Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4115

Appeal MA20-00522

Guelph Police Services Board

October 25, 2021

Summary: The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Guelph Police Services Board (the police). The request was for a copy of a theft report regarding a specified police item belonging to a named deceased police officer. The police refused to confirm or deny the existence of responsive records, relying on the discretionary exemption at section 14(5) of the *Act* to do so. On appeal, the appellant raised the public interest override at section 16 of the *Act*. In this order, the adjudicator upholds the police's decision, 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"), 2(2.1), 2(2.2), 10(1), 14(1), 14(2)(a), 14(3)(b), 14(5), and 16.

Order Considered: Order MO-3981.

OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Guelph Police Services Board (the police). The request was for a copy of a theft report regarding a specified police

item[1] belonging to a named deceased police officer. The appellant specified in her request which individual the appellant believed had called in the theft to the police (this is the alleged complainant, but for ease of reference I will refer to this individual as the complainant).

[2] In response to the request, the police refused to confirm or deny the existence of responsive records, relying on section 14(5) of the *Act* to do so.

[3] 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 the possibility of resolution.

[4] The mediator contacted the appellant and the police to review the appeal. The police maintained their position with respect to section 14(5). The appellant disagreed with the police's section 14(5) claim, as she is not seeking personal information of the complainant. She also asserted there is a public interest in disclosure, raising section 16 of the *Act.* The appeal could not be resolved through mediation. As a result, it moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[5] 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. I sought and received written representations in response. I then asked the appellant to provide representations on the issues set out in the Notice of Inquiry and the non-confidential portions of the police's representations that I shared with her.[2] The appellant provided representations in response, some of which were also confidential in nature.[3] After considering each party's confidential and non-confidential representations, I decided that no further representations were needed, and I closed the inquiry.

[6] For the reasons set out below, I uphold the police's decision and dismiss the appeal. While I have taken each party's confidential representations into consideration in coming to my decision, I will not be setting them out in this order.

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[1] I am not stating what the item was because to do so might identify the police officer.

[2] In accordance with the IPC's practice direction on the sharing of representations, *Practice Direction 7* of the IPC's *Code of Procedure*.

[3] In her representations, the appellant takes the position that records relating to her request exist and that the police have not conducted a reasonable search. However, at the close of mediation, the issue of reasonable search was not an issue in this appeal, and accordingly, it is outside the scope of the appeal and I will not address it in this order. I note that the police's representations state that during mediation, they advised that if the appellant were to obtain the written consent of the complainant to disclose their *personal information*, the police would conduct a further search. However, the appellant did not provide the police with that consent.

ISSUES:

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

B. Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

C. Did the police exercise their discretion under section 14(5)? If so, should the IPC uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records, if they exist, that clearly outweighs the purpose of section 14(5)?

DISCUSSION:

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

[7] The police rely on section 14(5) of the *Act*. This provision, which is set out under Issue B, allows an institution to refuse to confirm or deny the existence of a record containing personal information in some circumstances. The first question is, therefore, whether the records, if they exist, would contain *personal information*.

[8] For the reasons that follow, I find that the records, if they exist, would contain *personal information*, as that term is defined in section 2(1) of the *Act*, belonging to the complainant and the deceased police officer.

The parties' positions

[9] The police submit that the requested record, if it exists, "arguably contains" *personal information* relating to the deceased officer and the complainant. The police submit that although the item that the appellant alleges was stolen could relate to an individual in a professional capacity, a record like the one she is seeking, if it exists, could reveal something of "a highly sensitive nature" about the deceased officer (and the complainant). The police also state that appellant does not have any personal involvement in the alleged incident that she describes in her request.

[10] The appellant does not claim to have any involvement in the alleged incident she describes in her request.

[11] In the appellant's view, the information that she requested is not *personal information* as that term is defined under the *Act*.[4] She states that she is not interested in obtaining *personal information* about the complainant, and is aware of the identity of the deceased police officer. She says that she provided the names of the involved parties in her request (the deceased officer and the complainant), and does not seek "any other details" related to these two individuals. In addition, she specifically does not seek disclosure of the following:

- "any medical history, address, telephone number, fingerprints or blood type, or any other information that may be defined as personal information' under the *Act*",
- any views or opinions (which she argues should not appear in police reports), or
- the identity of any police officer if one was identified in the investigation of the theft as a potential suspect, or any personal information about that suspect.

[12] The appellant states that she is "only interested in obtaining enough information to show that the theft report was made, and then the steps that were taken by Guelph Police Service to [investigate] the report." Furthermore, if a police officer was identified in the investigation as a potential subject, she agrees to have only the police officer's rank disclosed to her.

[13] In addition, the appellant also points out that the complainant and the deceased police officer have been referenced in media coverage. She provided examples of this coverage with her representations.

Analysis/findings

[14] For the following reasons, I find that if records exist, they would contain *personal information*, as that term is defined in section 2(1) of the *Act*, belonging to several identifiable individuals, but not to the appellant.

[15] With respect to the appellant's argument that information about the deceased police officer and the complainant has been the subject of media coverage, that is not relevant to whether the records, if they exist, contain *personal information* about these individuals, as that term is defined in section 2(1) of the *Act*.

[16] I find that the appellant's statements about what she is not seeking only narrows

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[4] She also states that she is not seeking "highly sensitive" information, but the first question to be answered is whether the information (highly sensitive or not) is *personal information* as defined in section 2(1) of the *Act*, and if so, to whom it relates.

the scope of specific *types* of *personal information* (such as medical history,[5] address,[6] and views or opinions[7]) that would be at issue, if records exist.

[17] However, the term *personal information* is defined in section 2(1) of the *Act* as meaning "recording information about an identifiable individual." Section 2(1) lists many examples of *personal information* (such as the types of information the appellant indicates she does not seek), but the list of examples of *personal information* under section 2(1) is not exhaustive. Information that does not fall under any of the listed examples may still qualify as *personal information*.[8]

[18] Past IPC orders have held that disclosure of the fact that an identifiable individual has interacted with police qualifies as *personal information* about that individual.[9]

[19] In the circumstances, I find that if responsive records exist, they would reveal *personal information* about the complainant, such as the fact of their interaction with the police, which would be revealed by information that the appellant seeks (information to show that a theft report was made). This is the *personal information* of the complainant under the introductory wording of the definition of the term at section 2(1), as "recorded information about an identifiable individual."

[20] Since the circumstances of this appeal relate to at least one police officer (the deceased), I must determine whether the information about the officer is that officer's *personal information* or not because to qualify as *personal information*, the information must be about the individual in a personal capacity. Under section 2(2.1) of the *Act*, *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." 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.[10] However, 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.[11]

[21] Given the nature of the request, I find that it is reasonable to expect that information relating to the deceased officer and this allegedly stolen item would appear in the records, if they exist. In the particular circumstances of this appeal, I find that

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[5] Definition of "personal information," at section 2(1) of the *Act*, paragraph (b).
[6] Definition of "personal information," at section 2(1) of the *Act*, paragraph (d).
[7] Definition of "personal information," at section 2(1) of the *Act*, paragraphs (e) and (g).
[8] Order 11.
[9] See, for example, Orders PO-2326 and MO-4044.
[10] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[11] Orders P-1409, R-980015, PO-2225 and MO-2344.

this information would reasonably be expected to reveal something of a personal nature about the deceased police officer and would not strictly relate to the deceased policer officer in their professional capacity, while this individual was alive.

[22] Under section 2(2) of the *Act*, the term *personal information* does not include information about an individual who has been dead for more than thirty years. By including this provision, the Legislature has clearly signaled that *personal information* can include information relating to a deceased individual. In the circumstances, I find that it is reasonable to expect that, if records exist, they would also contain *personal information* belonging to the deceased police officer, as the evidence before me is that this officer passed away less than thirty years ago.

[23] Finally, there is no dispute that the records, if they exist, would not contain *personal information* belonging to the appellant. I find no basis to question this.

[24] Since the records, if they exist, would not contain the *personal information* of the appellant, but would contain *personal information* about other identifiable individuals, I must assess any right of access the appellant may to the records, if they exist, given the mandatory personal privacy exemption at section 14(1) of the *Act*.

Issue B: Have the police properly applied section 14(5) of the *Act* in the circumstances of this appeal?

[25] The police take the position that if a responsive record exists, it would be exempt under section 14(1), taking into consideration the presumption at section 14(3) (possible violation of law). For the reasons that follow, I agree with that position and find that the police properly applied section 14(5) of the *Act*.

[26] Section 14(5) says:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[27] Section 14(5) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[28] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary

power that should be exercised only in rare cases.[12]

[29] Before an institution may exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[30] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) of the *Freedom of Information and Protection of Privacy Act*, which is identical to section 14(5) of the *Act*, stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[13]

Part one: disclosure of the record (if it exists)

Definition of personal information

[31] Under part one of the section 14(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of *personal information*.

[32] For the reasons set out above under Issue A, I found that the records, if they exist, would contain the *personal information* of identifiable individuals, including the deceased police officer and the complainant.

Unjustified invasion of personal privacy

[33] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under

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[12] Order P-339.
[13] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

section 14(5).

Section 14(4): disclosure not an unjustified invasion of privacy

[34] If any of paragraphs (a), (b) or (c) of section 14(4) apply to the record, if it exists, disclosure would not be an unjustified invasion of privacy. The parties have not claimed that section 14(4) is relevant, and I find that there is no evidence before me to establish that any of the paragraphs in section 14(4) are relevant in the circumstances.

Section 14(3): disclosure presumed to be an unjustified invasion of privacy

[35] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure is presumed to be an unjustified invasion of privacy. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[14]

[36] Section 14(3)(b) of the *Act* is relevant here. It says:

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

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

[38] The police submit that if the records exist, the presumption at section 14(3)(b) would apply. The appellant did not specifically address this in her representations.

[39] However, she seeks records regarding a report made to the police about an alleged theft. As mentioned, she states that she is "only interested in obtaining enough information to show that the theft report was made, and then the steps that were taken by Guelph Police Service to investigate the report."

[40] I accept that any police investigation of the alleged theft report would include *personal information* of the complainant and the deceased police officer. Accordingly, I

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[14] *John Doe v. Ontario* (*Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767.
[15] Orders P-242 and MO-2235.
[16] Orders MO-2213, PO-1849 and PO-2608.

find that the presumption in section 14(3)(b) would apply to the *personal information*. Where a record contains the *personal information* of individuals other than the requester, but not the *personal information* of the requester, a presumed unjustified invasion of personal privacy established under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[17]

[41] However, I have no information about whether or not such an investigation took place. If the police did not conduct an investigation into the theft report, I will consider the factors in section 14(2) as I find that no other presumptions in section 14(3) may apply.

Section 14(2): factors for and against disclosure

[42] If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[18]

[43] The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).[19]

[44] In this appeal, the parties have raised sections 14(2)(a) (public scrutiny) and 14(2)(f) (highly sensitive) of the *Act*.

Section 14(2)(a): public scrutiny

[45] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[20]

[46] The appellant submits that if I agree with the police that the records, if they exist, would contain *personal information*, then the factor at section 14(2)(a) is relevant. In support of this position, she submits:

> As far back as 1992, there have been reports written that explicitly address the issue of police investigating themselves, and how public

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[17] *John Doe v. Ontario* (*Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div.Ct.).
[18] Order P-239.
[19] Order P-99.
[20] Order P-1134.

> confidence depends on a police force investigating alleged wrongdoing by officers.[21]

[47] The appellant states that, in this appeal, the police are refusing to disclose whether or not they even conducted an investigation into the conduct of one of their members. She states that the police have certain duties to carry out[22] when a police occurrence is created; she submits that if a theft report was made but duties were neglected in response to it, that is a matter of public interest. She submits that that information would be required in order to subject the activities of the police to public scrutiny. In addition, the appellant states that after the theft report was made, the Office of the Independent Police Review Director (the OIPRD) conducted an investigation, but also refused to disclose the existence of a police report relating to this incident.

[48] In my view, most of the appellant's submissions with respect to section 14(2)(a) do not weigh in favour of finding that public security is relevant to my determination of whether disclosure of the personal information would be an unjustified invasion of privacy.

[49] First, a refusal by the OIPRD, which is not the institution involved in this appeal, to provide information to the appellant is outside the scope of this appeal. Such a refusal does not relate to whether the Guelph Police Services appropriately claimed section 14(5) in response to the appellant's access request to them.

[50] Furthermore, the fact that the police have claimed section 14(5) and refused to confirm or deny the existence of records does not establish that section 14(2)(a) would apply if responsive records exist. The Legislature has given institutions, such as the police, the discretionary power to claim section 14(5) in response to an access request in circumstances that an institution believes it is necessary. In any event, I find that the mere fact of exercising this discretion at section 14(5) does not establish that disclosure of responsive records in this appeal, if they exist, would engage section 14(2)(a).

[51] In my view, it is also significant that there is insufficient evidence of the alleged offence, beyond assertions that it occurred. The media reports provided by the appellant relate to the deceased police officer's death, not the appellant's assertion that a member of the police stole something. The lack of sufficient evidence that a crime even occurred weighs against finding that the factor at section 14(2)(a) relating to

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[21] The appellant attached a copy of conclusion of the "Report on an inquiry into administration of internal investigations by the Metropolitan Toronto Police Force by the Ontario Civilian Commission on Police, August 1992" to her representations as supporting evidence of her position.

[22] The appellant says that this is Ontario Regulation 268/10: GENERAL, under the *Police Services Act*, R.S.O. 1990, c. P. 15, section 2(1)(c).

public scrutiny is relevant to the records, if they exist. However, assuming that an offence did occur, that the complainant reported it and records relating to the request exist, I accept that section 14(2)(a) would be of some relevance.

[52] I am prepared to accept that disclosure of the *personal information* in the records, if they exist, is necessary to subject the police's activities to public scrutiny, but I only give it minor weight, taking into account all of the evidence before me.

Section 14(2)(f): highly sensitive

[53] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[23]

[54] The appellant submits that the factor relating to high sensitivity is not relevant in the circumstances.

[55] However, the police submit, and I find, that the factor at section 14(2)(f) applies. Without elaborating on the police's confidential representations in this public order, I can summarize the police's position by saying that there is a reasonable expectation of significant personal distress if the information is disclosed, if it exists, due to the complainant's relationship to the deceased officer and the fact that the officer is deceased. I agree with this position and find it reasonable in the circumstances. The factor at section 14(2)(f) weighs against disclosure.

Weighing the presumptions/factors for and against disclosure

[56] In determining whether disclosure of the *personal information* in the records, if they exist, would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 14(2) and 14(3) of the *Act* in the circumstances of this appeal. I have found that if the records exist, the presumption at section 14(3)(b) may be relevant, which weigh against disclosure. Even if no presumptions apply, I have found that one factor favouring disclosure has some weight, (the factor at section 14(2)(a), but that the factor at section 14(2)(f) weighs against disclosure. Weighing the factors and presumptions, and the interests of the parties, I find that disclosure of the records at issue, if they exist, would be an unjustified invasion of personal privacy of the individuals' whose *personal information* would be found in the records, if they exist. Therefore, I find that the records, if they exist, would be exempt from disclosure under the mandatory personal privacy exemption at section 14(1) of the *Act*.

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

Part two: disclosure of the fact that the record exists (or does not exist)

[57] Under part two of the section 14(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and disclosure of that information would constitute an unjustified invasion of personal privacy.

[58] In their access decision, the police stated the following, in part:

> Reports and information from police occurrences are considered the personal information of those who are involved in the occurrence(s). Your request does not state whether you were personally involved in the occurrence you describe. As such, we will not confirm or deny whether there are police occurrences at this address during this time period.

[59] In non-confidential portions of their representations, the police say that the appellant's request states that a theft incident took place, but the police have no confirmation about how or why the appellant believes that it did, and no record of the appellant's involvement in the alleged occurrence she describes in the request. The police say that they invited the appellant to re-submit her request with written consent from the alleged complainant. The police explain that if the appellant were to provide them with this consent, they would issue a new access decision. However, the police submit that if they were to either confirm or deny the existence of a responsive record, they could be either confirming or denying a potential story or conversation that the appellant had with or about the complainant.

[60] The appellant submits that if the records exist, they would not contain *personal information*, and if they did, she is agreeable to that *personal information* being redacted.

[61] However, as discussed, the records, if they exist, would reveal *personal information* beyond the *types* of information that can simply be redacted. Stating that the records exist, if they do, would reveal the *fact of* the complainant's interaction with police, for example, which is the complainant's *personal information* as well as that of the deceased police officer. Similarly, confirming that no records exist would also convey information about the alleged complainant.

[62] In the circumstances, I uphold the police's decision that section 14(5) applies. I find that disclosure of the very fact that a record exists (or does not exist) would itself reveal *personal information* of others: the fact of the complainant's interaction with the police (if any) and/or the existence of reports and information from police occurrences, which would reasonably be expected to contain other *personal information*. Despite any media reports or other sources of information that the appellant has in relation to such *personal information,* the fact remains that disclosure of the existence or non-existence of the records she has requested would itself convey *personal information* to her, most

notably the alleged complainant's reporting (or not) of an alleged offence to the police. In the circumstances, I find that this disclosure constitutes an unjustified invasion of personal privacy for the reasons set out above. Therefore, I uphold the police's decision to claim section 14(5) in the circumstances, subject to my review of their exercise of discretion, below.

Issue C: Did the police exercise their discretion under section 14(5)? If so, should the IPC uphold the exercise of discretion?

[63] Section 14(5) is discretionary. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[64] In addition, the IPC 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.

[65] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[24] The IPC may not, however, substitute its own discretion for that of the institution.[25]

Relevant considerations

[66] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[26]

- 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; and 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

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[24] Order MO-1573.
[25] Section 43(2).
[26] Orders P-344 and MO-1573.

- 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
- 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.

[67] The police state that they have taken into account relevant considerations, as follows:

- individuals should have a right of access to their own *personal information* - the appellant is not seeking her own *personal information*
- the privacy of individuals should be protected – the content of a police report contains the private information of those involved in a police occurrence
- [the police] are unaware of the relationship between the requester and the involved persons
- [the police] are unaware of a compelling or sympathetic need for the requester to receive the information.

[68] The appellant submits that section 14(1)[27] is not relevant because she is not seeking the disclosure of *personal information*. She reiterates that she already knows the names of the parties involved. She states that even if the names are redacted, "the report is still desirable to subject the activities of the institution to public scrutiny." It appears that the appellant is submitting that the police should have considered the factor of whether disclosure would have increased public confidence in their operations.

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[27] The appellant made this submission in relation to section 38, perhaps in error. The discretionary personal privacy exemption at 38(b) was never at issue in this appeal because there has been no claim, and no grounds to believe, that the records contain the appellant's own *personal information*, if they exist.

[69] With respect to the suggestion that the police neglected to consider a relevant factor, that is, whether disclosure would have increased public confidence in their operations, I do not find that to be the case. For the reasons set out above under section 14(2)(a), I found that disclosure for the purpose of public scrutiny would only have some weight. Given the relatively low weight of this factor, in the circumstances, I find that the police did not err in not taking into consideration whether disclosure of the fact that records exist, or do not exist, would have increased public confidence in their operations.

[70] I also find that the four factors identified by the police were relevant considerations, not irrelevant factors, to take into account in the circumstances of this appeal.

[71] While I appreciate the appellant's concerns as expressed in both her confidential and non-confidential representations regarding the police, it must be acknowledged that the police offered to provide the appellant with a revised access decision if she obtained consent from the alleged complainant regarding disclosure of the complainant's *personal information*. I find that this is evidence of responding to the request in good faith. As a result, I am satisfied that the police exercised their discretion to invoke section 14(5) in good and not in bad faith or for an improper purpose.

[72] For these reasons, I uphold the exercise of the police's discretion to rely on section 14(5).

Issue D: Is there a compelling public interest in disclosure of the records, if they exist, that clearly outweighs the purpose of section 14(5)?

[73] The appellant submits that there is a compelling public interest in disclosure of the records, if they exist, that clearly outweighs the purpose of section 14(5), but I find insufficient evidence to accept this, for the reasons set out below.

[74] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

[76] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the

records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[28]

Compelling public interest

[77] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[29] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[30]

[78] A public interest does not exist where the interests being advanced are essentially private in nature.[31] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[32]

[79] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[33]

[80] Any public interest in *non*-disclosure that may exist also must be considered.[34] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[35]

[81] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[36]
- the integrity of the criminal justice system has been called into question[37]
- public safety issues relating to the operation of nuclear facilities have been raised[38]

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[28] Order P-244.
[29] Orders P-984 and PO-2607.
[30] Orders P-984 and PO-2556.
[31] Orders P-12, P-347 and P-1439.
[32] Order MO-1564.
[33] Order P-984.
[34] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[35] Orders PO-2072-F, PO-2098-R and PO-3197.
[36] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1999] O.J. No. 484 (C.A.).
[37] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[39] or the province's ability to prepare for a nuclear emergency[40]

- the records contain information about contributions to municipal election campaigns.[41]

[82] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[42]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[43]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[44]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[45]

- the records do not respond to the applicable public interest raised by appellant.[46]

The police's representations

[83] The police submit that if a responsive report exists it would fall within the mandatory personal privacy exemption at section 14(1) of the *Act* and there is no compelling public interest in its disclosure.

[84] Specifically, the police submit that there is no compelling public interest that would outweigh the potentially highly sensitive *personal information* in a police report initiated by the complainant regarding the deceased police officer's police item, given the relationship between the complainant and the deceased police officer.

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[38] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[39] Order P-1175.
[40] Order P-901.
[41] *Gombu v. Ontario* (*Assistant Information and Privacy Commissioner*) (2002), 59 O.R. (3d) 773.
[42] Orders P-123/124, P-391 and M-539.
[43] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[44] Orders M-249 and M-317.
[45] Order P-613.
[46] Orders MO-1994 and PO-2607.

[85] The police also reiterate that if the appellant provides the police with the complainant's consent, the police will provide "the explicit results of [their] search." However, in the circumstances, the police submit that they are ensuring the privacy of the complainant is at the forefront of their access decision, and they will not confirm or deny whether a report such as the one the appellant seeks exists.

The appellant's representations

[86] The appellant submits that "the handling of a criminal investigation involving the Guelph Police Service by the Guelph Police Service is a matter of public interest," and asserts her belief that a record exists that details criminal allegations of theft against a member of the police. She submits that this is an issue of "the institution attempting to shield members of their police service from public accountability, an effect that is contrary to the purpose of the *Act,"* citing Order MO-3981. She submits that if police were selectively enforcing laws, and offering favouritism based on profession or rank, that is also a matter of public interest and withholding those records from disclosure would be contrary to the purpose of the *Act*.

[87] The appellant also submits that since she cannot confirm whether or not an investigation into the alleged theft of the deceased officer's police item ever took place, it is difficult to accept the police's position that an interest in non-disclosure outweighs what she describes as the compelling public interest in favour of disclosure.

[88] The appellant also made other submissions under section 16, but I will not set them out here, as they do not concern section 16.[47]

Analysis/findings

[89] Based on my review of the parties' representations, there is insufficient evidence to conclude that there is a compelling public interest in disclosure of the records, if they exist. Nor is there a compelling public interest in the disclosure of the fact that records exist, or do not exist.

[90] In the portion of Order MO-3981 noted by the appellant in her representations, the adjudicator described and quoted from a court decision that distinguished between the operational role that an institution plays in discharging its institutional mandate from the institution's role as an employer. The context was an appeal where an exclusion was being claimed. The appeal before me does not involve an exclusion claim (which is different from an exemption claim because a record that is excluded cannot

[47] They relate to the issues of reasonable search (in that she describes what she believes should exist at a minimum), whether or not the records she expects to exist contain *personal information*, and an improper consideration for the police to factor into an exercise of discretion.

be accessed at all through the *Act*). However, I understand the appellant to be arguing that using the *Act* for the purpose of trying to protect members of the police service from public accountability would be contrary to the purpose of the *Act*.

[91] The evidence must still establish that despite findings that information is exempt under one or more of the listed possible exemptions, there is a public interest in disclosure of the records, and that public interest must be compelling (to meet the first part of the test for section 16). In the circumstances, I find insufficient evidence to conclude that this would be the case, if responsive records exist.

[92] Here, the appellant's submission that the police's handling of a criminal investigation involving one of their own members is a matter of public interest.

[93] Of course, in a general sense, I agree: there is a public interest in the proper handling of criminal investigations.

[94] However, as discussed, in the circumstances of this appeal, there is insufficient evidence of the alleged offence, beyond bald assertions that it occurred. The media reports provided by the appellant relate to the deceased police officer's death, not the appellant's assertion that a member of the police stole something. I find the appellant has not established a public interest in the records, if they exist.

[95] Even if I were to accept that there is a compelling public interest in the disclosure of the records (if they exist) in a general sense, I am not satisfied that the complainant's involvement in reporting the matter is necessarily a matter of public interest.

[96] Therefore, in the circumstances, I find that there is insufficient evidence before me to establish that any public interest that may exist in the records, if they exist, and specifically the fact of the complainant's involvement, if any, could reasonably be considered "compelling." As a result, I find that section 16 does not apply to override section 14(5) in the circumstances, and I dismiss the appeal.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: October 25, 2021

Marian Sami
Adjudicator