Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4128

Appeal MA19-00391

Halton Regional Police Services Board

November 24, 2021

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to records created by Halton Regional Police (the police) relating to an incident in which he was involved and about which he filed a complaint. The police issued a decision granting partial access to the responsive records, severing information pursuant to the discretionary exemptions at section 38(a) (discretion to disclose requester's own information), in conjunction with the law enforcement exemptions at sections 8(1)(e) and (l), and section 38(b) (personal privacy). The requester appealed the police's access decision and also raised the issue of whether the police conducted a reasonable search. In this order, the adjudicator finds that section 38(a), in conjunction with section 8(1)(l), applies to the information for which it was claimed. She also finds that section 38(b) applies to the personal information of an affected party and that neither the absurd result principle nor the public interest override at section 16 apply to permit disclosure. She finds that the police properly exercised their discretion in denying access to the information under sections 38(a) and (b). Finally, she finds that the police conducted a reasonable search for responsive records. 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"), 8(1)(e), (l), 14(3)(b), 14(2)(a), (b), (d), (f), (h), 16, 17 and 38(a) and (b).

OVERVIEW:

[1] This appeal arises from a dispute between two neighbours regarding a trailer,

which was parked on a street in front of a basketball net, thereby preventing the use of the net. The dispute resulted in a physical altercation between the neighbours. Following the physical altercation, one of the neighbours called 911 and filed a complaint with the Halton Regional Police (the police) and the police attended at the location to investigate. The complainant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "[a]ny audio or other types of materials" that were generated in connection with the complaint he initiated and the subsequent police investigation into the incident.

[2] The police identified a number of responsive records and issued a decision granting access to a 911 audio call and partial access to a number of hardcopy police records, including the investigating officers' notebook entries. Severances were made to some of the records pursuant to the discretionary exemption at section 38(a) (discretion to refuse requester's own information), in conjunction with the law enforcement exemptions at sections 8(1)(e) (endanger life or safety) and 8(1)(l) (facilitate commission of an unlawful act), as well as the discretionary exemption at section 38(b) (personal privacy). In their access decision, the police explicitly stated that as the officers investigating the incident took no witness statements or photographs, no responsive records of those types exist.

[3] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner/Ontario (the IPC). A mediator was assigned to attempt to facilitate a mediated resolution between the parties.

[4] During mediation, the appellant advised that he seeks access to the information that was severed from the records. In addition, the appellant questions the reasonableness of the police's search, stating that it is his belief that additional records should exist, including original handwritten notes and witness interview statements. The police maintained their position that no additional records responsive to the request exist.

[5] Also during mediation, the mediator contacted the other individual involved in the incident, the appellant's neighbour (the affected party), to determine whether he was prepared to give consent to disclose his personal information to the appellant. The affected party confirmed that he would not provide consent to disclose any of his personal information to the appellant.

[6] As the parties did not reach a mediated agreement, the file was moved to the adjudication stage of the appeal process. As the adjudicator assigned to the file, I decided to conduct an inquiry and prepared a Notice of Inquiry setting out the facts and issues on appeal. I sought and received representations from the police, initially.

[7] At the same time as I sought representations from the police, I also sent a Notice of Inquiry to the affected party, inviting him to submit representations. Although the affected party declined to make representations, he reiterated that he does not

consent to the disclosure of his personal information to the appellant.

[8] I then sought and received representations from the appellant, having provided him with the non-confidential representations of the police. The appellant provided representations which I shared with the police seeking a reply, in particular on the issue of search. Finally, I invited sur-reply representations from the appellant, which he provided.[1]

[9] In this order, I find the exemptions at sections 38(a), in conjunction with section 8(1)(l), and 38(b) apply to the information for which they were claimed and the police properly exercised their discretion not to disclose it to the appellant. I also find the police conducted a reasonable search for records responsive to the request. I uphold the police's decision and dismiss the appeal.

RECORDS:

[10] Remaining at issue are 13 pages of police officers' notes which have been disclosed to the appellant, in part. They include copies of the investigation notes from a police officer's electronic notebook, the handwritten notes from another police officer's notebook and the handwritten notes from a police cadet's notebook. Both police officers and the cadet responded to the complaint and were involved in the investigation into the incident.

ISSUES:

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

B. Does the exemption at section 38(a), in conjunction with the law enforcement exemptions at sections 8(1)(e) and/or (l), apply?

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

D. Does the public interest override in section 16 apply to the exempt personal information?

E. Did the police exercise their discretion under sections 38(a) and (b)?

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

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[1] The parties' representations were shared between them in accordance with the IPC's confidentiality criteria set out in the *Code of Procedure* and *Practice Direction 7.*

DISCUSSION:

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

[11] The police withheld the information at issue under the discretionary exemptions at sections 38(a) and (b) of the *Act*. In order to determine whether those sections might apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual." Section 2(1) sets out a non-exhaustive list of examples of "personal information" including:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (c) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] To qualify as personal information, the information must be about the individual in a personal capacity and not a professional, official or business capacity.[2] Also, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

Representations

[13] The police submit that the records contain the personal information of

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

identifiable individuals as that term is defined in section 2(1) of the *Act*. The police submit that the personal information includes information such as the age, sex, address, telephone number, and views or opinions of both parties to the incident, the appellant and the affected party. The police also submit that the records contain the statements and opinions of the appellant about the affected party, as well as the statements and opinions of the affected party about the appellant.

[14] The appellant concedes that the records may contain the personal information of other individuals, including the affected party, but he submits that he believes he is entitled to access to it. He submits that pursuant to section 7(2)(a) of the *Act*, the police shall not refuse to disclose information that is factual information and much of the information in the records that was collected during the investigation into the incident is factual and not personal information. The appellant also submits that he expects that the personal information that has been withheld "is no more than names, addresses, contact information, phone numbers and opinions" and because anyone who was present during the incident is a neighbour, that type of information is already "available to [him]."

Analysis and findings

[15] From my review of the records, I am satisfied that they contain the personal information of the appellant, as well as that of another individual, the affected party who was also involved in the incident. Although the appellant appears to believe that the records also contain information about other individuals such as neighbours who were witness to the incident, from my review of the records they only contain the personal information of the appellant and the affected party.

[16] Specifically, I find that the records contain the names of the appellant and the affected party, together with other personal information about them [paragraph (h) of the definition of personal information in section 2(1)], including their age and sex [paragraph (a)], their address and telephone number [paragraph (c)] and their personal views, some of which relate to each other [paragraphs (e) and (g).

[17] Where records contain the personal information of the appellant, access must be decided under Part II of the *Act* where the appropriate exemptions to consider are set out in section 38. The police have claimed that the exemptions at section 38(a), in conjunction with the law enforcement exemptions at sections 8(1)(e) and/or (l) and section 38(b), apply to the information that it has withheld. I will consider the possible application of the exemption at section 38(a), in conjunction with section 8(1)(e) and/or (l) first.

[18] In his representations on whether the records contain personal information, the appellant submits that the information is factual, not personal, and that section 7(2)(a) applies to prohibit the police from refusing to disclose it. The appellant is mistaken. Section 7(2)(a) is not relevant to my determination of whether the information at issue

qualifies as personal information within the definition of that term in section 2(1) of the *Act*.[4] Section 7(2)(a) is an exception that may be relevant in the determination of whether the exemption in section 7(1) of the *Act* applies, which would permit an institution to refuse to disclose the advice or recommendations of a public servant. Section 7(1) has not been claimed by the police to deny access to the personal information at issue in this appeal, and I confirm that neither it nor the exception in section 7(2)(a) are relevant to my analysis.

B. Does the discretionary exemption at section 38(a), in conjunction with the law enforcement exemptions at sections 8(1)(e) and/or (l), apply?

[19] The police claim that section 38(a), in conjunction with sections 8(1)(e) and (l) apply to exempt the ten codes, 900 codes, police zone information and other codes in the police officers' notes.

[20] Section 36(1) of the Act 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. 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. [emphasis added]

[21] 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.[5]

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

[23] In this case, the police rely on section 38(a), in conjunction with the law enforcement exemptions at sections 8(1)(e) and (l). Sections 8(1)(e) and (l) read:

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[4] Sections 7(1) and 7(2)(a) read:

> 7(1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material[.]

[5] Order M-352.

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[24] 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).

[25] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[6]

[26] 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.[7] 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.[8]

Representations

[27] The police state that they have applied section 38(a), in conjunction with sections 8(1)(l) to the ten codes, 900 codes, police zone information and other codes from the police officers' notes. They submit that this type of information is used in

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[6] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[7] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

policing to convey specific messages via radio transmissions and computer messages via codes that are not generally known to the public. The police submit that although their meaning might be unknown in isolation, when used in the context of the police officers' notes, their corresponding meaning would be revealed. The police submit that there is a real and substantial risk that persons who engage, or wish to engage in, criminal activity could use this information to predict police response time and resources for any given call. They submit that this could compromise the integrity and effectiveness of policing services, endanger the life or physical safety of a law enforcement officer, and potentially facilitate the commission of an unlawful act or hamper the control of crime.

[28] The police rely on Order PO-1665 where the adjudicator stated:

> In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space....

[29] The appellant disagrees with the police that disclosure of the police codes could reasonably be expected to facilitate the commission of an unlawful act. He submits that he is a civilian with no criminal record and "it is baseless to believe that [he] can endanger the law enforcement staff or the building."

Analysis and findings

[30] The IPC has issued numerous orders with respect to the disclosure of police codes and has consistently found that section 8(1)(l) applies to ten codes,[9] as well as to other coded information such as 900 codes.[10] In other orders, section 38(a), in conjunction with section 8(1)(l), has been found to apply to other information, including police zones and beats with a municipality, as well as emergency service zones used by the police.[11] These orders have found that disclosure of this type of information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime, engaging the application of section 8(1)(l) (or its provincial equivalent section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act*).

[31] I agree with this line of reasoning and find it relevant to the circumstances before me.

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[9] Orders M-93, M-757, MO-1715, PO-1665, MO-2112 and MO-2871.
[10] Order PO-1665.
[11] Orders PO-3013, PO-3650 and MO-4073.

[32] I accept that the ten codes, 900 codes, police zone information and other codes that the police have severed from the records are specific codes used by the police when sending transmissions through the radio or via computer. I also accept that they are not generally known to the public and that their disclosure, in the context of the other information in the record, could reveal their meaning which in turn could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, subject to my review of the police's exercise of discretion with respect to this information below (Issue E), I find that section 38(a), in conjunction with section 8(1)(l), applies to the information for which it has been claimed.

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

[33] Under section 38(b), where a record contains personal information of both the appellant 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 appellant. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.

[34] Sections 14(2) to (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 38(b). Section 14(4) also lists situations that would not be an unjustified invasion of personal privacy. None of these exceptions in section 14(1) or situations in section 14(4) apply in the context of this appeal.

[35] Where none of the paragraphs of section 14(4) apply to establish that disclosure is not an unjustified invasion of personal privacy, sections 14(2) and (3) contain factors and presumptions that the decision-maker must consider and weigh to balance the interests of the parties.[12] I will consider those below.

Representations

[36] The police submit that the presumption against disclosure at section 14(3)(b) applies to the information at issue because it was compiled and is identifiable as part of an investigation into a possible violation of law. The police submit that the records relate to an investigation into a dispute between neighbours where the initial allegations may have led to charges under the *Criminal Code of Canada*, including, but not limited to, property damage, mischief, theft or assault.

[37] The police note that although, following their investigation, the officers determined that there were no grounds to support a criminal charge, because the

[12] Order MO-2954.

incident was investigated in regard to a possible violation of law, section 14(3)(b) still applies.

[38] The appellant submits that based on the information to which he has been granted access, there is no evidence to support the police's position that any allegations were made that could have led to charges for any of the individuals involved in the incident. He submits that in the records, the police have described the incident as a "neighbour dispute" which he believes makes the incident appear "frivolous" and directly contradicts the police's claim that the information was compiled and is identifiable as part of an investigation into a possible violation of law.

[39] The appellant also notes that there is no "ongoing investigation" with respect to the matter and since the investigation is over, the first part of section 14(3)(b) is no longer applicable. He points to the second part of section 14(3)(b) which states: "… except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation" and submits that "now the disclosure is necessary either for prosecution or to find the truth of the incident."

[40] The appellant submits that the disclosure of the police officers' notes is in the public interest to ensure that the police "find the truth of the incident." He also submits that disclosure of the information would allow him to regain confidence in both the police services and the legal system. It appears that this submission is based on the appellant's submission that the affected party is a police officer and the appellant's view that the affected party's behaviour during the incident was inappropriate for someone from that profession. The appellant suggests that, given that context, the pubic interest override at section 16 of the *Act* should apply to permit disclosure of the information.

[41] The appellant mentions a small claims court action that he initiated against the affected party that relates to the incident documented in the police officers' notes. He submits that during the affected party's defence to that action, the affected party introduced into court statements from neighbours that "contradict each other." He argues that, as a result, to reveal "the truth of the incident," disclosure of the police officers' notes, in their entirety, is necessary "for public interest."

[42] In the appellant's sur-reply representations, the appellant clarifies that he believes it is in the public interest for the information to be disclosed because it would reveal misconduct by the affected party. He submits that the affected party is a police officer and "police officers' misconduct should be of public interest."

[43] The appellant submits that the factor at section 14(2)(b) is relevant because the disclosure of the withheld information would "help to improve and promote public safety by exposing police officers who have a tendency to misuse their police power in ways that are threats to public safety and public health."

[44] The appellant also appears to suggest that the withheld information should be

disclosed to him because is already aware of it. He submits that "names, address, contact information and opinions" of any neighbours who were contacted as witnesses are all available in legal documents for the small claims court case or are available at the City Hall property tax department. He submits that because the information is available to him, the police have no reason to consider that information as "significant" or "sensitive" to any affected parties.

Section 14(3): presumptions against disclosure

[45] Section 14(3) lists several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police submit that section 14(3)(b) applies in the circumstances. That section reads:

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

[46] Even if no criminal proceedings were commenced against any individual, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of the law.[13]

[47] The records containing the information that remains at issue are notebook entries from two police officers and a police cadet. The notes include the details of the incident between the two neighbours, the appellant and the affected party, including information about them and a narrative description of what occurred as described by them. Although the notes themselves do not indicate whether the police contemplated laying charges in respect of the incident, in my view it is clear that, in the circumstances, the personal information in the notes was compiled by the police officers during their investigation into whether the incident involved possible violations of law. I accept that given the nature of the incident in this case, which involved damage to property and culminated in a physical altercation, it is possible that the investigation could have resulted in charges under the *Criminal Code of Canada*, including property damage, mischief, theft or assault. However, in the circumstances, the police ultimately laid no charges.

[48] I note that the appellant submits that section 14(3)(b) can no longer apply since the investigation is over and there is no "ongoing investigation." However, section 14(3)(b) does not require that there be an ongoing investigation for the presumption to

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[13] Order P-242.

apply. The presumption only requires there be an investigation into a possible violation of law,[14] which I accept the police have established in this appeal.

[49] I also note the appellant's reliance on the second part of section 14(3)(b) which states: "… except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." Past orders of the IPC have interpreted this sentence as meaning that disclosure of the personal information may be required in a prosecution or in order to continue an investigation.[15] Although I acknowledge that the appellant would prefer that the police continue their investigation and would prefer the incident to be prosecuted, those are matters for the police and the Crown attorney's office to determine, not the IPC. Based on the evidence before me, I am satisfied that the police concluded their investigation without having laid charges and, as a result, no prosecution is anticipated. Therefore, as disclosure of the information remaining at issue is not necessary to prosecute the violation or to continue the investigation for the purpose of the second part of section 14(3)(b), the provision does not assist the appellant in arguing for disclosure of the withheld personal information.

[50] Accordingly, I find that although no criminal proceedings were commenced against any individuals as a result of the incident, the police compiled the personal information at issue as part of an investigation into a possible violation of law contrary to the *Criminal Code of Canada.* As a result, I find section 14(3)(b) applies and weighs against the disclosure of the affected party's personal information as a presumed unjustified invasion of personal privacy.

[51] As the records contain the personal information of the appellant, I must also balance the interests of the parties by considering and weighing the factors for and against disclosure in section 14(2).

Section 14(2): factors weighing for and against disclosure

[52] Section 14(2) is a non-exhaustive list of factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[16] Some of the factors weigh in favour of disclosure, while others weigh against disclosure. The police have not claimed that any of these factors are relevant in this appeal; however, the circumstances and the appellant's representations implicitly suggest that he believes that the factors at sections 14(2)(a), (b) and (d), weighing in favour of disclosure, should be considered. Those sections read:

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[14] Order P-242, MO-2021, MO-2235, MO-3520 and MO-3440.
[15] Order MO-3867.
[16] Order P-239.

> A head in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> …
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> …

[53] The appellant's representations suggest that he believes that the disclosure of the withheld personal information is desirable for the purpose of subjecting the activities of police officers to public scrutiny and, for the same reasons, he submits that the public interest override at section 16 should also apply to permit its disclosure.[17] To the extent that the appellant's representations on the public interest raise the possible application of the factor at section 14(2)(a) set out above, I will consider them here. I will also consider the same representations under the public interest override at section 16, in a separate discussion, below.

[54] I have considered whether the disclosure of the information at issue is desirable for the purpose of subjecting the activities of an institution to public scrutiny under section 14(2)(a), and find that it is not. I note that the behaviour that the appellant believes should be subject to public scrutiny is not the behaviour of a member of the police's own force.[18] The records document a dispute between two private citizens the occurred in their personal capacity. Given the private nature of this dispute and having considered the withheld personal information, I do not accept that its disclosure would be desirable or be of any assistance in subjecting the activities of the institution, the Halton police, to public scrutiny. As a result, I find that the factor at section 14(2)(a) is not relevant and does not apply here.

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[17] 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.

[18] As previously mentioned, the appellant submits that the affected party is a police officer with another municipal police force.

[55] Despite the appellant's claim that the factor favouring disclosure at section 14(2)(b) applies, I find that this factor, which contemplates disclosure to promote public health or safety, does not apply in this appeal. As noted above, the appellant submits that disclosure of the withheld personal information would help to improve and promote public safety and heath because it would expose police officers who have a tendency to misuse their police power in ways that are threats to public safety and public health. I do not accept that the appellant's argument that disclosure of the specific personal information at issue would have that effect. As previously noted, I accept that the personal information at issue relates to a private dispute between two neighbours in their personal capacities and in my view, I have been provided with no basis upon which to conclude that its disclosure would help promote public health and safety. I find that section 14(2)(b) is not a relevant factor in this appeal.

[56] With respect to section 14(2)(d), I note that the appellant refers to a small claims court action that appears to relate to the incident. Section 14(2)(d) weighs in favour of disclosure of the personal information of another individual to a requester where the information is needed to allow them to participate in a court or tribunal process. Past IPC orders have found that 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;

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

3. The personal information that 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.[19]

[57] The appellant must establish that all four parts of the test have been met.

[58] Although the appellant mentions a small claims court proceeding that appears to be connected to the incident to which the records relate, his representations do not provide sufficient evidence for me to conclude that any of parts 1 to 3 of the test have

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[19] PO-1764, in which the relevant considerations for the application of section 14(2)(d) were adopted from the test set out in 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.).

been established. Further, from my review of the withheld personal information of the affected party, I also find that that the fourth part of the request has not been met. Specifically, I am not satisfied that the withheld personal information is required in order for the appellant to prepare for the small claims court proceeding or to ensure an impartial hearing in that venue for the purpose of section 14(2)(d). As the appellant is already aware of the affected party's identity and contact information, he does not require it to commence the small claims court proceedings that are, in any event, evidently already underway. Additionally, from my review of the withheld personal information, I find no basis to conclude that it might be required to ensure an impartial hearing. Accordingly, as the requirements for section 14(2)(d) have not been established, I find that it does not apply as a factor that weighs in favour of disclosure in this appeal.

Summary of findings on the application of section 38(b)

[59] As stated above, in deciding whether information is exempt from disclosure under section 38(b), the IPC must consider and weigh the factors and presumptions in sections 14(2) and 14(3). I have found that the presumption against disclosure at section 14(3)(b) applies and weighs against disclosure of the withheld personal information. I have also found that no factors in section 14(2) weighing in favour of disclosure apply. With respect to the factors weighing against disclosure, the police have not claimed that any apply and, from my review, none of them are relevant.

[60] Having considered and weighed the factors and presumptions in sections 14(2) and (3), I conclude that the disclosure of the affected party's personal information would constitute an unjustified invasion of his personal privacy within the meaning of the exemption section 38(b). However, as the appellant's representations suggest that the absurd result principle might apply to permit disclosure of the information, I will consider that now.

Absurd result

[61] Where a requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 38(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[20] Conversely, 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.[21]

[62] The absurd result principle has been applied where, for example, the requester

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[20] M-444, MO-1323.
[21] M-757, MO-1323, MO-1378.

sought access to his or her own witness statement,[22] the requester was present when the information was provided to the institution,[23] or the information is clearly within the requester's knowledge.[24]

[63] The appellant's representations suggest that the absurd result principle should apply to the withheld personal information in the police officers' notes because he knows the identity of the affected party, because they are neighbours, and he knows the affected party's views and opinions about the incident as a result of the small claims court proceedings. However, although the appellant may be aware of some of the affected party's personal information, in the particular circumstances of this case I will not order disclosure of that information as it appears in the records.

[64] While some of the information that has been withheld from the police officers' notes was provided to the police directly by the appellant, all of that information is the personal information of the affected party. As noted above, some orders have found that the absurd result principle applies to information of this type. However, also as noted above, other orders have found that if disclosure is inconsistent with the purpose of the personal privacy exemption, the absurd principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[25] In my view, this is the case here. The police have disclosed to the appellant almost all of the information in the police officers' notes. The majority of the information that has been withheld is the personal information of the affected party. The affected party has made it clear that he does not want his personal information disclosed to the appellant. Having considered the withheld information and the context in which it appears, and having balanced the privacy rights of the affected party against the access rights of the appellant, in my view disclosure of the affected party's personal information in this context would be inconsistent with the purpose of the personal privacy exemption at section 38(b). As a result, I find that the absurd result principle does not apply in the circumstances of this appeal.

[65] As I have found that the absurd result principle does not apply to the withheld personal information, I find that the exemption at section 38(b) applies. However, prior to upholding the police's decision to withhold the personal information under that exemption, I must consider whether, pursuant to section 16, there is a sufficiently compelling public interest in its disclosure that could allow for the override of section 38(b) and permit its disclosure.

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[22] M-444, M-451.
[23] Orders M-444, P-1414.
[24] Orders MO-1196, PO-1679, MO-1755.
[25] Orders MO-1524-I, MO-2351 and MO-3465.

D. Does the public interest override in section 16 apply to the exempt personal information?

[66] In his representations, the appellant briefly raises the application of section 16, the public interest override. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 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.

[67] Although section 16 does not explicitly list section 38(b), the IPC has read in section 38(b) as an extension of a requester's ability to raise the public interest override in cases where information is withheld under the mandatory personal privacy exemption at section 14.[26]

[68] 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.

[69] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[27]

[70] 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.[28] In previous orders, the IPC has 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.[29]

[71] A "public interest" does not exist where the interests being advanced are essentially private in nature.[30] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[31]

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[26] Orders P-54, MO-2395, MO-2701, MO-3785-I and MO-4067-I.
[27] Order P-244.
[28] Orders P-984 and PO-2607.
[29] Orders P-984 and PO-2556.
[30] Orders P-12, P-347 and P-1439.
[31] Order MO-1564.

[72] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[32] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[73] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[33]

Representations, analysis and findings

[74] As stated above, in order for section 16 to apply, there are two requirements that must be met: there must be a compelling public interest in disclosure of the personal information withheld under section 38(b), and this interest must clearly outweigh the purpose of the section 38(b) exemption.

[75] The appellant states that the police should disclose the personal information of the affected party under section 16 "to protect [the appellant] and to find the truth of the incident." He submits that there is a public interest in the disclosure of the withheld information because "[p]olice officers' misconduct should be of public interest."

[76] In my view, rather than demonstrating a public interest in disclosure of the personal information, the appellant's representations suggest that he has a private interest in obtaining access to the information. His representations also do not establish that his private interest raises issues of more general application. Additionally, although the appellant appears to be alleging police officer misconduct, he does not provide sufficient evidence to connect the disclosure of the personal information at issue with any public interest, let alone one that could be described as compelling.

[77] The information that I have found exempt under section 38(b) is the personal information of the affected party as it appears in police officers' notes related to an incident in which the appellant and the affected party were both involved. The police have granted the appellant access to the remainder of the information in the police officers' notes.[34] Given the amount of information that has already been disclosed to the appellant and the actual content of the personal information exempt under section 38(b), I do not accept that there is any public interest in disclosure of this information under section 16 of the *Act*.

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[32] Order P-984.
[33] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).
[34] With the exception of police codes which I have found exempt under section 38(a), in conjunction with section 8(1)(l).

[78] For the reasons set out above, I am not persuaded that disclosure of the personal information that I have found exempt under section 38(b) would increase public confidence in the operations of the Halton police or that its disclosure would help members of the public express opinions or make political choices in a more meaningful manner. I find that there is not a compelling public interest in its disclosure and section 16 does not apply to override the exemption at section 38(b).

E. Did the police exercise their discretion under sections 38(a) and (b)?

[79] The exemptions at sections 38(a) and (b) are discretionary and permit the police to disclose information, despite the fact that it could be withheld. The police must exercise their discretion and, on appeal, I may determine whether they failed to do so. The IPC cannot, however, substitute its own discretion for that of the police.[35]

[80] The police submit that in exercising discretion under sections 38(a) and (b) of the *Act* not to disclose the information at issue, they took into account a number of considerations, including:

- the appellant has a right to access his own personal information,
- the exemptions from the appellant's right of access were limited and specific,
- the privacy of individuals other than the appellant should be protected,
- the acrimonious relationship between the appellant and the affected parties,
- the age and nature of the information, taking into account the extent to which it is significant or sensitive to the appellant and any of the affected parties, and
- the importance of maintaining the "integrity of coded information" for law enforcement purposes.

[81] The police submit that they exercised their discretion carefully, by considering and reviewing all relevant factors, and they maintain that it was appropriate.

[82] In his representations, the appellant submits that in exercising their discretion the police failed to weigh the public interest in the disclosure of information at issue "to reveal the truth of the incident" and for "social justice" purposes. He submits that disclosure of the requested information will assist him in gaining confidence in police services and legal systems.

[83] In their reply representations, the police submit that this is not a case where

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[35] Section 43(2).

releasing another individual's personal information can be justified "under the guise of public interest."

[84] I have considered the parties' representations in light of the personal information withheld under section 38(b), which consists only of the personal information of the affected party. I find that the police exercised their discretion properly, in good faith and without taking into account irrelevant considerations. I accept that the police balanced the appellant's right of access to his own personal information against the personal privacy rights of the affected party. I accept that they took into consideration the amount of information that has already been disclosed to the appellant as well as the nature of the personal information that was withheld, when deciding not to disclose the affected party's personal information. Based on all of these considerations, I uphold the police's exercise of discretion in deciding not to disclose the personal information remaining at issue, under section 38(b).

[85] I also accept that when denying access to the police codes and other information under section 38(a), in conjunction with section 8(1)(l), the police took into account the purpose of the law enforcement exemption at section 8(1)(l), that is to protect the safety of law enforcement officers. Accordingly, I uphold the police's exercise of discretion in its application of section 38(a).

[86] As I have upheld the police's exercise of discretion, I find that information at issue in the records is exempt under section 38(a), in conjunction with section 8(1)(l), and section 38(b).

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

[87] 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.[36] 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.

[88] 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.[37] To be responsive, a record must be "reasonably related" to the request.[38]

[89] A reasonable search is one in which an experienced employee knowledgeable in

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[36] Orders P-85, P-221 and PO-1954-I.
[37] Orders P-624 and PO-2559.
[38] Order PO-2554.

the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[39]

[90] 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.[40]

[91] 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.[41]

Representations

[92] In support of the reasonableness of their search, the police submitted an affidavit sworn by the Freedom of Information Coordinator (FOIC) who directed the search for responsive records.

[93] In her affidavit, the FOIC submits that the police interpreted the appellant's request to include the 911 call, photographs, and investigating officers' notebook entries. She explains that partial access was granted to the occurrence report relating to the incident through a previous access request, and it was not considered in the current request. She also submits that as the request sought all audio related to the incident, the police also considered whether any type of electronic recording, including in-car cameras, would be responsive, but did not consider body cameras because the police have never used them.

[94] The FOIC described how she conducted the searches for each type of responsive record: 911 call, photographs, and police officers' notes (both electronic and handwritten).

[95] For the 911 call, the FOIC submits that she requested that Electronic Disclosure Services provide her with a copy of the call, which it did. The FOIC states that the 911 call was disclosed to the appellant.

[96] The FOIC submits that she requested that Forensic Identification Services (FIS) provide her with any photographs related to the incident and she was advised by FIS that there were no photographs related to that incident. The FOIC explains later in her affidavit that several photographs related to the incident were located as part of the electronic notes of one of the police officers.

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[39] Orders M-909, PO-2469 and PO-2592.
[40] Order MO-2185.
[41] Order MO-2246.

[97] Regarding the police officers' notes, the FOIC submits that as electronic police officer notes are stored in their records management system she was able to obtain a copy of those notes without contacting the officer directly. For the handwritten notes of the other police officer, the FOIC submits that she made a request to that officer, via email, for her notes, and the police officer complied. With respect to the police cadet's notes, the FOIC advised that as the cadet is no longer is employed by the police, the FOIC retrieved the cadet's handwritten notes from the notebook storage facility which is maintained by the FOI office.

[98] Specifically addressing her search for witness statements, the FOIC explains:

> All audio and video recordings of witness statements are stored in the institution's Property and Evidence Management Unit (PEMU); all items are tracked through the institution's records management system under the "Property" tab. For this occurrence, there is no property of any type listed in this tab…. Furthermore, it is important to note that there is not a single notation in the officers' notebooks or the report to indicate that a formal witness statement of any kind was collected (audio, video or written), therefore, the fact that there are no audio or video statements in PEMU is not concerning.

[99] The FOIC submits that via email she confirmed specifically and directly with the investigating police officers themselves that no witness statements were obtained.[42] To support her submission, she provided the emails received from the officers confirming the non-existence of witness statements.

[100] The FOIC also submits that she sent separate emails to the two police officers, inquiring about the existence of any electronic audio records, including whether either of the officers had a microphone recording interactions with the parties when responding to the incident. She submits that she asked this even though the use of microphones in this way is not a usual practice of the institution. The FOIC says that both police officers confirmed that neither of them were wearing a microphone when they responded to the complaint and neither of them created any type of electronic recordings. To support this submission, she provided the emails received by those officers confirming the non-existence of electronic audio records.

[101] The FOIC also submits that to confirm that there was no in-car camera video footage obtained, she sent an email to the Information and Systems Support Analyst, who subsequently forwarded her email to the officer responsible for the in-car camera pilot project. The pilot project was in place prior to the launch of the program that is

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[42] The FOIC did not email the police cadet, whose notes are also at issue, about witness statements or any other records, because the cadet is no longer employed by the police.

currently in place. She submits that the responsible officer confirmed that no in-car cameras were in use at the time of the occurrence at issue in this appeal. Again, the FOIC provided a copy of the email received from the officer in charge of the in-car camera program to support her submission.

[102] Finally, the FOIC outlines the police's records retention schedule and submits that it is not possible that records responsive to the request existed but no longer exist.

[103] Having reviewed the FOIC's affidavit, the appellant maintains that additional records responsive to this request exist. The appellant submits that the police officers' notes to which he was granted partial access are not the "original notes" that the police officers took on site when they interviewed him in response to the complaint he made about the incident through a 911 call. He submits that when the police officers interviewed him, they used pen and paper to take notes. He believes that these original notes would disclose "more truth of the incident than the biased and engineered police reports" to which he was provided partial access. He believes that the police are concealing information from him on purpose "just as they omitted the important details in their police reports on purpose."

[104] Responding to the affidavit submitted by the police in support of their search, the appellant made several submissions that I summarize here:

- Although the police officers submitted notebook entries when requested to do so, there is no third party to guarantee that the notebook entries were the "authentic, original" notes that were taken on site when the officers investigated the incident.

- His review of the redacted police officer notes leads him to believe that they are not likely to be the original notes. He states that he observed them taking notes, holding their books on their hands and the note are too legible to be the original notes taken while the officers were interviewing him.

- There are no witness interviews in the police officer notes despite the fact that he provided witnesses' addresses to the police. He submits that the police told him that they interviewed witness on the day that he filed the complaint. He also submits that on the day he filed the complaint he saw the police enter the houses of several witnesses. He also submits that the police must be required to interview witnesses and take notes of those interviews and that it is a "basic requirement" for them to keep those notes.

- He submits that, having reviewed the portions of the electronic notes of one of the officers to which he was granted partial access, it is clear that they are not as reliable as "original" notes and that this is evident from the errors and the false and biased statements in those notes. He submits that "original" notes

taken by that officer should exist and there must be some discrepancies between the original notes and the electronic notes.

[105] In reply, the police provided sworn affidavits from two of the police officers whose notes are at issue.[43] In the affidavit provided by the officer who took handwritten notes, she states that the notes that she provided to the FOIC were the notes that she took while investigating at the location of the incident and that she did not subsequently alter them. She states that they are the only notes that she made in relation to the incident and that she did not subsequently make any additional entries. She also confirms that she did not take notes and then subsequently transfer them to her official notebook. Finally, she confirms that she did not conduct formal interviews with any witnesses regarding the incident either at the time that she attended at the location or at any time subsequent to the initial notes being made.

[106] In his sworn affidavit, the officer who took the electronic notes responds to the appellant's concerns about the accuracy of his electronic notes. He states that he "only ever made one set of notes for this occurrence" and that they were made in his police issued iPhone using an application specifically designed for the police to take electronic notes. He confirms that his notes include the report that he subsequently authored in relation to the incident and that he made no other notes elsewhere. He also states that he has reviewed the information that has been identified as responsive to the request and he confirms that it represents the "totality of the notes and documentation" that he made in relation to the incident. He also confirms that he "did not take any formal statement, written or otherwise," in relation to the incident. He states that, while at the location of the incident, he spoke to several local residents but no official statements were taken and no formal interviews were conducted. He confirms that he did not make any notebook entries when he spoke with these residents.

[107] The police also respond to the appellant's concerns regarding the accuracy of the electronic notes. They submit that the last page of the electronic notebook entry has an automatic time stamp that is created when the officer is taking electronic notes. They submit that the time stamp indicates that the first part of the officer's notes were recorded while at the location of the incident while subsequent parts were recorded at the headquarters in the evening, following telephone conversations with the parties. The police submit that the time stamps ensure the notes cannot be altered because if an officer re -opens a note to add or change information it will automatically capture the date and time in the note history listed on the record. In support of their position in this regard, the police provided evidence from a Staff Sargent explaining the electronic notebook entries and describing how entries made cannot be manipulated. They also

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[43] The police note that because the police cadet is no longer employed by the institution she was not contacted to provide an affidavit.

point to the page of the responsive records in this appeal that documents when the entries were made.

[108] In sur-reply, the appellant submits that it is possible that the affidavits sworn by the police officers attesting to the veracity of their notes are fraudulent because their notes and report contains fraudulent statements. He sets out in great detail the information in the records that he believes to be fraudulent. He submits that he continues to believe that the police officers' notes to which he has been granted partial access are not the notes that were take at the location of the incident. He submits that neither officer had a computer with them so the time stamps on the electronic notes must be inaccurate or have been altered. He submits that the police are either still refusing to disclose some original investigation material to him or the original investigation materials have been disposed of illegally.

Analysis and findings

[109] For the reasons that follow, I find that the police conducted a reasonable search for responsive records.

[110] I have reviewed the police's representations, including the affidavits sworn by the police officers and the documentation submitted in support of the search, and I am satisfied that the police have provided sufficient evidence to demonstrate that they have undertaken reasonable efforts to identify and locate the records sought by the appellant. I am also satisfied that all of the individuals who participated in the search, in particular, the FOIC and the police officers who responded to and investigated the incident, are experienced employees knowledgeable about the subject matter of the request and therefore were able to identify where responsive records would be located.

[111] I acknowledge that the appellant continues to have concerns about the veracity of the police officers' notes. He continues to believe that they are not the notes that were originally taken by the officers while responding to the incident and that those original notes should exist. I also acknowledge that he believes that other additional records related to the investigation into the incident, including witness statements must exist. However, in my view, the police have provided sufficient evidence about the responsive records, including when and how they were created and why the records that they have identified are the only records responsive to the request that were located. I accept the evidence provided, including the affidavit evidence of the police officers, and find that the appellant has not provided a reasonable basis for concluding that additional records exist.

[112] Additionally, I note the *Act* does not require the police to prove with absolute certainty that further records do not exist. An institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. For the reasons outlined above, I find that the police have made a reasonable effort to locate records reasonably related to the request in this case.

[113] Accordingly, I uphold the police's search for records responsive to the appellant's request as reasonable.

ORDER:

1. I uphold the police's decision to deny access to the information that has been withheld pursuant to sections 38(a), in conjunction with section 8(1)(l) and 38(b) of the *Act*.

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

3. I dismiss the appeal.

Original Signed by: November 24, 2021

Catherine Corban
Adjudicator