Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4222

Appeal MA19-00406

Toronto Police Services Board

July 6, 2022

Summary: The Toronto Star submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Services Board (TPSB or the police) for the videotaped police interview with a notorious convicted serial killer (B.M.) in November 2013. B.M. was interviewed about the disappearances of three men before police let him go. It was later determined that he had murdered the three missing men, and went on to murder five others. In response to the Toronto Star's request, the police denied access to the interview under the mandatory personal privacy exemption in section 14(1).

On appeal of the police's access decision to the IPC, the adjudicator finds that the interview is exempt under section 14(1) and that the public interest override in section 16 of the *Act* does not apply to require its disclosure. Although the adjudicator finds there to be a public interest in disclosure of the interview, she find that the public interest identified by the appellant is not compelling and that it does not outweigh the purpose of the personal privacy exemption in section 14(1), given the privacy interests of the individuals other than B.M. identified in the interview, the absence of a connection between the personal information of any of the individuals and the public interest in scrutinizing the police's actions during the investigation, and the significant amount of information already available to the public as a result of the *Missing and Missed* report issued by The Independent Civilian Review of Missing Person Investigations. The adjudicator upholds the police's decision to deny access to the interview in its entirety and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information"), 14(1), 14(3)(b) and 16.

OVERVIEW:

[1] In November 2013, Toronto Police Service interviewed a man they thought might have information about the disappearances of several men from the Village[1] over the preceding three years. All three of those men were later confirmed to be dead, and the man the police had interviewed and released without follow-up after the 2013 interview was B.M. B.M. had murdered the three men and, after the 2013 interview, went on to murder five more, before he was arrested in 2018 and subsequently sentenced to life in prison after pleading guilty to eight counts of first-degree murder.

[2] In this order, I find the videotape of this 2013 police interview requested by the Toronto Star to be exempt under the mandatory personal privacy exemption in section 14(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. I also find that, although there is some public interest in disclosure of the interview, the public interest in disclosure is neither compelling nor does it outweigh the privacy interests of the individuals who would be impacted by its disclosure. Accordingly, the public interest override in section 16 does not apply. I uphold the police's decision to deny access to the interview and dismiss the appeal of that decision brought by the Toronto Star.

[3] By way of background, the Toronto Star newspaper submitted two requests to the Toronto Police Services Board (TPSB or the police)[2] under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act)* for access to videotaped interviews with B.M. that were conducted in 2013 and 2016. The request that is at issue in this order seeks, specifically, the:

> Video of [B.M] witness statement to the Project Houston task force,[3] given on November 11, 2013, for any information in connection to the disappearances of [three named individuals].[4]

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[1] "The Village" refers to the Gay Village located around Church and Wellesley streets in the heart of downtown Toronto.

[2] The Toronto Police Services Board (TPSB) is responsible for the provision of adequate and effective police services in Toronto. The TPSB is an "institution" as defined in paragraph (b) of the definition of that term in section 2(1) of *MFIPPA*. In practice, access requests for records of the Toronto Police Service, or the TPSB, are handled by the Access & Privacy Section of the Toronto Police Service. For ease of reference, I have decided to use "the police" in this order when referring to either the respondent institution, the TPSB, or the Access & Privacy Section of the Toronto Police Service.

[3] Although begun in 2012 as an investigation into an active cannibalism ring and a specific person of interest in that regard, Project Houston eventually also included investigating the disappearances of three men from the Village between 2010 and 2012 as possibly related. Project Houston was disbanded 18 months later after it failed to find any linkages between the specific person of interest and the disappearances of the missing men.

[4] The second request sought the "Video of [B.M.] questioning on June 20, 2016 following an allegation made that day that [B.M.] had attempted to choke a man inside his van. Looking for video of his police interview that day." This second video is now public for the following reasons. The 2016 police interview with B.M. had been entered as an exhibit at a disciplinary proceeding under the *Police Services Act* (in 2021) and then immediately made subject to a publication ban. After members of the media sought to

[4] The police issued a decision, denying access in full to the videotape of the 2013 police interview with B.M. (the interview), under the mandatory personal privacy exemption in section 14(1) of the *Act*.

[5] The Toronto Star (the appellant) appealed the police's access decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was assigned to explore the possibility of resolution of the issues. During the mediation stage of the appeal, the appellant indicated that it had contacted B.M. to ask him to provide his consent to the disclosure of the interview to the Toronto Star. B.M. declined to provide his consent. At this point, the appellant raised the possible application of the public interest override provision in section 16 of the *Act*. The police maintained their decision to deny access to the interview.

[6] As a mediated resolution of the appeal was not possible, it was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and began it by sending the police a Notice of Inquiry seeking representations on the issues. After receiving the police's representations, I sent a non-confidential copy of them to the appellant, along with a Notice of Inquiry, to invite representations in response, which I received.[5]

[7] Next, I sought and received reply representations from the police. The police's reply representations raised considerations directly related to the application of the public interest override in section 16, namely the then-ongoing Independent Civilian Review into Missing Person Investigations by Toronto Police Services being conducted by the Honourable Gloria J. Epstein (the review). The police argued, in particular, that any public interest in the interview's disclosure would be satisfied by the review, given the expansion of its Terms of Reference to include B.M.[6] I offered the appellant an opportunity to respond to the police's arguments and subsequently received sur-reply

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make submissions on the ban, defence counsel was permitted to withdraw it as an exhibit. On application to the Ontario Superior Court for judicial review of that decision, the court found that the 2016 interview had been improperly removed as an exhibit in the disciplinary hearing. In reasons released in November 2021, the court ordered disclosure of the video to a media consortium that included CBC, CTV, Postmedia, and the Toronto Star, with a publication ban on the identity of the victim. The IPC subsequently confirmed that the appellant would not be continuing to pursue access to the 2016 interview through Appeal MA19- 00407, leading to the closing of that appeal.

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

[6] The relevant parts of the review's Terms of Reference state: AND WHEREAS Project Houston, the Toronto Police Service's 18-month investigation into the disappearance of three missing men who have now been identified as victims of serious violence, was closed in April 2014 having found no evidence of criminal conduct. AND WHEREAS [B.M.] has now entered guilty pleas and been sentenced for eight counts of first degree murder, allowing for the Reviewer to fully examine the circumstances surrounding the investigations into the disappearance of his victims, including but not limited to how and when he was identified as a person of interest or suspect and any deficiencies in such investigations. [page 1]

representations.[7]

[8] After a 31-month investigation and review, a report titled *Missing and Missed - Report of The Independent Civilian Review into Missing Person Investigations* (*Missing and Missed* or the report) was released in April 2021.[8] I subsequently sought the parties' supplementary representations on how the publicly available *Missing and Missed* report may affect the application of the public interest override in section 16 of the *Act* to the interview. First, I sought the appellant's supplementary representations on the review and report. Upon consideration of them, and after viewing the interview again, I wrote to the police to seek their supplementary representations in response to the appellant's. In particular, I asked the police to address the possibility of severance under section 4(2) of the *Act* and the potential for a differential application of the public interest override in section 16 with consideration of whose personal information was in the record at issue. The police provided supplementary representations, but they did not address severance or the possibility of section 16 applying to require disclosure of some, if not other, personal information. The police maintained their decision to deny access to the interview in full.

[9] Subsequently, I decided to notify other individuals whose interests might be affected by disclosure of the interview: B.M., individuals from the LGBTQ+ communities (community members), and family members of the three men who had been considered missing at the time of the interview, but who were later confirmed deceased. B.M. declined consent to the disclosure of his personal information. One of the community members also declined consent. The other notified affected parties did not respond.[9]

[10] In this order, I find that the mandatory section 14(1) personal privacy exemption applies to the interview. I also find that the public interest override in section 16 of the *Act* does not apply to require disclosure of any of the interview. Although I find there to be a public interest in disclosure of the interview, I find that the public interest identified by the appellant is not compelling and that it does not outweigh the purpose of the personal privacy exemption in section 14(1). I uphold the police's decision to deny access to the interview in its entirety and dismiss the appellant's appeal.

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[7] For the purpose of sur-reply, I shared the police's reply representations with the appellant, as well as a copy of the publicly available March 26, 2019 statement from the review about the expansion of the Terms of Reference.

[8] https://tinyurl.com/Missing-and-Missed-April-2021: Volume I, Executive Summary and Recommendations; Volume II, Investigations; Volume III, Relationships: the Police and Communities; and Volume IV, Recommendations, Conclusion and Appendices.

[9] The IPC made efforts to reach the identified affected parties by mail and phone using the last-known contact information for them provided by police. The contact information provided by the police was not current for some of these individuals and the IPC's independent efforts to update it proved unsuccessful for several of them. This included the family of one of the deceased men, for whom unsuccessful efforts were made by phone and LinkedIn messaging.

RECORDS:

[11] The record at issue in this order is a videotaped interview with B.M. by the police on November 11, 2013 (approximately 16.5 minutes in length).

ISSUES:

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

B. Does the mandatory personal privacy exemption at section 14(1) apply to the interview?

C. Is there a compelling public interest in disclosure of the interview that clearly outweighs the purpose of the section 14(1) personal privacy exemption?

DISCUSSION:

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

[12] As the police have withheld the interview under the mandatory personal privacy exemption in section 14(1), I must first decide whether it contains "personal information," and if so, to whom the personal information relates. The exemption in section 14(1) can only apply to "personal information" as that term is defined in the *Act*.

[13] Section 2(1) defines "personal information" as "recorded information about an identifiable individual."[10] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual[11] and the *Act* contains specific provisions for information about an individual in such a capacity.[12] Even if information relates to an individual in a professional capacity, it may still be

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[10] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information; Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[12] Sections 2(2.1) and (2.2) provide that the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity is not personal information, even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling. Additionally, section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years. As none of the identified individuals have been deceased for more than 30 years, this exception has no application in this appeal.

"personal information" if it reveals something of a personal nature about the individual.[13]

[14] Section 2(1) of the *Act* gives a list of examples of personal information, and the following are relevant in this appeal:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved, …
>
> (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.

[15] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[14]

Representations of the parties

[16] Neither the police nor the appellant specifically addresses the personal information definition in the *Act*, as set out above. However, the police refer to the record's containing individuals' names, and information about their sexual orientation and other sensitive details about them, generally. The police also express concern about family members (of the missing men) being identifiable from the content of the interview.

Analysis and findings

[17] Having reviewed the interview, I find that the videotape contains personal information about many identifiable individuals, which is revealed in the words spoken

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[13] Orders P-1409, R-980015, PO-2225 and MO-2344.
[14] Order 11.

and in photographic images. I find, in particular, that the interview contains not only personal information about B.M., but also about the three missing men, members of the community, and the family of one of the three men.[15] Much of this personal information is of a very sensitive nature, including details about the individuals' intimate relationships as well as their personal habits and experiences.

[18] Specifically, I find that the personal information includes the names of individuals with other sensitive information about them or information that connects them to the police's law enforcement investigation into the missing men, according to paragraph (h) of the definition in section 2(1). The personal information also includes the individuals' ethnicity and sexual orientation [paragraph (a)], B.M.'s personal opinions or views [paragraph (e)] and the views or opinions of B.M. about other individuals, some of them particularly sensitive, which is the personal information of those other individuals, according to paragraph (g) of the definition in section 2(1).

[19] For the individuals whose personal information is contained in the interview, particularly B.M. and the three missing men, I find that the severance of identifying information about them is not reasonably possible in the circumstances, given the publicity surrounding the case. Personal information remains personal information even if it is known to the public.[16]

[20] The interview also contains limited information about the two officers, such as their names and their rank, that I am satisfied is about them in a professional capacity. I am also satisfied, and I find, that disclosure of the officers' information would not reveal something of a personal nature about either of these individuals.[17] As this information is not their personal information as it is defined in the *Act*, it cannot be exempt or withheld under section 14(1). However, I also find that the officers' professional information is not reasonably severable for the purpose of section 4(2) of the *Act*, because severing it would merely result in the disclosure of "worthless information" in the context of my decision as a whole.[18]

[21] I consider the information about the police officers themselves to be distinct from the line of questioning employed by the interviewing officer, which itself contains

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[15] I use the term "missing" in this order even though it was later determined that all three of the men whose disappearances were being investigated during Project Houston were already deceased at the time of the interview in 2013.

[16] Order PO-3544.

[17] Orders P-1409, R-980015, PO-2225 and MO-2344.

[18] Section 4(2) provides that: "If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 6 to 15 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." An institution is not required to sever records for disclosure where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information; see Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

the personal information of many of the individuals discussed above, and must be reviewed under section 14(1) below for that reason.

B. Does the mandatory personal privacy exemption at section 14(1) apply to the interview?

[22] The police have withheld the interview, in its entirety, under section 14(1) of the *Act*. The mandatory personal privacy exemption in section 14(1) creates a general rule that prohibits an institution from disclosing personal information about another individual to a requester.

[23] This general rule is subject to the exceptions in sections 14(1)(a) to (f). If any of those exceptions exist, the institution is required to disclose the information. None of the exceptions at sections 14(1)(a) to (e) are relevant here.

[24] This leads me to the consideration of section 14(1)(f), which requires the institution to disclose another individual's personal information to a requester if this would not be an "unjustified invasion of personal privacy." Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy for the purpose of section 14(1)(f).

[25] Section 14(3) should generally be considered first. This section outlines several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If one of these situations applies, disclosure is presumed to be an unjustified invasion of privacy and the personal information cannot be disclosed unless there is a "compelling public interest" under section 16 requiring that the information should nonetheless be disclosed (the "public interest override", which I discuss under Issue C below).[19] [20]

Representations of the parties

[26] The police begin their representations by referring to "the conditions or expectations of disclosure under which the personal information was provided, collected or obtained" under Part II of the *Act*. These provisions have no application in the context of a request for access to records made under Part I of the *Act*, as is the case here, and I will not address them further.[21]

[27] The police argue that the presumptions against disclosure in sections 14(3)(b) (as described above) and 14(3)(h) (racial origin, sexual orientation, etc.) both apply to the interview, but they do not provide any explanation for the application of section 14(3)(h). The police submit that section 14(3)(b) applies to the interview because the

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[19] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[20] Also, section 14(4) sets out certain circumstances under which disclosure of the information would not be an "unjustified invasion of personal privacy.," None of them are relevant here.
[21] See, for example, Orders M-96 and P-679.

police conducted an investigation to determine the whereabouts of missing persons and had to assess whether there had been a violation of the Criminal Code of Canada in connection with the disappearances.

[28] The police maintain that all of the section 14(2) factors were considered, but none apply to weigh in favour of disclosure of B.M.'s personal information or that of any of the other individuals mentioned during the interview. Although the police do not cite the factors favouring disclosure in sections 14(2)(a) (public scrutiny) or (b) (promote public health and safety) specifically, they allude to them when referring to the retaining of a "former Justice of the Ontario Court of Appeal" to carry out an independent external review of "systemic concerns related to missing persons investigations" conducted by the police. The police refer to the reviewer's providing regular reports to the public on the status of the review and note that on March 29, 2019, the scope of the review was expanded to include the B.M. case.

[29] Regarding the section 14(2) factors that weigh against disclosure in sections 14(2)(e) (unfair harm) and (f) (highly sensitive), the police argue that disclosure of the interview could be expected to subject the families of the missing men to harm "as newspaper headlines and television reports would bring their tragedies to the forefront yet again. If the [record] at issue [is] released, extended family members could be identified and be subject to having their personal information exposed."

[30] The police submit that the factor in section 14(2)(h) (supplied in confidence) applies because B.M. had a reasonable expectation of confidentiality in providing a statement in the interview knowing that it would only be used in the investigation of missing persons and "in a court proceeding." The assurance of confidentiality was given by the investigating detective in the form of a "sworn statement caution (KBG Caution)."[22]

[31] The appellant's representations do not directly address the application of the mandatory section 14(1) exemption to the interview, although the appellant makes several comments essentially dismissing the police's position that B.M.'s personal privacy is worthy of protection. I return to this in the context of my discussion of the public interest override.

Analysis and findings

[32] Based on my consideration of the interview and the personal information of the many individuals that it contains, and the relevant parts of the mandatory personal privacy exemption I address below, I find that the interview is exempt under section 14(1), subject to my consideration of the public interest override in section 16.

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[22] The police also offer confidential submissions about the application of an unlisted factor they say favours non-disclosure, which I do not set out here. This submission was not shared with the appellant, because I found that it met the IPC's confidentiality criteria in *Practice Direction 7* and section 7 of the IPC's *Code of Procedure.* In any event, it is not relevant to my decision.

[33] As I said above, the exceptions in sections 14(1)(a) to (e) do not apply, but I have considered the exception in section 14(1)(f), which requires disclosure if it would not constitute an unjustified invasion of personal privacy. I begin with the section 14(3) presumptions.

[34] Section 14(3)(h) refers to "the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations." As I have noted, the police provided no argument specifically addressing the presumption in section 14(3)(h). Although it may be the case that some portions of the interview would reveal this type of personal information, I make no finding on section 14(3)(h) specifically because I am satisfied, based on my finding that section 14(3)(b) applies, that it is unnecessary to do so.

[35] Section 14(3)(b) states that:

> 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[.]

[36] The presumption against disclosure in section 14(3)(b) for personal information gathered during an investigation requires only that there be an investigation into a *possible* violation of law.[23] So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.[24] Criminal proceedings were, in fact, later instituted against B.M., of course, but even if they had not been, it is clear, and I have no difficulty finding, that at the time of the interview, police compiled the personal information at issue in the course of conducting an investigation into a possible violation of law within the meaning of section 14(3)(b). I find, therefore, that disclosure of the interview is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b).

[37] Given this finding, it is not necessary to review the factors outlined in section 14(2), because they cannot be used to rebut a presumed unjustified invasion of personal privacy under section 14(3).[25] In other words, since the application of section 14(3)(b) means that disclosure of the personal information is presumed to be an unjustified invasion of personal privacy, no factors favouring disclosure in section 14(2) can displace that finding, according to the court's decision in *John Doe*. This also means that my analysis need not squarely confront the appellant's argument that B.M. has a diminished (or non-existent) right to privacy because of his crimes, including the

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[23] Orders P-242 and MO-2235.
[24] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn; see Orders MO-2213, PO-1849 and PO-2608.
[25] *John Doe*, cited above.

possibility of this being an unlisted factor under section 14(2) weighing in favour of disclosure. However, I consider below how this argument may be relevant in the context of my section 16 analysis of the public interest override.

[38] As disclosure of the personal information in the interview is presumed to constitute an unjustified invasion of personal privacy under section 14(3)(b), the exception in section 14(1)(f) is not established, and the interview is exempt from disclosure under section 14(1), subject to my consideration of the public interest override, which I turn to next.

C. Is there a compelling public interest in disclosure of the interview that clearly outweighs the purpose of the section 14(1) personal privacy exemption?

[39] The appellant argues that the public interest override at section 16 of the *Act* should apply such that the police are required to disclose the interview in its entirety notwithstanding the application of the personal privacy exemption in section 14(1).

[40] Section 16 of the *Act* provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It 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.

[41] For section 16 to apply, it must be established that there is a compelling public interest in disclosure of the record *and* that this interest clearly outweighs the purpose of the exemption. I have considered the evidence provided by the parties and also the interview with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the section 14(1) exemption.[26]

Compelling public interest

Public interest

[42] In considering whether there is a "public interest" in disclosure of the interview, the first question to ask is whether there is a relationship between it and the *Act*'s central purpose of shedding light on the operations of government.[27] 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

[26] Order P-244.
[27] Orders P-984 and PO-2607.

opinion or to make political choices.[28]

[43] A "public interest" does not exist where the interests being advanced are essentially private in nature.[29] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[30] Further, a public interest is not automatically established because a requester is a member of the media.[31]

Compelling

[44] The IPC has defined the word "compelling" as "rousing strong interest or attention".[32] The IPC must also consider any public interest in **not** disclosing the record.[33] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[34]

[45] A compelling public interest has been found to exist where, for example, the integrity of the criminal justice system is in question.[35] A compelling public interest has been found not to exist where, for example: another public process or forum has been established to address public interest considerations;[36] a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[37] there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[38] and the records do not respond to the applicable public interest raised by appellant.[39]

Outweighs the purpose of the exemption

[46] The existence of a compelling public interest is not enough to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the exemption in the specific circumstances. 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.[40]

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[28] Orders P-984 and PO-2556.
[29] Orders P-12, P-347 and P-1439.
[30] Order MO-1564.
[31] Orders M-773 and M-1074.
[32] Order P-984.
[33] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[34] Orders PO-2072-F, PO-2098-R and PO-3197.
[35] Order PO-1779.
[36] Orders P-123/124, P-391 and M-539.
[37] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[38] Order P-613.
[39] Orders MO-1994 and PO-2607.
[40] Order P-1398, upheld on judicial review in *Ontario v. Higgins,* 1999 CanLII 1104 (ONCA), 118 OAC 108.

Representations of the parties

The police's representations

[47] The police submit that no compelling public interest exists and that the appellant has failed to provide a rationale for "the unjustified invasion of the personal privacy of the interviewee or personal privacy of the other involved parties." In particular, the police argue that there is a public interest in non-disclosure as the families and relatives of the deceased "may be subject to harm." The police say that they generally view the *Act* as "placing a greater responsibility on [them in] safeguarding the privacy interests of individuals …" and they maintain that it is not possible to disclose the interview without violating B.M.'s privacy and the privacy of others directly and indirectly involved in the events.

[48] The police maintain that other public processes and forums have been established to address public interest considerations, and they refer to town meetings and "numerous updates to the media" in 2017, three news conferences held in 2018 after B.M. was arrested, and "almost daily updates" provided in July 2018. They also refer to "numerous interviews" granted by the officers in charge of the investigation to news outlets in the Toronto area and nationwide. These initial representations from the police also refer to the then-ongoing independent external review as serving the public interest in knowing about the case.

Appellant's representations

[49] The appellant provides context for the access request by saying that they sought the 2013 interview with B.M. because when he was questioned as a witness in the disappearances of his first three victims, he had already murdered them and went on to murder others upon being released after questioning. Referring to the police's argument that disclosure would be an unjustified invasion of B.M.'s personal privacy, the appellant says that the public interest in this case, and specifically in the actions of the police, must override B.M.'s privacy rights.

[50] The appellant explains their view that personal privacy rights are "not absolute" because "in particular situations, the right to privacy may give way to a public interest in disclosure of the information."[41] One such situation, the appellant submits, is when disclosure is necessary for the purpose of examining the actions of governments or other public sector organizations, like the police. The appellant claims that the public has a right to know how and why the police did not identify B.M. as a serial killer earlier "when lives could have been saved." According to the appellant,

[41] The appellant relies on a statement by former Commissioner Brian Beamish "in written correspondence with the Star on June 25, 2019" but does not provide other context or a copy of the correspondence.

> The public has a right to see how Toronto police questioned [B.M.], in the name of transparency and in the name of understanding how mistakes were made so they are not repeated.

Police's reply

[51] The police maintain, in reply, that the *Act* "clearly defines circumstances in which the public interest override applies" and this situation is not one of those circumstances, because another public process or forum is available to address public interest considerations – the review. The police again refer to and rely on the expansion of the Terms of Reference for the review in March 2019 to include the investigations into B.M. The police submit that "the head of the committee, former Ontario Court of Appeal Justice Gloria Epstein, is extremely qualified and in a position to examine 'the actions of government and other public sector organizations', as this is the main purpose of the committee."

Appellant's sur-reply

[52] In sur-reply, the appellant says that they were told by the review's lead counsel that summaries of the interview would be provided when the report was issued, but that:

> … this is not enough. The [interview] should be made available for the public to see in the interest of full and complete transparency. If there is video evidence in a criminal trial, jurors are not shown written documents that purport to summarize the video. They are shown the video. Given the high stakes here – where police did not arrest a serial killer until he'd killed eight men over seven years – the public deserves as complete as possible an understanding of police actions. That means releasing [the interview].

The report: Missing and Missed - Report of The Independent Civilian Review into Missing Person Investigations, April 2021

[53] As the police had relied, in their earlier representations, on the then-ongoing review of its handling of missing person cases as meeting the public interest, and since both parties' representations respecting section 16 had been submitted before the report was made public, I concluded that they should both be asked to address how the review and its report serves, or fails to serve, any public interest in disclosure that exists in the circumstances. I sought representations from the parties in turn, beginning with the appellant.

Appellant's supplementary representations following release of the report

[54] The appellant's position on the effect of the review (and report) on the application of section 16 to override the section 14(1) personal privacy interests in this

appeal is, first, that the review's findings reinforce the compelling public interest in the interview,[42] and this public interest clearly outweighs B.M.'s privacy rights; and second, that the report's description of the interview is not an appropriate substitute for disclosure of the interview itself, which the appellant claims must be released in full in order to properly serve the public interest.

[55] Regarding the first point, the appellant states that the reviewer:

> … raises significant concerns about both interviews at the heart of this appeal. Overall, the Nov. [11], 2013, interview of [B.M.], Epstein says, was "deeply flawed." It had "serious deficiencies" and was "inadequately prepared for and poorly conducted," she wrote.[43] [appellant's footnote]

[56] The appellant notes that the report concluded that, due to a series of compounding investigative and systemic failures, the police missed several "important opportunities to identify [(B.M.)] as the killer."[44] The appellant writes:

> Regarding the 2013 interview, Justice Epstein details several missed opportunities to link [B.M.] to Project Houston's three missing persons cases, including that the interviewer asked "superficial" questions about the nature of [B.M.]'s relationship with one of the men, and failed to ask about his past conviction for an unprovoked assault that resulted in B.M. being prohibited from Toronto's Gay Village.[45]

[57] Explaining why the review, including its consideration of the interview in particular, is not sufficient to serve the public interest, the appellant states:

> Justice Epstein's report highlights various shortcomings in how the police conducted the interviews in question. This strengthens the appellant's claim that disclosure would serve the public interest by shedding light on the police's handling of the interviews, and the investigation at large. At the same time, Justice Epstein's descriptions of the videos omit important information about the interviews – most notably, the specific exchanges between the officers and [B.M.]. As such, disclosure of the videos is necessary for the public interest to be served adequately.

[58] In arguing that the interview must be released in its entirety to restore the trust of the marginalized communities impacted by the murders, the appellant submits that:

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[42] When the appellant made these submissions, both the 2013 and 2016 interviews remained at issue, as the Court had not yet ordered disclosure of the 2016 interview upon judicial review of its status as an exhibit in disciplinary proceedings under the *Police Services Act*. See footnote 4, above, for more context. The representations made address both interviews, but have been edited (for the most part) to reflect the sole remaining appeal before me.

[43] See *Missing and Missed*, vol 1 at 28.

[44] The appellant refers to *Missing and Missed*, vol 1 at 29.

[45] *Missing and Missed*, vol 2 at 192.

> While Justice Epstein's report highlights various flaws with the interviews in question, these communities deserve as complete of an understanding into the police's handling of these interviews as possible. A secondhand description of the videos is no substitute for the ability to see the videos firsthand, evaluate the police's conduct independently, and form an opinion about the investigation more confidently.

[59] According to the appellant, the "new insights" into the interview provided by the report contain only brief descriptions of aspects of it, not a complete summary or even a partial transcript, and that is no substitute for access to the interview itself. The appellant submits that:

> Asking the public to rely on these descriptions of the videos, as opposed to the videos themselves, risks depriving them of important information about how the interviews were conducted. The public's ability to evaluate the police's handling of the interviews would be hindered if it was unable to observe the tone of the parties, body language and, crucially, the specific exchanges between the officers and [B.M.].

[60] The appellant's view is that the disclosure of the interview remains vital and necessary even after the release of the report, because it adds important context to the report's findings.

[61] Adding to the description of the public interest they say is compelling, the appellant states that B.M.:

> … is the first serial killer in Canadian history to target the LGBTQ2 and immigrant communities.[46] … [Q]uestions have been raised about why it took seven years and eight deaths to apprehend him, and the fact that his victims were largely racialized, marginalized members of the LGBTQ2 community has contributed to the public outcry and search for answers.[47] [appellant's footnotes]

[62] The appellant submits that the interview fits squarely within the central purpose of Ontario's access laws: shedding light on the operations of a public body. Further, the appellant argues that:

> The videos of these interviews, therefore, are crucial for understanding whether the police ought to have apprehended [B.M.] sooner. The public interest in these videos goes beyond any news value they may have – they would genuinely enhance the public's ability to express public opinion

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[46] The appellant refers to *R. v. [B.M.]*, 2019 ONSC 963, at paras. 79-80.

[47] See, e.g., https://www.thestar.com/news/crime/2018/01/31/lgbtq-community-wonders-why-arrest-took-so-long-after-racialized-men-had-been-disappearing-for-years.html.

> and make political choices.[48] This is of heightened concern to various Toronto communities that were particularly affected by [B.M.]'s actions, as noted by Justice McMahon in his reasons for sentence …

[63] The appellant provides excerpts from the sentencing reasons, in which the judge referred to B.M. as "morally bankrupt", and acknowledged the vulnerability of the victims and the devastation wrought on the LGBTQ+ communities, especially the South Asian Middle Eastern LGBTQ+ community, by the murders of the eight men.[49] The appellant submits that:

> These communities, among others, would benefit greatly from a direct window into the police investigation. Given broad concerns raised by Justice Epstein about public trust and the importance of transparency — particularly, her findings about broken trust between police and many of those in racialized and marginalized communities – it is critical to provide a full accounting of what investigators did in these interviews. [appellant's emphasis]

[64] The appellant dismisses the submission that the public processes and forums the police hosted fully address public interest considerations, calling them "insufficient for those who feel distrust toward the police," and argues that full disclosure of the interview would serve the public interest "in a much more effective and inclusive manner."

[65] Regarding the requirement for the application of section 16 that a compelling public interest also be found to outweigh the purpose of the exemption, the appellant argues that withholding the interview on the basis of the personal privacy exemption is "not consistent with the very purpose of the exemption." The appellant submits that:

> The purpose of this exemption is to ensure that the personal privacy of individuals is maintained. However, the videos are not expected to impact [B.M.]'s privacy rights any more than the description of the interviews in Justice Epstein's report. While the videos would provide additional details about the interviews that are missing from the report …, the interview is not expected to contain any personal information about [him] that is not already revealed in the report.

[66] The appellant asserts that "any privacy interest [B.M.] had in these interviews was relinquished when the investigation into his murders became the subject of a public review" and, that because he will likely be spending the rest of his life in prison, the disclosure of the interview would not have any further impact on his privacy.

[67] The appellant also raises a concern with the police's position that the interview

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[48] Here, the appellant refers to Orders P-984 and PO-2556.
[49] Citing *R. v. [B.M.]*, *supra*, at paras. 63, 64, 79 and 80.

cannot be severed to permit disclosure of non-exempt information. Further, any such severance of the interview "should be minimal and relate only to the identity of the victim."[50]

Police's supplementary representations following release of the report

[68] The police respond to the appellant's supplementary representations on the application of the public interest override, and begin by disputing the appellant's role in this situation, stating that:

> By the appellant's representations, they would have you believe that they are best equipped to conduct an inquiry, and to scrutinize the handling of "missing persons" cases by Toronto Police Service (TPS) and in turn, should be given access to the video record at issue in this appeal.

[69] The police argue that the independent review conducted by Justice Epstein, with the assistance of experienced legal counsel and others, was best placed to carry out this function, and did. The police submit that:

> As part of the review, Justice Epstein organized a robust outreach that provided opportunity for all members of the public to contribute to the review in a number of ways. Specifically, an advisory group representing affected communities was established to ensure that these communities were heard. Meetings were held with affected community members, an online survey was conducted and written submissions from organizations and individuals were accepted. Policy roundtables and town hall meetings were also held. Input from other Police Services and the Ontario Ministry of the Solicitor General was also sought and examined. In addition, four papers from leading academics on issues relevant to the mandate of this review were commissioned; and most importantly, Justice Epstein and her committee engaged with many of the family members, friends and loved ones of the murder victims for further insight. Over 80,000 pages of documents were obtained from the TPS and TPSB and examined by Justice Epstein. …

[70] The police submit that, during the review, Justice Epstein viewed the interview and described the aspects of it in the report that were relevant to addressing "the systemic issues involving the police's policies and practices, thus satisfying the public's 'curiosity' and entitlement to know the truth."

[71] The police refer to the "exhaustive review" and the resulting four-volume report,

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[50] This submission appears to have been made in reference to the 2016 interview, and although there is no corresponding submission relating to the 2013 interview before me in this appeal, I have considered the extent to which there is any non-exempt information in the video that can be severed for the purposes of disclosure. See my discussion above under Issue A, and below.

part of which outlines how the B.M. investigations were flawed, and which makes 151 recommendations to improve police policies, procedures, training, education, professional development and culture respecting how the police conduct missing person investigations. The police submit that the police and the TPSB responded by issuing a joint statement accepting all 151 recommendations and establishing an implementation team to track the ongoing status of the recommendations. The police add that the website set up specifically to demonstrate to the public the progress of implementation includes a feedback form for members of the public to provide comments or suggestions. In the police's view, the circumstances of this appeal are such that a compelling public interest should not be found to exist because another public process or forum is available to address public interest considerations.

[72] The police reject the appellant's arguments about B.M.'s privacy interests being less worthy of protection. The police say that "a person's right to privacy does not disappear when they enter the penal system," adding that the *Act* contains no limitation on the privacy rights of incarcerated individuals.

[73] In conclusion, the police say that as the interview contains the personal information of both B.M. and the people to which he refers, and the appellant has not established the grounds for the public interest override to supersede their privacy rights, access to the interview should not be granted.

Analysis and findings

[74] To provide context for my consideration of the public interest override in this appeal, more detail about the interview is necessary. As stated, the interview contains the personal information of the three missing men, members of the community, the family of one of the three men, and B.M. himself, all of which I found exempt under section 14(1) above.

Personal information of men other than B.M.

[75] The interview runs just over 16.5 minutes and proceeds with the interviewing officer asking B.M. questions, most directly related to the missing men and his knowledge of or acquaintance with them. B.M. is shown photographs of various individuals, including the missing men. As the line of questioning is clearly focused on gathering information about the missing men and what B.M. might have known about them, the interview – both questions and responses – consists almost exclusively of the mixed and intertwined personal information of the three men and B.M., a good deal of which is intimate and sensitive in nature. B.M.'s responses also include personal information about community members and the family of one of the missing men, also intertwined with B.M.'s. In the context of these responses, it is not reasonably possible to sever B.M.'s personal information from the personal information of the missing men or the other identifiable individuals.

[76] In addressing the public interest override in section 16, I wish to highlight the privacy interests that are at stake here. It is important to acknowledge the significant privacy interests of the individuals other than B.M., including the three missing men, their families, and members of the community. In the interview, intimate and sensitive personal information about a number of these other individuals is discussed in some detail. Below, I address the three elements of the public interest override separately: 1) is there a public interest? 2) is it compelling? and 3) does it outweigh the purpose of the personal privacy exemption? My consideration of all the elements of the public interest override test is necessarily coloured by my consideration of the significant privacy rights and interests of these individuals.

Personal information of B.M. alone

[77] As part of my analysis of section 16, I have also considered and I address below the approximately 85-90 seconds of the interview where B.M. is asked about his social activities, particularly online, and his answers relate only to him.

[78] I have stressed above the importance of the privacy interests of the individuals other than B.M. The situation is somewhat different with respect to the privacy interests of B.M. himself. As I noted in reviewing the mandatory section 14(1) exemption, the appellant's position is that B.M.'s right to privacy is diminished, if it exists at all, because of the nature of his crimes. In my view, this argument has considerable merit and has support in past Canadian court decisions in other areas of the law. In particular, the courts have recognized – in decisions decided in the context of section 8 of the *Canadian Charter of Rights and Freedoms* (search and seizure) – that a convicted offender has a substantially reduced expectation of privacy, particularly when the individual is incarcerated.[51] In the circumstances, I do not need to decide the extent to which B.M.'s privacy rights can be overridden in the public interest, because I find below that, in any event, there is no compelling public interest in the disclosure of the 85-90 seconds of the interview in which his personal information stands alone.

[79] For the purposes of my analysis, therefore, and as will be evident from the preceding discussion, I have grouped the personal information the interview contains into two broad categories. The first category consists of the personal information of the missing men, members of the community and families, which, as noted, is inextricably intertwined with B.M.'s personal information. The second category consists of the 85-90 seconds of the interview containing B.M.'s personal information standing alone. For the reasons given below, I find that the public interest override does not apply to require

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[51] See, for example, *R. v. Stillman,* 1997 CanLII 384 (SCC) at para 61 and *R. v. Sutherland (J.D.),* 1997 CanLII 22990 (MB QB). In the access context, see Order P-679; in that decision (where no presumption against disclosure in section 21(3), the equivalent to section 14(3) of *MFIPPA*, applied), former Assistant Commissioner Irwin Glasberg found the factor weighing against disclosure in section 21(2)(i) (unfair damage to reputation) did not apply because disclosure of personal information about an individual who had been convicted of a criminal offence and subsequently served a prison term would not *unfairly* damage his reputation.

disclosure of either category of exempt personal information.

Public interest

[80] The appellant argues that there is strong public interest in the disclosure of the full 2013 police interview with B.M. No summary can act as a substitute for access to the entire interview, the appellant says, because of the terrible acts that B.M. committed after the interview, when he was let go and went on to murder five more men before his arrest in 2018. The appellant maintains that there is a strong public interest in what the police did, or did not do, in the interview, and the nature of their interactions with B.M. that day, including the specific exchanges between the interviewing officer and B.M. The appellant argues that disclosure of the interview is essential for the public to scrutinize and understand the failures of the police's investigation into B.M.'s crimes generally, and to restore the trust of the affected communities in policing and the police, in particular.

[81] Based on the appellant's representations, my review of the interview, and the circumstances surrounding its creation, I find that there is a public interest in its disclosure. I agree with the appellant that the manner in which the investigation was conducted and, specifically, the failure of the police to identify B.M. as a suspect in the disappearances of the three men at that time is a matter of strong public interest. There has been extensive media coverage and public discussion of the crimes he was eventually convicted of, and it is most notable that he committed five of the eight murders after the November 2013 interview with the police. There is validity to the appellant's argument that, in the circumstances, the public was entitled to question the response of the police, particularly in its failure to identify the threat B.M. posed, and resulting failure to protect the LGBTQ+ communities. Given the notoriety of B.M.'s crimes, and the other aspects of this matter described above, I accept that there is a relationship between the interview and the *Act*'s central purpose of "shedding light on the operations" of the police. The next question is whether that public interest is compelling.

Compelling

[82] For the reasons I give below, I find that the public interest in disclosure of the interview is not a compelling one, given the significant public discussion already made possible by the review and its report.

[83] As stated, a compelling public interest has been found not to exist where the following circumstances are present: another public process or forum has been established to address public interest considerations;[52] a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[53] and there has already been wide public coverage or debate of

[52] Orders P-123/124, P-391 and M-539.
[53] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

the issue, and the records would not shed further light on the matter.[54]

[84] The appellant has provided evidence to demonstrate, and it is not really in dispute, that B.M.'s murder of eight men has been the subject of significant media attention and discussion. Nor is it in doubt that there were serious concerns about the police's Project Houston investigation from 2012 to 2014 – namely delays, lack of coordination and preparation, and a resulting failure to protect public safety – that contributed to making those murders possible.

[85] On the whole, however, I accept the police's position that B.M.'s criminal behaviour and activities, and more significantly, the police's handling of the investigation, have already been the subject of significant scrutiny by the media, in the court proceedings, and, most importantly, in the review of the police's handling of the case by the Independent Civilian Review into Missing Person Investigations. A significant amount of information has already been disclosed in each of these contexts concerning the activities of the police, and, as I explain below, I conclude that this adequately addresses the identified public interest considerations.

[86] The police provide various examples in support of their assertion that other public processes and forums have been established to address public interest considerations. They include town halls, news conferences and daily updates. If the public processes and forums were limited to those, I would have had difficulty finding these adequate to serve the public interest in this case. Most of the news conferences and all of the "daily updates," for example, took place after B.M. was arrested and, in my view, none of these would have addressed the particular public interest identified by the appellant. Instead, the review and its report are most persuasive in my finding.

The review and the *Missing and Missed* report

[87] The report has provided the public with the most significant source of information available about the circumstances surrounding the record at issue in this appeal. It contains a lengthy and detailed exploration of these circumstances, permitted by the expansion in March 2019 of the review's Terms of Reference to include the B.M. investigations. The statement issued by the reviewer at the time says, in part,

> By removing restrictions related to the police investigation of the crimes of [B.M.], in light of his conviction and sentencing for the murder of eight members of the community, my work can now correctly take a wider perspective.
>
> This change will permit me to ask even more questions and look directly into the facts surrounding the investigations relating to [B.M.]'s victims. …

[54] Order P-613.

> Although there is much work yet to do, I have already come to appreciate the deep sense of concern and anxiety shared by members of our LGBTQ2S+ communities as well as members of marginalized and vulnerable communities generally.[55] In that respect, I see my task as not only to provide direct answers to complex questions but also to help foster a climate that leads to an enhanced relationship between Toronto police and our diverse communities.

[88] The review's Terms of Reference provided a detailed roadmap to follow in its investigation of the circumstances and probing of the shortcomings of multiple missing person investigations. In the introduction to the report, the reviewer explains the rationale for the independent examination of how the police handle missing person investigations:

> … [M]uch has been said publicly about what the police did and did not do. Some of it is untrue, and these untruths cause me great concern. The public is entitled to know the truth; indeed, it must know the truth. So are the loved ones and friends of those who went missing. In some instances, providing an accurate account of what happened exposes serious investigative flaws or a lack of attention that made these cases more difficult to solve. In other instances, an accurate account corrects a narrative that is unfair to investigators.[56]

[89] The review was mandated to prepare a report with its findings and recommendations and was to prepare it "in a form appropriate for release to the public, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act.*"[57] The result was a four-volume, 780-page report. Most significant to this appeal is volume 2: Investigations, which is 370 pages long; it reviews Project Houston at pages 141 to 215 of Chapter 6, including the 2013 interview.

[90] The appellant recognizes that the reviewer engaged in a significant process in identifying the serious deficiencies of the interview, including inadequate preparation for and conduct of it. The appellant also acknowledges that, by comparison with its assessment of the now-public 2016 police interview with B.M., the review provided more analysis of the interview at issue in this appeal. The public interest identified by the appellant is in scrutinizing the police's interview method and procedure in their questioning of B.M. on this occasion, as well as the demeanor of the participants and

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[55] A related section of the revised Terms of Reference stated: AND WHEREAS members and groups within the LGBTQ2S+ communities in the City of Toronto have expressed concern over the manner in which the Toronto Police Services handle and have handled missing person investigations, and specifically, the investigations into the disappearance of [B.M.]'s victims, including concerns that the handling of missing person investigations in the City of Toronto may have been tainted by implicit or explicit, specific, and systemic bias.

[56] *Missing and Missed*, vol 1 at 1-2.

[57] As stated in the Terms of Reference for the review.

tone of the interaction. My view is that this interview is appropriately scrutinized within the larger context of Project Houston, and the B.M. investigations generally. The report provides a step-by-step review of the police's actions (and inactions) during Project Houston and also comments on their conduct, and the reasons why, in the reviewer's assessment, they failed to identify B.M. as a key suspect during Project Houston. The extensive consideration and analysis of, and critique about, the police in the report clearly identifies the errors made by the police in interviewing B.M. in 2013 during Project Houston, as well as the time before and time after.

[91] The reviewer evaluated all of the police's B.M.-related investigations, which occurred between 2010 and 2018, in Chapters 5, 6 and 7 of volume 2 of the report, describing the evaluation in the following terms:

> A significant component of that evaluation involves how [it] was organized and case managed; how and what information was collected, recorded, indexed, cross-referenced, and used; and the extent to which investigators availed themselves of existing external and internal technological and analytic tools and resources to advance [the investigation].[58]

[92] The flaws in the B.M. investigations, the report pointed out, were explained in part by the absence of adequate case management, and no investigation highlighted this more than Project Houston.[59] The investigation was flawed in many ways, impeding the ability of the police to investigate the disappearances properly and to end B.M.'s killing spree at an earlier stage.[60] The report describes the 2013 interview and identifies the serious deficiencies in its conduct. To begin, the police did not prepare adequately for this interview. The reviewer notes that the interviewing officer assembled photographs to show B.M., including the missing men and several others, but did not have an interview plan or questions prepared. Nor did he do a Canadian Police Information Centre (CPIC) database search relating to B.M., which would have revealed B.M.'s 2003 convictions. The reviewer points out that had CPIC been checked and those prior convictions seen, the officer could have obtained a synopsis of them and would have seen that B.M. had been convicted in 2003 of an unprovoked attack on a gay man in the Village.[61] Although the interviewing officer told the review that he thought he did such a search, the report observes that there is no mention of it in his notes, nor did he mention the convictions in the interview with B.M. or in any post-interview documents.

[93] The report considers six aspects of the questioning in the interview deemed inadequate, particularly respecting B.M.'s prior associations with the three missing men and the failure to meaningfully probe his activities or whereabouts at material times. The reviewer notes that it is obvious from her viewing of the interview that:

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[58] *Missing and Missed*, vol 2 at 108.
[59] *Missing and Missed*, vol 2 at 110.
[60] *Missing and Missed,* vol 2 at 141.
[61] *Missing and Missed,* vol 2 at 190.

> [T]he investigator who questioned [B.M.] was reticent about asking about [B.M.]'s sexual relationships with any of the missing men. He failed to appreciate the significance of [B.M.]'s potential connection to all three men, misunderstanding that those connections were different from those described by other witnesses. Part of the problem was a lack of understanding of the gay community and its culture. The investigators had very limited knowledge of the gay community's dating websites, how gay men connected with each other, the places they frequented, or the social interactions within the Village.[62]

[94] The report not only identifies the clear lack of preparation for this interview, but also the serial failures that followed and compounded matters. The report observes that, although flawed, the interview provided police with a potentially meaningful connection between all three of the missing men,[63] but it was overlooked because the summary notes of the interview failed to record it. The interview summary was not reviewed by a supervisor and no report (or the interview videotape itself) was ever entered into the major case management system. No forensic examination was done of the first missing man's laptop computer that would have revealed B.M. lied about their relationship in the interview.[64] Nor was the username B.M. used for three meet-up websites looked into further.[65]

[95] The reviewer pointedly identifies the systemic issues reflected in the flawed interview as follows:

> The point here is that full preparation for the interview, an understanding of [B.M.]'s criminal history, and his connection to all three missing men should have resulted in heightened scrutiny of his conduct. Such scrutiny should have carefully examined his whereabouts at the material times (questions that were only superficially addressed during his interview); revealed, through proper forensic examination of [the first man's] computer, that he lied about his relationship with [the first man]; and, ultimately resulted in additional investigative work.[66]

[96] And, finally, the report identifies how B.M. disarmed others, including the interviewing officer, with "his calm and ostensibly helpful approach to the interview."[67]

Determination of "compelling" in relation to the particular personal information at issue

[97] It is against this backdrop that I have considered whether disclosure of the

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[62] *Missing and Missed,* vol 1 at 60.
[63] *Missing and Missed*, vol 2 at 191-193. See also vol 1 at 14.
[64] *Missing and Missed,* vol 2 at 216.
[65] For example, see *Missing and Missed,* vol 2 at 178.
[66] *Missing and Missed*, vol 2 at 216. See also vol 1 at 28-29
[67] *Missing and Missed*, vol 2 at 216.

interview is necessary to permit meaningful public scrutiny, discussion and understanding of the failures of the police investigation into B.M. thereby establishing the public interest as compelling. In my view, much is known about the circumstances of, and deficiencies in, the investigations, and the interview itself. The reviewer has seen and examined the interview, as I have also done. During the course of the review, great care was taken to consult the families, friends and communities of the missing men. The comprehensive report that was issued scrutinized and catalogued the ways in which the police's 2013 interview with B.M. and the investigations overall were inadequate.

The personal information of the men other than B.M.

[98] The appellant argues that transparency demands that members of the public see for themselves how the police questioned B.M. so that they may understand how mistakes were made and prevent them from being repeated. The appellant also maintains that no summary of the interview could offer the necessary information about how the interview was conducted, such as "the tone of the parties, body language and, crucially, the specific exchanges between the officers and [B.M.]." I acknowledge that the report does not reveal the questions B.M. was asked and the answers he gave. As I said above, however, the interview is largely comprised of the personal information of identifiable individuals other than B.M. and for the most part, B.M.'s own personal information is not reasonably severable from the personal information of these other individuals because it is all inextricably intertwined. I have already acknowledged and emphasize here the very significant privacy rights of the individuals other than B.M. – namely the three missing men, their families, and the identified members of the community, whose sensitive personal information appears in the interview.

[99] Both the nature of the personal information of these other individuals and considerations flowing from concern for their privacy help inform my finding that the public interest in the disclosure of their personal information is not compelling. Specifically, I am not satisfied that the personal information of these other individuals that is conveyed in the questions and answers in the interview is connected in any direct way to the public interest identified by the appellant. Given this, I do not believe that disclosure of the portions of the interview containing the intertwined personal information of B.M. and other individuals would, as the appellant asserts, help mend the broken trust of the public, particularly the families, other loved ones and the affected LGBTQ+ communities. To the extent that a light needs to be shone on the deficiencies of the police in relation to the interview, that has already been accomplished by the review.

B.M.'s personal information standing alone

[100] Further, regarding the brief portions of the interview that contain only the personal information of B.M. related to his social activities, particularly online, standing alone, I find that these activities are comprehensively addressed in the report. Notably,

this appears in the discussion of the police's failure to look into B.M.'s username on dating websites, which includes those websites he identified in response to the questioning in the interview. In arguing for disclosure, the appellant claims that the interview likely does not contain any more personal information about B.M. than what is revealed in the report. I make no finding on that specifically, but assuming it to be true, this invites the question of how disclosing the information in the interview could further serve the public interest and purpose identified by the appellant. In addition, to the extent there may be snippets of personal information about B.M., given in his responses to the questioning in the interview about his online activities, that are not specifically mentioned in the report, these are not reasonably severable in the circumstances, as doing so to disclose them would reveal only "disconnected snippets," "worthless" or "meaningless" information.[68] With respect to whether this particular personal information about B.M. is the subject of a compelling public interest, I am satisfied that the report adequately addresses the police's failure to look further into B.M.'s username on the dating sites and the investigators' having overlooked its significance in connecting him to all three missing men.

[101] Having considered the interview and the representations of the parties carefully, I am not persuaded that disclosure of the personal information I have found to be exempt under section 14(1) would shed any further light on, or serve the purpose of informing the public about, the police's handling of the B.M. investigation at that point in time in 2013. In these circumstances, I find that disclosure of the interview itself is not necessary to serve the police accountability interest identified by the appellant and that the public interest in disclosure of the interview is therefore not compelling.

Does the public interest clearly outweigh the purpose of the section 14(1) exemption?

[102] Given my finding that the public interest does not meet the threshold of compelling, I need not go on to consider the third element of the test, whether the public interest clearly outweighs the purpose of the section 14(1) exemption. However, below I explain why, even if I had found a compelling public interest existed in the circumstances of this appeal, I would have found that it does not clearly outweigh the purpose of section 14(1).

Public interest does not outweigh the purpose of the section 14(1) exemption

[103] Section 14(1) is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this privacy interest are justified.[69] The exemption reflects one of the two key purposes of the *Act*, which is to protect the privacy of individuals with respect to personal information about themselves held by institutions.[70] In light of this purpose, I must carefully balance the public interest in disclosure against the privacy interests of the

[68] Orders PO-1663, cited above, and PO-2033-I.
[69] Order P-568.
[70] Order PO-2805.

individuals identified in the record.[71]

[104] A vital aspect of this balancing relates to my finding above that the interview not only contains the personal information of B.M., but that of many other individuals, including the three missing men, their families, and members of the community. As I also observed above, the interview contains highly sensitive personal information about a number of these other individuals. In their representations on the mandatory personal privacy exemption in section 14(1),[72] the police argued against disclosure of the interview on the basis that it could be expected to subject the families of the men to unfair harm because "newspaper headlines and television reports would bring their tragedies to the forefront yet again." I accept this consideration to be highly relevant in assessing whether the public interest (were it compelling) would outweigh the purpose of section 14(1).

[105] Without question, the failures of the police in their investigations into B.M., including those revealed by the interview, had terrible consequences for the five men murdered after this interview took place. But I disagree with the appellant's implicit suggestion that the public interest in scrutinizing the police investigation beyond the exhaustive review that has already taken place outweighs the privacy rights of the missing men (and, by implication, their families) or the community members in the circumstances of this appeal. In this respect, I agree with the police's submission that the appellant has not established the grounds for the public interest override to "supersede" the privacy rights of these individuals.

[106] The identities of the various members of the community who are mentioned in the interview are not public. The identities of the three missing men are public and well known, but this does not mean that the sensitive details in the interview are less worthy of protection. I find the nature of the personal information, and the particular sensitivity of some of it, is significant to this balancing of the public interest against the purpose of section 14(1). I agree with the police that its disclosure would only exacerbate the distress of the families of the missing men and members of the community referred to in the interview who no doubt have been trying to move on since these events.[73]

[107] Accordingly, even if I had found there to be a compelling public interest in the disclosure of the interview, I would not have found that this public interest is sufficiently

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[71] Order PO-3164.

[72] Respecting the factors in sections 14(2)(e) (unfair harm) and 14(2)(f) (highly sensitive).

[73] On a related note, the report includes the following acknowledgement in Chapter 2 (Honouring the Lives Lost): "I also want to thank the many family members, loved ones, friends, and members of the Village who agreed to meet with me. I know it was painful for them to share their experiences and their memories. I also realize they made this sacrifice to ensure I appreciated the true nature of the suffering and loss at the heart of this Review. Those who met with me have helped me understand the terror of a loved one gone missing and the devastation of learning that their worst fears have come true. I have heard of the lasting impact of these events – the difficulties in trusting people and in forging new relationships, to name but two. Simply put, their lives will never be the same again." *Missing and Missed*, vol 2 at 21.

compelling to override the privacy protection purpose of the section 14(1) exemption in the circumstances of this appeal.

Summary

[108] To conclude, given the significant public discussion that has already taken place aided by the review and its report, and the sensitive nature of the personal information at issue, I find that a compelling public interest in disclosure has not been established. Further, even if a compelling public interest were found to exist, it does not clearly outweigh the purpose of the mandatory personal privacy exemption in section 14(1). Section 16 does not apply.

ORDER:

I uphold the police's decision to deny access to the interview under section 14(1), and I dismiss the appeal.

Original Signed by: July 6, 2022

Daphne Loukidelis
Adjudicator