Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4147

Appeal MA19-00485

Toronto Police Services Board

January 19, 2022

Summary: A requester sought access from the Toronto Police Services Board under the *Municipal Freedom of Information and Protection of Privacy Act* to records relating to himself, and the discipline file of a named police officer. The police issued a decision granting partial access to an email with severances under the discretionary personal privacy exemption at section 38(b). The police denied access in full to the discipline file, based on their claim that the section 52(3) labour relations and employment records exclusion applies to exclude it from the *Act*. The requester, now the appellant, appealed the police's decision. In this order, the adjudicator upholds the police's decision and dismisses the appeal.

Statutes Considered: The *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"), 14(3)(b), 38(b) and 52(3)3.

OVERVIEW:

[1] This order determines the issue of access to the withheld portions of an email attached to a police occurrence report and a named officer's discipline file. The Toronto Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> If you could please provide the private investigators [named individual] notes and information that [named police officer] [badge number] refers

> to in his booknotes, when I was falsely arrested by [the named police officer].
>
> [The named individual] made comments about me to [the named police officer].
>
> I would like all material [the named individual] provided to [the named police officer].
>
> Also can I please get a copy of [the named police officer's] discipline file with the TPS.

[2] The police issued a decision granting partial access to a responsive email with severances under the discretionary personal privacy exemption at section 38(b). The police denied access in full to the discipline file, because they claim that the section 52(3) labour relations and employment records exclusion applies to exclude it from the *Act.*

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

[4] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the police, initially. I received representations from the police, which contained information that I withheld from the appellant as confidential.[1] I shared the non-confidential representations of the police with the appellant, and invited representations from him, which I received.

[5] In this order, I uphold the police's access decision and dismiss the appeal.

RECORDS:

[6] The records at issue in this appeal consist of the named police officer's discipline file (discipline file) in its entirety, and a one-page email withheld in part.

ISSUES:

A. Does the labour relations and employment records exclusion at section 52(3) of the *Act* apply to the discipline file?

[1] These portions were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

B. Does the email contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

C. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the email?

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

DISCUSSION:

A. Does the labour relations and employment records exclusion at section 52(3) of the *Act* apply to the discipline file?

[7] The police claim that section 52(3) applies to exclude the discipline file of the named police officer from the *Act*. The police rely specifically on paragraphs 2 and 3.

[8] Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
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> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[9] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act* and, consequently, from the IPC's authority to order that access to those records be granted. If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[2]

[10] For the collection, preparation, maintenance or use of a record to be "in relation

[2] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[3]

[11] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[4]

[12] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[5]

[13] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[6]

Representations of the parties

[14] The police submit that section 52(3) applies to exclude the discipline file from the *Act*. The police submit that both sections 52(3)2 and 52(3)3 apply to exclude the discipline file. I will begin with the police's submission on section 52(3)3. Since I find that section 52(3)3 applies, below, I will not set out the police's representations on section 52(3)2.

[15] The police note that the discipline file in question is the discipline file of a police officer employed by the Toronto Police Service. The police further submit that the appellant has no "invested interest" in any record contained in the named police officer's discipline file.

[16] The police submit that the preparation, maintenance and use of the discipline file is for the purposes of complying with an employment-related obligation; namely, to investigate the actions of employees and to govern discipline internally. The police submit that, as an employer, the police are legally required to investigate and eventually establish a disciplinary process in accordance with Part V of the *Police Services Act* (*PSA*).

[17] The police submit that the discipline file was collected, prepared, maintained or used by the police upon receipt of complaints and in the course of the subsequent

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[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[4] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[5] Order PO-2157.
[6] *Ministry of Correctional Services*, cited above.

investigation into the named officer's conduct, in accordance with his employment by the police. The police submit that under the *PSA*, the police are accountable for investigating and conducting hearings to address complaints against officers and, in doing so, meetings, discussions and communications occur in this context.

[18] The police submit that any meetings, consultations, discussions or communications about "employment-related" matters, such as a complaint against an officer, would be of interest to the police as it is compulsory for the police to ensure that all members adhere to the rules, regulations and procedures of the service. The police submit that the police have an interest in the discipline file of the named police officer.

[19] The appellant's representations do not address the section 52(3) exclusion.

Analysis and findings

[20] The police did not provide me with a copy of the discipline file. However, based on the representations of the police, I find that section 52(3)3 applies to exclude the discipline file from the *Act*.

[21] For section 52(3)3 to apply, the police must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[22] In order for section 52(3)3 to apply, all three parts of the test set out above must be met.

Part 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[23] After reviewing the representations of the police and the circumstances of this appeal, I am satisfied that the discipline file was collected, prepared, maintained or used by the police in their capacity as the named police officer's employer. Although the police did not provide me with copies of the records in the discipline file, they confirmed that such a file exists in respect of the officer in question. The discipline file at issue would contain records setting out the allegations about the named police officer, as well as the police's investigation into those allegations. These types of documents are collected, prepared, maintained or used by an employer as part of an employee's file. Accordingly, I find that part 1 of the test under section 52(3)3 has been met.

[24] I am also satisfied that records in the discipline file were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications by the police with or in relation to the named police officer, in connection with the proceedings under the *PSA* referred to by the police in their representations. Therefore, I find that part 2 of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[25] The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[7]

[26] Examples of when the IPC has found the phrase "labour relations or employment-related matters" applicable include a job competition[8], an employee's dismissal[9], and a grievance under a collective agreement[10].

[27] The phrase "labour relations or employment-related matters" has been found not to apply in the context of an organizational or operational review[11] and litigation in which the institution may be found vicariously liable for the actions of its employee.[12]

[28] In addition, previous IPC orders have found that an employment-related nexus is not established simply because an institution is called upon to address a complaint about one of its employees, simply on the basis that a complaint *might* result in a disciplinary matter.[13]

[29] As noted above, the police did not provide a copy of the records at issue. However, the appellant's access request was specifically for the named police officer's discipline file and not simply about any complaints made against the officer.

[30] Whether a record is excluded from the *Act* under section 52(3) is record-specific and fact-specific. In this case, the appellant specifically requested the named officer's discipline file, which the police have confirmed exists. Discussions and communications about discipline of an officer are matters in which the police have an interest as the officer's employer. Based on the representations of the police and the nature of the records, I find that the discipline file was collected, prepared, maintained or used by the police in relation to meetings, consultations, discussions or communications about

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[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[8] Orders M-830 and PO-2123.
[9] Order MO-1654-I.
[10] Orders M-832 and PO-1769.
[11] Orders M-941 and P-1369.
[12] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[13] Orders PO-4223 and PO-3861.

labour relations or employment related matters in which the police have an interest.

[31] I am satisfied that records in the discipline file meet the requirement that they be about employment-related matters, because they relate to the named police officer's employment with the police, and would consist of correspondence and other records describing interactions between the named police officer and the police service with respect to his employment and conduct as a police officer. This is not simply a matter of a public complaint that may or may not have led to discipline: the evidence before me satisfies me that the police in this case were acting as employer in relation to the records in the discipline file.

[32] I am satisfied in this case that the police's interest in the communications in the records is as an employer. Accordingly, I find that part 3 of the test under section 52(3)3 is met.

[33] Neither party has argued that the exceptions in section 52(4) apply to the discipline file, and I find, that none of the exceptions in section 52(4) apply.

[34] Since all three parts of the section 52(3)3 test have been met and none of the exceptions in section 52(4) apply, I find that the records in the named police officer's discipline file are excluded from the scope of the *Act*. Therefore, the appellant has no right of access to them under the *Act*.

B. Does the email contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[35] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[14] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[15]

[36] The term is defined in section 2(1). The relevant portions are as follows:

> "personal information" means recorded information about an identifiable individual, including,

[14] Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[15] Sections 14(1) and 38(b), as discussed below.

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
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> (h) the individual's name where 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;

[37] Section 2(2.1) also relates to the definition of personal information and is relevant in this appeal. This section states:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[38] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[16]

[39] 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.[17]

[40] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[18]

Representations

[41] The police submit that the email at issue contains personal information that fits within paragraphs (a), (c), (f), (g), and (h) of the definition in section 2(1) of the *Act*.

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[16] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[17] Orders P-1409, R-980015, PO-2225 and MO-2344.
[18] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

The police submit that it was attached to a police occurrence report about an investigation into criminal harassment involving the appellant and another individual. The police submit that the email contains the personal information of the appellant and the other party involved. The police further submit that the email also contains the name and title of a private investigator who provided the email statement to the police and the name and title of the private investigator was provided to the appellant.

[42] The appellant's representations do not address whether the email at issue contains personal information.

Analysis and findings

[43] After reviewing the email and the representations of the police, I find that the email at issue contains the personal information of the appellant and the other individual involved in the alleged criminal harassment incident. Because I find the email contains the personal information of the other individual, their personal privacy may be affected by the appellant's access request. Since their interests may be affected by disclosure, I will refer to this individual as the affected party.

[44] I find that the email contains personal information about the appellant and the affected party, such as their sex, marital and family status, views or opinions about them, and their name along with other information, which fits within paragraphs (a), (g), (h) of the definition of "personal information" in section 2(1) of the *Act*. Having reviewed this email, I can see that the police have disclosed the portions of the email that only contain the appellant's personal information to him.

[45] I agree with the police that the email also contains the name and title of a private investigator. However, I find that this information does not constitute personal information as that term is defined under the *Act*, because the exception in section 2(2.1) applies to the information. As I noted above, under section 2(2.1), personal information does not include the name, title, and contact information of a person acting in a professional capacity. I find that the private investigator was acting in a professional capacity when he emailed the police, because he was contacting the police as part of an assignment he was hired to complete. Moreover, the email does not reveal anything of a personal nature about the private investigator.[19] Therefore, I find that the email at issue does not contain his personal information.

[46] The police redacted the email address of the private investigator under section 38(b). I understand from the police, however, that the email address of the private investigator was manually redacted from the original copy of the email. The police submit, and I accept, that they do not have a copy of the email with this email address unredacted.[20] Were it possible to do so, I would have ordered the police to disclose the

[19] See Order PO-2225.

[20] The police claim that the original record was uploaded to the police's system with the email address redacted and they do not have another copy.

email address of the private investigator, because as noted above, the contact information of a person acting in a professional capacity does not constitute personal information under the Act and, consequently, the information cannot be exempt under section 38(b).[21] However, since I accept that the police do not have a copy of the email that includes this email address, I will not order the police to disclose this portion of the email.[22]

[47] Other than four withheld portions of the email that contain the mixed personal information of the appellant and the affected party, the rest of the withheld portions of the email only contain the personal information of the affected party.

[48] Having found that the email contains the personal information of both the appellant and the affected party, I will now determine whether the withheld personal information of the affected party is exempt from disclosure under section 38(b) of the *Act.*

C. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld portions of the email?

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

[50] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[51] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would **not** be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply.

[52] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), the decision-maker[23] must consider and weigh the factors and presumptions in sections

[21] No other exemptions were claimed for the email and no mandatory ones would apply.
[22] In any event, the appellant submitted an email between him and the private investigator with his representations, and it therefore appears that he already has the private investigator's email address.
[23] The institution or, on appeal, the IPC.

14(2) and (3) and balance the interests of the parties.[24]

[53] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). 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.[25] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).[26]

Representations of the parties

[54] The police submit that disclosure of the withheld portions of the email would result in an unjustified invasion of personal privacy of the affected party whose personal information is contained in the email. The police submit that none of the exceptions in sections 14(1) or 14(4) applies to the withheld portions of the email.

[55] The police submit that the section 14(3)(b) presumption applies to the withheld portions of the email, because the personal information was collected and recorded for the explicit purpose of aiding a law enforcement investigation. The police submit that this investigation resulted in a charge under the Criminal Code.

[56] The police submit that the section 14(2)(h) (supplied in confidence) factor applies to the withheld portions of the email, and weighs against their disclosure, because the personal information was supplied to the police in the course of an investigation, which implies an element of trust that the police will act responsibly in the manner in which it deals with recorded personal information.

[57] The appellant submitted several documents, including a Family Court order, a charge summary, a letter from his legal counsel, photographs, a doctor's letter about his son, and other documents, which I find are not relevant to my determination of the application of section 38(b) in this appeal. Therefore, I have not summarized these documents below, and I will not refer to them further in this decision.

[58] The appellant submits that if his "case had gone to trial", the identity of the person making the statements about him would have been revealed to him. In support of this argument, the appellant provided a copy of the Supreme Court of Canada decision of *R. v. Stinchcombe*[27] *(Stinchcombe)* with his representations.

[59] The appellant submits that the private investigator emailed him stating that he (the private investigator) gave information to the police. The appellant submits that his

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[24] Order MO-2954.
[25] Order P-239.
[26] Order P-99.
[27] [1991] 3 SCR 326.

counsel provided information and photographic evidence to the Crown, which "proved the arresting officer['s] synopsis was fabricated" and, as a result, the charge against him was dropped. The appellant submits that the court order was clear that he was not to be followed. The appellant submits that he wants the withheld portions of the email, because it will be clear "who made things up" to have him charged and this would allow him to pursue legal action against that party. The appellant's representations suggest that he could be raising the application of the factor favouring disclosure in section 14(2)(d) (fair determination of rights).

Analysis and findings

[60] I will begin by addressing the appellant's assertion that the withheld personal information contained in the email should be disclosed to him, because it would have been if his "case had gone to trial". The appellant's right to access information under the *Act* is different from his right to access information under other legal frameworks; and the appellant's right to access information under other legal frameworks is not determinative of his right to access information under the *Act*. I note that the police's withholding of the personal information at issue does not prevent him from pursuing other legal remedies that might be available to him, nor does a denial of access under the *Act* prevent him from receiving the same information in a different legal context.[28]

[61] With respect to *Stinchcombe*, which the appellant has provided in support of his argument, I find that *Stinchcombe* is not applicable to this appeal. This case deals with the Crown's obligation to make disclosure to the defence in a criminal trial, which has no bearing on the appellant's right to access information under the *Act*. Therefore, I am not persuaded by the appellant's arguments in this regard. However, I will consider below the extent to which the appellant's arguments could support the application of the factor for fair determination of rights in section 14(2)(d).

[62] Based on my review of the withheld personal information in the email and the representations of the parties, I find that none of the exceptions at sections 14(1)(a) to (e) or 14(4) apply in the circumstances of this appeal. Since I have found that none of the exceptions at sections 14(1)(a) to (e) or 14(4) apply, I must consider and weigh any section 14(2) factors and section 14(3) presumptions that apply.

Section 14(3)(b): investigation into a possible violation of law presumption

[63] The police argue that the section 14(3)(b) presumption applies to the withheld information, because the personal information was compiled for an investigation into criminal harassment, and charges were laid.

[64] Section 14(3)(b) states:

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[28] Section 51(1) of the *Act* provides that "This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation."

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

[65] Based on my review of the withheld personal information in the email, which was attached to an occurrence report about a criminal harassment investigation, I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. Even if no criminal proceedings were commenced against an individual or if they were later withdrawn, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[29] In any event, as the police noted, charges were laid as a result of the investigation. Therefore, I find that section 14(3)(b) applies to the personal information at issue in this appeal, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the individual to whom the information relates – here, the affected party.

[66] Under section 38(b), the presumptions in section 14(3) must be weighed and balanced with any factors in section 14(2) that are relevant. The appellant argues that the factor at section 14(2)(d) (fair determination of rights) applies to the withheld personal information. This factor weighs in favour of disclosure, if it is found to apply.

[67] The police argue that the factor at section 14(2)(h) (supplied in confidence) applies to the withheld personal information. This factor weighs against disclosure, if it is found to apply.

[68] Sections 14(2)(d), and (h) state:

> 14(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence

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

[69] From the appellant's representations, it appears that he is arguing that the section 14(2)(d) factor applies and weighs in favour of disclosure of the personal

[29] Orders P-242 and MO-2235.

information of the affected party in the email. In order for this factor to apply, the appellant must establish all four parts of the following test:

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

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

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

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[30]

[70] I am not persuaded that section 14(2)(d) applies to the withheld personal information at issue in this appeal. The appellant has argued that he wants the withheld portions of the email, because it would reveal "who made things up" to have him charged and this would allow him to pursue legal action against that party. However, the appellant has not explained how or why the withheld personal information is significant to or required for the fair determination of his rights. Given this, I find that the appellant has not established that the withheld personal information is required for the fair determination of his rights for the purpose of the third and fourth parts of the test. As noted above, the police's withholding of the personal information at issue does not prevent him from pursuing other legal remedies that might be available to him. For example, the appellant is able to commence a proceeding against a "John Doe" and request production of the name from the police in that forum. Based on the appellant's representations and the circumstances of this appeal, I am not satisfied that I should order disclosure of the personal information at issue in this appeal.

[71] In order for section 14(2)(d) to apply, all four parts of the test must be established. Since the appellant has not persuaded me that all four parts of the section 14(2)(d) test have been met, I find that section 14(2)(d) does not apply to weigh in favour of the disclosure of the withheld personal information in this appeal.

Section 14(2)(h) (supplied in confidence)

[72] The police argue that the section 14(2)(h) (supplied in confidence) factor applies to weigh against disclosure of the withheld personal information, because it was supplied in confidence. The police submit that it is essential that the trust bestowed upon them be maintained by protecting the personal information obtained in the course

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

of police investigations.

[73] As past orders have established, section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[31]

[74] I find that this factor applies in the circumstances and weighs against disclosure. The withheld personal information at issue is contained in an email from a private investigator to the police relating to an alleged incident of criminal harassment involving the appellant and the affected party. In my view, the context of the private investigator's email to the police, including his statements about the affected party and the surrounding circumstances, is such that a reasonable person would expect that the information in the email relating to this affected party was supplied to the police with a degree of confidentiality. Based on my review of the withheld personal information in the email and the representations of the police, I am satisfied that the personal information was provided in circumstances where there was a reasonable expectation of confidentiality. Therefore, I find that the factor in section 14(2)(h) applies to the withheld personal information in this appeal and weighs against its disclosure.

Conclusion

[75] Overall, I have found that no section 14(2) factors, listed or unlisted, weigh in favour of disclosure of the withheld personal information and that the factor at section 14(2)(h) (supplied in confidence) weigh against its disclosure. I have also found that the section 14(3)(b) presumption applies to the withheld personal information. Balancing the interests of the parties, the facts of this appeal weigh against disclosure of the withheld personal information in the email. Therefore, I find that the withheld personal information in the email is exempt from disclosure under the discretionary exemption at section 38(b) of the *Act*, subject to my findings on the police's exercise of discretion below.

[76] As I stated above, other than four withheld portions of the email that contain the mixed personal information of the appellant and the affected party, the rest of the withheld portions of the email only contain the personal information of the affected party. I am satisfied that the appellant's own personal information cannot be severed and disclosed to him without revealing the affected party's personal information.

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

[77] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Where access is denied

[31] Order PO-1670.

under section 38(b), 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. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[79] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[32] The IPC may not, however, substitute its own discretion for that of the institution.[33]

[80] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[34]

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

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

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

Representations

[81] The police submit that they exercised their discretion under section 38(b) appropriately, withholding information only to the extent required to protect the privacy and personal information of the affected party identified in the email. Furthermore, the police submit that they did not exercise their discretion in bad faith, and that all relevant factors were taken into account and no irrelevant factors were taken into account in exercising their discretion.

[82] The police submit that, when choosing not to disclose the information at issue in the appeal, they considered the privacy of the affected party should be protected and that they withheld personal information that was intertwined with the appellant's.

[83] The police submit that they withheld information in a limited and specific manner and disclosed as much of the records as they could reasonably sever without disclosing exempt information.

[84] The appellant did not address the police's exercise of discretion in his representations.

Analysis and findings

[85] After considering the police's representations and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the withheld personal information in the email under section 38(b) of the *Act*. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose.

[86] I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in the exercise of discretion. In particular, it is evident that the police considered the fact that the email contains the appellant's own personal information, and I am satisfied that the police provided him with access to as much information as possible by applying section 38(b) in a limited and specific manner.

[87] Accordingly, I find that the police exercised their discretion in an appropriate

manner in this appeal, and I uphold it.

ORDER:

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

Original Signed by: January 19, 2022

Anna Truong
Adjudicator