and a recording of that interview should exist. The police advised that they did not locate an audio or video recording of an interview with the appellant from March 2017. As the appellant maintains that a recording of that interview should exist, the issue of the reasonableness of the police's search has been included as an issue in this appeal.

[5] The appellant also advised that she seeks access to all of her daughter's personal information as she is the custodial parent and entitled to all information pertaining to her child. As a result, whether the appellant can exercise her daughter's rights under the *Act* pursuant to section 54(c) is included as an issue on appeal.

[6] The appellant confirmed that she does not seek access to information about other incidents recorded in the officer notes that the police identified as not responsive to the request. The appellant also confirmed that she does not seek access to police codes, patrol information or statistical codes, which have been severed under section 38(a), in conjunction with sections 8(1)(e) and (l) of the *Act*. As a result, section 38(a), read in conjunction with section 8(1)(l), is no longer at issue.

[7] During mediation, the police advised that they continue to claim section 38(a), in conjunction with section 8(1)(e), and section 38(b), for all of the information that has withheld. The police also clarified that although its decision letter referred to having located only video recordings, two of the recordings that were deemed responsive to the request are actually audio recordings.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. I sought and received representations from both parties. In accordance with this office's *Code of Procedure* and *Practice Direction 7*, I shared the non-confidential portions of the police's representations with the appellant. The appellant provided representations in response. I determined that it was not necessary to share the appellant's representations with the police.

[9] In this order, I find that the appellant cannot exercise a right of access on behalf of her daughter under section 54(c) and I uphold the police's decision not to disclose the withheld information. I also uphold the police's search for responsive records as reasonable.

RECORDS:

[10] The 25 records at issue (identified as records 6 to 31) relate to four separate occurrences connected to the police investigation into the appellant's allegations of abuse or sexual abuse of her daughter. They include occurrence reports, police officer notes and DVDs containing audio and video interviews of individuals contacted during the police investigations into the occurrences.

ISSUES:

A. Does section 54(c) of the *Act* permit the appellant to exercise a right of access on behalf of her daughter?

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

C. Does the personal privacy exemption at section 38(b) apply to the information at issue?

D. Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

E. Did the police conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Does section 54(c) of the *Act* permit the appellant to exercise a right of access on behalf of her daughter?

[11] Through her requests, the appellant seeks access to her own information, as well

as that of her daughter, who is under the age of sixteen. This raises the potential application of section 54(c) of the *Act*, which provides:

> Any right or power conferred on an individual by this Act may be exercised, if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

[12] Section 54(c) of the *Act* permits custodial parents to make access requests on behalf of children under the age of sixteen and to take other steps on their behalf. This includes permitting the parent to consent to the disclosure of the child's personal information under section 14(1)(a), which permits the disclosure of personal information on the written consent of the individual to whom the personal information belongs.

[13] Under this section, a custodial parent can exercise their child's right of access under the *Act* if they can demonstrate that:

- the individual is less than sixteen years of age; and
- the requester has lawful custody of the individual.

[14] If a requester meets the requirements of this section they are entitled to have the same right of access to the personal information of the child as the child would have. The request for access to the personal information of the child will be treated as though the request came from the child itself.[1]

[15] This office has previously stated that the consequences of the application of section 54(c) are significant. If section 54(c) applies, the person with custody essentially "steps in the shoes" of the child and any personal privacy rights of the child on whose behalf the request is made are not considered in determining whether to grant access to the person with custody.[2]

[16] In the current appeal, it is not in dispute that the appellant's daughter is less than 16 years of age. However, it remains for me to determine whether the appellant has lawful custody of her daughter and if so, whether section 54(c) applies. Given the circumstances of this appeal, I find that it does not.

Evidence related to "lawful custody" and representations on the application of section 54(c)

[17] Enclosed with her request to access her daughter's information, the appellant provided the police with a copy of a final court order dated January 28, 2016, that awards her what she says is "final sole custody of the child…[.]" Despite this, the police

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[1] Order MO-1535.
[2] Order MO-3351.

take the position that the circumstances demonstrate that the appellant should not be entitled to exercise a right of access on behalf of her daughter under section 54(c).

[18] In their representations, the police question the current validity of the court order provided by the appellant for the following reasons:

- there have been numerous family court appearances since the Custody/Access Order was signed;
- an application against the appellant was filed with the Ontario Court of Justice by the Children's Aid Society of the Region of Peel (Peel CAS);
- an assessment conducted by the McMaster Children's Hospital Child and Advocacy & Assessment Program suggests that changes may have been made to the custody arrangements.

[19] The police further submit that even if the appellant continues to have sole custody of her daughter, they are of the view that given the highly sensitive nature of the information at issue and the circumstances surrounding the investigation for which they were created, the appellant should not be able to exercise a right of access to her daughter's personal information under section 54(c). The police submit that the appellant seeks access to her daughter's personal information, not on her daughter's behalf, but in order to pursue her own agenda. In support of their position, the police point to Order PO-3599. In that order, Senior Adjudicator John Higgins found that a custodial parent could not exercise a right to access his minor son's personal information under section 66(c) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), which is the provincial equivalent of section 54(c) of the *Act*, because he was seeking that information in order to further his own position in matrimonial proceedings and was therefore not acting in a custodial capacity.

[20] The police express significant concern, in both their non-confidential and confidential representations, regarding the disclosure of the appellant's daughter's personal information to the appellant. They point to specific information contained in the records themselves that speak to these concerns and submit that there is sufficient evidence to conclude that the appellant's motives for seeking access to her daughter's personal information are not out of genuine concern for the child but are to further her own personal motives. They also submit that disclosure of the appellant's daughter's personal information to the appellant is not in the child's best interest as it risks causing the child "more emotional harm and parental alienation" by the appellant.

[21] The appellant submits that she has lawful custody of her daughter and the custody/access order that she provided to the police and to this office is the final custody order. She acknowledges that Peel CAS has since brought an application against her, but submits that they did not seek to remove her daughter from her custody. She submits that her daughter has lived with her since birth and is currently

living with her.

[22] With her representations, the appellant enclosed a letter from her lawyer which confirms that on the date of the letter she was the custodial parent of her daughter. She also enclosed a copy of a settlement conference brief for the application brought against her by Peel CAS. That document states that the appellant's daughter "shall remain in the permanent care and custody of [the appellant], subject to supervision of [Peel CAS]" on a number of specified terms which include, amongst other terms, that:

- The Respondent parents shall safeguard the child's emotional wellbeing by refraining from exposing her to adult conversations and conflicts;
- The Respondent parents shall engage with and allow the [Peel CAS] to attend their respective homes on an announced and unannounced basis[.]

[23] Specifically addressing whether she is seeking access to her daughter's personal information for the benefit of the child or for her own interest, the appellant explains that she seeks the information in relation to an application brought against her by Peel CAS.

[24] The appellant enclosed with her representations, a final order of the Ontario Court of Justice in relation to a motion that the appellant brought during the application referred to above. In that order, the police are ordered to disclose to the appellant and the appellant's daughter's father, subject to some restrictions, the records that are at issue in the current appeal. The order identifies what severances should be made to the records and specifies certain documents that should not be severed. The order also stipulates that the records produced and copied shall only be used by the parties for the full and fair disposition of the issues in the proceeding at hand and that the parties shall not disclose the records or any information contained therein to any person (except for any retained experts) who does not have a direct interest in the child protection proceeding.

Previous considerations of the application of section 54(c)

[25] The first order of this office to consider the issue of whether a custodial parent is automatically entitled to obtain access to the personal information of their child was Order P-673. In that order, Commissioner Irwin Glasberg considered whether a father could obtain access under section 66(c) of *FIPPA* to the personal information of his son. The records related to a child protection proceeding.

[26] In Order P-673, Commissioner Glasberg found that the father could not rely on section 66(c) of *FIPPA* to obtain access to his son's personal information for two reasons. First, the Commissioner determined that the father was not exercising his right of access on behalf of his son but rather, was seeking the information to meet his own

personal objectives (to prove whether the Ministry of Community and Social Services[3] and other government agencies had shown favouritism to his former spouse in child protection proceedings). Second, the Commissioner determined that, based on the sensitive nature of the information contained in the records, the release of the son's personal information to the father would not serve the best interests of the child.

[27] In finding that section 66(c) of *FIPPA* did not apply in the circumstances to allow the father to stand in the shoes of his minor son, Commissioner Glasberg recognized that children under the age of 16 have privacy rights and that, in certain cases, these stand in opposition to the desire of parents to receive information about their children.

[28] More recent orders of this office have considered this issue in light of the modern principle of statutory interpretation, which indicates that in some circumstances, despite the apparent plain or literal meaning of a provision, a more probing reading may cause a different interpretation to be adopted.[4]

[29] In Order PO-3599, referred to by the police in their representations, Senior Adjudicator Higgins explains that this principle was established by the Supreme Court of Canada in *Rizzo Shoes*, where the Court stated:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act*, the object of the Act*, and the intention of Parliament.[5]

[30] In *Rizzo Shoes,* Senior Adjudicator Higgins noted, the Court rejected an interpretation which, despite being in accordance with plain meaning, was incompatible with both the object of the legislation at issue and with the object of the provisions themselves.

[31] In Order PO-3599, a custodial parent sought access to Ontario Provincial Police investigation records concerning allegations that he had committed a criminal offence against his daughter. Senior Adjudicator Higgins applied this principle in that context and found that although the appellant in that case was a custodial parent, section 66(c) of *FIPPA* did not apply because he was not acting in a custodial capacity. Senior Adjudicator Higgins concluded that the evidence demonstrated that the father sought access in order to further his own interests in matrimonial proceedings.

[32] Similarly, in Order MO-3351, Senior Adjudicator Gillian Shaw followed the principle established in *Rizzo Shoes* and the reasoning expressed in Order PO-3599. She found that section 54(c) of the *Act* did not apply where the appellant sought access to

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[3] Now the Ministry of Children, Community and Social Services.
[4] See Orders PO-3599 and MO-3351.
[5] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at para 21 (*Rizzo Shoes*). The Court is quoting from Elmer Driedger, Construction of Statues (2nd ed. 1983) at p. 87.

police investigation records relating to allegations that she committed a criminal offence against her son. Senior Adjudicator Shaw noted that on a plain reading of section 54(c), the mother may appear to be entitled to exercise her son's right of access to his own personal information. She further noted that "the appellant's request would appear to be at least in part an 'incident of custody'; that is, one in which she is acting in a custodial capacity by seeking the records to assist her son." However, Senior Adjudicator Shaw applied the principle established in *Rizzo Shoes* that section 54(c) must be interpreted in light of the purposes of the *Act* and the object of section 54(c) itself. After considering the evidence before her, including the information at issue which consisted mainly of the children's statements about the alleged sexual abuse, and occurrence reports referring to those statements, she found that the records were not ones to which section 54(c) should apply to allow the appellant to "step into the shoes" of her son for access to information purposes or to allow her to consent, on his behalf, to their disclosure.

[33] In finding that section 54(c) did not apply, Senior Adjudicator Shaw stated:

> In my view, it would be perverse to interpret section 54(c) so as to permit a custodial parent, as a matter of right, and without separately considering the child's privacy interests, to exercise the child's right of access to allegations of the child against that very parent. Whether the allegations are founded or not is not the issue. While section 54(c) contemplates some measure of loss of a minor's privacy rights, it would, in my view, constitute a severe violation of fundamental privacy principles to interpret section 54(c) to apply to the present circumstances.

[34] In Order MO-3351, Senior Adjudicator Shaw went on to consider whether disclosure of the child's personal information to the appellant in that case would amount to an unjustified invasion of the child's personal privacy under section 38(b).

Analysis and finding

[35] The evidence before me suggests that the appellant has lawful custody of her daughter, who is less than 16 years old, but this evidence is not recent and it is possible that additional custody orders have been granted since January 2016. However, aside from the police's speculative statements, I have no definitive evidence to support a conclusion that the appellant no longer has custody of her daughter. Nevertheless, I find that even if the custodial arrangement has not changed and the appellant remains her daughter's custodial parent, the personal information of the appellant's daughter is not of the type to which the appellant should be entitled to "stand in the shoes" of her daughter and obtain access to it under section 54(c). In reaching my determination on this issue, I have considered and applied the reasoning in Orders P-673, PO-3599, and MO-3551, discussed above.

[36] The appellant submits that she requires access to the requested information for

the purposes of defending herself in a protection application brought by Peel CAS. From the evidence she provided, it appears that in that application, the Ontario Court of Justice has already ordered the police to disclose the requested records to the appellant, subject to severances and a number of restrictions, including restrictions that address how she may use the information. The terms of the order suggest to me that the appellant is seeking access to her daughter's personal information to further her own interests rather than on behalf of her daughter.

[37] Moreover, from my review of the information at issue, I find the daughter's personal information to be particularly sensitive in nature. From the evidence submitted to me by the police, it is clear that the police are concerned that the appellant's daughter may have been influenced or coached with respect to the allegations that gave rise to the records at issue and that the appellant may have been involved. Without commenting on the legitimacy of the police's concerns, I accept that they are not frivolous and are reasonably held.

[38] In my view, this evidence, coupled with the fact that disclosure of information under the *Act* is not subject to any restrictions or limits on what an individual may do with the records obtained,[6] makes it far from clear that disclosure to the appellant of her daughter's personal information in accordance with section 54(c) would be in the child's best interests. Given these circumstances, I do not accept that the legislature would have intended for section 54(c) to apply in this appeal to give the appellant a right of access to her daughter's statements, without a separate consideration of the child's privacy interests.

[39] Given my finding that the personal information of the appellant's daughter is particularly sensitive and that the appellant's interest in obtaining access to it is not clearly identifiable as being on behalf of her daughter, I find that this is not a circumstance where section 54(c) should apply to permit the appellant to stand in her daughter's shoes and exercise a right of access to her daughter's personal information.

[40] In this case, as in Order MO-3351, my finding that section 54(c) does not apply does not mean that the appellant's right of access to her child's information is without merit, only that the circumstances warrant more deliberate consideration of the child's privacy interests under the *Act*. I consider the daughter's privacy interests and appellant's right of access to her daughter's personal information in my discussion on section 38(b), below.

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

[41] 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

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[6] See Order PO-3117.

relates. That term is defined in section 2(1), in part, 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,
> >
> > …
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > ...
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[42] 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.[7]

[43] 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.[8]

[44] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[9]

Representations

[45] The police submit that the records contain personal information as defined in section 2(1) of the *Act*, including "information relating to the age, sex, address,

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[7] Order 11.

[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

telephone number, driver's licence information, and views or opinions of affected individuals." The police submit that the records also contain statements, opinions and allegations of witnesses about the appellant and her daughter as well as other individuals and that information qualifies as the personal information of the individuals about whom the statements, opinions or allegations are made.

[46] The appellant does not make any specific representations on whether the records contain information that qualifies as personal information under the *Act*.

Analysis and finding

[47] As indicated at the outset of this order, the records relate to a police investigation conducted in response to allegations made by the appellant against another individual regarding abuse or sexual abuse of her daughter. I find that all of the records contain the personal information of the appellant and her daughter, while some of them also contain the personal information of other identifiable individuals questioned during the investigation, including the individual alleged to have committed the abuse, as well as a number of witnesses.

[48] The personal information contained in the records includes these individuals' names, along with their dates of birth, sex, marital or family status (paragraph (a) of the definition of "personal information"), their addresses and telephone numbers (paragraph (d)), and in some cases, their driver's licence information (paragraph (c)). Additionally, the records contain the names of individuals involved in the investigation, in a context where the disclosure of their name would reveal other personal information about them (paragraph (h)); amongst other things, it would reveal that they were involved in a police investigation.

[49] The records also contain statements made to the police by the appellant, the appellant's daughter, the individual alleged to have committed the abuse and a number of other witnesses contacted by the police as potentially having information about the allegations. These statements not only contain the personal information of the individuals making the statement (of the types identified above), but their views or opinions about other individuals, specifically, the appellant, the appellant's daughter and the individual alleged to have committed the abuse. Therefore, the statements also contain the personal information of the individuals about whom the witnesses are expressing their views or opinions (paragraph (g)).

[50] The police have disclosed most of the appellant's own personal information to her. Where the appellant's personal information has not been disclosed to her it is so intertwined with the personal information of other identifiable individuals that it cannot be severed for the purposes of section 4(2) of the *Act*.[10] As the records contain the

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[10] Section 4(2) provides:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 …, the head shall disclose as much of the

personal information of the appellant together with that of other identifiable individuals (including her daughter), in the circumstances, I must consider whether either of the discretionary exemptions in sections 38(a) and 38(b) apply to the information that has been withheld.

Issue C: Does the personal privacy exemption at section 38(b) apply to the information at issue?

[51] 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.

[52] Under section 38(b), where a record contains the 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. As section 38(b) is a discretionary exemption, the institution may also choose to disclose the information. When balancing the interests of the parities, factors weighing for and against the disclosure of the information must be considered and weighed.

[53] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. Section 14(4) does not apply in this appeal.

Section 14(1) - exceptions

[54] If the information fits within any of the exceptions in paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[55] Although I have found that none of the exceptions in section 14(1) apply, I have considered and dismissed the possible application of paragraphs (a) and (d), which state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
> >
> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure[.]

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record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Is there consent to disclose as considered in section 14(1)(a)?

[56] Section 14(1)(a) applies if the individual to whom the personal information relates consents in writing to its disclosure in the context of an access request.[11] In this appeal, no such consent has been given.

[57] Additionally, given my finding that section 54(c) does not apply in the circumstances of this appeal, the appellant cannot stand in her daughter's shoes and provide consent on her daughter's behalf.

[58] Therefore, section 14(1)(a) does not apply to authorize the disclosure of any of the personal information at issue in this appeal, to the appellant.

Does another Act authorize disclosure pursuant to section 14(1)(d)?

[59] Although the appellant did not raise it, I have also considered whether section 14(1)(d) authorizes disclosure of the affected party's personal information to the appellant on the basis of either section 20(5) of the *Children's Law Reform Act*[12] or section 16(5) of the *Divorce Act*.[13] For the following reasons, I find that it does not.

[60] Previous orders that have considered the disclosure of a minor child's personal information to a parent when section 54(c) does not apply, have addressed the possible application of section 14(2)(d).[14] Specifically, both Orders PO-3599 and MO-3351, discussed above under my analysis of the application of section 54(c), considered the application of section 14(1)(d) in light of the rights of access parents have to information about their children set out in section 20(5) of the *Children's Law Reform Act* and section 16(5) of the *Divorce Act*.

[61] Section 20(5) of the *Children's Law Reform Act* states:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right of as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

[62] Section 16(5) of the *Divorce Act* contains similar wording about access to a child's information:

> Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries and to be given information, as to the health, education and welfare of the child.

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[11] Order PO-1723.

[12] *Children's Law Reform Act*, R.S.O. 1990, c. C. 12/

[13] *Divorce Act*, R.S.C 1985 . 3 (2nd Supp.).

[14] The provincial equivalent of this section is at section 21(1)(d) of *FIPPA*.

[63] In Orders PO-3599 and MO-3351, both adjudicators found that section 14(1)(d) (or its provincial equivalent at section 21(1)(d)) did not apply on the basis of section 20(5) of the *Children Law Reform Act* or section 16(5) of the *Divorce Act*. They concluded that to find that the exception at section 14(1)(d) applied would permit disclosure of sensitive personal information about the appellants' children in police records in circumstances where "[i]t is far from clear that disclosure of the records would be in the children's best interests." Both adjudicators concluded the Family Court was better positioned to determine the issue of the production of the information.

[64] Considering the circumstances before me and the reasoning expressed in Orders PO-3599 and MO-3351, I find that neither section 20(5) of the *Children's Law Reform Act* or section 16(5) of the *Divorce Act* authorizes the disclosure of the appellant's daughter's personal information under section 14(1)(d). For reasons similar to those expressed above under Issue A, I find that the legislature could not have intended that the scope of section 14(1)(d) would include the appellant's right to access the type of records at issue here, without separate consideration of the child's privacy interests.

[65] Accordingly, I find that the exception at section 14(1)(d) does not apply in this appeal.

Sections 14(2) and (3) – presumptions and factors

[66] In determining whether disclosure would be an unjustified invasion of privacy under section 38(b), this office must consider and weigh the presumptions at section 14(3) and the factors at section 14(2) to balance the interests of the parties.

Section 14(3) – presumptions against disclosure

[67] If any of the paragraphs at (a) to (h) of section 14(3) apply, disclosure of the personal information of individuals other than the appellant is presumed to be an unjustified invasion of personal privacy under section 38(b). In the context of section 38(b), the existence of a presumption is a factor weighing against disclosure.

[68] In this appeal, section 14(3)(b) is the only relevant presumption and I accept that it applies.

Were the records compiled as part of an investigation into a possible violation of law?

[69] The police take the position that the presumption at section 14(3)(b) applies in this appeal. Section 14(3)(b) 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;

[70] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[15] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[16]

[71] It is clear that the records at issue were compiled and are identifiable as part of a police investigation into a possible violation of the *Criminal Code of Canada,*[17] namely the possible abuse or sexual abuse of the appellant's daughter by another individual. As a result, I find that the presumption at section 14(3)(b) applies to the personal information at issue and is a factor to be considered weighing against its disclosure.

Section 14(2) – factors

[72] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[18] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).[19]

Factors weighing against disclosure

[73] The police rely on three listed factors weighing against disclosure to argue that the privacy rights of the affected parties, including the appellant's daughter, should be protected and their personal information should not be disclosed to the appellant. These are the factors at section 14(2)(e) (the individual to whom the information relates will be exposed unfairly to pecuniary or other harm) and section 14(2)(i) (the disclosure may unfairly damage the reputation of any person referred to in the record). The police also suggest that the factor at section 14(2)(f) (the personal information is highly sensitive) might also be relevant.

Is the personal information highly sensitive as contemplated by section 14(2)(f)?

[74] Section 14(2)(f) states:

> 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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[15] Orders P-242 and MO-2235.
[16] Orders MO-2213, PO-1849 and PO-2608.
[17] R.S.C., 1985, c. C-46.
[18] Order P-239.
[19] Order P-99.

the personal information is highly sensitive[.]

[75] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[20]

[76] The police submit that the personal information that remains at issue is highly sensitive in nature and should not be disclosed. In their representations they submit that given the nature and content of the personal information, there is a reasonable expectation that the individuals to whom the personal information relates would experience significant personal distress were the information disclosed.

[77] Considering the personal information that is at issue, I accept that the factor at section 14(2)(f), which contemplates information that is highly sensitive in nature, applies and weighs heavily against disclosure. All of the withheld personal information relates to the affected parties' involvement in an investigation into possible abuse or sexual abuse of a child. Also, if the information was disclosed to the appellant, the affected parties, including the appellant's daughter, would not have any control over the appellant's use or distribution of this information, including whether or not it is publically disseminated. In this context, and given the circumstances, I accept that it is reasonable to expect that the individuals to whom the personal information relates, including the appellant's daughter, would experience significant personal distress if their personal information were disclosed to the appellant. Therefore, I find that the personal information is highly sensitive within the meaning of section 14(2)(f) and it is a factor that weighs heavily against disclosure.

[78] In view of my conclusion below on the balancing of the presumptions and the factors that are relevant in the circumstances of this appeal, it is not necessary for me to address the police's submissions that the factors favouring disclosure at sections 14(2)(f) and/or (i) apply. I will now consider whether any of the factors weighing against disclosure of the personal information apply.

Factors weighing in favour of disclosure

[79] The appellant is of the view that the personal information of the affected parties, including that of her daughter, should be disclosed to her. Her representations suggest that she believes that two listed factors weighing in favour of disclosure are relevant: section 14(2)(a) (the disclosure is desirable for the purposes of subjecting the activities of the institution to public scrutiny) and section 14(2)(d) (the personal information is relevant to a fair determination of rights affecting the person who made the request).

[80] If the factors at sections 14(2)(a) and (d) apply, they weigh in favour of disclosure. If the factors at sections 14(2)(e), (f) and (i) apply, they weigh in favour of non- disclosure. In the circumstances, I find that none of the factors weighing in favour of disclosure apply.

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

Would disclosure be desirable for the purpose of subjecting the activities of the institution to public scrutiny under section 14(2)(a)?

[81] Section 14(2)(a) states:

> 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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> > the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny[.]

[82] The appellant suggests that the disclosure of the affected parties' personal information, to her, is desirable for the purpose of subjecting the activities of the police to public scrutiny. She submits:

> It appears that the Halton Police [are] denying access by using [the] excuse of the [*Act*] to hide their unethical practices, misused power, disrespecting victims, compromised victim's safety and security, freedom and fundamental rights, discrimination. [sic]

[83] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government institutions to public scrutiny.[21] In order for this section to apply, the issues addressed in the records need not have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.[22]

[84] The appellant has not provided me with any evidence to support a conclusion that the specific actions taken by the police in this case warrant public scrutiny or that disclosure of the specific information at issue, the personal information of individuals other than herself, would assist in subjecting the activities of the police to public scrutiny. As a result, I find that the factor favouring disclosure in section 14(2)(a) is not a relevant factor in this appeal.

Is the personal information relevant to a fair determination of the appellant's rights under section 14(2)(d)?

[85] Section 14(2)(d) states:

> 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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[21] Order P-1134.
[22] Order PO-2905.

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[86] Although the appellant does not specifically refer to section 14(2)(d), she submits that her request for access to the information at issue is for the purposes of court proceedings in which she is involved.

[87] For section 14(2)(d) to apply, the appellant must establish that:

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

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

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

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[23]

[88] Although the appellant indicates that she requires the information for court proceedings, the only proceeding to which she refers is one which, based on evidence that she herself has provided to me with her representations, has already been completed. Additionally, the proceeding to which she refers is the same proceeding during which the Ontario Court of Justice ordered the police to produce to the appellant, the records at issue in this appeal, subject to a number of severances and restrictions.

[89] As the appellant has not provided me sufficient evidence to establish that there is a proceeding, either existing or contemplated, or that the personal information to which she seeks access is required in order to prepare for the proceeding or to ensure an impartial hearing, parts 2 and 4 of the test set out above have not been met. As a result, I find that the factor favouring disclosure at section 14(2)(d) is not a relevant factor in this appeal.

<u>Does the fact that the appellant has already been granted access to much of the information that is at issue qualify as an unlisted factor weighing in favour of disclosure?</u>

[90] As mentioned above, the appellant provided a copy of an order issued by the

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[23] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

Ontario Court of Justice in response to the motion that she made in the middle of a protection application brought by Peel CAS. In that order it is clear that the court granted the appellant access to the same records that are at issue in this appeal. As the appellant is already aware of much of the content of the records, it is necessary to consider whether this is a relevant factor that weighs in favour of the disclosure of the information. I find that it is not.

[91] I have reviewed the order issued by the Ontario Court of Justice that addresses the appellant's motion for disclosure closely. Although the order grants her access to the same information that is at issue in this appeal, that access is subject to a number of severances and restrictions, including an undertaking that the information is to be used only for the purpose of the disposition of the issues in the proceeding before that court. As mentioned briefly above, previous orders have found that disclosing records to a requester under the *Act* is deemed to be disclosure to the world. The *Act* does not impose any restrictions or limits on what a requester can do with records disclosed to them.[24]

[92] Given that disclosure would move the records into the public domain where they can be freely disseminated, and considering the circumstances under which the appellant gained knowledge of the content of the records, I do not accept that the fact that she may be aware of much of the information that is at issue is a factor that is relevant to my determination of whether its disclosure would be an unjustified invasion of the personal privacy of the individuals to whom the information relates.

Conclusion on section 38(b): disclosure would be an unjustified invasion of personal privacy.

[93] As indicated above, since the records at issue contain both the personal information of the appellant and other individuals, the relevant presumptions and factors must be balanced and weighed to determine whether disclosure of the information would be an unjustified invasion of the personal privacy of the individuals other than the appellant. In this appeal, I have found that the presumption at section 14(3)(b) applies and is a factor that weighs against disclosure. I have also found that the factor at section 14(2)(f) weighs strongly against disclosure. With respect to the factors favouring disclosure, I have found that I have insufficient evidence to conclude that any of them apply. Therefore, I find that disclosure of the personal information of the affected parties, including that of the appellant's daughter, would be an unjustified invasion of their personal privacy under section 38(b).

[94] In light of my finding that disclosure of all of the personal information that remains at issue would be an unjustified invasion of personal privacy under section 38(b), it is not necessary for me to consider whether the exemption at section 38(a), read in conjunction with the law enforcement exemption at section 8(1)(e), also applies

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[24] See Orders M-96, P-169, P-679, MO-1719, MO-1721-F and PO-3117.

to this information.

Issue D: Did the police exercise their discretion under section 38(b)? If so, should this office uphold their exercise of discretion?

[95] The exemption at section 38(b) is discretionary, and permits 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.

[96] If the Commissioner finds that the institution erred in exercising its discretion, the matter may be sent back to the institution for an exercise of discretion based on proper considerations.[25] This office may not, however, substitute its own discretion for that of the institution.[26]

Representations

[97] The police submit that their exercise of discretion to withhold the personal information of the affected parties under section 38(b) was proper. They submit that in making their decision to withhold this personal information they took into account the following considerations:

- The appellant has been granted a right to access her own personal information.
- The exemptions from the appellant's right of access were limited and specific.
- The nature of the personal information and the extent to which it is significant and/or sensitive to the affected individuals.
- The nature of the relationships between the appellant and each affected party.

[98] Specifically addressing their exercise of discretion to withhold the appellant's daughter's personal information, the police state that they considered the highly sensitive nature of the information and the fact that its disclosure would be an unjustified invasion of the daughter's personal privacy. Throughout their representations, the police reiterate several times that they exercised their discretion not to disclose the appellant's daughter's personal information to the appellant, because in their view, disclosure to the appellant is not in the best interests of the child as it would be an unjustified invasion of the child's personal privacy.

[99] The appellant disputes the police's position that the information should be withheld on the basis that its disclosure would not be in her daughter's best interest. She suggests that disclosure will help provide "justice" for her daughter and will help to

[25] Order MO-1573.
[26] Section 43(2).

ensure that her daughter will not grow up in fear of the police, believing that they are "best friends" with the alleged perpetrator.

Analysis and findings

[100] Considering the police's representations and the content of the personal information that is at issue, particularly the portions of the appellant's daughter's personal information that have been withheld from the appellant, it is clear that the information is highly sensitive in nature. I accept that the police are aware of the sensitivity of the information in the records and the need to consider and protect the privacy interests of the affected parties, including the appellant's daughter. I also accept that in exercising its discretion not to disclose the personal information of the affected parties, police balanced the privacy interests of these individuals against the appellant's right to access the information under section 38(b) and determined that the balance weighed in favour of non-disclosure.

[101] I uphold the police's exercise of discretion under section 38(b).

Issue E: Did the police conduct a reasonable search for responsive records?

[102] The appellant states that the police interviewed her in March 2017 and a recording of that interview should exist. The police respond that there is no audio or video recording of an interview with the appellant from March 2017.

[103] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[27] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[104] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[28] To be responsive, a record must be "reasonably related" to the request.[29]

[105] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[30]

[106] If the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its

[27] Orders P-85, P-221 and PO-1954-I.
[28] Orders P-624 and PO-2559.
[29] Order PO-2554.
[30] Orders M-909, PO-2469 and PO-2592.

custody or control, I will order a further search.[31]

[107] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[32]

Representations

[108] In support of its position that no video or audio recording of an interview with the appellant in March 2017 exists, the police submit an affidavit sworn by its Information Privacy Officer and Freedom of Information Coordinator (FOIC) in which the search for such a recording is detailed.

[109] At the outset of the affidavit detailing her search for records sought by the appellant, the FOIC directly addresses the appellant's belief that a recording of an interview conducted in March 2017 should exist. She states that there are two responsive occurrences from in or around March 2017.

[110] With respect to the first occurrence, she states that the FOI analyst contacted the investigating officer and requested a copy of the videotaped interviews related to that occurrence. No audio or video record of the appellant was located. The FOIC submits that, from the content of the records, however, it is clear that although an interview was scheduled with the appellant, the interview was cancelled.[33] The FOIC submits that she contacted the investigating officer who confirmed that there was no audio or video record of a statement taken for that occurrence.

[111] With respect to the second occurrence, the FOIC indicates that the FOI analyst did not initially contact the investigating officer as there was no indication in the report that any witness statements were collected. However, she submits that when it was revealed during mediation that the appellant believed a recording of an interview should exist, the FOI analyst did contact the investigating officer who advised that she "did not do a recorded video of this [appellant]." When contacted again to clarify, the investigating officer confirmed that she did not take any audio or video statements for that specific occurrence.

[112] The FOIC states:

> I feel it necessary to point out that, although an investigating officer may "interview" an individual, it is not always recorded.

[113] To support her statement, the FOIC points to record 26 which documents that the complainant attended the police station and spoke to the investigating officer. The

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[31] Order MO-2185.
[32] Order MO-2246.
[33] The FOIC refers to record 17.

FOIC states that she believes that it is this statement, which was documented in an occurrence report and not recorded, to which the appellant is referring and has resulted in her confusion about the existence of an additional interview recording.

[114] The remainder of the FOIC's affidavit provides a description of the police's search for records responsive to the appellant's request. She submits that the appellant's request was clear and, as a result, they did not need to clarify it. She submits that a search was conducted of the NICHE Record Information Management System using the appellant's name and date of birth and four occurrence reports were located. She submits that using the occurrence reports as a basis, responsive notebook entries were collected from all officers listed in the occurrences.

[115] The FOIC states that on review of the occurrence reports and officer notes, the FOI analyst noted that witness statements for one of the occurrence reports had not been provided. The FOIC states that she contacted the investigating officer to request witness statements for that occurrence and several were provided to her, including the witness statement of the appellant.

[116] The FOIC further submits that once the appeal reached the adjudication stage, she conducted a new NICHE Record Information Management System search using the appellant's name and date of birth, as well as the name and date of birth of the appellant's daughter. She states that this search resulted in the same four occurrence reports that were identified in the initial search locating. The FOIC states that for the remaining two occurrences for which witness statements were not obtained, she contacted the investigating officers who each confirmed that there is no audio or video statement of the appellant associated with their respective occurrences.

[117] Finally, the FOIC states that she conducted an "Intergraph" search of the appellant's last name, as well as an "Intergraph Netviewer" search of the address where the four occurrences took place and no further occurrences were identified. She states she asked another FOI analyst to conduct a "tertiary" (third) search to ensure that nothing was missed and no further responsive occurrences were identified.

[118] The FOIC concludes her affidavit by submitting that if a witness statement was collected, it would be linked to an occurrence number. She states that following numerous searches, only four responsive occurrences were identified. She states that the retention period for occurrence reports from 2007 to present is permanent; therefore, they would not have been destroyed.

[119] In her representations, the appellant does not respond directly to the police's affidavit describing their search for responsive records or comment on whether or not she is of the view that their search was reasonable. Additionally, despite the position that she took in mediation that a recording of an interview that occurred between herself and the police in March 2017 should exist, in her representations she does not make any submissions on why she believes that a recording of that specific interview

should exist.

[120] The appellant does express concern about the fact that the police stated in their decision that they were denying access in full to video recordings and that no audio recordings had been found, and yet later clarified that the two recordings it was withholding were actually audio, not video, recordings. The appellant submits that this information is inconsistent and raises concerns. However, she does not specify what those concerns are or whether they are related to her position that additional records, specifically a recording of an interview conducted in March 2017, should exist.

Analysis and finding

[121] Having considered the evidence before me, I am satisfied that the police have conducted a reasonable search for responsive records, including for a recording or an interview of the appellant that she submits occurred in March 2017. Specifically, I am satisfied that the police's representations demonstrate that experienced employees, knowledgeable in records related to the subject matter of the request, made a reasonable effort to locate all responsive records.

[122] I find that the evidence demonstrates that the police searched for all occurrences related to the appellant and her daughter; they reviewed the occurrences to determine whether any related records, including officer notes or witness statements associated with those occurrences existed; and, where the occurrences indicated that no recorded witness statements were taken, confirmed directly with the investigating officers to ensure that was the case. As a result, I find that the police expended a reasonable effort to locate records responsive to the request.

[123] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[34] In the circumstances of this appeal, the appellant's representations not only do not respond to the police's representations on their search but are silent on the assertion that a recording of an interview conducted in March 2017 should exist. In the absence of representations on this issue, having also considered the appellant's position as communicated to the mediator, there is insufficient evidence before me to establish a reasonable basis upon which to conclude that additional records, including a recording of a March 2017 interview, might exist.

[124] Given my conclusion that the police expended a reasonable effort to locate responsive records, and the absence of a reasonable basis to conclude that additional records responsive to the appellant's request might exist, I find that the police have conducted a reasonable search as required by section 17 of the *Act*, and I uphold it.

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[34] Order MO-2246.

ORDER:

1. I uphold the police's decision not to disclose the information at issue.

2. I uphold the police's search for responsive records as reasonable.

Original Signed by: March 12, 2020

Catherine Corban
Adjudicator