Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4044

Appeal MA19-00780

Peel Regional Police Services Board

April 28, 2021

Summary: An individual seeking to pursue a private prosecution under the *Criminal Code of Canada* made a request to the Peel Regional Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specific occurrence number. The police located responsive records and granted partial access to them. However, the police relied on the discretionary exemptions at section 8(1)(l) (facilitate commission of an unlawful act) and 38(b) (personal privacy) to fully or partially withhold some responsive records. The requester appealed the police's decision, and raised the issue of reasonable search, under section 17 of the *Act*. At adjudication, the adjudicator added the discretionary exemption at section 38(a) (discretion to refuse requester's personal information) to the scope of the appeal. This order addresses arguments made relating to pursuing a private prosecution under the *Criminal Code of Canada* and access to withheld police codes and personal information, and in particular with respect to whether the factor favouring disclosure at section 14(2)(d) of the *Act* is engaged by the appellant's wish to privately prosecute another individual. In this order, the adjudicator upholds the police's access decision and the reasonableness of the police's search, and dismisses the appeal.

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

Orders Considered: Orders PO-2225, MO-1436, MO-1664, MO-2410, MO-2417, MO-2844, MO-3622, MO-3815, MO-3831-F, and MO-3977.

OVERVIEW:

[1] An individual accused of theft seeks to engage the private prosecution process provided for in the *Criminal Code of Canada*[1] to have his accuser charged with public mischief. The individual requested records under the *Municipal Freedom of Information and Protection of Privacy* Act (the *Act*) from the Peel Regional Police Services Board (the police) relating to their investigation into the theft allegation made to them, as follows:

> All documents and details relating to occurrence [specific #] including records of phone calls, visits by police, witness statements, officer's notes including officers #[three specific badge numbers]. Incident started [specified date, without year] if not earlier – there was a phone call to me that evening which might be a 4th officer not listed. Please include details of phone calls with [named individual] and others.

[2] The police issued a decision granting partial access to the requested records. The police denied access to some information in the records, relying on the discretionary exemptions at sections 8(1)(l) (facilitate commission of an unlawful act) and 38(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore resolution.

[4] During the course of mediation, the mediator had discussions with the appellant and the police. The appellant indicated that he was unsure what records were denied as he did not receive an index of records outlining the records and the exemptions. The police agreed to prepare an index of records. The appellant also expressed his belief that further records exist. The police advised the mediator that they reached out to the officers involved and that there were no further responsive records. The appellant advised the mediator that he was seeking access to all the withheld information and that he believes further records exist. Accordingly, the issue of reasonable search under section 17 of the *Act* was added to the scope of the appeal.

[5] Since no further mediation was possible, the file moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[6] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. Based on my review of the records, it appeared that the discretionary exemption at section 38(a) (discretion to refuse requester's own information) might be relevant, so I added that as an issue. I sought and received written representations in response, first from the police, then from the appellant. The parties agreed to the sharing of their representations with

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[1] Under section 507.1 of the *Criminal Code of Canada*.

each other and in a public order.

[7] For the reasons that follow, I uphold the access decision of the police and the reasonableness of their search, and dismiss the appeal.

RECORDS:

[8] The records at issue in this appeal consist of police officers' notes and three audio recordings. The police withheld police codes in several pages of the officer's notes under section 8(1)(l) of the *Act*, and withheld personal information in all of the records under section 38(b) of the *Act*.

ISSUES:

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

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

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

D. Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

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

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

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
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> (g) the views or opinions of another individual about the individual, and
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> (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[.]

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

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[12] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
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> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

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[2] Order 11.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> dwelling and the contact information for the individual relates to that dwelling.

[13] 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.[4]

[14] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

[15] The appellant states that he believes the withheld information could reveal the types of personal information listed at paragraphs (b), (e) and (g) of the definition in section 2(1). He also states his belief that the records likely only contain the personal information of one individual, whom he names in his representations.

[16] The police submit that the records contain the personal information of the appellant and other identifiable individuals. The police submit that the records contain personal information in relation to an allegation and subsequent investigation of a theft, and that this information qualifies as personal information under paragraphs (c), (d), and (g) of the definition of personal information at section 2(1) of the *Act*.

[17] Based on my review of the records, I agree with the parties, and find, that the records contain personal information belonging to the appellant; I also find that the records contain the personal information belonging to several identifiable individuals. Furthermore, I find that the records contain personal information pertaining to police interactions with the appellant or identifiable individuals in relation to an allegation and subsequent investigation of a theft. This qualifies as their personal information under the introductory wording of the definition of that term as "recorded information about" them, because it reveals the fact of the interaction with the police.

[18] Further, having reviewed the records, I find that the records also contain personal information as defined under paragraphs (c) (identifying numbers) (d) (address or telephone number), and (g)(views and opinions) in section 2(1) of the *Act*. I also find that paragraph (h) of the definition is relevant in this appeal, as the names of individuals appear in conjunction with other personal information about them. Furthermore, I find that the audio records contain the voice, tone, and inflection of individuals who are identifiable by other information found in the audio records,[6] and therefore, the voice,

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] These individuals may also be identifiable by their voices alone, depending on other information thatmay be known by the listener.

tone, and inflection of these individuals is their "personal information" under the introductory wording of the definition of that term in section 2(1).

[19] In addition, to the extent that any withheld information pertains to an individual in their professional or business capacity, I find that it takes on a personal quality due to the underlying context of the allegation and subsequent criminal investigation and that its disclosure would reveal something of a personal nature about them.[7]

[20] Since the records contain the appellant's personal information, along with the personal information of other identifiable individuals, I must assess any right of access he may have to them under section 38 of the *Act*.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(l) law enforcement exemption apply to the information at issue?

[21] The police withheld police operational codes under section 38(a) in conjunction with section 8(1)(l), and I uphold that decision for the reasons set out below.

[22] 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.

[23] Section 38(a) reads:

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

[24] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[8]

[25] As mentioned, the police rely on section 38(a) in conjunction with section 8(1)(l) to withhold police operational codes.

[26] Section 8(1)(l) says:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

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[7] Order PO-2225.
[8] Order M-352.

> (l) facilitate the commission of an unlawful act or hamper the control of crime.

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

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

[28] The term "law enforcement" has covered situations such as a police investigation into a possible violation of the *Criminal Code.*[9]

[29] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[10]

[30] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[11] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12]

[31] For section 8(1)(l) to apply, the police must establish that disclosure of the records could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

The police's representations

[32] In support of their decision to withhold police operational codes, the police submit that a long line of IPC orders has found that police operational codes qualify for exemption

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[9] Orders M-202 and PO-2085.
[10] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[11] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

under section 8(1)(l), due to the reasonable expectation of harm that could result from their release.[13] The police maintain that knowledge of the police operational codes could reasonably interfere with police investigative privilege and should not be disclosed to the appellant. Given the content of the records, the police submit that there is no reason for the IPC to deviate from the established principle in this appeal.

The appellant's representations

[33] In response to the police's representations, the appellant submits that police have not "disclosed or argued what specific harms would result" from disclosure of the operational codes. He objects to the police's reliance on past IPC decisions regarding police codes.

[34] The appellant also argues that the police operational codes should be disclosed to him because he states that a Justice of the Peace advised him that if he were to proceed with a private prosecution, he would have the "full rights and obligations of the Crown." He asserts that withholding the police operational codes "would seem to be at odds" with this because he would be "denied the rights normally accorded to the Crown prosecutor."

[35] Finally, the appellant asserts that many of the police codes are commonly known and used by other police forces in Ontario and elsewhere, which I understand to be an argument that there is no valid reason to withhold the police codes found in the records, because they are allegedly publicly available. In support of this assertion, the appellant directed me to a website purporting to provide a quiz or flash cards of a specified Ontario police agency's operational codes.

Analysis/findings

[36] Having reviewed the parties's representations and the records themselves, I will uphold the police's decision to withhold their operational codes under section 38(a) in conjunction with section 8(1)(l).

[37] Based on my review of the police operational codes which have been withheld, I am satisfied that the police's decision to withhold that information under section 8(1)(l) should be upheld, in accordance with the longstanding jurisprudence of this office regarding such information. This office has held that the use of operational codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning, and that if the public were to learn these codes and their meanings, the effectiveness of the codes would be compromised. This could result in the risk of harm to police personnel and/or members of the public with whom the police engage, such as victims and witnesses.[14] I accept that these important considerations remain relevant. In this context, I cannot order the police to "disclose the actual

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[13] Citing Orders PO-1665, PO-1777, PO-1877, PO-2209, PO-2339, PO-2409, M-393, M-757, M-781, and MO-1428, as examples.
[14] See, for example, Orders MO-3622, MO-3815, and MO-3977.

information that the codes represents separately, with an index or cover letter," as the appellant suggests, since this would still effectively disclose exempt information.

[38] With respect to the appellant's assertion that many of the police codes are commonly known and used by other police forces in Ontario and elsewhere, I understand this to be an argument against the validity of withholding the police codes found in the records. I have reviewed the information provided in support of this position. However, based on my review of it, I am not satisfied that that website referenced by the appellant is a reliable source of information or that it provides a reasonable basis to depart from past orders of the IPC.

[39] Furthermore, in the circumstances there is nothing improper in the police's reliance on past IPC decisions regarding police codes. Parties are invited to provide examples of past IPC decisions relating to relevant circumstances with their representations (and indeed, the appellant did so himself).[15] In this case, where there is already a long line of cases on a particular point of law, and where there is insufficient evidence that there is reason to depart from a consistently held approach to the type of information at issue, it was not inappropriate for the police to draw attention to that established jurisprudence.

[40] I am also unpersuaded by the appellant's assertion that withholding police codes under the *Act* is at odds with any rights or obligations he may have in proceeding with a private prosecution. He asserts that withholding the police operational codes denies him "rights normally accorded to the Crown prosecutor." However, my authority in this appeal is in reviewing an access decision by the police under the *Act*, and it does not extend to considering what the appellant's rights are in respect of any private prosecution he may pursue.

[41] For these reasons, and subject to my findings on the exercise of discretion, I find that the police operational codes at issue are exempt under the law enforcement exemption at section 8(1)(l), and the police were allowed to refuse to disclose it to the appellant under section 38(a).

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

[42] As mentioned, since the records contain the appellant's personal information as well as the personal information of other identifiable individuals, I must assess any right of access he may have to the records under section 38 of the *Act*.

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[15] The appellant mentions Order MO-3718 in his representations. However, this order is not helpful to him in challenging the police's decision to withhold the police codes at issue, as the adjudicator in Order MO-3718 also noted the "long line of orders" on the withholding of police codes and found that there was nothing before him that would lead him to conclude that a different approach should be taken.

[43] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[16]

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

[45] If the information fits within any of 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). The police submit that the exceptions at sections 14(1)(a) through (e) do not apply. The appellant did not address these exceptions in his representations. On my review of the records, I find that none of the exceptions at sections 14(1)(a) through (e) applies in the circumstances.

[46] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[47] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[48] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[17]

Do any of the section 14(3) presumptions apply?

[49] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[50] The police submit that the presumption at section 14(3)(b) applies because the records relate to an investigation into a possible violation of law in relation to an allegation and subsequent investigation of a theft of a laptop contrary to the *Criminal Code of Canada* (Theft under $5000).

[51] The appellant's position is that the information at issue should be disclosed because it will be used to prosecute the criminal offense that he alleges was committed. He also submits that he has been carrying on the investigation and needs the information

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[16] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).
[17] Order MO-2954.

to investigate the matter further.

[52] I accept the police's position that the presumption at section 14(3)(b) applies. As the presumption at section 14(3)(b) only requires that there be an investigation into a possible violation of law,[18] it applies even if no proceedings were commenced. Based on my review of the records at issue, I find that the records were complied and are identifiable as part of an investigation into a possible violation of the *Criminal Code of Canada* (Theft under $5000). My finding is not affected by the appellant's arguments regarding a private prosecution. Accordingly, I find that the presumption at section 14(3)(b) applies in the circumstances of this appeal and that it weighs against disclosure of the personal information at issue.

[53] While the police say that because section 14(3)(b) applies, it cannot be rebutted by the factors in section 14(2), that would be the case if the responsive records did not contain both the personal information of the appellant and of other identifiable individuals. However, since the records contain the appellant's personal information, I must determine whether the disclosure of the personal information in the records belonging to other individuals would be an unjustified invasion of personal privacy under section 38(b). Under section 38(b), the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties. For that reason, I will now proceed to consider whether there are any section 14(2) factors that weigh in favour of disclosure in this appeal.

Do any of the section 14(2) factors apply?

[54] 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.[19]

[55] 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).[20]

Factors favouring disclosure

[56] The appellant argues that two factors favour disclosure: the factor listed at section 14(2)(d) and the unlisted factor of "inherent fairness." I will discuss each of these factors below.

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[18] Orders P-242 and MO-2235.
[19] Order P-239.
[20] Order P-99.

14(2)(d): fair determination of rights

[57] 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[21]

[58] The appellant argues that this four-part test for section 14(2)(d) is met because he would like to exercise a right under the *Criminal Code* to pursue a private prosecution against someone whom he believes misled the police into investigating whether he (the appellant) had committed a crime. He argues that the personal information at issue is required to do this and would have some bearing on the determination of the right in question. He submits that he requires the withheld information to successfully, or convincingly, bring information to the attention of the court regarding the offence he alleges was committed.

[59] The police disagree. They submit that the appellant does not require any of the withheld personal information in order to start the proceeding in question, and they question how it could help the appellant in the context of a private prosecution. Accordingly, they argue that section 14(2)(d) does not apply.

[60] Several IPC orders have previously considered whether the factor favouring disclosure in section 14(2)(d) is relevant when the requester wants to pursue a private prosecution.[22] In Order MO-1436, the adjudicator found that section 14(2)(d) was relevant for a contemplated civil action involving the appellant, but not a contemplated criminal proceeding, as set out below:

> With respect to the contemplated criminal prosecution, I find that section 14(2)(d) is not a relevant factor. For this factor to apply, the determination of rights must be those affecting the person who made the request. By definition, the prosecution of an alleged offence under the Criminal Code

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[21] 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.).
[22] See, for example, Orders MO-1436, MO-1664, MO-2417, and MO-2844.

> engages the rights of the accused and Her Majesty the Queen or the Crown. In contrast to the proposed civil action, the criminal proceedings do not involve a determination of the rights of the party who initiates the prosecution, whether that party is the police, the alleged victim or any other individual. On this basis, I find that the appellant is not sufficiently affected by the proposed determination of rights in the criminal proceedings, and thus section 14(2)(d) cannot apply in this regard.

[61] The appellant states that the above approach sees criminal prosecutions as "only" engaging the rights of the accused and the Crown, and he submits that this approach might be true once a person has been charged, but not before. I disagree. The passage above recognizes that while an appellant may be affected, they are not "sufficiently affected by the proposed determination of rights in the criminal proceedings" for the purpose of section 14(2)(d), because the nature of criminal proceedings (which is the goal of a private prosecution) is such that the injured party is considered the Crown.

[62] The appellant also argues that the person "who initiates a charge does have rights" and points to the safeguard of the private prosecution process, described on the Ontario Attorney General's website on Private Prosecutions, as proof of this right: "a private citizen's right to swear an information [bring information about an alleged offence to a Justice of the Peace] is always subject to the Crown's right to intervene and take over the prosecution."[23] In my view, if anything, such a safeguard is consistent with, and does not challenge or undermine, the IPC'S characterization of the rights engaged as being those of the Crown and an accused person when there is a criminal prosecution under section 14(2)(d). The existence of the safeguard shows that, if the allegation leads to a prosecution, it is still the Crown that is the allegedly wronged party and not the person who brought the information to the courts. Therefore, I am not persuaded that I should depart from the approach previously taken in other IPC orders considering whether section 14(2)(d) applies when a private prosecution is contemplated.

[63] Adopting the reasoning set out above from Order MO-1436, I find that the four-part test in section 14(2)(d) is not met in this appeal because the appellant is not sufficiently affected by the proposed determination of rights in the proposed criminal proceedings. Accordingly, I find that this factor favouring disclosure does not apply.

Unlisted factor: inherent fairness to the appellant

[64] The appellant also argues that "inherent fairness" is an unlisted factor that is relevant in the circumstances. He submits that a person "should not be able to make false accusations about a person to the police, then be able to claim an invasion of privacy in a civil or criminal court matter if the injured person seeks justice." In his representations, the appellant also set out section 140(1) of the *Criminal Code*, which deals with public mischief. Public mischief involves causing a peace officer to enter or continue an

[23] See https://www.attorneygeneral.jus.gov.on.ca/english/private_prosecution.php.

investigation, with intent to mislead that officer, in one of four different ways (including making a false statement that accuses someone else of having committed an offence). The appellant also submits that it was "clearly" not the intention of *MFIPPA* to "interfere with the process of a private prosecution" under the *Criminal Code* "when the person whose privacy is at issue is the person who will be charged if the charges are successfully laid." The appellant's representations rely on Order MO-1436, which also involved an individual seeking to privately prosecute another.

[65] Although I appreciate the appellant's concerns, I have no authority under *MFIPPA* to comment, or making findings, on the basis, or lack of basis, for any complaints made against him or any related circumstances, including the involvement of the police as a result of complaints made against him. What I may properly consider is whether the unlisted factor of inherent fairness, which may favour disclosure, applies in this case.[24] That is, I must consider whether withholding the personal information in the various records at issue would be inherently unfair to the appellant because of the rights that are at stake.

[66] The records at issue are police officer notes containing the statements and other personal information of various identifiable individuals, as well as three audio recordings containing such personal information. These records exist because of the accusation of theft made against the appellant with respect to the specified laptop. However, based on my review of the records that have not been disclosed to the appellant and the parties' representations, I am not persuaded that it would be inherently unfair to the appellant to withhold the information at issue. He is clearly aware of the allegation that was made against him, and he was not charged with any offence in relation to it.

[67] On my review of the records and the evidence before me, I am also not satisfied that withholding the personal information at issue would "interfere" with the appellant's pursuit of a private prosecution. The appellant refers to Order MO-1436 in his representations, but that case is not helpful to him. In Order MO-1436, the adjudicator considered the fact that the appellant wanted to start criminal proceedings against another individual and needed the name of the individual (in contrast to this appeal, based on the appellant's representations and the information that was disclosed to him by the police). The adjudicator considered the fact that it appeared that the appellant could not bring a criminal proceeding against the other individual without a name, unlike in the civil process, and that this was a factor weighing in favour of disclosure. It is worth noting that the adjudicator in Order MO-1436 recognized that the appellant could still accomplish his objective of bringing a criminal proceeding against the individual in question by first starting a civil lawsuit and, as a result, gave that unlisted factor low weight. Having distinguished Order MO-1436 from this appeal, and based on the content of the records and other evidence before me, I find that in the circumstances, the unlisted factor of inherent fairness does not apply to favour disclosure.

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[24] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

Does section 14(4) apply?

[68] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Section 14(4)(a) applies to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution. Section 14(4)(b) applies to financial and other details of contracts for personal services between an institution and a consultant or independent contractor, if that information is found to qualify as personal information. Section 14(4)(c) applies to situations involving disclosure of personal information of a deceased individual based on compassionate reasons.

[69] The police submit, and I find, that none of the section 14(4) exceptions are relevant in the circumstances before me.

Weighing the presumptions and factors

[70] In determining whether disclosure of the identifiable individuals' personal information would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and (3) of the *Act* in the circumstances of this case. I have found that there are no factors favouring disclosure of the personal information withheld in the responsive records. On the other hand, the presumption at section 14(3)(b) applies and weighs against disclosure. Weighing the factors and presumptions, I find that disclosure of the records at issue to the appellant would be an unjustified invasion of personal privacy of several identifiable individuals. Therefore, I find that the withheld responsive portions of the records are exempt from disclosure under the personal privacy exemption at section 38(b), subject to my determination regarding the absurd result principle, and to my review of the exercise of the discretion of the police.

Absurd result

[71] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[25]

[72] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[26]

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[25] Orders M-444 and MO-1323.
[26] Orders M-444 and M-451.

- the requester was present when the information was provided to the institution[27]
- the information is clearly within the requester's knowledge.[28]

[73] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[29]

[74] The appellant indicates that he believes that the records likely relate to one specific named individual, and that this person's personal information consists of their name, home and business addresses, and phone number. He states that the police are aware that he knows this information, as he provided them with a "Statement of Witness" form containing that information. As a result, the appellant argues that there is "no point" in withholding information that is already known to him, and that redactions "only make it difficult to make use of the disclosed documents or recordings as part of the private prosecution process."

[75] The police state that the absurd result principle does not apply. They submit that "[i]t would reasonably and objectively be expected that the withheld records would not be produced in the context of such a request."

[76] Based on my review of the records, I find that the absurd result principle does not apply. While I accept that the appellant has knowledge of some of the types of personal information withheld, the evidence does not clearly establish that the information at issue is actually within his knowledge. The records include personal information belonging to a number of identifiable individuals, not merely the one mentioned in the appellant's representations. Furthermore, given the context of the creation of the records, I agree with the police and find that disclosure under the absurd result principle would be inconsistent with the purpose of the section 38(b) exemption. I find that upholding the denial of access to the personal information at issue would be consistent, and not inconsistent, with the purpose of the personal privacy exemption at section 38(b) of the *Act*.

[77] For these reasons, I conclude that the personal information withheld by the police is exempt under the personal privacy exemption at section 38(b) of the *Act*, and that it would not be absurd for the police to withhold it in the circumstances.

Issue D: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[78] The section 38(a) and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution

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[27] Orders M-444 and P-1414.
[28] Orders MO-1196, PO-1679 and MO-1755.
[29] Orders M-757, MO-1323 and MO-1378.

must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[79] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[80] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] This office may not, however, substitute its own discretion for that of the institution.[31]

Relevant considerations

[81] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[32]

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

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[30] Order MO-1573.
[31] Section 43(2).
[32] Orders P-344 and MO-1573.

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

[82] The police state that, in denying access to the record, they exercised their discretion when assessing which records to withhold, and made their decision in good faith. The police say that they took all relevant considerations into account, such as the overarching purpose of *MFIPPA,* the interests that the law enforcement exemption seeks to protect, the relationship between the appellant and affected persons, and the nature of the information and the extent to which it is sensitive to the police, the appellant, and the other individuals identified in the records. Furthermore, the police maintain that they disclosed as much of the records as they could disclose to the appellant, while taking into consideration the circumstances of this case.

[83] For his part, the appellant states that as far as he can tell, this sort of case has not come before the IPC previously where a person wishing to initiate a private prosecution under section 507.1 of the *Criminal Code of Canada* has brought a complaint to the IPC against a police department for withholding information. On the basis of that belief, he states that he can understand the police's "reluctance" to disclose information "when there is no clear decision or precedent" demonstrating that they should, but that "this does not mean that this is the correct interpretation of *MFIPPA* in such circumstances." However, as discussed under section 14(2)(d), above, the IPC has previously considered whether that factor favouring disclosure applies to personal information that is being sought for the purpose of initiating a private prosecution, and I will not reiterate that discussion here.

[84] In addition, the appellant argues that one relevant consideration, listed above, is "whether the requester has a sympathetic or compelling need to receive the information." He states that he believes his arguments and the underlying context are ones that should have resulted in the police exercising their discretion to disclose further information to him.

[85] Having considered the representations of the parties, and the underlying circumstances of this appeal, I find that the police exercised their discretion and that the factors that they considered were relevant, not irrelevant. I find that there is no evidence before me that they exercised their discretion in bad faith. Accordingly, I uphold their exercise of discretion under sections 38(a) and 38(b) of the *Act*.

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

[86] The appellant's position is that one or more additional records exist beyond those

identified by the police. 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.[33] 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.

[87] 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.[34] To be responsive, a record must be "reasonably related" to the request.[35]

[88] 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.[36]

[89] A further search will be ordered 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 custody or control.[37]

[90] 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.[38]

[91] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[39]

The police's representations

[92] The police submit that they conducted a reasonable search. They state that the appellant's request "was very exact," and sufficiently detailed such that it enabled an experienced employee, upon a reasonable effort, to identify the responsive records. The police submit that they adopted a liberal reading of the request to encompass any record that may involve an interaction between the appellant and the police, not limiting the scope of the request in any way. Furthermore, they state that all databases with potentially responsive records were searched, including all audio and communications databases.

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[33] Orders P-85, P-221 and PO-1954-I.
[34] Orders P-624 and PO-2559.
[35] Order PO-2554.
[36] Orders M-909, PO-2469 and PO-2592.
[37] Order MO-2185.
[38] Order MO-2246.
[39] Order MO-2213.

[93] In support of their representations, the police provided an affidavit from the civilian employee who conducted the search, the Freedom of Information Supervisor. This individual had worked as an analyst for the police in the Freedom of Information area since 2011, and as a supervisor since 2019, and receives training on the *Act* in order to keep current with developments. Both the representations and the affidavit were shared with the appellant, so I will summarize the steps that the supervisor attests that they took, as follows:

- she conducted a Niche and UCR[40] query of the appellant's name, without limiting the scope of the searches by timeframe;
- reviewed and obtained a Persons Detail Report, which contained a summary of all occurrences involving the appellant;
- identified any individuals within the police service who may have responsive records and made a request for any officer's notes and any communications recordings;
- received further information from the appellant to assist with identifying the source of any further records; and
- reviewed all responses and confirmed that there were no further materials outstanding.

[94] In addition, the police explain that employees who were contacted to search, but who did not have responsive records, provided reasonable information to satisfy the supervisor that there were no further records.

[95] Accordingly, the police submit that they conducted a reasonable search and that there is no evidence to establish a reasonable basis upon which to conclude that further records exist.

The appellant's representations

[96] The appellant states that he is not familiar with the police's procedures and systems of record keeping, so it is difficult for him to fully understand what is reasonable or the procedures that the police state they have followed.

[97] However, he states that "the fact remains" that the Statement of a Witness he obtained through a lawyer for one of the individuals identified in the records was not located by the supervisor who conducted the search, or the officers who took this statement. He states that it is unclear if the Statement form he obtained through the lawyer was the original handwritten version or was a copy of the original. He also states

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[40] Although the police did not state what UCR means, it appears from past orders, such as Orders MO-2410-F, MO-2844, and MO-3831-I, that it stands for "Uniform Crime Reporting."

that the police have not adequately explained why the Statement of Witness record was "missing," which I take to mean was not located in the police's search. He thinks that perhaps the police officer involved did not follow the standard procedures or there were problems with the record keeping system.

[98] In addition, the appellant takes issue with the fact that he had to track down a specified officer to provide him with notes, and he states that the notes might be inaccurate in some ways, because they were written weeks after the incident. He also states that the fact that there were no records of outgoing phone calls by the police officers in which they "threaten citizens with criminal charges (based on accepting only one side of a civil dispute without a fair consideration of the opposing side)" is "also problematic."

[99] On the basis of the issues that the appellant raises with the police's search, he argues that "it becomes even more important that little or nothing be withheld under *MFIPPA* since it was only my own persistence and investigative skills that lead to discovering more information or evidence that Peel Police had not discovered on their own."

Analysis/findings

[100] On the basis of the evidence provided by the police, including the affidavit of the supervisor who conducted the search, I find that the police took reasonable steps to search for responsive records.

[101] I accept, on the evidence before me, that the Freedom of Information Supervisor is an experienced employee with knowledge of the subject matter of the request.

[102] I am satisfied that the police did not restrict the scope of the search, and that the parameters of the search were clear enough, particularly in light of further information provided by the appellant upon request. Based on the details and explanations provided about the supervisor's search efforts, I find that the police provided sufficient evidence that they searched for responsive records in all relevant databases that may have offered up search results, and I accept that they contacted all relevant police employees who were involved in the incident that is the subject of the request.

[103] Since I am satisfied that the police asked an experienced employee to lead the search for responsive records, and that the police provided sufficient evidence about the locations and individuals involved in the search, I am not persuaded that the appellant's representations regarding the Statement of Witness record that he says he provided to the police, or the lack of a record showing outgoing calls, establish a reasonable basis for believing that further responsive records exist. As mentioned, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. I am satisfied that the police have provided sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.

[104] Even if I had come to a different conclusion about the reasonableness of the police's search, that would not be grounds to order that the police disclose further information to the appellant, as disclosure is an access issue, which I already addressed above, and is separate from the issue of reasonable search.

ORDER:

I uphold the police's decision and the reasonableness of their search, and I dismiss the appeal.

Original Signed by: April 28, 2021

Marian Sami
Adjudicator