

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4295

Appeal MA21-00551

London Police Services Board

December 6, 2022

**Summary:** The London Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of certain police records relating to complaints the appellant believes his ex-spouse made to the police about the appellant; the appellant's ex-spouse is named in the request as the complainant. The police refused to confirm or deny the existence of the records, under the discretionary exemption at section 14(5) of the *Act*. In this order, the adjudicator upholds the police's decision to claim section 14(5), though read with the discretionary exemption at section 38(b) (personal privacy) of the *Act*, and dismisses the appeal.

**Statute Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(2), 14(3), 14(5), and 38(b).

### OVERVIEW:

[1] The London Police Services Board (the police) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of certain police records. Parts 1, 3, and 4 of the request, which are the subject of this appeal,<sup>1</sup> as follows:

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<sup>1</sup> During the inquiry, the police determined that part 2 of the request relates to a record that they found to be responsive to a separate request to them made by the same appellant (which was also subject to an

"Please provide detailed description of requested records, personal information records or personal information to be corrected:

1. Requesting a copy of the two 9-1-1 calls related to [specified occurrence report] made on [specified date] at 12:39am and 1:11am from [specified phone number].

...

3. Requesting a copy of photos provided to police in their original format included in the [specified occurrence report].

4. Requesting a copy of the occurrence filed between [specified dates, months after the date listed in part 1 of the request], occurrence number docketed and mentioned in [specified occurrence report listed in part 3 of the request] and regards the accusation of 'being followed' made by the complainant [the appellant's named ex-spouse<sup>2</sup>]"

[2] By way of background, and as I will elaborate on later in this order, the requester believes that the police were provided with allegations about him and, as set out above, he specifically names his ex-spouse in his request for information relating to this. What this request presupposes is the requester's belief that his ex-spouse complained to the police about him.

[3] In response to the request, the police issued a decision refusing to confirm or deny the existence of records relating to parts 1, 3 and 4 of the request, under section 14(5) (refuse to confirm or deny) of the *Act*.

[4] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution. During mediation, the appellant advised the mediator that he is pursuing access to the information responsive to parts 1, 3, and 4 of the request, which he believes to exist. The mediator conveyed this to the police, who advised that they were maintaining their decision. The appellant advised the mediator that he wishes to pursue the appeal at adjudication. Accordingly, this appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] I conducted a written inquiry under the *Act* by seeking representations from the

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IPC appeal). Therefore, part 2 of the request was removed from the scope of this appeal, and adjudicated separately in the appeal resolved by Order MO-4247.

<sup>2</sup> It is not clear from the evidence before me whether this individual was his spouse or ex-spouse at the time of the request. For the purpose of this order, I will refer to her as his ex-spouse, but nothing turns on whether she is or was a spouse or ex-spouse at the time of the request and/or the inquiry in this appeal.

parties on the police's decision to claim section 14(5) of the *Act*.<sup>3</sup> In doing so, I provided the appellant with a summary of the non-confidential portions of the police's representations, but withheld portions of the police's representations due to certain confidentiality concerns.<sup>4</sup>

[7] For the reasons that follow, I uphold the police's decision to claim section 14(5) of the *Act*, though read with the discretionary exemption at section 38(b) (personal privacy), and dismiss the appeal.

## **ISSUES:**

- A. Do the records, if they exist, contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption at section 14(5) read with section 38(b) of the *Act*, apply in the circumstances of this appeal?
- C. Did the police exercise their discretion under section 14(5), read with section 38(b)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

### **Background information**

[8] To better understand my decision in this appeal, it is important to keep in mind the underlying context: the appellant *names his ex-spouse*, and lists a phone number, in a request for various records.

[9] In other words, from the wording of his request, it appears the appellant believes that his ex-spouse contacted the police with various allegations and/or complaints, and related photos, about him. The appellant's request for records, therefore, presupposes that his ex-spouse contacted the police in this way, in the first place.

[10] Also in the background are the appellant's assertions that there are criminal and family court matters which "hinge" on the records he seeks. He expresses a desire to prove his innocence and support his credibility through the records he has requested. He asserts that he is aware that "the record" exists because "a copy was used" at his trial (but without further specifics, it is not clear what he refers to by this). He also states that his representations will focus on his desire to authenticate the photos that he seeks through part 3 of his request.

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<sup>3</sup> The parties provided both initial and reply/sur-reply representations.

<sup>4</sup> In accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

[11] The police have refused to confirm or deny whether any of the records requested exist. This appeal addresses whether, in the circumstances, the police were entitled to rely on the section of the *Act* that allows them to refuse to confirm or deny the existence of records responsive to the appellant's request.

**Issue A: Do the records, if they exist, contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?**

[12] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the records contain (or would contain, if they exist) "personal information," as that term is defined in section 2(1) of the *Act*, and if so, to whom the personal information relates (or would relate, if the records exist).

[13] As I will explain below, I find that if responsive records exist, they would contain, at a minimum, the "personal information" of the appellant and his ex-spouse, whom he named in his request.

***What is "personal information"?***

[14] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

*Recorded information*

[15] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>5</sup>

*About*

[16] 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.<sup>6</sup> In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.<sup>7</sup>

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<sup>5</sup> See the definition of "record" in section 2(1).

<sup>6</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and (2.2), which state:

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

(2.2) For greater certainty, subsection (2.1) applies 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.

<sup>7</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

### *Identifiable individual*

[17] 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.<sup>8</sup>

### ***What are some examples of “personal information”?***

[18] Section 2(1) of the *Act* gives a list of examples of personal information. Examples of personal information that are listed in the *Act* include information relating to age, marital or family status, medical history, contact information, and an identifiable individual’s views or opinions.<sup>9</sup> If a person’s name appears in a record with other personal information, their name is also personal information.<sup>10</sup>

[19] 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.”<sup>11</sup>

### ***Whose personal information is in the record?***

[20] It is important to know whose personal information is in the record. If the record contains the requester’s own personal information, their access rights are greater than if it does not.<sup>12</sup> Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>13</sup>

### ***Representations***

[21] The police submit that the appellant requests access to records which, if they exist, “would document [the police’s] interactions with the affected parties.” The police submit that 9-1-1 calls and police occurrence reports routinely contain personal information such as addresses, telephone numbers, dates of birth, gender, places of employment, and statements from the affected parties. The police submit that if records responsive to parts 1, 3, and 4 of the request exist, it is reasonable to expect that “an individual” may be identified if the information is disclosed.

[22] The appellant submits that the information he seeks relates to him and is his

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<sup>8</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>9</sup> Information relating to age and marital or family status is listed at paragraph (a) of the definition of “personal information” at section 2(1) of the *Act*; information relating to medical history, contact information, and an identifiable individual’s views or opinions is listed at paragraphs (b), (d), and (g) of the definition of “personal information” at section 2(1), respectively.

<sup>10</sup> *Ibid*, paragraph (h).

<sup>11</sup> Order 11.

<sup>12</sup> Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

<sup>13</sup> See sections 14(1) and 38(b).

personal information. He also states that he is already aware of various specified types of personal information relating to other individuals involved, and that he is not seeking personal information that he is not already aware of.

### ***Analysis/findings***

[23] Having considered the wording of the request and the parties' representations, I find that if responsive records exist, they would contain the "personal information" (as that term is defined in the *Act*) of the appellant and his ex-spouse.

[24] I am persuaded by the police's representations that, considering the nature of the appellant's request, it is reasonable to conclude that any responsive records, if they exist, would contain the types of personal information listed in the police's representations. These types of information clearly qualify as "personal information," as listed examples of "personal information" in the definition of that term at section 2(1) of the *Act*.<sup>14</sup>

[25] In addition, if responsive records exist, since they would each relate to interaction(s) with the police, that fact in itself is "personal information," under the introductory wording of the definition of that term ("recorded information about an identifiable individual"). That is because disclosure would reveal, at the very least, the fact of an interaction with police and/or the fact of having been the subject of a complaint to police – this is "recorded information about an identifiable individual."

[26] Therefore, given the wording of the request and the parties' representations, in the circumstances, I am satisfied, and find, that if responsive records exist, they would contain, at a minimum, the personal information of the appellant and his ex-spouse (given the fact that he names her in his request for police records). Since the records, if they exist, would contain the appellant's personal information, the police's refusal to confirm or deny the existence of records is made through section 38(b) of the *Act*, as I explain in further detail below.

### **Issue B: Does the discretionary exemption at section 14(5), read with section 38(b) of the *Act*, apply in the circumstances of this appeal?**

[27] The police submit that the two-part test for section 14(5) has been met. For the reasons that follow, I agree that it applies, but read with section 38(b).

[28] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. If the records contain the personal information of individuals other than the requester but not that of

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<sup>14</sup> At paragraphs (a), (b), (d), (g), and (h) of the definition of "personal information" at section 2(1) of the *Act*.

the requester, access to the records is addressed under Part 1 of the *Act* and the exemptions at sections 12 through 22 may apply.

[29] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an *unjustified invasion* of the other individual's personal privacy, the institution may refuse to disclose that information to the requester, or may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[30] The police rely on section 14(5), which is found in Part I of the *Act*, to refuse to confirm or deny the existence of responsive records on the basis that disclosure would constitute an unjustified invasion of personal privacy.

[31] Section 38 contains no parallel provision to section 14(5). Since I have found that any responsive records, if they exist, would contain the appellant's personal information as well as the personal information of his ex-spouse, the issue is whether section 14(5) can apply in the context of a request for one's own personal information. The IPC has found that it can.<sup>15</sup> I agree with this approach, and I adopt it in the circumstances of this appeal.

[32] Accordingly, I will consider whether section 14(5) applies in this case. This section reads:

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

[33] A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.<sup>16</sup>

[34] Section 14(5) of the *Act* gives an institution the discretion to refuse to confirm or deny the existence of a record if confirming or denying the record's existence would be an "unjustified invasion of personal privacy."

[35] For section 14(5) to apply, it must be the case that:

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<sup>15</sup> See Orders M-615, MO-2984, MO-3235 and MO-3293.

<sup>16</sup> Order P-339.

1. disclosure of the record (if it exists) would be an unjustified invasion of personal privacy, and
2. disclosure of the fact that the record exists (or does not exist) would in itself give some information to the requester, and disclosure of that information would be an unjustified invasion of personal privacy.

[36] The Ontario Court of Appeal has upheld this approach and two-part test.<sup>17</sup>

***Part one: disclosure of the record (if it exists) would be an unjustified invasion of personal privacy***

*Would the record, if it exists, contain personal information?*

[37] Under part one of the section 14(5) two-part test, the institution must show that disclosure of the record, if it exists, would be an “unjustified invasion of personal privacy.” This can only happen if it is “personal information,” as that term is defined in section 2(1) of the *Act*, that would be disclosed if the institution granted the request for information.

[38] For the reasons set out under Issue A, above, I have found that if responsive records exist, they would contain the personal information of the appellant and his ex-spouse.

*Would disclosure of the records, if they exist, be an “unjustified invasion of personal privacy”?*

[39] Sections 14(1) to (4) are relevant in deciding if disclosure of the information would be an “unjustified invasion of personal privacy” under section 14(5).<sup>18</sup>

[40] Section 14(1) should be considered first. If any of the section 14(1)(a) to (e) exceptions exist, disclosure would not be an unjustified invasion of personal privacy. Here, the parties do not claim that any of these exceptions apply, and I see no basis for finding that they do.

[41] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would be an *unjustified invasion of privacy* under section 14(5), read with section 38(b).

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<sup>17</sup> Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

<sup>18</sup> Neither party has submitted that any of the circumstances listed in section 14(4) are present, and I find that they are not.



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

### ***Representations***

[42] The police submit that, if responsive records exist, the presumption at section 14(3)(b) (investigation into possible violation of law) would apply, given the wording of the request and the types of records that would be responsive to the request. They also submit that the only way that the presumption can be overcome is if the personal information at issue falls under section 14(4), or if section 16 applies. The police submit that section 14(3)(b) is not rebutted by section 14(4) in this appeal, and that there is no compelling public interest, under section 16 of the *Act*, to rebut section 14(3)(b) either.

[43] The police submit that since section 14(3)(b) would apply if responsive records exist, then there is no need to consider whether section 14(2) factors are relevant.<sup>19</sup> However, they claim a number of section 14(2) factors may be relevant, if records exist, as I will discuss below.

[44] The appellant does not make submissions about section 14(3)(b), or any other presumptions, applying.

### ***Analysis/findings***

[45] Based on my review of the parties' representations and the wording of the request, I am satisfied that, if responsive records exist, the personal information at issue would have been compiled and is identifiable as part of an investigation into a possible violation of law. The presumption at section 14(3)(b) requires only that there be an investigation into a *possible* violation of law.<sup>20</sup> So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.<sup>21</sup> In my view, due to the nature of the information that the appellant seeks, it is reasonable to conclude that, as the police submit, if responsive records exist, section 14(3)(b) would apply to them.

[46] Therefore, I find section 14(3)(b) is a factor favouring non-disclosure of the personal information, if it exists.

[47] Although the police submit that there is no need to consider whether section 14(2) factors are relevant, that is not the case because I have found it reasonable to conclude that if responsive records exist, they would include the personal information of the appellant. For records that contain the appellant's personal information, the test for whether disclosure is an unjustified invasion of personal privacy is not exactly the same

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<sup>19</sup> The police rely on Order MO-1757 for this submission.

<sup>20</sup> Orders P-242 and MO-2235.

<sup>21</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

as under section 14(1). Where the records contain the requester's own personal information, the IPC will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>22</sup> The list of factors under section 14(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 14(2).<sup>23</sup>

*Section 14(2): Do any factors in section 14(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?*

[48] 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.<sup>24</sup> Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[49] 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).<sup>25</sup>

[50] 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.

### ***Representations and analysis/findings***

[51] Although the appellant does not specifically cite any of the factors in sections 14(2)(a) to (d), which generally would favour disclosure if records exist, he states that "many legal issues . . . hinge" on the information that he is seeking. In his sur-reply representations, he also refers to a need for the original format of the photos (that are the subject of part 3 of his request) for a family law case, and his view that the police are denying his ability to "fairly respond to false accusations made against [him] in both criminal court and [a] family matter."

[52] I have considered whether the appellant's representations are sufficient to establish the factor at section 14(2)(d) (that is, whether the personal information is relevant to the fair determination of his rights, as the requester), and I find that they are not. The factor at section 14(2)(d) weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide

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<sup>22</sup> Order MO-2954.

<sup>23</sup> Order P-99.

<sup>24</sup> Order P-239.

<sup>25</sup> Order P-99.

whether this factor applies. For the factor to apply, all four parts of the test must be met:

- (1) Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
- (2) Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
- (3) Is the personal information significant to the determination of the right in question?
- (4) Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?<sup>26</sup>

[53] Based on the appellant's brief representations, I have insufficient evidence before me to conclude that this four-part test is met. The appellant did not establish that each of these parts of the test is met in relation to parts 1, 3, and 4 of his request. In particular, I find that there is insufficient evidence to establish that part two of the above test is met: he makes general reference to various legal matters, but it is not clear from this evidence whether these matters are ongoing or might be brought (as opposed to already being completed, which would mean that part two would not apply). Since all four parts of the test must be met for the factor at section 14(2)(d) to apply and I have insufficient evidence that part two applies, I have insufficient evidence to conclude that section 14(2)(d) applies.

[54] Although I find that section 14(2)(d) is not relevant, I am prepared to give some weight to the appellant's desire to authenticate the photos requested through part 3 of his request,<sup>27</sup> if they exist, in relation to the legal matter(s) that he generally refers to, as an unlisted but relevant factor under section 14(2).

[55] The police submit that, given the nature of the records requested by the appellant, the factors weighing in favour of non-disclosure at sections 14(2)(e) (disclosure will result in unfair pecuniary or other harm), 14(2)(f) (highly sensitive), and 14(2)(h) (personal information supplied in confidence) are relevant to the responsive records, if they exist.

[56] The appellant disagrees and denies that disclosure would result in exposure to harm to any individual; this appears to be in reference to the factor at section 14(2)(e). He notes that he is aware of a lot of personal information relating to the individual involved (such as date of birth and place of residence). As such, he argues that there is

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<sup>26</sup> See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

<sup>27</sup> As these are what he describes as the focus of his representations.

no personal information that he would be able to get from the photos that he does not already know. He reiterates that he is not asking to reveal any personal information beyond what he knows and is looking to authenticate the photos he seeks. He states that the police's reasons for denying access do not apply to his situation.

[57] Having reviewed parties' representations and the wording of the request, I am persuaded that the factors favouring non-disclosure at sections 14(2)(e), 14(2)(f), and 14(2)(h) are all relevant, if responsive records exist.

[58] Due to the nature of the records sought, and having considered both parties' representations, I am satisfied that the factor at section 14(2)(e) is relevant. This factor weighs against disclosure when the evidence shows that 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. I am not satisfied that the appellant's assertions that there is no risk of harm from disclosure is sufficient to overcome the police's compelling position that section 14(2)(e) would be relevant in the circumstances, if responsive records exist. I cannot elaborate further about this, in this public order, other than to point back to the background noted above, that the appellant appears to believe his ex-spouse complained to the police about him. Therefore, I find that the factor at section 14(2)(e) weighs against disclosure of responsive records, if they exist.

[59] Similarly, I am persuaded that the factor at section 14(2)(f) is relevant in the circumstances, again considering the wording of the request, the presupposition underlying it, and the representations before me. Section 14(2)(f) weighs 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.<sup>28</sup> For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.<sup>29</sup> Given the nature of the records requested, I find that, if records responsive to parts 1, 3, or 4 exist, the personal information would be highly sensitive, within the meaning of section 14(2)(f). I reiterate that a record revealing merely the fact of interaction with police is itself "personal information" under the *Act* – not just the listed examples of personal information in the *Act*, such as information related to age or address. In the circumstances, I am satisfied that if any responsive records exist, the factor at section 14(2)(f) would be relevant to them. I find that this factor weighs against disclosure of responsive records, if they exist.

[60] Finally, in the circumstances, I am also satisfied that the factor at section 14(2)(h) is relevant. This section 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

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<sup>28</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>29</sup> Order MO-2980.

circumstances. This requires an *objective* assessment of whether the expectation of confidentiality is "reasonable."<sup>30</sup> In the circumstances, again, given the nature of the information that the appellant seeks and the presupposition underlying his request, I find that if responsive records exist to any of parts 1, 3, or 4 of his request, the personal information would qualify as having been supplied by the appellant's ex-spouse in confidence to the police. In this context, if records exist, it would also be reasonable to conclude that the police gave assurances of confidentiality to the appellant's ex-spouse. I find that the factor at section 14(2)(h) weighs against disclosure of responsive records, if they exist.

[61] In conclusion, I have found that sections 14(3)(b), 14(2)(e), 14(2)(f), and 14(2)(h) apply and weigh against disclosure of the personal information in the records, if they exist. Giving the sensitivity of the information the appellant seeks, if it exists, I find that the section 14(3)(b) presumption, and all of the factors weighing against disclosure should be given significant weight.<sup>31</sup> I have also found that there is an unlisted factor with some weight favouring disclosure of the information, if it exists, as the appellant seeks to authenticate records, to support for his innocence and credibility in legal matters. However, weighing the factors and presumptions, and the interests of the appellant and his ex-spouse (whose personal information would reasonably be expected to be in the records, if they exist), I find that the presumptions and factors against disclosure outweigh the appellant's interest in obtaining the records, if they exist, and disclosure would be an unjustified invasion of his ex-spouse's personal privacy. Therefore, part one of the test under section 14(5) has been met.

***Part two: disclosure of the fact that the record exists (or does not exist) would be an unjustified invasion of personal privacy***

[62] Under part two of the section 14(5) two-part test, the police must show that disclosure of just the fact that a record exists (or does not exist) would in itself disclose some personal information to the appellant, and that this would be an unjustified invasion of personal privacy.

[63] The police submit that the disclosure of the fact that a record responsive to parts 1, 3 or 4 exists or does not exist would in itself convey information to the appellant. The police submit that this is supported by the relevance of the factors at sections 14(2)(e), 14(2)(f), and 14(2)(h) to responsive records, if they exist, given the nature of the records requested by the appellant. The police submit that these section 14(2) factors would weigh against disclosure, if responsive records exist. Therefore, the police submit that this second part of the two-part test for section 14(5) is met.

[64] The appellant submits that there is no invasion of the privacy of any individual by disclosing the existence or nonexistence of records to him. As mentioned, he asserts

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<sup>30</sup> Order PO-1670.

<sup>31</sup> Order MO-3293.

that he is aware that “the record” exists because “a copy was used” at his trial, without providing further specifics.

[65] I find that the appellant’s bald assertion that he is aware a record exists does not establish that the absurd result principle<sup>32</sup> is relevant in this appeal.

[66] Having considered both parties’ positions, I find that, in the circumstances, confirming or denying the existence of records responsive to parts 1, 3, and/or 4 of the request would be an unjustified invasion of personal privacy of the appellant’s ex-spouse. Based on the evidence before me, including the wording of the request which names the ex-spouse, the request presupposes that the ex-spouse went to the police with allegations and/or complaints, and photos, regarding the appellant. Therefore, to confirm or deny the existence of records would itself disclose whether that presupposition is true or not.

[67] In my view, whether the appellant’s ex-spouse did or did not make a complaint to the police about the appellant is highly sensitive information about her. It is also my view that there are no factors weighing in favour of disclosure of this information to the appellant in the context of a freedom of information request. If there were complaints and if charges were brought, presumably the appellant would have a full opportunity to defend himself in accordance with the rules of court. If there are no complaints, I see no factor favouring disclosure of that information to the appellant. I find, therefore, that confirming or denying the existence of responsive records would be an unjustified invasion of the appellant’s ex-spouse’s personal privacy.

[68] As both parts of the two-part test under section 14(5) have been met, I find that the police were entitled to rely on section 14(5) to refuse to confirm or deny the existence of responsive records.

[69] I now turn to the question of whether the police properly exercised their discretion in claiming section 14(5), read with section 38(b).

**Issue C: Did the police exercise their discretion under section 14(5), read with section 38(b)? If so, should the IPC uphold the exercise of discretion?**

[70] As noted above, the IPC has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases.<sup>33</sup> For the reasons that follow, I find that the police exercised their discretion under section 14(5), read with section 38(b), and I uphold that exercise of discretion.

[71] 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

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<sup>32</sup> Under the absurd result principle, the personal privacy exemption might not apply where the requester is clearly already aware of the very information sought.

<sup>33</sup> Order P-339.

erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. Where an institution has failed to exercise its discretion or has exercised it improperly, the adjudicator may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>34</sup> This IPC may not, however, substitute its own discretion for that of the institution.<sup>35</sup>

[72] Here, the police provided both confidential and non-confidential representations on the exercise of discretion. I will summarize the factors that the police considered to be relevant, with the appellant's response.

### ***Representations***

[73] The police considered the factor that the privacy of individuals should be protected. The appellant submits that this is irrelevant because he states that he is aware of the identity of the individuals, and of the fact that "the record" exists because "a copy was used at [his] trial." He asserts that he knows who took the photos. The appellant states that the police have failed to consider that he knows the third parties whom the police are trying to protect, thereby undermining the police's entire protection of privacy argument.

[74] The police also considered wording of the exemption and the interests it seeks to protect. The appellant states that he is already well aware of the individual who reported evidence to the police. He rejects "the assumption that this may expose an affected party to harm" as being not possible since he is not looking to seek retribution for the reporting.

[75] The police and the appellant disagree about whether the appellant, as the requester, is seeking his own personal information, and whether he has a sympathetic or compelling need to receive the information, in light of the background circumstances described in each of their representations.

[76] The parties also disagree about whether the disclosure will increase public confidence in the operation of the police. The police believe this is a relevant factor in the circumstances, and the appellant disagrees, taking the view that the police were applying "generic reasoning" to deny him access, and are denying his ability to fairly respond to false accusations to both criminal and family court matters.

[77] The police also stated that they considered the nature of the information and the extent to which it is significant and/or sensitive to the police, the requester, or any other individual. The appellant did not specifically respond to this.

[78] In addition, the appellant states that he believes there have been errors in the

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<sup>34</sup> Order MO-1573.

<sup>35</sup> Section 43(2).

investigation and collection of the records. He submits that the police's refusal to provide information in this appeal appears to be the police not accepting responsibility for errors and an effort to protect themselves against liability.

[79] To summarize, the police submit that they exercised their discretion properly and in good faith, and the appellant submits that they have "misjudged their exercise of discretion." He submits that the IPC should rule to grant him access to the information he seeks to protect himself and certain other individuals (whom I will not describe in this public order).

***Analysis/findings***

[80] Having reviewed the parties' representations in full, I am satisfied that the police exercised their discretion to claim section 14(5), read with section 38(b). I find that the factors that the police considered were relevant. Although they did not specifically list consideration of the appellant's personal information as a factor, in the circumstances, I find that this was implicitly considered, given the other factors that they listed in their representations (such as the factor regarding the sensitivity of the information). On balance, therefore, the factors that the police considered were relevant and their exercise of discretion was done in good faith. There is insufficient evidence before me to accept the suggestion that this exercise may have been done in bad faith, or taking into consideration irrelevant factors. While I understand that the appellant is seeking information that he believes could be helpful to him in other legal matters, I find that the police properly considered his interests when weighed against the rights of others whose personal information would reasonably be expected to be in the records, if they exist.

[81] For these reasons, I uphold the police's exercise of discretion in claiming section 14(5), though I do so when read with section 38(b), in refusing to confirm or deny the existence of responsive records, and I dismiss the appeal.

**ORDER:**

I uphold the police's decision to claim section 14(5), though read with section 38(b), and I dismiss the appeal.

Original Signed By: \_\_\_\_\_  
Marian Sami  
Adjudicator

December 6, 2022 \_\_\_\_\_