Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4252

Appeal MA19-00341

St. Thomas Police Services Board

September 19, 2022

Summary: The appellant sought access to certain records and to all information about him, held by the police, for a specific time period. The police granted the appellant partial access to the records responsive to his request. The police relied on the discretionary exemptions in section 38(b) (personal privacy), and in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations) and 8(1)(l) (facilitate commission of an unlawful act), to deny access to information in certain emails. The police also claimed that a complaint file provided to the Chief of Police from the Office of the Independent Police Review Board, and work schedules for their officers, were excluded from the application of the *Act* under the exclusion in section 52(3) (employment or labour relations). Finally, the police claimed that their correspondence with the IPC about the appellant was excluded from the application of the *Act* under section 52(2.1) (ongoing prosecution) and section 52(3). The appellant challenged the police's claims and the reasonableness of their search for responsive records.

In this order, the adjudicator finds that the police have not established the application of the discretionary exemption in section 38(a), in conjunction with sections 7(1) and 8(1)(l), and she orders the information withheld under those sections disclosed. She also finds that the police have not established that their communications with the IPC about the appellant are excluded under sections 52(2.1) or 52(3) and she orders the police to issue an access decision in respect of those records. She also orders the police to issue an access decision for any records of the number of access requests they received between November 19 and December 7, 2018, and the associated processing times, which request the police misinterpreted. The adjudicator upholds the remainder of the police's decision, specifically, their claim of and exercise of discretion under section 38(b), their claim that the OIPRD complaint file and their officers' work schedules are excluded under section 52(3), and the reasonableness of their search for responsive records regarding the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of "personal information"), 7(1), 8(1)(l), 38(a), 38(b). 52(2.1) and 52(3)3.

Orders and Investigation Reports Considered: Orders MO-2235, MO-3291, P-242 and PO-2248.

OVERVIEW:

[1] This order addresses an individual's right of access to police records relating to himself and to certain other records. The appellant submitted a request to the St. Thomas Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information relating to himself from November 2018 to the time of the request. In his access request, the appellant specified that he sought access to:

> Any and all information, field notes, audio/video recordings, reports, emails, with my name attached or referred to – from Nov 28th, 2018 forward. The number of record requests received by the [police] between Nov 19, 2018 & Dec 7, 2018. And the time in days to complete each request. Record of any contact between the [police] and the OIPRD [Office of the Independent Police Review Board] & IPC (Information and Privacy Commissioner) as it relates to me.

[2] In his request, the appellant also named three "officers involved" and asked the police to provide a list of the entire police platoon, including officer names and badge numbers. Finally, the appellant asked the police to answer 'yes or no' to two questions about whether specific officers were on duty at specific times, or, in the alternative, to grant him access to the "on duty logs" for November 15 to 23, 2018.

[3] The police initially issued a decision denying the appellant's request on the basis that it was frivolous or vexatious within the meaning of section 20.1 of the *Act*. The appellant was not satisfied with the police's decision and appealed it to the Information and Privacy Commissioner (IPC). The IPC attempted mediation. During mediation, the police abandoned their position that the request was frivolous or vexatious and issued a revised decision.

[4] In their revised decision, the police granted the appellant partial access to the records responsive to his request, which included emails, letters and memos. The police relied on the discretionary exemptions in section 38(b) (personal privacy), and in section 38(a) (discretion to refuse requester's own information), in conjunction with sections 7(1) (advice or recommendations) and 8(1)(l) (facilitate commission of an unlawful act), to deny access to information in certain emails. The police stated that they conducted an extensive search of their records and found no field notes, audio or video recordings, or reports for the time period specified in the appellant's request. The police also stated that they had received four access requests from the appellant and

completed them within the timelines prescribed in the *Act.*

[5] The police's revised decision also noted that, regarding the appellant's request for records of communications between the police and the OIPRD, the appellant had filed OIPRD complaints about certain police officers; the police confirmed that letters from the OIPRD to the police, and emails and memoranda regarding the appellant's complaints were included in the records disclosed to the appellant.

[6] In response to the appellant's request for records of communications between them and the IPC, the police claimed that their correspondence with the IPC in the appellant's ongoing IPC appeals was excluded from the application of the *Act* under the section 52(2.1) (ongoing prosecution) and section 52(3) (employment or labour relations) exclusions. Finally, the police claimed that "staffing, duty rosters, vacation schedules, and platoon listings" are all employment records, which are excluded from the application of the *Act* by section 52(3). In the alternative, the police claimed that the discretionary law enforcement exemption in section 8(1) applied to the requested police duty logs.

[7] In response to the revised decision, the appellant provided a list of additional responsive records that he believes exist. The police subsequently sent a letter to the appellant enclosing records that he had provided to an officer on November 17, 2018, during one of his visits to the police station, and confirming that they did not retain a copy of those records. The appellant remained dissatisfied with the police's revised decision and additional disclosure. He alleged that the police had not investigated his concern about property being removed from his home, had lied to him numerous times, and had destroyed records. The appellant also challenged the police's decision to withhold information in the records from him.

[8] Because a mediated resolution of the appeal was not possible, the appeal was moved to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry under the *Act.* I decided to conduct an inquiry, and invited and received representations from the police and the appellant on the issues set out below. I shared the parties' representations with them in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*.

[9] In this order, I uphold the police's decision with the exceptions of their claim of section 38(a), in conjunction with sections 7(1) and 8(1)(l), to withhold a URL, a path name of a document, and a paragraph in the third email, and their claim that their communications with the IPC about the appellant are excluded under sections 52(2.1) or 52(3) of the *Act*. I order the police to disclose some withheld information to the appellant, and to issue an access decision for records of their communications with the IPC about the appellant. I also find that the police have not conducted a reasonable search for records regarding the number of access requests they received between November 19, 2018 and December 7, 2018, and the processing times for those requests. I order the police to identify records responsive to this part of the request and to issue an access decision for them.

RECORDS:

[10] At issue in this appeal are three emails withheld in part, and two other records withheld in full.

[11] The records the police have withheld in full are: 1) the OIPRD's 57-page complaint file regarding the complaints filed by the appellant about three police officers, and 2) four pages of police platoon work schedules.

[12] The OIPRD complaint file was sent under a cover letter from OIPRD to the police chief. The police have already disclosed a copy of that cover letter to the appellant.

[13] In addition to the above records, the appellant seeks communications between the police and the IPC about himself, and records regarding the number of access requests the police received between November 19, 2018 and December 7, 2019, and the processing times for those requests.

ISSUES:

A. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the OIPRD complaint file and the police platoon work schedules to exclude them from the application of the *Act*?

B. Are records of communications between the police and the IPC excluded from the application of the *Act* under sections 52(2.1) and/or 52(3)?

C. Do the three emails at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

D. Does the discretionary exemption at section 38(a), in conjunction with section 7(1) or 8(1)(l), apply to the withheld information in the emails?

E. Does the discretionary exemption in section 38(b) apply to the remaining withheld information?

F. Did the police exercise their discretion under section 38(b)?

G. Did the police conduct a reasonable search for records responsive to the appellant's request?

DISCUSSION:

A. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the OIPRD complaint file and the police platoon work schedules to exclude them from the application of the *Act*?

[14] The police submit that section 52(3) of the *Act* applies to exclude the OIPRD complaint file and the police platoon work schedules from the application of the *Act*. Section 52(3) excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[1] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[2]

[15] There are three paragraphs under section 52(3) and the police rely on the first one, section 52(3)1, in their representations to claim that the OIPRD complaint file and the police platoon work schedules are excluded from the application of the *Act.* As I will explain below, I find that the third paragraph, section 52(3)3, applies to the OIPRD complaint and the work schedules.

[16] Section 52(3)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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> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[17] 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 use 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.

[18] If section 52(3)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*. If section 52(3) applied at the time the record was collected, prepared, maintained or used, it

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[1] Order PO-2639.
[2] *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (CanLII).

does not stop applying at a later date.[3]

[19] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[4] 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]

[20] If the records fall within any of the exceptions in section 52(4), the records are not excluded from the application of the *Act*.[6] Based on my review of the records at issue, none of the exceptions in section 52(4) applies in the circumstances of this appeal.

The police's representations

[21] The police submit that the platoon work schedules are about inherently employment-related matters and that they were collected, prepared, maintained and/or used by them in relation to discussions and communications in regards to work scheduling, work assignment, attendance, work performance and compensation issues relating to the employment of the officers named in the request. They add that the work schedules also contain this information for other officers who are not named in the appellant's request. The police assert that the work schedules reflect the employer-employee relationship between them and the named officers. The police state that they are responsible for scheduling employees for duty and for appropriate compensation; as such, this type of information is routinely communicated to management, scheduling and payroll staff of the police. The police submit that these are clearly matters relating to the management and staffing of their workforce, and that they have an interest as an employer in these activities. In support of their submission that work schedules are about employment-related matters, the police rely on Order PO-2643. They conclude by asserting that none of the exceptions in section 52(4) applies to the work schedules.

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[3] *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. 509.

[4] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

[5] Order PO-2157.

[6] The exceptions are:

> 1. An agreement between an institution and a trade union.
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The appellant's representations

[22] The appellant does not address the section 52(3) exclusion, or the three-part test for its application, directly in his representations. In response to the police's representations, the appellant makes various allegations about the conduct of police staff before and throughout his IPC appeal. Overall, the appellant's representations focus on his concerns about how the police treated him when he complained to them about a matter that he believed the police should have investigated.

Analysis and findings

[23] I have considered the parties' representations and the records at issue. Based on my review of the OIPRD complaint file and the work schedules, I find that they are excluded from the application of the *Act* by section 52(3)3 because they were both used by the police in relation to communications about human resources and staffing issues arising from the police's relationship with their police officers as their employer.

[24] The OIPRD complaint file and the work schedules, on their face, satisfy all three parts of the test for the application of section 52(3)3 of the *Act*. Both the OIPRD complaint file and the work schedules were collected, prepared, maintained or used by the police, in satisfaction of the first part of the test for section 52(3)3. The police collected, maintained and used the OIPRD complaint file when the police chief received it from the OIPRD, and they prepared, maintained and used the work schedules to determine and communicate when their police officers would be working.

[25] In respect of the second part of the test, the collection, preparation, maintenance or use of the OIPRD complaint file and the work schedules was in relation to meetings, consultations, discussions or communications. The police collected, maintained and used the OIPRD complaint file in relation to communications with the officers complained of; this is evident from the cover letter to the OIPRD complaint file (that the police disclosed to the appellant), which directs the police chief to take specific steps to notify the respondent officers of the OIPRD complaints. The police also prepared, maintained and used the work schedules in relation to communications with their police officers about the hours that the police officers were expected to report to work.

[26] Finally, the OIPRD complaint file and the work schedules satisfy the last part of the section 52(3)3 test because the meetings, consultations, discussions or communications relate to labour relations or employment-related matters in which the police have an interest. The police engaged in communications about the OIPRD complaint and the work schedules with the affected police officers and these communications were about employment-related matters in which the police have an interest. Specifically, the police have an interest in their officers' hours of work, performance of duties, and professional conduct, which are all, clearly, employment-

related matters.[7]

[27] Because I have found that the OIPRD complaint file and the work schedules qualify for exclusion under section 52(3)3 of the *Act*, I have no jurisdiction to address them further in this appeal. Also, I need not consider whether they also qualify for exclusion under section 52(3)1 of the *Act*, relied on by the police.

B. Are records of communications between the police and the IPC excluded from the application of the *Act* under sections 52(2.1) and/or 52(3)?

[28] In their representations, the police assert that the records of their contacts with the IPC (emails, letters, phone calls) relating to the appellant are excluded from the application of the *Act* by sections 52(2.1) and 52(3). For the reasons below, I find that neither exclusion claimed by the police applies to any records of their contacts with the IPC about the appellant.

[29] Section 52(2.1) of the *Act* excludes records relating to an ongoing prosecution from the *Act*.[8] The term "prosecution" in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada. A "prosecution" may include prosecuting a regulatory offence that carries "true penal consequences" such as imprisonment or a significant fine.[9] The section 52(2.1) exclusion is generally claimed by an institution that is the prosecuting authority.

[30] The police do not address why they believe the requested records qualify as records relating to a "prosecution" under section 52(2.1). The only submission they offer in support of their claim of section 52(2.1) is that the appeal is still before the IPC and they denied access to the records under section 52(2.1) because the "proceedings in respect of the prosecution have not been completed." The police's claim of the exclusion and their submission are insufficient to establish the application of the exclusion in section 52(2.1). The records of contacts between the police and the IPC in this appeal do not relate to a prosecution. I find that section 52(2.1) does not apply to records of the police's contacts with the IPC relating to the appellant.

[31] Regarding their claim of the section 52(3) exclusion, the exclusion discussed at Issue A above, the police assert that records of their contacts with the IPC were collected, prepared, maintained and used by the police in relation to proceedings commenced by the appellant "in relation to proceedings or anticipated proceedings before a court, tribunal or other entity" and that these proceedings were in regards to the appellant's complaints about the conduct of police officers who are employees of the police. The police's representations contain a footnote citing Orders MO-2507 and

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[7] See Orders MO-3291 and PO-2248, which also upheld the application of the exclusion to records about the days and hours worked by police officers because the recording of information for work scheduling and payment purposes "is clearly a part of the police's standard personnel management practices."

[8] Section 52(2.1) states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[9] Order PO-2703.

M-815 in support of their submission, but do not contain any explanation or discussion of those orders and why the police believe they are relevant to this issue.

[32] The police's representations on section 52(3) indicate that they rely on paragraph 1 of the exclusion, which 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:
>
> > 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.

[33] As I noted above in my consideration of section 52(3)3, the type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. The police's representations do not explain how records of their contacts with the IPC about the appellant relate to the employment of officers by the police.

[34] The police's claim of the section 52(3)1 exclusion and their corresponding brief representations are insufficient to establish the application of the exclusion in section 52(3)1. Records of the police's contacts with the IPC about the appellant do not relate to a proceeding relating to the employment of a person by the police, as required for this exclusion to apply. I find that section 52(3)1 does not apply to records of the police's contacts with the IPC about the appellant.

[35] Having found above that neither of the exclusions claimed by the police applies to exclude the records of their contacts with the IPC about the appellant from the application of the *Act*, and because the police have not claimed any other exemption to withhold those records, I will order the police to issue an access decision to the appellant for those records.

C. Do the three emails at issue contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[36] There are three emails that remain at issue, and all three contain the personal information of the appellant. As I will explain below, it is necessary to determine whether the emails contain the personal information of any individuals other than the appellant.

[37] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs,

videos, or maps.[10] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. 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.[11]

[38] If the records contain the requester's own personal information, the requester's access rights are greater than if they do not.[12] Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.[13]

[39] The personal information of the appellant in the three emails includes his name, which is in the subject line of each of the three emails, and other information about him that qualifies as personal information under paragraph (h) of the definition of that term in section 2(1).[14]

[40] Two of these emails contain only the personal information of the appellant. It is necessary, therefore, to consider the police's claim under section 38(a), in conjunction with section 8(1)(l), to withhold a URL and a computer file path from the appellant.

[41] The third email contains both the personal information of the appellant and another individual (the affected party), including the affected party's name and other information about her that qualifies as personal information under paragraph (h) of the definition in section 2(1). In this third email, the police rely on section 38(b), with reference to the presumption in section 14(3)(b) (investigation into violation of law) and sections 14(1)(a), 14(2)(f) and 14(2)(h), to withhold the personal information relating to the affected party.

[42] The police also rely on section 38(a), in conjunction with sections 7(1) and 8(1)(l), and on section 14(3)(g), to withhold the last paragraph in the third email. I presume that the police mean to argue that this last paragraph in the third email contains the personal information of its author, a Staff Sergeant, thus qualifying for exemption under the discretionary personal privacy exemption in section 38(b); however, this is not the case. The last paragraph of the third email contains only the personal information of the appellant, and, thus, this paragraph cannot qualify for personal privacy exemption under section 38(b) with reference to the presumption in section 14(3)(g). Accordingly, I will not address this exemption claim further and will consider only the possible application of section 38(a), with sections 7(1) and 8(1)(l), to

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[10] See the definition of "record" in section 2(1).
[11] Order PO -1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[12] Under section 47(1) of the *Act*, a requester has a right of access to their own personal information and any exemption from that right is discretionary, meaning that the institution can still choose to disclose the information to the requester even if the exemption applies.
[13] See sections 21(1) and 49(b).
[14] Paragraph (h) of the definition in section 2(1) states that personal information includes: 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.

the last paragraph in the third email.

[43] Having found that the three emails at issue contain the personal information of the appellant, and that one of them also contains the personal information of another individual, I will consider whether the withheld information in the emails is exempt under the discretionary exemptions in sections 38(a) and 38(b) of the *Act*.

D. Does the discretionary exemption in section 38(a), in conjunction with section 7(1) or 8(1)(l), apply to the withheld information in the emails?

[44] Section 38 provides a number of exemptions from individuals' general right of access, under section 36(1), to their own personal information held by an institution. The police rely on section 38(a), in conjunction with section 8(1)(l) to withhold a URL and path name for a document stored on the police's network in two emails, and on section 38(a), in conjunction with section 7(1) to withhold a paragraph from the third email. These sections read:

> 38. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a) if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.
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> 7(1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.
>
> 8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (l) facilitate the commission of an unlawful act or hamper the control of crime.

[45] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[15]

[46] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[16] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted

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[15] Order M-352.
[16] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.

or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made.

[47] For section 8(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime. The police, as the party resisting disclosure, must provide detailed evidence about the risk of harm if the record is disclosed. Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[17] While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[18]

The parties' representations

[48] The police submit that the information withheld under section 38(a), in conjunction with section 7(1), is advice from a Staff Sergeant to all police staff that contains recommendations on how to interact with the appellant. They assert that none of the exceptions under section 7(2) and 7(3) applies to the withheld information. The appellant does not directly address the exemption claim, but he asserts that the claim is inappropriate and an attempt to withhold information that would demonstrate the police's unprofessional conduct towards him.

[49] Regarding their claim of section 38(a), in conjunction with section 8(1)(l), to withhold a URL and path name for the storage of a document on the police's network, the police assert that release of the information would reveal investigative techniques and procedures, endanger the life or safety of officers, and facilitate the commission of an unlawful act.

Analysis and findings

[50] As the party resisting disclosure of the withheld URL and path name, and the paragraph in the records under the section 38(a) exemption, the police bear the burden of establishing that the exemption applies.

Paragraph from the third email

[51] Regarding their claim of section 38(a), in conjunction with section 7(1), to withhold a paragraph in the third email written by a Staff Sergeant about the appellant, the police have not established that the withheld information constitutes "advice or recommendations" for the purposes of section 7(1). I find that the paragraph neither relates to a discussion of a suggested course of action nor to a police officer's view of policy options to be considered by a decision-maker. Rather, the paragraph provides direction to police officers on how to interact with the appellant. This direction to

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[17] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[18] Orders MO-2363 and PO-2435.

officers does not qualify as advice or recommendations for the purposes of section 7(1), and, therefore, it does not qualify for exemption under section 38(a). The police's representations do not address their claim of section 38(a), with section 8(1)(l), to withhold this same paragraph, and, as a result, I find they have not established the application of that exemption. Since the police have not claimed any other exemption and no mandatory exemption applies to this paragraph, I will order the police to disclose it to the appellant.

URL and path name

[52] The police's single sentence in support of their claim of section 38(a), in conjunction with section 8(1)(l), which is simply a recital of some the language in section 8(1)(l), is not sufficient to satisfy their burden. The police have not established that the URL and the path name withheld under section 38(a), in conjunction with section 8(1)(l), are exempt. I find that the URL and path name are not exempt under these sections. The police have not claimed any other exemption for this information. Accordingly, I will order the police to disclose the URL and the path name to the appellant.

E. Does the discretionary exemption in section 38(b) apply to the remaining withheld information?

[53] The police have withheld information in the third email[19] under the discretionary personal privacy exemption in section 38(b) of the Act. As such, and because I have found that this email contains the personal information of both the appellant and the affected party, I must determine whether disclosure of this withheld information would be "an unjustified invasion of personal privacy" under section 38(b).

[54] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy. The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy. If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 38(b) and the institution must disclose it.

[55] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy. If any of the exceptions in sections 14(1)(a) to (e) applies, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b).

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[19] This withheld information is different from the information in the third email that I addressed in my consideration of section 38(a) above.

[56] 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. Having reviewed the information at issue, I find that sections 14(1) and 14(4) are not relevant to the present appeal. In particular, the police did not seek or receive consent from the affected party to disclose the information to the appellant (section 14(1)(a)).

[57] 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[20] must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[21] As I explain below, the presumption in section 14(3)(b) and the factors in sections 14(2)(f) and (h) are relevant in this appeal.

[58] Sections 14(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). The police claim that the presumption in section 14(3)(b) applies to the affected party's withheld personal information because the email is about an investigation into a possible violation of law. This presumption reads:

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

[59] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[22] Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[60] 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).[23] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 14(2)(e) to (i), if established, would tend to support non-disclosure of that information. The police argue that sections 14(2)(e), 14(2)(f) and 14(2)(h) apply in the circumstances of this appeal. These sections read:

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[20] The institution or, on appeal, the IPC.
[21] Order MO-2954.
[22] Order P-239.
[23] Order P-99.

> 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,
>
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive,
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[61] The factor in section 14(2)(e) is intended to weigh against disclosure when the evidence shows that financial damage or other harm from disclosure is either present or foreseeable, and that this damage or harm would be "unfair" to the individual whose personal information is in the record.

[62] The factor in section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[24]

[63] The factor in section 14(2)(h) weighs against disclosure 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. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."[25]

The police's representations

[64] The police explain that they investigated a complaint by the appellant and determined it to be a civil matter resulting from a relationship breakdown. During their investigation, the police spoke to the appellant and other affected parties. The police assert that the information at issue includes personal information that was compiled and is identifiable as part of a police investigation into possible infractions under the *Criminal Code*. The police rely on the factors in sections 14(2)(e), (f) and (h), and the presumption in section 14(3)(b) to withhold the personal information of the affected party.

[65] On the application of the presumption in section 14(3)(b), the police state that they created two "incidents" regarding the appellant's complaints about the affected party and an alleged theft. They assert that they investigated the appellant's allegations of theft, which engages section 14(3)(b) because it applies to investigations into a possible violation of the law (Order P-242).

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[24] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[25] Order PO-1670.

[66] Regarding the factors that they say apply, the police note the adversarial nature of the relationship between the appellant and the affected party. They submit that given the adversarial context, disclosure of the affected party's withheld personal information would unfairly expose her to pecuniary or other harm, as contemplated by the factor in section 14(2)(e). The police also assert that the affected party's withheld personal information is highly sensitive, engaging the factor in section 14(2)(f). They add that the affected party provided her personal information, including details of her consultations with legal counsel, in confidence, with the expectation that it would not be shared with the appellant, engaging section 14(2)(h). The police argue that the affected party's withheld personal information is not relevant to a fair determination of the appellant's rights, and, thus, they deny that the factor in section 14(2)(d) applies to favour disclosure of the information at issue.

[67] The police submit that they balanced the appellant's right of access against the affected party's right to have her personal privacy protected by considering and weighing all relevant factors. They determined that disclosure of the affected party's personal information is presumed to be an unjustified invasion of personal privacy under section 14(3)(b), and that the factors in section 14(2)(e), (f) and (h), all apply and weigh in favour of privacy protection. Accordingly, the police state that they determined section 38(b) applies to the affected party's withheld personal information because disclosure of it to the appellant would be an unjustified invasion of her personal privacy.

The appellant's representations

[68] The appellant challenges the police's claim of the personal privacy exemption in section 38(b), alleging that the police contradicted themselves when they advised him, on numerous occasions, that there was an investigation and that there was no investigation. The appellant asserts that the police, who are not lawyers and do not enjoy solicitor-client privilege, should not be able to withhold information in the records on the basis of "advice given to" other individuals.

Analysis and findings

[69] Based on my review of the withheld information and the parties' representations, I am satisfied that the information withheld under section 38(b) that relates to the affected party qualifies for exemption because its disclosure would constitute an unjustified invasion of personal privacy of another individual. The withheld information is about an affected party with whom the appellant has an adversarial relationship.

[70] Although the appellant provides lengthy representations, his representations do not address the exemptions claimed by the police. The appellant's position seems to be that he is entitled to the withheld information because it is contained in records that contain his personal information. While that is the starting point for the analysis, section 38(b) provides for an exemption from the right of access to one's own personal information granted by section 36(1). I must decide if the section 38(b) exemption applies, turning to the factors and presumptions in sections 14(2) and (3) of the *Act*.

[71] I find that the presumption in section 14(3)(b), which only requires that there be an investigation into a *possible* violation of law,[26] applies to the affected party's withheld information because the police investigated the appellant's complaints of an alleged theft by the affected party. The fact that the police eventually determined the matter was a civil dispute and not a criminal one, is not determinative, because even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply.

[72] I also find that, considering the adversarial relationship between the appellant and the affected party, the factors in sections 14(2)(f) and (h) apply and weigh favour of protecting the privacy of the affected party's personal information. The withheld information about the affected party and her communications with her legal counsel about issues relating to the dissolution of her relationship with the appellant and the division of property is highly sensitive information (section 14(2)(f)) that, in the circumstances, I am satisfied she provided in confidence to the police (section 14(2)(h)), and it would be reasonable to expect that its disclosure would cause her significant distress. Balancing the presumption and the factors that all weigh in favour of withholding the affected party's personal information against the appellant's right of access to his own personal information, I agree with the police that the affected party's privacy interests must prevail. I uphold the police's decision under section 38(b) regarding the affected party's personal information and I will consider their exercise of discretion, below.

F. Did the police exercise their discretion under section 38(b)?

[73] The section 38(b) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC may find that the institution erred in exercising its discretion where it does so in bad faith or for an improper purpose, it considers irrelevant considerations, or it fails to consider relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] The IPC cannot, however, substitute its own discretion for that of the institution.[28]

[74] Considerations that are relevant to the exercise of discretion in this appeal are:

- 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

[26] Orders P-242 and MO-2235.
[27] Order MO-1573.
[28] Section 54(2) of the *Act*.

    - 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 is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person.

The parties' representations

[75] The police submit that they exercised their discretion under section 38(b) and decided to deny the appellant access to the personal information of the affected party in the email at issue. The police state that they disclosed as much of the appellant's personal information to him as they could without unjustifiably invading the personal privacy of the affected party. The police state that they are aware that the appellant should have a right of access to his own information that they tried to respect the spirit of the *Act* and the appellant's right to access. They add that they are acutely aware of their responsibility to respect the affected party's right to privacy and, therefore, they believe they struck a balance between these obligations.

[76] The police submit that they exercised their discretion in good faith and for a proper purpose, considering all relevant factors. They state that they applied the section 38(b) exemption in a limited and specific manner, granting the appellant access to the majority of the records, and withholding only the personal information of the affected party. The police conclude that they made every effort to provide the appellant with all of his personal information. They note that the personal information they withheld as exempt does not have a bearing on the appellant's ability to exercise the advice that the investigators provided to him.

[77] The appellant's representations do not directly address the exercise of discretion. Rather, they set out allegations about the police's conduct towards him and assert that the police have a duty to provide the records to him.

Analysis and findings

[78] The appellant makes various unsupported allegations that the police acted inappropriately. Insofar as these bald allegations relate to the police's exercise of discretion, they do not convince me that the police exercised their discretion in bad faith or for an improper purpose, or that the police considered irrelevant factors.

[79] Overall, I am satisfied that the police considered relevant factors in exercising their discretion under section 38(b). They considered the fact that the appellant seeks access to his personal information, and that they disclosed much of the appellant's personal information to him. The police exercised their discretion under section 38(b) to withhold the personal information of the affected party after balancing and weighing the presumptions and factors in favour of privacy protection, and considering the privacy interests of the affected party against the access right of the appellant.

[80] I also accept that the police considered the wording of the section 38(b) exemption and the fundamental privacy interest it seeks to protect, the sensitive and confidential nature of the affected party's withheld personal information, and the adversarial nature of the relationship between the affected party and the appellant. There is nothing before to me to suggest that the police took irrelevant factors into account in exercising their discretion, or that they exercised their discretion in bad faith. For the foregoing reasons, I uphold the police's exercise of discretion under section 38(b).

G. Did the police conduct a reasonable search for records responsive to the appellant's request?

[81] Because the appellant claims that additional records exist beyond those identified by the police, I must decide whether the police conducted a reasonable search for records as required by section 24.[29] The appellant's request is for "all information" that refers to his name from November 28, 2018 forward. The *Act* does not require the police to prove with absolute certainty that further records do not exist. However, the police must provide sufficient evidence to show that they have made a reasonable effort to identify and locate responsive records.[30]

[82] To be responsive, a record must be "reasonably related" to the request.[31] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[32]

[83] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[33] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[34]

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[29] Orders P-85, P-221 and PO-1954-I.
[30] Orders P-624 and PO-2559.
[31] Order PO-2554.
[32] Orders M-909, PO-2469 and PO-2592.
[33] Order MO-2185.
[34] Order MO-2246.

The police's representations

[84] The police provide an affidavit from their Freedom of Information Analyst in support of the reasonableness of their search for responsive records. In her affidavit, the analyst attests as follows:

- She has been employed by the police since 1999 and has been the MFIPPA analyst since 2010.

- When she received the appellant's request, she queried his name in the police's Service Records Management System regarding his prior request and found two incidents (Schedule "A" to the affidavit is a screenshot of the appellant's name located in the system and Schedule "B" to the affidavit is a screenshot of the two incidents noted for the appellant in the system). The police do not maintain any additional databases that would hold information about the appellant.

- She then sent an email to all police employees asking for the notes of any employee that had spoken to the appellant. (Schedule "C" to the affidavit is a copy of this email).

- She also sent an email to the police's IT department requesting retrieval of the video recordings (Schedule "D" to the affidavit is a copy of this email, which identifies the dates and approximate times of three video recordings).

- She sent a further email to all police employees asking, again, for any notes made of interactions with the appellant and to advise if the appellant had been spoken to in an area for which a video recording would exist (Schedule "E" to the affidavit is a copy of this email).

- All emails that she sent to the employees were disclosed to the appellant as part of a subsequent access request, F19014, IPC appeal number MA19-00341.

- A further email was sent to all officers, by an Inspector, asking them to produce any materials provided by the appellant. In response to that email, two documents and a thumb drive were provided by a specified constable. The police mailed the two documents and the thumb drive to the appellant on August 27, 2019, and did not retain a copy.

- Regarding the package of documentation that the appellant states he dropped off at the police department's front desk on December 31, 2019, the appellant dropped the package off with no explanation or seeming purpose. None of the documentation was distributed to any employee of the police, nor was it retained by the police. Accordingly, this documentation no longer exists in the police's custody or control. She confirmed with a specified Inspector that this documentation was provided to the Deputy Chief; the Deputy Chief confirmed that this documentation was not retained and has been shredded. Furthermore, this documentation was not included in the appellant's access request. Attempts

to obtain clarification from the appellant were met with great resistance, combativeness, evasiveness, and condescending and confrontational behaviours.

- The appellant also challenged the reasonableness of the police's search in Appeal MA19-00074. In that appeal, the IPC upheld the reasonableness of the police's search in Order MO-3826.

The appellant's representations

[85] In his representations, the appellant alleges that the police "received official legal documents and evidence [from him] and then destroyed them." He asserts that the police should have a copy of his package of documentation from December 31, 2019, which includes an affidavit and seven notices. He also asserts that there are other records that should exist, but have not been located, for November 17, 2018, including a written statement he provided along with a financial statement and a letter that he provided as "evidence."

[86] The appellant also states that his request for "the number of record requests" the police received between November 19, 2018 and December 7, 2018, and "the time in days to complete each request" has not been addressed. The appellant notes that the police misinterpreted that part of his request as a request for the number of access requests they received from him during the identified time period and the corresponding processing times. The appellant argues that this part of his access request remains outstanding.

Analysis and findings

[87] As set out above, the *Act* does not require the institution to prove with absolute certainty that further responsive records do not exist. I am satisfied that the affidavit, including the exhibits to the affidavit showing the details and steps of the police's search, is sufficient evidence that the police made a reasonable effort to identify and locate responsive records. Based on my review of the affidavit evidence, the records at issue in this appeal and those disclosed by the police to the appellant, I am satisfied that a search was conducted and managed by an experienced employee of the police knowledgeable in the subject matter of the request, and a reasonable effort was expended to locate records within the police's custody and control, which are reasonably related to the request.

[88] I have considered the appellant's arguments about the package of documents that he delivered to the police on December 31, 2019, along with the police's evidence that they did not maintain these documents. I understand that the appellant takes the view that these documents ought to have been filed or otherwise maintained by the police. The police disagree. In any event, these documents were not maintained by the police and this is why they were not identified in the police's search. The only issue before me in this appeal is whether the police's search is reasonable, including whether there is a reasonable basis to conclude that further searches would yield further responsive records. There is no basis for me to conclude that further searches will yield

these documents and, as a result, I do not order further searches.

[89] With the exception that I identify below, the police have demonstrated that their search for responsive records complied with their obligations under the *Act*. Accordingly, I find that the police conducted a reasonable search for responsive records relating to the appellant.

[90] However, I agree with the appellant that his request for the number of access requests the police received between November 19 and December 7, 2018, and the associated processing times, remains outstanding as a result of the police's misinterpretation of this aspect of his request. To remedy this oversight, I will order the police to issue an access decision in respect of any records responsive to this aspect of the request.

ORDER:

1. I order the police to disclose the withheld URL and document path name, and the last paragraph in the third email, to the appellant by **October 24, 2022, but not before October 19, 2022.**

2. I order the police to issue an access decision to the appellant in response to his request for records of any contact between the police and the IPC regarding him, and in response to his request for the number of access requests the police received between November 19 and December 7, 2018, and the time it took to process these requests. The police's access decision shall be made in accordance with the provisions of the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements of their decision.

3. I uphold the police's decision in all other respects.

Original signed by: September 19, 2022

Stella Ball
Adjudicator