Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4123

Appeal PA17-21

Ministry of Community Safety and Correctional Services

March 22, 2021

Summary: The appellant made a request for access to information pertaining to a murder of an identified individual in 1970. The Ministry of Community Safety and Correctional Services (the ministry) denied access to the records, in whole, claiming the application of the law enforcement exemptions at sections 14(1)(a) (law enforcement matter), 14(1)(b) (law enforcement investigation), 14(1)(l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement report) of the *Act* as well as the personal privacy exemption at section 21(1). In this order, the adjudicator finds that the records qualify for exemption under section 14(1)(b) and upholds the ministry’s decision. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 as amended, section 14(1)(b); *Police Services Act*, RSO 1990, c P.15, Regulation 3/99, section 12(l)(i).

Orders Considered: Orders MO-1171, MO-2443 and PO-3117.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information pertaining to a murder of an identified individual (the victim). The request was worded as follows:

> Looking for any public information on the murder of [the victim] in Timmins, Ontario on Nov. 12, 1970. Is this case still open?"

[2] As explained by the ministry in its representations, the matter is jointly being investigated by the Timmins Police Services Board (the Timmins police) and the Ontario Provincial Police (OPP) The OPP is under the umbrella of the ministry, which handles freedom of information requests for OPP records.

[3] The ministry identified records pertaining to an investigation into the victim's death and relying on sections 14(1)(a) (law enforcement matter), 14(1)(b) (law enforcement investigation), 14(1)(l) (facilitate commission of an unlawful act), 14(2)(a) (law enforcement report) and 21(1) (personal privacy) of the *Act* denied access to them, in full.

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

[5] At mediation, the appellant asserted that it was in the public interest that the withheld information be disclosed. Accordingly, the possible application of the public interest override at section 23 of the *Act* was added as an issue in the appeal. Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] I commenced my inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. The ministry provided responding representations. I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry as well as the ministry's representations. The appellant provided responding representations. I determined that the appellant's representations raised issues to which the ministry should be given an opportunity to reply. Accordingly, I sent a copy of the appellant's representations to the ministry inviting its reply representations. The ministry provided representations in reply.

[7] I subsequently determined that the Timmins police should be given an opportunity to provide representations in the appeal. Accordingly, I sent a Supplementary Notice of Inquiry to the Timmins police. The Timmins police provided representations. I then sent a Supplementary Notice of Inquiry to the appellant along with the Timmins police's representations. The appellant provided responding representations. These were shared with the ministry and the Timmins police who provided reply representations. These were shared with the appellant who provided sur-reply representations.

[8] In the course of adjudication, I requested and received from the Timmins police an initial sampling of responsive records. I subsequently requested and received an affidavit from the Timmins police regarding details of any ongoing investigation pertaining to the matter at issue in the appeal. I also requested and received from the OPP a further sampling of responsive records, which were accompanied by a letter from an OPP Detective. The affidavit and letter were shared with the appellant who provided representations in response.

[9] For the reasons that follow, I find that the records qualify for exemption under section 14(1)(b)[1]. The appeal is dismissed.

RECORDS

[10] At issue in this appeal are records pertaining to an investigation into the victim's death, which include general occurrence reports, letters, memoranda, witness statements, news articles and press releases.

ISSUES:

Issue A: Does the discretionary exemption at section 14(1)(b) apply to the withheld information?

Issue B: Did the institution exercise its discretion under section 14(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 14(1)(b) apply to the withheld information?

[11] Section 14(1)(b) states:

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

[12] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[2]

[13] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[3] The institution must provide detailed

---

[1] In light of my conclusion that the records qualify for exemption under section 14(1)(b) of the *Act*, it was not necessary for me to address the possible application of other exemptions claimed by the ministry.

[2] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[3] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

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.[4]

The ministry's representations

[14] The ministry observes that its representations are based on the Case Summary record of the investigation that the OPP provided to the ministry. The ministry writes:

> I have only been provided with the Case Summary record of the investigation for the purpose of writing these representations. I have not been provided with the remainder of the records, because they are voluminous, and highly sensitive. Accordingly, it would not be practical to move them from the OPP Archive in Orillia, where they are currently stored.

[15] The ministry also submitted that if the appellant is only seeking "public" information, any public information on the murder of the subject individual may be found in public sources, or sources to which the public has unrestricted access (e.g., sources contained in public libraries).

[16] The ministry further submits that, in any event, the records contain the names of affected third party individuals who were involved in the law enforcement investigation, either as witnesses or as suspects.

[17] The ministry takes the position that the investigation into the victim's death is ongoing, and submits that:

> … the OPP investigation into the death of the identified individual is indeed still "open", in that it is active and ongoing, and it will remain so until the law enforcement investigation is concluded. No one has ever been charged with the murder of [the victim]. Unresolved historical investigations such as this one are known as "cold cases". However, cold cases are still open cases. There is no statute of limitations for charging someone with murder. There is a strong policy interest in finding the murderer of [the victim], and in bringing that person to justice, assuming they are still alive.

[18] The ministry submits that disclosure of the records would imperil the ongoing law enforcement investigation into the victim's death, and the prospect of bringing her killer or killers to justice. In that regard, the ministry relies on Order PO-3117, which it says came to a similar conclusion with respect to another cold case homicide investigation.

[19] However, the ministry submits that:

---

[4] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52 to 54.

> One key factual difference between Order PO-3117 and this appeal is that in this appeal, the appellant is not a 'close relative' of [the victim], as that term is defined in the [*Act*]. Nor is the [appellant] otherwise named in any of the records. These considerations bolstered our decision to deny the appellant access to any records.

[20] The ministry submits that as with any major homicide investigation, the records include evidence, interviews, case summaries, and investigators' notes. The ministry submits that because these records form part of an active homicide investigation they qualify for exemption under section 14(1)(b) of the *Act*.

[21] The ministry submits that under section 12(l)(i) of Regulation 3/99 made under the *Police Services Act*[5], the OPP is required to "develop and maintain procedures on and processes for undertaking and managing general criminal investigations into ... homicides and attempted homicides" and that as a provincial law enforcement agency, the OPP is frequently called upon to assist homicide investigations involving municipal police services, which occurred here.

[22] The ministry submits that:

> … the records are part of the law enforcement investigation of the murder of [the victim], which is jointly led by the OPP and Timmins Police Service. If the murderer is ever apprehended, he or she will be subject to charges under the Criminal Code, and, if convicted, subject to the sanction of imprisonment. The OPP acknowledges that many years have passed since [the victim] was murdered. However, there is no statute of limitations for charging someone with murder.

[23] With respect to the passage of time, the ministry submits that:

> The OPP has homicide investigations that are older than [the victim's]. In some cases, cold case investigations are re-activated decades after the crime occurred, due to the discovery of new evidence and the emergence of new technology, such as DNA. For example, in 2009, a man received a life sentence [for] second-degree murder in the death of [a named individual], who was also killed in 1970, this time in Kirkland Lake. [Footnote omitted] It is critically important to the interests of justice and to the families and loved ones of the deceased that law enforcement investigations continue until they are resolved, and that justice is served.

[24] The ministry submits that the investigation will remain open until it is resolved.

---

[5] RSO 1990, c P.15.

[25] The ministry explains that the disclosure of the records would harm the homicide investigation, because it could lead to these records being widely disseminated without restriction. Relying on Order PO-3117[6] in which Adjudicator Colin Bhattacharjee made a determination regarding records relating to a murder that took place in a federal penitentiary, the ministry submits that disclosing records under the *Act* is "deemed disclosure to the world", because once disclosure occurs, the records can be disseminated anywhere, including on the internet. In addition, the ministry states that the OPP is concerned that the release 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.

[26] The ministry adds:

> Once these records are disseminated without restriction, suspects could become aware of the evidence that the OPP and Timmins police has collected against them. This awareness could lead to suspects taking steps to evade capture, including by covering their tracks, and intimidating potential witnesses who have not come forward. Further, police investigators would have no way of knowing when an individual comes forward with information whether the individual learned of the information first hand, or as a result of the disclosure of the records. In other words, investigators would have no way of determining the reliability of a witness or an informant coming forward with information.
>
> We liken the records to a large jigsaw puzzle. The OPP investigation is tasked with putting together the various pieces, in order to resolve who killed [the victim]. Because the investigation is still ongoing, the police cannot say for certain at this point the relevance of a record to the investigation. Quite often, what appears to be insignificant information at one point in an investigation can suddenly, without warning, be of much greater significance when new information comes to light. That is why the OPP takes the position that until the killer or killers of [the victim] are brought to justice, all records it has collected pursuant to its investigation are significant law enforcement records, and the release of any record can have adverse implications for the investigation and future law enforcement proceedings in ways that may not be currently understood.

[27] The ministry states that:

> … We are especially concerned by any ordered disclosure of historic records due to the impression that such records may not be as relevant from a law enforcement perspective, because of their age. We do not want [the victim's] killers, if they are still out there, to think for a moment that they

---

[6] The ministry refers to paragraph 74 of the decision.

> have escaped justice due to the passage of time. Any such impression would be completely inconsistent with the efforts of the OPP and [the Timmins police] to bring those who have committed historic crimes to justice.

The appellant's representations

[28] The appellant understands that a "cold case" may still be solved years later; however, she submits that this case is different from the case referenced by the police because in that case there was public information available on sites such as doenetwork.org and unsolvedcanada.ca. prior to the case being solved in 2009.

[29] The appellant submits that in recent years the Toronto and Vancouver police websites have featured over 800 cold cases. She adds:

> [A named Sergeant] of the Vancouver Police states "it's generated plenty of tips we're following up on". [Footnote omitted]. It makes sense that releasing information to the public could generate new leads. I do not see how withholding all information on this case serves resolution.

[30] The appellant submits that in an unrelated appeal file[7] press releases pertaining to the matter at issue in that appeal were disclosed. The appellant considers this to be the type of public information she seeks. She explains that:

> My request was submitted because after intensive searching I could find no official public information regarding this case outside of the newspaper articles published in the Timmins Daily Press and Sudbury Times in the weeks following [the victim's] death. I searched for but could not find any press releases, social media references, inclusions on cold case websites such as unsolvedcanada.ca, or updates on the investigation online. It is the lack of information available and a "culture of fear" that seems to exist in my hometown regarding questions surrounding this case that compelled me to submit my application and appeal. In Order MO-2443 (Appeal MA07-335) press releases relating to the case were ordered to be disclosed to the appellant. I believe these would be considered "public" information.

[31] She requests that same order in the appeal before me.

The ministry's reply representations

[32] In reply, the ministry submits that:

> The ministry has reviewed the appellant's representations. We share the appellant's interest in bringing to justice whoever caused the murder of [the victim]. We continue to assert, however, that we acted in full compliance

---

[7] Which resulted in Order MO-2443 discussed in more detail below.

> with the [*Act*] in withholding responsive investigative records. The decision by the OPP to disclose to the public records about a crime, such as a homicide, is one that depends on the particular circumstances of a law enforcement investigation. The [*Act*] cannot be used, as the appellant seemingly suggests, to oversee the discretion exercised by OPP officers to publicize (or not publicize) information gleaned from an ongoing investigation.

The Timmins police's representations

[33] The Timmins police submit that if the murderer is apprehended, charges will be laid and proceeding will be commenced. The Timmins police state that, notwithstanding the passage of time, it is still possible that charges can be laid.

[34] The Timmins police submit:

> Interestingly, the ministry's representations […] make reference to OPP cases with ongoing investigations that are older than the [victim's] case and also the emergence of new DNA technology. Coincidentally, as confirmed by Sergeant [named Sergeant] of the [Timmins police] in his March 21, 2018 letter, the [Timmins police are] currently examining a possible forensic DNA lead in the investigation. The outcome of this lead could obviously have a significant impact on the investigation with a view that it may lead to its resolution. [Named Sergeant's] letter confirms that the investigation of the [victim's] murder is "specific and ongoing" as that term is defined in the [*Act*] and that it is not closed and that it will remain open until it is solved.
>
> The disclosure and probable dissemination of the records would undoubtedly harm the murder investigation. We did receive some information that the appellant may be intending to write a book on this case. Clearly, disclosure should not happen to protect the integrity of the ongoing investigation not to mention the protection of the privacy interests of many individuals including the victim's family.

[35] The Timmins police submit that the issue addressed in Order MO-3117, relied upon by the ministry in its representations, is the same as the one before me, submitting that:

> … There is clearly an ongoing investigation. There is DNA evidence being followed up on. Disclosing any records with the strong possibility of dissemination especially if the intent is to write a book will accomplish nothing but interfere with an ongoing police investigation.

The appellant's response to the Timmins police's representations

[36] The appellant submits that without an examination of the case files, the claim that the case is active and ongoing is questionable. She submits:

> … There was no mention until this time that DNA evidence was currently being analyzed. Because I was not in receipt of the reply from the ministry to my representations, I do not know if it was addressed at that time. Was the DNA evidence submitted for testing before my request for information and has the [Timmins police] provided other proof that the investigation has been ongoing? These questions are outstanding for me as they pertain to the validity of my concerns.

[37] The appellant also states that she does not intend nor has ever intended to write a book regarding this case or any other.

The Timmins police's reply representations

[38] In reply, the Timmins police advised that they did not have anything to add other than to advise that DNA testing was undertaken and a response was received from the Forensics Unit. They advise that this part of the investigation is now complete.

[39] They add that:

> The [Timmins police's] position on this matter remains unchanged. The file remains an active one for the [Timmins police], as are the concerns over personal information as discussed in our previous representations.

The appellant's sur-reply representations

[40] In sur-reply, the appellant submits:

> When the [Timmins police] revealed they had submitted evidence for DNA analysis I understood that a response from the Forensics Unit would be forthcoming. Since that part of the investigation is complete, does it follow that information will be released to the public? Still outstanding for me are questions when the DNA evidence was submitted for testing and if the [Timmins police] has provided other proof that the investigation had been active and ongoing prior to my request for information. It appears as if they are relying on the fact that DNA evidence was recently submitted and responded to as proof that this has been active and ongoing for the past 47 years.

The affidavit of the Timmins police Sergeant

[41] In the course of adjudication, I asked for and received an affidavit sworn by a Timmins police Sergeant regarding the nature of the responsive records.

[42] He states that there is in excess of 1600 pages of that comprise the investigative file and states that:

> … By our reasonable estimation, it would take a team of lawyers months to review each and every one of the records to decipher what could potentially be disclosable. It is a task that is neither feasible, practical or frankly possible. Nor is it necessary or permitted at this time given the fact that the investigation remains open and is ongoing.

[43] He adds:

> Further, as the Ministry states, many of the 1600 pages of records identify and name third-party individuals who for instance may be identified either as witnesses, persons of interest, suspects or family members. These individuals, many who are still alive today, would have no reason to suspect that their very personal information would be subject to possible disclosure.
>
> [The Timmins police] confirms that the entirety of the records are now in the custody of the [Timmins police] and that we have reviewed the case summary, general reports as well as an index of the different folders consisting of the investigative file. Some of the titled tabs and/or subfolders contain highly sensitive information such as witness lists, named CFS reports, list of suspects, polygraph reports, persons of interest and photo line-ups.

[44] He states that it is the Timmins police's position that disclosure and probable dissemination of the records would undoubtedly harm the murder investigation. He asserts that disclosure would affect the integrity of the ongoing investigation and affect the privacy interests of many individuals, including the victim's family.

Letter accompanying records

[45] The OPP ultimately provided a further representative sample of the records to this office accompanied by a letter from an OPP Detective.

[46] The detective states that the records consist of various police investigative reports and include findings, records identifying suspects, Centre of Forensic Science documents, and statement synopsis. He writes that the records were organized by year, ranging from 1970 through to 2020.

[47] He adds:

> The totality of the case file includes items such as forensic investigation, polygraph testing, and 166 civilian statements, the most recent dating from 2017. Some records are subject to informer privilege and others contain sensitive medical information, namely an extensive number of psychiatric files of many people from Timmins and area that were collected at the time of the homicide, as part of the original investigation.

> The investigation remains unsolved, but it is open and ongoing. A number of potential suspects were identified throughout the years and efforts have been made to ascertain their involvement, if any. With the ongoing advances in technology, records (including fingerprints) as well as physical exhibits that were seized during the original investigation are re-evaluated to assess potential findings.

Appellant's responding representations

[48] In response to the affidavit and letter, the appellant emphasizes that one of the purposes of the *Act* is to uphold the principle that information should be available to the public. The appellant states:

> … this cold case is now literally a half century old with little to no information being disclosed over the years. How is withholding all information from the public serving the community or resolution and is this supported within section 2(2) of [*FIPPA*]? A Timmins Daily Press article dated Wednesday November 18th, 1970 is titled "Reach Dead End in Killing"[8]. What information has been provided to the public since that time? I have specifically requested news releases which I have been unable to find available to the public digitally or otherwise.
>
> …
>
> With the recent news regarding a resolution in [a different murder victim's] case through the use of advanced technology comes renewed hope for cold cases such as this one. Since the Toronto Police announced the breakthrough in this 36 year old case they have received over 60 tips from the public and have set up a tip line for more information. [Footnote omitted] November 12th, 2020 marks the 50th anniversary of the violent murder of [the victim] which impacted our entire community. This is an opportunity for the [Timmins police] to show good faith by renewing their commitment to solving this case and publicly asking for information while providing an update. Veteran police officer, criminologist and Associate Professor at Western University, [named individual] states, "Ninety per cent of all crime that is solved is solved through some form of citizen engagement, and the public can't help if it doesn't know what it's looking for or they are not told or used…" [Footnote omitted]

Analysis and findings

[49] To satisfy section 14(1)(b), the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is

---

[8] A copy was included with the appellant's representations.

completed. The volume of records, alone, is not a reason not to withhold information under section 14(1)(b).

[50] The records were created or gathered in relation to a murder investigation. I find that these circumstances fall within the definition of "law enforcement."

[51] This office has found in previous orders that records similar to the ones at issue in this appeal qualify for exemption under the municipal equivalent of sections 14(1)(a) and (b) of the *Act* if an ongoing investigation is taking place. For example, in Order MO-1171, the appellant was seeking records relating to the police's investigation of an arson attack on an abortion clinic that had taken place eight years earlier. The adjudicator found that the records at issue qualified for exemption in their entirety under sections 8(1)(a) and (b) of the *Municipal Freedom of Information and Protection of Privacy Act*[9] for the following reasons:

> The Police express the concern that premature disclosure of the information concerning the current investigation could, either intentionally or inadvertently, cause an obstruction of justice insofar as it could reasonably be expected to tip an involved party or suspect as to the direction of the investigation, provide an opportunity for individuals involved to tamper with evidence which the police may uncover at a later time and effectively cover their tracks and evade charges.
>
> The records relate to an event which occurred approximately eight years ago. However, based on the representations and my review of the records, I am satisfied that they contain information which relates to an ongoing law enforcement investigation and/or matter, and that disclosure of this information could reasonably be expected to interfere with the investigation and/or matter. Therefore, I find that the records are properly exempt under sections 8(1)(a) and (b) of the *Act*.

[52] Similarly, in Order MO-2443, Adjudicator Colin Bhattacharjee made a determination regarding records relating to the murder of the son of the person seeking the information at issue. He found that the murder, which had taken place six years prior, remained unsolved and was therefore characterized as a "cold case." He also found that it was evident, based on the police's representations, that there was an ongoing investigation taking place.

[53] In Order MO-2443, Adjudicator Bhattacharjee found that the records at issue qualified for exemption under both sections 8(1)(a) and (b) of *MFIPPA* (the equivalent of section 14(1)(a) and 14(1)(b) of *FIPPA*), with one exception, being news releases issued by the police relating to the murder investigation. He stated:

---

[9] RSO 1990, c. m.56, as amended.

> In my view, disclosing these news releases to the appellant could not reasonably be expected to lead to the harms contemplated by any of the exemptions in the *Act*, including sections 8(1)(a) or (b). These news releases were publically available at some point, and I find that disclosing them could not reasonably be expected to interfere with a law enforcement matter or interfere with an investigation undertaken with a view to a law enforcement proceeding.

[54] I have now had an opportunity to review the representative sample of records and I note that work has been done on the case throughout the years since the death of the victim. Based on my review of the representative sample of records and the representations of the ministry and police, I am satisfied that the investigation of the victim's death is ongoing.

[55] The representative sample of records contain sensitive information about the investigation. Many of these records set out the specific evidence collected by the police, including occurrence reports, interviews with family, friends and other individuals, police officers' notes and other evidence gathered in the investigation.

[56] I also accept that because there is no limitation period for charging an individual with murder under the *Criminal Code*, the OPP does not close murder investigations simply because of the passage of time, and that the application of emerging technologies and the discovery of new evidence can result in "cold cases" being reactivated. In my view, the investigation into the murder of the subject individual is a specific, ongoing criminal investigation that is not closed. Amongst other things, there is evidence of a fairly recently conducted DNA test.

[57] The IPC has found in previous orders that disclosing records to a requester under the access scheme in Part II of *FIPPA* is deemed to be disclosure to the world.[10] *FIPPA* does not impose any restrictions or limits on what a requester can do with records disclosed to him or her. Consequently, while it is not relevant if the appellant intends to write a book on the matter, disclosing the information would move it into the public domain where it can be freely disseminated.

[58] 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 collected against them, identify suspects or otherwise provide information about current leads or the leads that are being pursued. 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.

[59] 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

---

[10] e.g., Orders P-169, P-679 and PO-3117.

presents information about the murder, the investigators may 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.

[60] In short, I find that the ministry has provided sufficient evidence required to prove that disclosing records could reasonably be expected to interfere with the murder investigation.

[61] Consequently, I find that these records qualify for exemption under section 14(1)(b). Because I have found that section 14(1)(b) applies it is not necessary to address the possible application of the other law enforcement exemptions claimed by the ministry and the police.

[62] There are press releases and newspaper articles in the representative sample of records. Based upon my review of all the records and considering the circumstances of the ongoing investigation, however, I find that these records also contain information that could reasonably be expected to prejudice the investigation, by virtue of the fact that they are in the investigation file. In that regard, given the circumstances of the appeal and the nature of the investigation as may be revealed through their disclosure, I find that this case is distinguishable from the case at issue in Order MO-2433, with respect to these records.[11]

[63] Finally, although the appellant provides representations in support of her position that it is in the public interest that the information should be disclosed, section 14 is not listed as one of the section to which the public interest override at section 23 applies.[12] The public interest is, however, a factor that can be relevant to the institution's exercise of discretion to withhold the records I have found to be subject to section 14(1)(b), which I discuss below.

Issue B: Did the institution exercise its discretion under section 14(1)(b)? If so, should this office uphold the exercise of discretion?

[64] The section 14(1)(b) exemption 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.

---

[11] Furthermore, to the extent that any prior orders of this office may be considered to be in conflict with my conclusion, including Order MO-2433, I decline to follow them. In *Weber v. Ontario Hydro* [1995] 2 SCR 929, 1995 CanLII 108 at paragraph 14, the Supreme Court of Canada affirmed that tribunals are not constrained by past precedent.

[12] Section 23 provides that an exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[65] 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
- it fails to take into account relevant considerations.

[66] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[13] This office may not, however, substitute its own discretion for that of the institution[14]

The ministry's representations

[67] The ministry submits it has exercised its discretion correctly in not releasing any of the records that are the subject of this appeal. It adds:

> … We have exercised our discretion in consideration of the strong public policy interest in protecting the integrity of cold case investigative records, to ensure that the evidence in the records can be used in the future to apprehend and prosecute offenders who are brought to justice.

[68] The ministry takes the position that the records cannot reasonably be severed without disclosing exempt information.

The appellant's representations

[69] The appellant submits that she is concerned that because this case involved a law enforcement officer's family it may be subject to special treatment. In her representations on the public interest in disclosure, she submits that the absence of updates, recent public calls for witnesses to come forward or press releases was what prompted her concern that the investigation was "not being pursued to the fullest". She adds that in the circumstances of this case transparency and keeping the community informed is essential in "promoting faith in law enforcement".

Analysis and finding

[70] 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.[15] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I

---

[13] Order MO-1573.

[14] Section 54(2) of the *Act*.

[15] Order MO-1287-I.

conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[16]

[71] I am satisfied overall that the ministry properly exercised its discretion under section 14(1)(b).

[72] I am satisfied that the ministry was aware of the reasons for the request and why the appellant wished to obtain the information, including her position on the public interest in the disclosure of the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the ministry considered why the appellant sought access to the information, the nature of the information and whether the appellant was an individual or an organization. I have no evidence of bad faith to support the appellant's allegation that the ministry exercised its discretion in order to provide special treatment to a law enforcement officer's family. In all the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion.

ORDER:

1. I uphold the ministry's decision.
2. The appeal is dismissed.

Original Signed by: March 22, 2021

Steven Faughnan
Adjudicator

[16] Order P-58.