

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4330

Appeal MA21-00664

Durham Regional Police Services Board

February 21, 2023

Summary: The Durham Regional Police Services Board (the police or the DRPS) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to police records about the appellant and his ex-wife and other information pertaining to specific officers and police policies.

The police denied access to portions of the responsive records relying on the discretionary personal privacy exemption in section 38(b).

The police also denied access to portions of their Domestic Violence Occurrences Directive, relying on the discretionary law enforcement exemption in section 8(1).

The police also refused to provide access to police officers' service records, asserting that the section 52(3)1 employment or labour relations exclusion applied.

In this order, the adjudicator upholds the application of the section 38(b) exemption to the police records about the appellant and his ex-wife. She upholds the application of section 8(1) to the information at issue in the police's Domestic Violence Occurrences Directive. However, she finds that the section 52(3)1 exclusion does not apply to the police officers' service records and orders the police to make another access decision on the disciplinary records contained in these records without relying on the section 52(3)1 exclusion.

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"), 8(1)(b), 8(1)(c), 8(1)(e), 14(2)(d), 14(2)(f), 14(2)(i), 14(3)(b), 38(b), and 52(3)1.

OVERVIEW:

[1] The appellant sought access to records related to his interactions with the police as they concern his relationship with his ex-wife, as well as other information about the officers involved and police policies.

[2] Specifically, the Durham Regional Police Services Board (the police or the DRPS) received the following request from the appellant under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for:

...copies of all records regarding any incidents, interactions, arrests, reports, police calls, and or any other recorded interactions on any file, server, records department and or database associated with my [ex-]wife [name] and myself [name], including but not limited to: All video and related audio (including Dashcam, Bodycam, and any video or audio recording), dispatcher logs and recordings, Police Reports, Incident reports, Internal memos, Police Officer notes and service records of all Officers involved, and related departmental policies associated with any of the aforementioned records and incidents.

I also request the work schedule for officer [named police constable, badge #] for the entirety of June 2021, as it is part of my case [#].

[3] The police issued a decision granting partial access to some responsive records withholding information pursuant to the exemptions at section 8(1) (law enforcement) and 38(b) (personal privacy), and the exclusion at section 52(3) (employment or labour relations) of the *Act*.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt to resolve the issues in this appeal.

[5] After discussions with the parties, the appellant stated he is not pursuing access to the following withheld information:

- an officer's work schedule,
- redactions of printing information on each page,
- redactions in the police notes,
- factual information about himself or affected parties such as name, address, contact information, sex, date of birth and driver's license number.

[6] Subsequently, the police informed the mediator that its decision letter inadvertently omitted mention of redactions pursuant to sections 8(1)(b) (law

enforcement investigation) and 8(1)(f) (right to a fair trial) of the Act.¹

[7] The appellant narrowed his request and confirmed that he was pursuing access to the following information:

- statements by affected parties to police and any statements by police which were redacted from the police reports,
- communications sent or received by himself or his lawyer,
- disciplinary records of all involved officers, which were fully withheld on the basis of the section 52(3) exclusion, and
- all withheld information in a directive on Domestic Violence Occurrences Directive (the directive).

[8] As mediation was not successful in resolving the issues in this appeal, it was transferred to adjudication where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the police's representations initially, which I shared with the appellant. In their representations, the police clarified that they relied on the exclusion in section 52(3)1. The appellant provided representations in response.

[9] In this order, I uphold the police's decision that the withheld information about the appellant mixed with that of his ex-wife is exempt under section 38(b). I uphold the police's decision that the portions of the directive at issue are exempt under sections 8(1)(c) (reveal investigative techniques and procedures) or 8(1)(e) (endanger life or safety). Finally, I find that section 52(3)1 exclusion does not apply to the responsive police officers' disciplinary records and I order the police to make another access decision on these records.

RECORDS:

[10] The records at issue consist of the following:

1. Portions of pages 1 to 146 of the records, consisting of police reports and notes regarding incidents involving appellant and his ex-wife, withheld pursuant to section 38(b). The appellant was granted partial access to these records.
2. Portions of pages 147 to 162 of the records, consisting of the 16- page Domestic Violence Occurrences Directive, withheld pursuant to section 8(1). The directive is responsive to the appellant's request for the departmental policies associated

¹ The police also noted that they had withheld duplicates and non-responsive information. During the adjudication stage, the police disclosed the information they had identified as non-responsive, so it is no longer at issue.

with his request for records related to the domestic violence allegations in the records. The appellant was granted partial access to the directive.

3. Any disciplinary records in the police service records of the police officers involved in incidents with the appellant withheld pursuant to section 52(3)1.

ISSUES:

- A. Does the section 52(3)1 exclusion for records relating to labour relations or employment matters apply to the police disciplinary records?
- B. Do the police reports and notes contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the discretionary personal privacy exemption at section 38(b) apply to the information in the police report and notes?
- D. Do the discretionary law enforcement exemptions at sections 8(1)(b), (c), or (e) apply to the information at issue withheld from the directive?
- E. Did the police exercise their discretion under sections 8(1) and 38(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the section 52(3)1 exclusion for records relating to labour relations or employment matters apply to the police disciplinary records?

[11] Section 52(3) of the *Act* 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.²

[12] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.³

[13] The police rely on section 52(3)1, which reads:

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:

² Order PO-2639.

³ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

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.

[14] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[15] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁴

[16] 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.⁵

[17] Section 52(3) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.⁶

[18] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.⁷

[19] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.⁸

[20] The term "employment of a person" refers to the relationship between an employer and an employee.

[21] For section 52(3)1 to apply, the institution must establish that:

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

⁴ *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.

⁵ *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)."

⁶ *Ministry of Correctional Services*, cited above.

⁷ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁸ Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div. Ct.).

2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Representations

[22] In their representations on the application of the exclusion in section 52(3)1, the police did not address directly the records that the appellant stated that he wanted, namely police disciplinary records. Instead the police provided representations on police service records which may contain police disciplinary records.

[23] Specifically, the police state that all DRPS employee service records may contain an employee's resume, references, start date at the institution, quarterly performance reviews, any disciplinary records relating to the employee, sick time including injuries sustained while on duty, holiday time allotted, promotions applied for and received as well as any awards for exemplary service or otherwise. They state that the reason why they rely on this section is to protect all the confidential information contained in all DRPS police officers' service records.

[24] The police submit that all of the information contained in a DRPS employee's service record is extremely personal to each individual employee and common sense should prevail in not allowing service records to be released to anyone but the owner of these records, namely the actual DRPS employee.

[25] The appellant did not directly address this issue. Instead, he indicates that he wants the disciplinary records to hold the police accountable for their actions.

Findings

[26] The appellant initially requested access to "service records of all officers involved," but during the mediation, clarified that he seeks access to only the disciplinary records of the police officers with whom he interacted.

[27] The police have only provided a general description of the records for which they claimed the application of the section 52(3)1 exclusion, the police service records, and have not addressed specifically the application of this exclusion to the disciplinary records sought by the appellant.

[28] The police have the onus to establish the claimed exclusion.⁹ In the Notice of Inquiry, the police were asked to address all three parts of the test under section 52(3)1.

⁹ Order MO-3191-I.

[29] Specifically, the police were asked to address the following questions under each part of the 3-part test under section 52(3)1:

Part 1: collected, prepared, maintained or used

- Did an institution collect, prepare, maintain or use the records? Did a person or body collect, prepare, maintain or use the records on behalf of an institution? Please explain.

Part 2: proceedings or anticipated proceedings before a court or tribunal

- Were the records collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity? Please explain.

Part 3: labour relations or employment

- Do the proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution? Please explain.

[30] As is clear from the summary above, the police have not answered these questions as they relate to disciplinary records.

[31] Most importantly, in claiming the application of section 52(3)1, the police have not provided submissions on any proceedings or anticipated court or tribunal proceedings as they relate to the responsive records, as is required by part 2 of the test under section 52(3)1.

[32] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity that has the power, by law, binding agreement, or mutual consent, to decide the matters at issue.¹⁰

[33] For proceedings to be "anticipated," they must be more than a vague or theoretical possibility. There must have been a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.¹¹

[34] The word "court" means a judicial body presided over by a judge.¹²

[35] A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or

¹⁰ Orders P-1223 and PO-2105-F.

¹¹ Orders P-1223 and PO-2105-F.

¹² Order M-815.

obligations.¹³

[36] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity," the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.¹⁴

[37] The police have not addressed how there is a reasonable prospect of proceedings or anticipated proceedings at the time the responsive records were collected, prepared, maintained or used.

[38] In the absence of representations on any proceedings or anticipated proceedings as they relate to the records, therefore, I find that part 2 of the test under section 52(3)1 has not been met.

[39] To establish that the exclusion applies, an institution must establish all three parts of the test. As part 2 of the test has not been met under section 52(3)1, I find that the responsive records are not excluded from the application of the *Act* under section 52(3)1 and I will order the police to issue another access decision on them without claiming the application of section 52(3)1.

Issue B: Do the police reports and notes contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[40] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. Specifically, in this case, I need to decide if the police reports and notes contain the appellant's personal information, and whether they contain the personal information of others. If the record contains the requester's own personal information, their access rights are greater than if it does not¹⁵ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.¹⁶

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

[42] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹⁷

¹³ Order M-815.

¹⁴ Order M-815.

¹⁵ 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.

¹⁶ See sections 14(1) and 38(b).

¹⁷ See the definition of "record" in section 2(1).

[43] 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.¹⁸

[44] 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.¹⁹

[45] Section 2(1) of the *Act* gives a list of examples of personal information:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of

¹⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the name would reveal other personal information about the individual.

[46] 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."

Representations

[47] The police state that the records at issue contain information about several identifiable individuals, including their names, dates of birth, ethnicity, addresses, phone numbers, occupation and employers, physical descriptors, and marital status.

[48] According to the police, these individuals are the appellant, his ex-wife, and other family members, as well as witnesses to incidents. They state that the information of these identifiable individuals is in a personal capacity, not in a professional, official or business capacity, as the records are all involving domestic related incidents.

[49] The appellant agrees that the records contain information about several identifiable individuals and that these are people he knows.

Findings

[50] The records are all police reports related to the appellant's interaction with the police regarding alleged domestic violence related incidents.

[51] Based on my review of the records at issue, I find that they contain the personal information of the appellant and other identifiable individuals. This personal information includes their dates of birth, home addresses and telephone numbers, marital status, views or opinions, race, medical, criminal, and employment history, and driver's license numbers in accordance with the definition of personal information in section 2(1). Most importantly, they contain the statements of various individuals, which is their personal information under the introductory wording and paragraph (h).

[52] As the police reports and notes contain the personal information of the appellant and other identifiable individuals, it is necessary to consider whether the discretionary personal privacy exemption in section 38(b) applies to exempt the information at issue in the records.

Issue C: Does the discretionary personal privacy exemption at section 38(b) apply to the police reports and notes?

[53] 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 some exemptions from this right.

[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.

[55] 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.

[56] 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).

[57] Also, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.²⁰

[58] Sections 14(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

[59] If any of the section 14(1)(a) to (e) exceptions apply, or if any of the paragraphs in section 14(4) of the *Act* apply, disclosure of personal information is not an unjustified invasion of personal privacy under section 38(b), even if one of the section 14(3) presumptions exists. None of these sections or paragraphs apply in this appeal.

[60] Sections 14(2) and (3) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). These sections list factors and presumptions that, if present, weigh in favour or against a finding that disclosure is an unjustified invasion of personal privacy.

[61] In deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²¹

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

[62] 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 rely on the presumption in section 14(3)(b) regarding an investigation into a possible violation of law. Section 14(3)(b) reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

²⁰ Order PO-2560.

²¹ Order MO-2954.

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.

[63] This presumption requires only that there be an investigation into a *possible* violation of law.²² So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.²³

[64] The police state that the records at issue consist of General Occurrence Hardcopies and Call Hardcopies, which were clearly prepared and compiled by members of the DRPS in relation to an investigation into a possible violation of law, specifically the offences of assault, mischief, and breaches of release conditions, as listed in the *Criminal Code of Canada*.

[65] The appellant admits that the police conducted investigations into violations of law but submits that as all of the charges have been withdrawn and no further investigation is taking place, this section is not applicable.

[66] Based on my review of the records and the parties' representations, I find that the personal information about the individuals other than the appellant was compiled and is identifiable as part of an investigation into a possible violation of law under the *Criminal Code of Canada* related to alleged domestic violence incidents.

[67] Therefore, I find that the presumption in section 14(3)(b) applies to the information at issue in the records and it weighs in favour of privacy protection.

Section 14(2) – relevant factors

[68] 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.²⁴ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[69] The relevant parts of section 14(2) read:

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

²² Orders P-242 and MO-2235.

²³ 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).

²⁴ Order P-239.

(f) the personal information is highly sensitive;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[70] 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).²⁵

[71] Other considerations [besides the ones listed in sections 14(2)(a) to (i)] must be considered under section 14(2) if they are relevant. These may include:

- inherent fairness issues,²⁶
- ensuring public confidence in an institution,
- personal information about a person who has died,²⁷ or
- benefit to unknown heirs.²⁸

[72] The police state that the factors in sections 14(2)(f) (the personal information is highly sensitive) and 14(2)(i) (disclosure may unfairly damage the reputation of a person), both of which favour privacy protection, were used to withhold portions of the records at issue. The police state that they relied on these two factors as some of the information disclosed to the police by the victim (in this case the appellant's ex-wife) in domestic related situations was both very sensitive and if disclosed may damage the victim's reputation.

[73] The appellant states that he is the victim, not his ex-wife who he says lied to the police. He states that these lies damaged his reputation. He states that he needs to know all of the statements his ex-wife made to the police so he can assist the police in prosecuting her for lying. He also wants access to the names of the individuals and their associated comments so he can protect himself from slander, public mischief, and any other false allegation proceedings these individuals were willing to make about him.

Section 14(2)(f) applies and weighs in favour of privacy protection

[74] If applicable, section 14(2)(f) weighs against disclosure; it applies 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.²⁹ For example, personal information about

²⁵ Order P-99.

²⁶ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

²⁷ Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

²⁸ Orders P-1493, PO-1717 and PO-2012-R.

²⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

witnesses, complainants or suspects in a police investigation may be considered highly sensitive.³⁰

[75] I agree with the police that the personal information of the individuals other than the appellant is highly sensitive as it concerns information about allegations of domestic violence, an inherently sensitive circumstance.

[76] Therefore, I find that the factor in section 14(2)(f) applies to the information at issue in the records and it weighs in favour of privacy protection.

[77] The police have also raised the application of section 14(2)(i), which weighs against disclosure if disclosure of personal information might create damage or harm to an individual's reputation that would be considered "unfair" to the individual.³¹

[78] The police have indicated that the victim's reputation might be unfairly damaged by disclosure of the information at issue in the record. However, the police have not explained how disclosure would unfairly damage the victim's reputation.

[79] For section 14(2)(i) to apply, there must be a risk that disclosure may unfairly damage the reputation of any person referred to in the record. I have insufficient evidence to conclude that that is the circumstance is present in this case.

[80] The appellant appears to be raising in his representations the application of section 14(2)(d), the factor that favours disclosure if the personal information is relevant to a fair determination of his rights.

[81] The appellant was advised in the Notice of Inquiry that section 14(2)(d) supports disclosure of someone else's personal information where the information is needed to allow the requester to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four of the following questions must be answered yes:

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?

³⁰ Order MO-2980.

³¹ Order P-256.

4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?³²

[82] The appellant did not address any of these questions in his representations. Instead, he implies generally that the police are prosecuting his ex-wife for lying and he needs to defend himself in slander and public mischief proceedings. He has not provided any information or evidence about any particular legal proceedings that are ongoing or might be brought. I also note that from disclosure of information in the records, the appellant is aware of any allegations made against him and the general nature of the information that has been withheld from the police reports and notes.

[83] The appellant has not explained how access to the information at issue is significant to any potential proceeding or required for him to prepare for a potential proceeding.

[84] Based on my review of the records and the appellant's representations, I find that the appellant has not provided sufficient evidence for me to determine that the factor in section 14(2)(d) applies and disclosure of the personal information at issue is relevant to a fair determination of his rights. Therefore, I find that the factor in section 14(2)(d) does not apply in this appeal.

Conclusion

[85] As set out above, in deciding whether the disclosure of the personal information of individuals other than the appellant would be an unjustified invasion of their personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.³³

[86] I have found above that the presumption in section 14(3)(b) and the factor in section 14(2)(f), both of which favour privacy protection, apply and that the factor favouring disclosure in section 14(2)(d) that appears to have been raised by the appellant does not apply.

[87] Therefore, after balancing the interests of the parties and because no factor favouring disclosure is relevant to my determination, I find that disclosure of the information at issue would be an unjustified invasion of personal privacy of the individuals in the records other than the appellant.

[88] Accordingly, I uphold the police's decision that the information at issue in these records is exempt by reason of the discretionary exemption at section 38(b). I will review the police's exercise of discretion below.

³² 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.).

³³ Order MO-2954.

Issue D: Do the discretionary law enforcement exemptions at sections 8(1)(b), (c), or (e) apply to the information at issue in the directive?

[89] The police disclosed portions of the directive and withheld portions under the exemption at section 8(1). Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement. The police rely on sections 8(1)(b), (c), and (e),³⁴ which read:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

[90] The term "law enforcement"³⁵ is defined in section 2(1):

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[91] Many of the exemptions listed in section 8 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

³⁴ The police initially relied on section 8(1)(f) for two severances (one found in each of sections 15 and 16 of the directive), but did not provide representations on this exemption. This section reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(f) deprive a person of the right to a fair trial or impartial adjudication.

In the absence of representations and based on my review of the information at issue, I find that section 8(1)(f) does not apply to this information. The police also relied on section 8(1)(g) for one severance (in section 24.1 of the directive) and did provide representations on this exemption. In any event, as I have found the information that the police have claimed sections 8(1)(f) and 8(1)(g) exempt by reason of section 8(1)(c), there is no need for me to consider the application of sections 8(1)(f) or 8(1)(g) in this order.

³⁵ The term "law enforcement" appears in many, but not all, parts of section 8.

[92] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.³⁶

[93] However, the exemption does not apply just because a continuing law enforcement matter exists,³⁷ and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. 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*.³⁸

[94] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.³⁹ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁴⁰

[95] Pages 147 to 162 of the records is the police's 16-page Domestic Violence Occurrences Directive LE-01-024 (defined above as the directive). Portions of the directive have been withheld, starting at page 151, pursuant to the section 8(1) exemptions noted above.

[96] All of the redacted information in the directive has been withheld by reason of section 8(1)(c) (alone or in conjunction with other section 8(1) exemptions), except for sections 12.2 and 14.1.3 (withheld under section 8(1)(e) only).

[97] In applying the exemptions at issue, the police state that the directive contains policies designed to protect victims of domestic abuse and violence. They state:

Having a domestic violence directive that outlines how to respond to domestic violence is the first step to improving officers' ability to address domestic violence in our community. It helps officers by making complex dynamics clearer and ultimately helps victims by ensuring a standard, trauma-informed, and victim-centered response to what often is the most painful moment a person might find themselves in.

[98] The police made specific representations on each of the sections at issue, which I will now consider below.

³⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

³⁷ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

³⁸ Orders MO-2363 and PO-2435.

³⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁴⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[99] The appellant submits that the law enforcement exemption does not apply as no active investigation is taking place at this time, all cases against him are closed, all charges against him are being withdrawn and no weapons charges were laid. He states:

As the incident has already been closed and all charges are being withdrawn, the argument that I could use this information is inaccurate, but the fact that it has been so easily used against me means that I should be able to review the grounds on which they based the charges. If I'm not granted access to this directive in its entirety, how am I supposed to show that my ex [wife] manipulated the police and did exactly what this paragraph is set out expressly to prevent, the aggressor, my ex, turning the tables and turning me, the victim, into a perceived aggressor.

Section 8(1)(b): interfere with a law enforcement investigation

[100] The directive contains consecutively numbered paragraphs that I will refer to as sections in this order. The police have applied section 8(1)(b) to portions of sections 16, 17, 22 and 24. They have also applied section 8(1)(c) to each of these portions (and in some cases section 8(1)(e), as well).

[101] Although the police claim that section 8(1)(b) applies to four sections of the directive, sections 16, 17, 22 and 24⁴¹, the police have only addressed section 22, titled "Weapons (Firearms)." They state that section 22 of the directive deals with weapons and firearms being present in the residence and possible seizure of same under the authority of the *Criminal Code* in order to ensure victims, officers, and public safety in the event the occurrence escalates or continues and an offence occurs where charges may have to be laid.

Findings re section 8(1)(b)

[102] For section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.⁴² The investigation in question must actually exist or be ongoing.⁴³

[103] The police were asked in the Notice of Inquiry:

⁴¹ These sections are titled:

- 16 - DV [Domestic Violence] Incidents Where Frontline Members Retain Carriage of the Investigation
- 17 - Where Charges Fall Under the DVIU [Domestic Violence Investigative Unit] Mandate
- 22 - Weapons (Firearms)
- 24 - High Risk Cases and Repeat Offenders

⁴² Order PO-2085.

⁴³ Order PO-2657.

- Is the investigation in question a “law enforcement” investigation? Please explain.
- Is the alleged interference with a specific, ongoing law enforcement investigation? Please explain.
- Could disclosure of the record reasonably be expected to interfere with the law enforcement investigation? Please explain.

[104] The police have not addressed these questions in their representations. Most importantly, they have not provided evidence that there is a specific, ongoing law enforcement investigation. The evidence before me in this appeal that there is no ongoing specific law enforcement investigation regarding the appellant and his ex-wife’s domestic situation.

[105] Although the police have referred to section 22 of the directive about weapons and firearms, they have not directed me how this section applies to the records at issue, nor can I ascertain the same from my review of the records.

[106] Based on my review of the portions of the directive at issue and the underlying circumstances described in the representations and the records, I find that section 8(1)(b) does not apply. I do not have sufficient evidence to determine that disclosure could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. I will consider the police’s alternative claims below.

Section 8(1)(c): reveal investigative techniques and procedures

[107] The police have applied section 8(1)(c) to all of the information at issue in the directive (except for sections 12.2 and 14.1.3 of the directive), being portions of the following sections of the directive:⁴⁴

- 11 - Reasonable Grounds to Arrest
- 12 - Dual Charges
- 14 - Initial Response to a Domestic Violence / Domestic Incident
- 15 - Where No Charges are Laid
- 16 - DV [Domestic Violence] Incidents Where Frontline Members Retain Carriage of the Investigation
- 17 - Where Charges Fall Under the DVIU [Domestic Violence Investigative Unit] Mandate

⁴⁴ The disclosed portions of the directive include the titles of each section in the directive.

- 18 - Statements from Children (Under the Age of 18) Who Are Not Victims Themselves
- 20 - Domestic Violence Involving Police Service Members
- 22 - Weapons (Firearms)
- 24 - High Risk Cases and Repeat Offenders

[108] Section 8(1)(c) states that a head may refuse to disclose a record if the disclosure could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

[109] The police state that if the information from the directive is released to any member of the public, it may assist the dominant aggressor in the relationship in concealing their true role in a domestic incident.

[110] The police state that, for example, sections 11.5 to 12 of the directive contain information on the determination of who the dominant aggressor is and lists factors which should be taken into consideration in doing so. They submit that if the aggressor has access to these factors before an incident were to occur, they could use them against the victim and possibly turn the tables and have the victim be determined as the dominant aggressor, who may possibly face charges.

Findings re section 8(1)(c)

[111] For section 8(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.⁴⁵

[112] The technique or procedure must be “investigative”; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to “enforcing” the law.⁴⁶

[113] The police were asked in the Notice of Inquiry:

- What is the technique or procedure in question? Please explain.
- Is the technique or procedure “investigative” in nature? Please explain.
- Is the technique or procedure currently in use or likely to be used in law enforcement? Please explain.

⁴⁵ Orders P-170, P-1487, MO-2347-I and PO-2751.

⁴⁶ Orders PO-2034 and P-1340.

- Could disclosure of the technique or procedure reasonably be expected to interfere with its effective use?
- Is the technique or procedure generally known to the public? Please explain.

[114] The police have not addressed these questions in their representations, other than indicating that sections 11.5 to 12 of the directive contains information on the determination of who the dominant aggressor is.

[115] Although the police have not made arguments about the application of section 8(1)(c), I have reviewed the record itself to determine whether disclosure could reasonably be expected to give rise to the harms protected by the section.

[116] Based on my review of the information at issue in the directive, I find that the information for which section 8(1)(c) has been claimed, namely all of the information at issue except that in sections 12.2 and 14.1.3, is information about an investigative technique or procedure that, if disclosed, could reasonably be expected to interfere with its effective use. Therefore, this information is exempt under section 8(1)(c).

[117] The sections of the directive at issue for which section 8(1)(c) has been claimed, and which I have found subject to this exemption contain specific investigative techniques or procedures that are unknown to the public that are likely to be used in law enforcement in investigating domestic violence incidents. This information is specific detailed instructions to law enforcement officers in how to investigate domestic violence incidents and is information that is unknown to the public.

[118] I will determine below whether the remaining information at issue in the directive, sections 12.2 and 14.1.3, is subject to the section 8(1)(e) exemption.

Section 8(1)(e): endanger life or physical safety of a law enforcement officer or any other person

[119] The police have applied section 8(1)(e) to the information remaining at issue in the records, namely sections 12.2 and 14.1.3, of the directive.

[120] Section 8(1)(e) states that a head may refuse to disclose a record if the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer of any other person.

[121] The police state that the directive contains sections dealing with procedures for first responding police officers to a domestic incident, which if known by the general public could possibly result in the victims or officers being placed in dangerous situations. They state that emotions are running very high during a domestic occurrence, and weapons or firearms have been used against victims and officers when someone has their back against the wall.

Findings re section 8(1)(e)

[122] For section 8(1)(e) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger someone's life or physical safety. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own establish this exemption.⁴⁷

[123] The term "person" is not necessarily limited to a specific individual. It can include the members of an identifiable group or organization.⁴⁸

[124] The police argue that disclosure of the information at issue could put victims of domestic violence in danger. However, they have not addressed the particular information at issue could reasonably be expected to result the harms set out in section 8(1)(e).

[125] Nevertheless, based on my review of the information at issue, I accept the police's submission that disclosure of the information found at sections 12.2 and 14.1.3, could reasonably be expected to endanger the lives or physical safety of domestic violence victims or police officers, as claimed by the police under section 8(1)(e) of the *Act*.

[126] As argued by the police, section 12.2 contains information related to the method that the police use to make a determination of who the dominant aggressor is in a domestic violence situation. I find that the information in section 12.2, if known, could reasonably be expected to endanger the life or physical safety of a victim of domestic violence. I cannot elaborate in detail without revealing the content of this information, but in my view, it has the potential to provoke further violence on the part of those who are preparators of domestic violence.

[127] Similarly, section 14.1.3 of the directive, which contains specific directions to police officers in the steps to take in responding to domestic violence incidents, also has the potential to provoke further violence on the part of those who are preparators of domestic violence, thereby putting police officers in danger.

Conclusion about section 8(1)

[128] I have found above that all of the information at issue in the directive is exempt by reason of sections 8(1)(c) or 8(1)(e). Therefore, I will uphold the police's decision to withhold it, subject to my review of the police's exercise of discretion.

⁴⁷ Order PO-2003.

⁴⁸ Order PO-1817-R.

Issue E: Did the police exercise their discretion under sections 8(1) and 38(b)? If so, should I uphold the exercise of discretion?

[129] I will now determine whether the police exercised their discretion in a proper manner under section 8(1) concerning the exempt information in the directive (found at pages 147 to 162 of the records) and under section 38(b) for the exempt information in pages 1 to 146 of the records.

[130] The sections 8(1) and 38(b) exemptions are discretionary (the institution “may” refuse to disclose), 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.

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

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

[132] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁹ The IPC cannot, however, substitute its own discretion for that of the institution.⁵⁰

[133] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:⁵¹

- 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, and
 - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,

⁴⁹ Order MO-1573.

⁵⁰ Section 43(2).

⁵¹ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

Representations

[134] The police state that they realize that individuals have a right of access to their own personal information and exemptions from this right of access should be limited and specific and have used the exemptions in order to protect the privacy of other individuals.

[135] The police state that some of the records at issue in this appeal involve sensitive matters and the appellant has been granted full access to his own information and partial access to information that also pertains to his ex-wife and various other individuals involved in the incidents.

[136] The appellant submits that the police have not acted in good faith because the police have not prosecuted his ex-wife for lying to them. He asks,

...how does a victim of false domestic abuse charges, and repeated harassment by the police, who fail to take any action against a repeat offender, supposed to get justice and clear their name?

To this day I do not know precisely what allegations were made as the police refuse to disclose all of the allegations and statements that were made against me.

Findings

[137] I find that the police have exercised their discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[138] As is clear from the discussion above, the information at issue involves

allegations of domestic violence, and inherently sensitive information of the appellant and others, including the appellant's ex-wife.

[139] I find that in partially disclosing the information in pages 1-146, the police have taken into account the appellant's right to access his own personal information but also the highly sensitive nature of the personal information of other individuals.

[140] Considering the information that has already been disclosed, I find that the police have also taken into account any sympathetic or compelling interest that the appellant has in obtaining access to the information at issue. In my view, the police took into account proper competing interests and considerations when it decided not to disclose the personal information other individuals and the parts of the directive that I have found are exempt.

[141] Regarding the appellant's suggestion that the police are acting in bad faith, I do not agree. I am satisfied that the police have taken into account relevant considerations in making the decisions that they did concerning the information that I have found exempt in this order.

[142] In summary, I uphold the police's exercise of discretion under sections 8(1) and 38(b) as applicable.

ORDER:

1. I find that the section 52(3)1 exclusion does not apply to the police service records and order the police to issue another access decision to the appellant on his request for responsive police disciplinary records in the police service records without claiming the application of the section 52(3)1 exclusion **by March 23, 2023**.
2. I uphold the police's decision on the application of section 38(b) to the information at issue at pages 1 to 146 of the records.
3. I uphold the police's decision on the application of section 8(1) to the information at issue in the directive found at pages 147 to 162 of the records.

Original Signed by: _____
Diane Smith
Adjudicator

February 21, 2023 _____